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## Wage Theft in New York: The Wage Theft Prevention Act As a Counter to an Endemic Problem

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# WAGE THEFT IN NEW YORK: THE WAGE THEFT PREVENTION ACT AS A COUNTER TO AN ENDEMIC PROBLEM

*Lauren K. Dasse*<sup>†</sup>

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I. INTRODUCTION

Francisco Alvarez<sup>1</sup>, an immigrant worker originally from Ecuador, has won three separate judgments against three different employers for claims of unpaid wages.<sup>2</sup> However, Francisco has not received any of the money his employers owe him, wages he earned while working on different construction sites around New York City. Francisco is a member of the Latino/a immigrant rights organization Make the Road New York ("MRNY") in New York City and Long Island.<sup>3</sup> Working with the organization's legal team, he filed claims of unpaid wages with the New York State Department of Labor ("NY DOL") on three separate occasions. Each time, after waiting roughly nine to twelve months while the NY DOL investigated his claims, he received judgments in his favor. By the time he received the news, his employers had already hidden their assets<sup>4</sup>

<sup>1</sup> All names in this piece have been changed to protect the identity of the subjects.

<sup>2</sup> Case file, on file with Make the Road New York. Contact author for details.

<sup>3</sup> Make the Road New York has community centers in Brooklyn, Queens, Staten Island, and Long Island. Its 11,000 members "work together in active member-led committees around issues of critical importance to low-income, immigrant workers and their families, such as wage theft." Deborah Axt, Amy Carroll, & Andrew Friedman, *Advocacy Story: The Campaign to Pass the New York Wage Theft Act*, 45 CLEARINGHOUSE REV. 154, 154 (2011) [hereinafter *Advocacy Story*]; see also MAKE THE ROAD NEW YORK, www.maketheroadny.org/whoware\_aboutourcommunity.php (last visited Nov. 19, 2012).

<sup>4</sup> Interview with Elizabeth Wagoner, former Staff Attorney, Make the Road New York, in N.Y.C. (Aug. 3, 2011). Notes on file with the author.

and claimed they could not afford to pay the judgments.

Fellow MRNY member Maria, an immigrant worker from Mexico, had better luck, but still had to wait months before receiving her pay.<sup>5</sup> While working at a lamp factory in Manhattan, she worked over seventy hours a week without being paid overtime for more than a year. Maria received almost \$10,000 in unpaid overtime, with the assistance of the MRNY legal team.

Maria and Francisco are but two examples of wage theft in New York City. According to estimates, nearly one billion dollars are stolen annually from low-wage workers in New York City alone.<sup>6</sup> MRNY's fourteen years of organizing and advocating with workers around similar stories of wage theft<sup>7</sup> inspired the organization's members, community organizers, and attorneys to tackle the problem head on. They decided to draft legislation to change New York State's existing labor law and gain more protections for immigrant workers.<sup>8</sup>

This paper will examine this widespread problem of wage theft in New York City, especially amongst low-wage workers. The paper will focus on the Wage Theft Prevention Act ("WTPA"), legislation that increases workers' protections under the New York Labor Law.<sup>9</sup> Part I will discuss what is commonly known as wage theft and common employment and labor law violations. This section will also discuss current data on the breadth of workplace violations in low-wage industries in New York City, and discuss who is most affected by wage theft. Part II will discuss current legal remedies available to victims of wage theft, under federal and New York law. This section will also analyze key provisions of the 2010 law passed in New York State to combat wage theft, the WTPA, and how the new law differs from former New York State Labor Laws and federal remedies. Part IV addresses objections to the WTPA. Part V discusses the need for both the NY DOL and workers' rights groups to conduct education and outreach in order to effectively implement the new law. Wage theft is a serious problem affecting our

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<sup>5</sup> Sam Dolnick, *Workers' Safeguards Strengthened by N.Y. Law*, N.Y. TIMES, Dec. 13, 2010, <http://www.nytimes.com/2010/12/14/nyregion/14wage.html?emc=eta1> (quoting Maria saying that the new wage theft law in New York State "is very great because this [wage theft] won't happen to someone else").

<sup>6</sup> See Annette Bernhardt, Diana Polson, & James DeFilippis, *WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 44* (2010), [http://nelp.3cdn.net/990687e422dcf919d3\\_h6m6bf6ki.pdf](http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf) [hereinafter *WORKING WITHOUT LAWS*].

<sup>7</sup> *Advocacy Story*, *supra* note 3, at 1.

<sup>8</sup> See *infra* text accompanying notes 113–25.

<sup>9</sup> See *infra* text accompanying notes 10–55, for a discussion of wage theft.

communities, and the WTPA will be an effective tool for combating wage theft and protecting workers' rights.

## II. WAGE THEFT: A PERVERSIVE PROBLEM IN NEW YORK

### A. *Wage Theft and Low-Wage Industries*

Wage theft is a widespread problem that affects many workers from different backgrounds and in different industries. Wage and hour violations<sup>10</sup> are especially common in low-wage industries.<sup>11</sup> The term “wage theft” refers to various violations of federal, state, and local wage and hour or labor laws, including nonpayment of wages due for work completed, including overtime.<sup>12</sup> It occurs “when an employer violates the law and deprives a worker of legally mandated wages” governed by the Fair Labor Standards Act (“FLSA”) and state labor laws.<sup>13</sup> In addition, wage theft refers to the following scenarios: employers fail to give workers a final paycheck after leaving a job, workers receive less than the hourly minimum wage or less pay than promised, workers work off the clock without pay, have tips stolen or illegal deductions from paychecks, and workers are misclassified as independent contractors by their employers (in order to avoid coverage under federal and state labor laws).<sup>14</sup>

A sample of workers from low-wage industries in three major U.S. cities found that “over a quarter of low-wage workers receive less than the minimum wage rate required by law: 60% of those are underpaid by more than \$1.00 an hour.”<sup>15</sup> Organizations and researchers have various definitions of what constitutes a low-wage industry. The primary data utilized in this paper, from a 2008 study conducted by researchers at the National Employment Law Project

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<sup>10</sup> The term wage and hour laws can refer to “any law that covers claims for unpaid minimum, overtime and promised wages, as well as rest breaks, meal periods, child labor, etc.” See NAT’L EMP’T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE’S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 10 (Jan. 2011), <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1> [hereinafter WINNING WAGE JUSTICE].

<sup>11</sup> WORKING WITHOUT LAWS, *supra* note 6.

<sup>12</sup> KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT 7 (2008).

<sup>13</sup> *Id.*

<sup>14</sup> INTERFAITH WORKER JUSTICE, <http://www.iwj.org/issues/wage-theft> (last visited Oct. 11, 2012); see also WINNING WAGE JUSTICE, *supra* note 10, at 6.

<sup>15</sup> ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 21 (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

(“NELP”),<sup>16</sup> defines “low-wage industries” as industries in which the average hourly wage for front-line workers (workers other than management) was less than 85% of New York City’s average wage.<sup>17</sup> The “85% threshold” is a measure commonly used to identify low-wage industries.<sup>18</sup> Other scholars have defined low-wage jobs as those in which a full-time, year-round worker earns less than the poverty threshold for a family of four (two adults and two children).<sup>19</sup> NELP used 2000 Census data to create a list of industries in New York City in which median wages fell below 85% of the city’s average hourly wage.<sup>20</sup> Examples of low-wage industries include restaurant work, poultry processing, janitorial services, garment manufacturing, agricultural jobs, domestic homecare workers, and retail.<sup>21</sup> Studies show the low-wage workforce is majority female<sup>22</sup> and foreign-born undocumented women workers are most likely to experience workplace violations.<sup>23</sup>

New job growth since the recent “Great Recession” has been

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<sup>16</sup> WORKING WITHOUT LAWS, *supra* note 6, at 12–13.

<sup>17</sup> *Id.* at 54.

<sup>18</sup> *Id.*

<sup>19</sup> HEATHER BOUSHEY ET AL., UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 2 (2007), *available at* <http://inclusionist.org/files/lowwagework.pdf> (defining low-wage work with wage-based definitions, as opposed to approaches that describe low-wage workers as those whose annual earnings are below a certain threshold and describing two alternative ways of calculating what is a low-wage job, the basic-income approach and the social-inclusion approach).

<sup>20</sup> WORKING WITHOUT LAWS, *supra* note 6, at 54.

<sup>21</sup> See NAT’L EMP’T LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF LABOR STANDARDS FOR LOW-WAGE WORKERS 6–7 (Oct. 2006), *available at* [http://nelp.3cdn.net/95b39fc0a12a8d8a34\\_iwm6bhbv2.pdf](http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf). The 2006 policy update lists resources and statistics on wage and hour violations in many low-wage sectors, barriers to enforcing wage and hour laws, and recommendations for improvement, naming examples of successful legislative and organizing campaigns. Statistics of violations in low-wage industries include: nearly 80% of workers in the agriculture industry are underpaid, in 2000 the U.S. Department of Labor (“U.S.DOL”) has found that 100% of poultry processing plants were in violation of wage and hour laws, in 2005 a study found that the majority of employers in the New York City restaurant business “were not in compliance with overtime and minimum wage laws,” in 2001, “about half of the garment-manufacturing businesses in New York City were in violation of the Fair Labor Standards Act,” in 2000, “the U.S.DOL found that 60% of nursing homes routinely violated overtime, minimum wage, and/or child labor laws,” 26% of domestic homecare workers earn below the poverty line, and 67% of workers do not receive overtime payment.

<sup>22</sup> Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LABOR REV., Sept. 2000 at 26, *available at* [www.bls.gov/opub/mlr/2000/09/art3full.pdf](http://www.bls.gov/opub/mlr/2000/09/art3full.pdf).

<sup>23</sup> NAT’L EMP’T LAW PROJECT, WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: SUMMARY OF FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY (Aug. 2011), *available at* [http://www.nelp.org/page/-/Justice/2011/Fact\\_Sheet\\_Workplace\\_Violations\\_Immigration\\_Gender.pdf?nocdn=1](http://www.nelp.org/page/-/Justice/2011/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf?nocdn=1).

primarily concentrated in low-wage industries. These industries have accounted for 49% of recent job growth in the private sector between January 2010 and January 2011.<sup>24</sup> U.S. Bureau of Labor statistics also show an increase in the number of low-wage workers in New York State: in 2009 there were 192,000 low-wage workers in the state, compared to 95,000 in 2005.<sup>25</sup> This suggests that many workers' current job prospects are in low-wage industries. Thus, combating wage theft amongst low-wage industries is increasingly important.

Wage theft, while causing individual workers to suffer economic losses, also impacts the economy as a whole and unfairly disadvantages employers who comply with the law. The effects of wage theft on individual workers and their families can be devastating, as minimum-wage workers bring home more than half (54%) of their family's weekly earnings.<sup>26</sup> Low-wage workers who are victims of wage theft still have to pay rent, feed themselves and their family, and pay for childcare or education costs.<sup>27</sup> Additionally, workers who suffer wage theft therefore have less money to save for future expenses.<sup>28</sup> Researchers "estimate that [New York City] workers lose an average of \$3,016 annually" because of wage and hour violations, "out of total annual earnings of \$20,644."<sup>29</sup> Subsequently, workers had approximately 15% of their earnings lost due to wage theft.<sup>30</sup> Researchers also estimate that approximately 317,263 workers in New York City suffer at least one pay-based labor law violation per week, meaning that low-wage workers lose

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<sup>24</sup> NAT'L EMP'T LAW PROJECT, A YEAR OF UNBALANCED GROWTH: INDUSTRIES, WAGES, AND THE FIRST 12 MONTHS OF JOB GROWTH AFTER THE GREAT RECESSION 4 (Feb. 2011), available at <http://www.nelp.org/page/-/Justice/2011/UnbalancedGrowthFeb2011.pdf?nocdn=1> (analyzing eighty-two detailed industries and creating three groups based on their median wages: lower-wage, mid-wage, and higher-wage industries, and tracking the job losses and job growth of each group).

<sup>25</sup> JACOB MEYER & ROBERT GREENLEAF, COLUMBIA LAW SCHOOL NAT'L STATE ATTORNEYS GEN. PROGRAM, ENFORCEMENT OF STATE WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS 55 (Apr. 2011), available at [http://www.law.columbia.edu/null?&exclusive=filemgr.download&file\\_id=551819&rtcontentdisposition=filename%3DWage%20and%20Hour%20Report%20FINAL.pdf](http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=551819&rtcontentdisposition=filename%3DWage%20and%20Hour%20Report%20FINAL.pdf) (citing U.S. DEP'T OF LABOR, BUREAU OF LABOR JUSTICE STATISTICS, CHARACTERISTICS OF MINIMUM WAGE WORKERS, <http://www.bls.gov/cps/earnings.htm#minwage> (workers at or below minimum wage)).

<sup>26</sup> See KAI FILION, ECON. POLICY INST., MINIMUM WAGE ISSUE GUIDE 2-3 (Jul. 21, 2009).

<sup>27</sup> See BOBO, *supra* note 12, at 22.

<sup>28</sup> *Id.*

<sup>29</sup> WORKING WITHOUT LAWS, *supra* note 6, at 6.

<sup>30</sup> *Id.*

more than \$18.4 million per week combined,<sup>31</sup> money that is not able to be reinvested in the community. Using these figures, wage theft can be said to account for nearly \$1 billion annually in stolen wages for low-wage workers in New York City.<sup>32</sup> Less disposable income translates into less money spent at local businesses.<sup>33</sup> In addition, ethical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs than their dishonest competitors who are increasing profits by violating the law.<sup>34</sup> Furthermore, dishonest employers steal from taxpayers when they do not pay their fair share of payroll taxes.<sup>35</sup>

*B. Illustrating the Problem: Wage Theft Statistics in New York City*

1. Minimum Wage Violations

Statistics show that in New York City alone, many workers receive far less than the minimum wage mandated by law. Twenty-one percent of the workers surveyed (male and female) were paid less than the minimum wage in their previous workweek, and more than 50% were underpaid by more than \$1 an hour.<sup>36</sup> At least one-third of the workers in laundry and dry-cleaning businesses, in private households, in beauty salons, nail salons, barbershops, and grocery stores were paid less than the minimum wage.<sup>37</sup> Immigrant women suffered especially high rates of minimum wage violations. Forty percent of unauthorized immigrant women in the study suffered violations in the week prior to the study, compared to 13% of U.S.-born women and 24% of foreign-born authorized immigrant women (and 10% for U.S.-born men).<sup>38</sup> Latino/a workers suffered higher rates of minimum wage violations than Asian, black, or white workers (U.S.-born white workers in the sample did not report minimum wage violations).<sup>39</sup> Also, there was little variation of minimum wage violation rates between immigrant workers (male and female) who had recently settled in the U.S. and those who had been here for more than six years, as well as little difference in violation rates amongst immigrants (male and female) who spoke

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 44.

<sup>33</sup> WINNING WAGE JUSTICE, *supra* note 10, at 6.

<sup>34</sup> See BOBO, *supra* note 12, at 22.

<sup>35</sup> *Id.*; see also WINNING WAGE JUSTICE, *supra* note 10, at 6–7.

<sup>36</sup> WORKING WITHOUT LAWS, *supra* note 6, at 18.

<sup>37</sup> *Id.* at 26.

<sup>38</sup> *Id.* at 38, 40.

<sup>39</sup> *Id.* at 38.

English well and those who spoke little English.<sup>40</sup>

## 2. Overtime Violations

Lack of overtime pay<sup>41</sup> is a serious wage and hour violation that affects countless workers in New York City alone. Regarding overtime violations, 36% of male and female workers surveyed worked more than forty hours during the previous workweek and are therefore eligible to receive overtime pay. Amongst these workers, a shocking 77% were not paid the legally required overtime pay (the average worker had worked over thirteen hours extra, without proper compensation).<sup>42</sup> Overtime violation rates were very high amongst *all* industries included in the survey; these violations were highest among hairdressers, cosmetologists, and laundry and dry-cleaning workers.<sup>43</sup> Ninety-eight percent of workers in these occupations who worked more than forty hours a week in the previous workweek suffered overtime violations.<sup>44</sup> The personal and repair services, social services, child day care centers, and schools combined had a 97% rate of overtime violations.<sup>45</sup> Eighty-five percent of workers in private households also reported that they did not receive payment due for overtime.<sup>46</sup> As one workers' rights advocate put it, it can seem like "nobody pays overtime."<sup>47</sup>

Immigrant workers disproportionately suffered from overtime violations, and undocumented immigrant female workers reported higher rates of overtime violations than documented immigrant fe-

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<sup>40</sup> *Id.* at 38, 39.

<sup>41</sup> 29 U.S.C. § 207(a)(1) (2011) (after forty hours of work for the same employer in one workweek, employees are due payment at a rate not less than one and one-half times the employee's regular rate of pay); 29 U.S.C. § 213 (2011) (under FLSA, certain positions are exempt from overtime coverage); U.S. DEP'T OF LABOR, E-LAWS-FAIR LABOR STANDARDS ACT ADVISOR: EXEMPTIONS, <http://www.dol.gov/elaws/esa/flsa/screen75.asp> (listing positions exempt from overtime coverage); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2011) (overtime is calculated the same under New York State Labor Law as under FLSA); *Frequently Asked Questions*, N.Y. STATE DEP'T OF LABOR, WAGES AND HOURS, <http://www.labor.ny.gov/workerprotection/laborstandards/faq.shtm#5> (last visited Oct. 11, 2011) (where an employee is subject to both the state and federal overtime laws, the employee is entitled to overtime according to the law that would provide the higher rate of pay); *see also* U.S. DEP'T OF LABOR, E-LAWS-FAIR LABOR STANDARDS ACT ADVISOR: WHEN IS OVERTIME PAY DUE?, *available at* <http://www.dol.gov/elaws/faq/esa/flsa/011.htm2>.

<sup>42</sup> WORKING WITHOUT LAWS, *supra* note 6, at 18, 20.

<sup>43</sup> *Id.* at 29–30.

<sup>44</sup> *Id.* at 29.

<sup>45</sup> *Id.* at 29–30.

<sup>46</sup> *Id.*

<sup>47</sup> Conversation between the author and immigrant workers' rights advocate. Summer 2010.

male workers. Eighty-three percent of immigrant workers reported overtime violations, compared with 63% for U.S.-born survey participants (with foreign-born men suffering slightly more than foreign-born women).<sup>48</sup> Amongst immigrant workers, unauthorized foreign-born women workers had a 90% overtime violation rate, compared to 75.5% for authorized women immigrant workers.<sup>49</sup> U.S.-born women workers reported a 74% rate of overtime violations, compared to 51% for U.S.-born males.<sup>50</sup> In contrast to minimum wage violations, English-speaking ability did make a difference for overtime violation rates: immigrant workers who reported that they did not speak English well or at all reported a violation rate of 89%, compared with a 68% violation rate amongst workers who reported speaking English well or very well.<sup>51</sup>

### 3. Illegal Retaliation Against Workers

Many workers are afraid to speak up about unsafe working conditions or unpaid wages because of a well-founded fear of retaliation.<sup>52</sup> Twenty-three percent of respondents made a complaint about unsafe working conditions or unpaid wages.<sup>53</sup> Forty-two percent of these respondents reported that their employers had taken negative actions after they spoke out: 74% had their hours cut or received less desirable assignments, 32% were fired or suspended, 32% were threatened with firing or deportation, and 31% were harassed or had an increase in work load.<sup>54</sup> Twenty-three percent of the total workers surveyed reported that even though they experienced serious problems at work in the last year, such as on-the-job safety issues, wage theft, or discrimination, they did not make a complaint, for fear of retaliation.<sup>55</sup>

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<sup>48</sup> WORKING WITHOUT LAWS, *supra* note 6, at 41.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See* Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) (workers fear retaliation by their employers that may cause employees to accept substandard conditions); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1058–59 (N.D. Cal. 1998); Aguilar v. Baine Services Sys., Inc., 538 F. Supp. 581, 584 (S.D.N.Y. 1982) (employees not only stand to lose their jobs if they speak up, but their dignity and ability to provide for their families).

<sup>53</sup> WORKING WITHOUT LAWS, *supra* note 6, at 22.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 22–23.

### III. FEDERAL AND NEW YORK STATE LAWS GOVERNING WAGE THEFT

#### A. *Federal Law: The Fair Labor Standards Act*

The federal law governing wage theft is the Fair Labor Standards Act (“FLSA”).<sup>56</sup> Enacted in 1938,<sup>57</sup> it provides for a federal minimum hourly wage,<sup>58</sup> in addition to other provisions that protect workers’ rights. For example, FLSA mandates that employers must pay overtime at a rate of time and a half of the employee’s regular rate of pay if employees work over forty hours a week.<sup>59</sup> In addition, FLSA bans employers from retaliating against an employee for asserting his or her rights guaranteed by FLSA.<sup>60</sup> FLSA defines “employee” as “any individual employed by an employer.”<sup>61</sup> An “employer” is broadly defined as “any person acting directly or indirectly in the interest of an employer, in relation to an employee,”<sup>62</sup> and defines “employ” as “to suffer or permit to work.”<sup>63</sup> FLSA coverage is thought of in two ways: individual and enterprise.<sup>64</sup> Individual FLSA coverage extends to workers who are directly engaged in interstate commerce or in production of goods for interstate commerce.<sup>65</sup> Enterprise coverage extends to employees who are employed by a business that is engaged in interstate commerce or in the production of goods for interstate commerce.<sup>66</sup> Businesses with annual gross value of sales of over \$500,000 a year are by definition engaged in interstate commerce, and all of its employees are covered under FLSA.<sup>67</sup> Not all workers are covered under FLSA; if a worker’s employer is not involved in a business that is deemed to be involved in interstate commerce, or if the business’s annual sales are less than \$500,000 (as is the case with many small restaurants and shops), then a worker’s only rem-

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<sup>56</sup> 29 U.S.C. §§ 201–219 (2011).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* § 206(a)(1) (current federal minimum wage is \$7.25 an hour).

<sup>59</sup> *Id.* § 207(a)(1)-(2) (creating the eight-hour work day).

<sup>60</sup> *Id.* § 215(a)(3).

<sup>61</sup> *Id.* § 203(e)(1).

<sup>62</sup> *Id.* § 203(d).

<sup>63</sup> *Id.* § 203(g).

<sup>64</sup> See WAGE AND HOUR DIVISION, U.S. DEP’T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2009), available at <http://www.dol.gov/whd/regs/compliance/whdfs14.pdf>; see also *id.* §§ 203(a), (r)(1).

<sup>65</sup> WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (July 2009), available at [www.dol.gov/whd/regs/compliance/whdfs14.pdf](http://www.dol.gov/whd/regs/compliance/whdfs14.pdf).

<sup>66</sup> See 29 U.S.C. § 203(s)(1)(A) (2011). The FLSA contains a lengthy list of employees who are exempt from some of its provisions. *Id.* § 213.

<sup>67</sup> *Id.* § 203(s)(1)(A).

edy is governed by state labor laws. Undocumented immigrant workers are eligible to seek redress under FLSA.<sup>68</sup>

Workers covered under FLSA may bring administrative actions<sup>69</sup> and also have a private right of action<sup>70</sup> (for violations of unpaid wages, overtime, or retaliation, for example). Administrative complaints may be filed with the U.S. Department of Labor (“U.S. DOL”).<sup>71</sup> The U.S. DOL will investigate the claim and has the right to file an action against the employer.<sup>72</sup> Advocates have critiqued the U.S. DOL for a shortage of staffing, resulting in long wait times for workers’ claims to be resolved.<sup>73</sup> Advocates also claim that the U.S. DOL does not administer strict penalties to employers who violate the law.<sup>74</sup> The Brennan Center for Justice analyzed data relating to the U.S. DOL’s Wage and Hour Division enforcement activities during the years 1975–2004.<sup>75</sup> The organization found that the Department’s resources and activities to enforce wage and hour laws had declined while the number of workers and workplaces in the U.S. had increased.<sup>76</sup> A March 2009 report by the Government Accountability Office determined that the U.S. DOL’s Wage and Hour Division only successfully investigated one out of ten cases brought to the Department by undercover agents.<sup>77</sup> According to the U.S. DOL, in 2010 the number of Wage and Hour

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<sup>68</sup> See NAT’L EMP’T LAW PROJECT & NAT’L IMMIGRATION LAW CTR., IMMIGRATION AND LABOR ENFORCEMENT IN THE WORKPLACE: THE REVISED DOL-DHS MEMORANDUM OF UNDERSTANDING 3 (2011), available at <http://www.nelp.org/page/-/Justice/2011/ImmigrationLaborEnforcementWorkplace.pdf?nocdn=1> (indicating that the Department of Labor and Department of Homeland Security reiterate that immigration enforcement will not interfere with employment and labor rights enforcement in the workplace).

<sup>69</sup> 29 U.S.C. § 216(c) (2011).

<sup>70</sup> See U.S. DEP’T OF LABOR, WAGE AND HOUR DIV., BRIDGE TO JUSTICE: WAGE AND HOUR CONNECTS WORKERS TO NEW ABA-APPROVED ATTORNEY REFERRAL SYSTEM, available at <http://www.dol.gov/whd/resources/ABAReferralPolicy.htm> (last visited Dec. 3, 2012).

<sup>71</sup> See *How to File a Complaint*, U.S. DEP’T OF LABOR, [www.dol.gov/wecanhelp/howtofilecomplaint.htm](http://www.dol.gov/wecanhelp/howtofilecomplaint.htm) (last visited Dec. 3, 2012).

<sup>72</sup> 29 U.S.C. § 216(c) (2011).

<sup>73</sup> See generally Todd A. Palo, *Minimum Wage, Justifiably Unenforced?*, 35 SETON HALL LEGIS. J. 36, 44 (2010).

<sup>74</sup> *Id.* at 48.

<sup>75</sup> Annette Bernhardt & Siobhán McGrath, *U.S. Trends in Wage and Hour Enforcement by the U.S. Department of Labor: 1975-2004*, BRENNAN CTR. FOR JUSTICE (Sept. 2005), <http://www.nelp.org/page/-/EJP/TrendsInEnforcement2005.pdf>.

<sup>76</sup> See *id.*

<sup>77</sup> GREGORY D. KUTZ & JONATHAN T. MEYER, U.S. GOV’T ACCOUNTABILITY OFFICE, WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 4 (Mar. 2009), available at <http://www.gao.gov/products/GAO-09-458T>.

Division investigators increased, allowing the agency to reduce the backlog of complaints and conduct more targeted investigations of industries at high-risk of wage and hour law violations.<sup>78</sup>

A worker covered by FLSA may also choose to exercise a private (civil) right of action against the employer, for violations of minimum wage, overtime, and anti-retaliation provisions.<sup>79</sup> The statute of limitations is two years; three years if the employer's violation is found to be willful.<sup>80</sup> Under a FLSA civil claim, a court may award damages in the amount of unpaid minimum wages and overtime due, plus liquidated damages in the amount equal to the unpaid wages.<sup>81</sup> Workers may receive reasonable attorney's fees in FLSA private civil suits.<sup>82</sup>

Many low-wage workers are exempt from coverage. Multiple low wage industries are exempt from FLSA's minimum and maximum hours requirements<sup>83</sup> and certain child labor provisions.<sup>84</sup> Examples include seasonal amusement park workers,<sup>85</sup> camp workers,<sup>86</sup> employees in the catching, farming, and processing of seafood,<sup>87</sup> some agricultural workers,<sup>88</sup> babysitters,<sup>89</sup> and domestic caretakers of the elderly.<sup>90</sup> Employees employed by businesses that report less than \$500,000 annual gross revenue do not have to comply with FLSA.<sup>91</sup> Finally, "independent contractors" are not covered under FLSA.<sup>92</sup> By having employees fill out IRS form 1099s (the form used by independent contractors) instead of W-2 forms, employers avoid FLSA minimum wage requirements.<sup>93</sup> Therefore, access to state law remedies and state enforcement agencies is key

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<sup>78</sup> U.S. DEP'T OF LABOR, AGENCY FINANCIAL REPORT FISCAL YEAR 2010 15 (2011), available at [http://www.dol.gov/\\_sec/media/reports/annual2010/2010annualreport.pdf](http://www.dol.gov/_sec/media/reports/annual2010/2010annualreport.pdf).

<sup>79</sup> 29 U.S.C. § 216(b) (2011).

<sup>80</sup> *Id.* § 255(a).

<sup>81</sup> *Id.* § 216(b).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* § 213.

<sup>84</sup> *Id.* § 213(c).

<sup>85</sup> 29 U.S.C. § 213(a3) (2011).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* § 213(a5).

<sup>88</sup> *Id.* § 213(a6).

<sup>89</sup> *Id.* § 213(a15).

<sup>90</sup> *Id.*

<sup>91</sup> 29 U.S.C. § 203(s)(1)(A)(ii) (2011).

<sup>92</sup> *Id.* § 203(r)(1) (2011).

<sup>93</sup> See Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 378-79 (2008); see also NAT'L EMP'T LAW PROJECT, 1099'D: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (2005), available at <http://www.nelp.org/page/-/Justice/1099edFactSheet2010.pdf?nocdn=1>.

to addressing wage theft, because not all workers are covered by federal law.

## B. *New York State Labor Law*

### 1. General Provisions

As in other states, New York State has its own law governing wage and hour violations, the New York State Labor Law (“NYS LL”).<sup>94</sup> Similar to federal law, workers may file an administrative complaint with the New York State Department of Labor (“NY DOL”),<sup>95</sup> or file a private civil suit in state court. The statute of limitations is six years.<sup>96</sup> According to NYS LL, the state minimum wage must equal or exceed the federal minimum wage.<sup>97</sup> The law regarding overtime requirements is similar to FLSA,<sup>98</sup> as employers are required to pay workers who work over forty hours a week the overtime pay rate of one-and-a-half times their regular rate of pay.<sup>99</sup> However, NYS LL provides for an additional extra hour of minimum wage pay owed to the employee if he or she works more than ten hours in a single day.<sup>100</sup> New York’s definitions of employee and employer are similar to FLSA definitions.<sup>101</sup> As it is a state law, the NYS LL extends coverage to all workers throughout the state. Like FLSA,<sup>102</sup> the NYS LL allows for attorney’s fees for the prevailing party.<sup>103</sup> Similar to the U.S. DOL policy,<sup>104</sup> the New York State Attorney General issued an opinion in 2003 expressing that undocumented workers may assert their rights under the NYS LL without fear of immigration consequences.<sup>105</sup> While undocumented workers are covered by the NYS LL, many workers do not realize this, and many employers take advantage of this situation.<sup>106</sup>

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<sup>94</sup> N.Y. LAB. LAW §1 *et seq.* (McKinney 2011).

<sup>95</sup> See *infra* notes 108–20, 213–27 and accompanying text for further discussion about the NY DOL.

<sup>96</sup> N.Y. LAB. LAW §§ 198(3), 663(3) (McKinney 2011).

<sup>97</sup> *Id.* § 652(1) (New York State minimum wage is currently \$7.25/hour, the same as federal law).

<sup>98</sup> 29 U.S.C. § 207(a)(1)–(2) (2011).

<sup>99</sup> N.Y. COMP. CODES R. & REGS. tit.12, § 142–2.2 (2011).

<sup>100</sup> *Id.* §§ 137-1.7, 142–2.4; WORKING WITHOUT LAWS, *supra* note 6, at 20.

<sup>101</sup> N.Y. LAB. LAW §§ 651(5)–(6) (McKinney 2011). Compare with 29 U.S.C. § 203(e)(1)–(5) (2011).

<sup>102</sup> 29 U.S.C. § 216(b) (2011).

<sup>103</sup> N. Y. LAB. LAW §§ 198(1-a), 663(1) (McKinney 2011).

<sup>104</sup> See *supra* note 68 and accompanying text.

<sup>105</sup> Formal Opinion No. 2003-F3, N.Y. Op. Atty. Gen. No. F3, 2003 WL 22522840 (N.Y.A.G. Oct. 21, 2003).

<sup>106</sup> Interview with Amy Carroll, former Legal Director, Make the Road New York, in N.Y.C. (Aug. 11, 2011). Notes on file with the author.

NYS LL is especially important to low-wage workers, as many businesses produce less than \$500,000 in annual gross revenues and do not produce goods for interstate commerce and are not covered by FLSA. Thus, for many New Yorkers who work in small businesses—such as restaurants, landscaping, and construction companies—NYS LL is the only remedy available.<sup>107</sup>

## 2. New York State Labor Law Reform

### a. *History of Workers' Rights Organizations' Advocacy Efforts to Reform the New York State Labor Law*

Workers' rights advocates in New York State have long called for better protections against wage theft and for the NY DOL to improve enforcement regarding wage and hour violations.<sup>108</sup> Citing a lack of enforcement by the NY DOL and insufficient penalties that did not deter employers from violating the law, immigrant workers from The Workplace Project in Long Island, NY, lobbied for The Unpaid Wages Prohibition Act ("UWPA"), which passed in 1997.<sup>109</sup> The UWPA's main provisions altered the NYS LL to create a felony offense for wage theft and increased fines for repeat offenders (from \$200–\$10,000 to \$500–\$20,000).<sup>110</sup> The law also increased civil penalties for repeat or willful offenders of nonpayment of wages, so that employers must pay an increased fine to the NY DOL up to an additional 100% (or double) the amount of wages owed to the worker.<sup>111</sup> In addition, because of the 1997 law, NY DOL investigations are now required to review violations for six years prior to the commencement of an action, as opposed to two years as was former NY DOL practice.<sup>112</sup>

The Unpaid Wages Prohibition Act, while a step in the right direction, did not effectively address wage theft in New York State.

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<sup>107</sup> See JENNIFER GORDON, CARNEGIE ENDOWMENT FOR INT'L PEACE, THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW 39 n.8 (Sept. 1999), available at [http://carnegieendowment.org/files/imp\\_wp4gordon.pdf](http://carnegieendowment.org/files/imp_wp4gordon.pdf).

<sup>108</sup> See CAMPAIGN TO END WAGE THEFT, PROTECTING NEW YORK'S WORKERS: HOW THE STATE DEPARTMENT OF LABOR CAN IMPROVE WAGE-AND-HOUR ENFORCEMENT 16 (Dec. 2006), available at <http://www.mfy.org/wp-content/uploads/reports/Protecting-Workers-Dept-of-Labor.pdf> (many of these provisions were included in the WTPA) [hereinafter CAMPAIGN TO END WAGE THEFT].

<sup>109</sup> GORDON, *supra* note 107, at 3–9 (the Act altered the following provisions of the NYS LL: Creation of 196-A, 198.3, 198-a, creation of 199-A, 218.1); see also N.Y. LAB. LAW §§ 196(A), 198.3, 198-a, 199-A, 218.1 (McKinney 2011).

<sup>110</sup> N.Y. LAB. LAW § 198-a (McKinney 2011).

<sup>111</sup> N.Y. LAB. LAW § 218.1 (McKinney 1997), amended by N.Y. LAB. LAW § 218.1 (McKinney 2010).

<sup>112</sup> N.Y. LAB. LAW § 198.3 (McKinney 2011); see also GORDON, *supra* note 107, at 7

Organizers of the legislation focused on targeting repeat offenders, but many employers who were committing wage theft were never caught to begin with.<sup>113</sup> Organizers also claimed that the NY DOL did not use the new tools that the law had given the agency.<sup>114</sup> After the law was passed, the Workplace Project reported an increase in workers who came to their offices and became involved with the organization.<sup>115</sup> The bill did not require additional spending and did not directly attack the agency's practices.<sup>116</sup> These two aspects were perhaps reasons why the bill was able to pass, but organizers caution that it may have also "undermined its effectiveness."<sup>117</sup>

Because the Workplace Project did not continue to focus its organizing and advocacy work for the implementation of the law as it had for its passage, the Department of Labor was let off the hook. Without ongoing activism and bad publicity, the DOL had little incentive to do things differently after the bill became law.<sup>118</sup>

A main goal of the legislation itself was to deter employers from stealing wages, so that even if the agency was not able to do its job, the law would be "self-enforcing."<sup>119</sup> Deterrence is very difficult to measure. Workers' rights advocates continued to fight wage theft after the implementation of the law, suggesting that the law did not adequately address wage theft in New York. For example, in 2006, nine years after the law was passed, workers' rights advocates declared it to be "open season on low wage workers, because employers know they can violate the law with impunity."<sup>120</sup>

In 2009, after requests from MRNY Workplace Justice Project committee members and many consultations with MRNY organizers, the organization's legal team began drafting legislation to

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<sup>113</sup> See GORDON, *supra* note 107, at 30–32.

<sup>114</sup> *Id.* at 31. For example, wage theft activists report that it is not agency practice for the NY DOL to investigate violations for six years prior to the commencement of an action, as they are required to do by the NY LL. Interview with Amy Carroll, *supra* note 106.

<sup>115</sup> GORDON, *supra* note 107, at 32.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *id.*, at 32 (quoting Jennifer Gordon, former director of The Workplace Project).

<sup>119</sup> *Id.*

<sup>120</sup> Press Release, Brennan Ctr. for Justice, Report Urges Better Enforcement of Minimum Wage and Overtime Laws (Dec. 13, 2006), *available at* [http://www.brennancenter.org/content/resource/report\\_urges\\_better\\_enforcement\\_of\\_minimum\\_wage\\_and\\_overtime\\_laws/](http://www.brennancenter.org/content/resource/report_urges_better_enforcement_of_minimum_wage_and_overtime_laws/) (quoting Amy Carroll, former Legal Director of Make the Road New York).

reform the NYS LL. During the past fourteen years MRNY has won millions of dollars in unpaid wages and damages for their primarily low-wage, Latino/a immigrant members.<sup>121</sup> Despite their victories for individual workers, immigrant workers continued to suffer wage theft.<sup>122</sup> As MRNY directors wrote in a recent article, wage theft became a policy priority because of their members' experiences "combating wage theft, facing retaliation, and attempting to collect on judgments when they won."<sup>123</sup> According to MRNY, the existing law's provisions did not create incentives for employers to comply with the law; penalties for wage theft were very low, as was the chance of getting caught.<sup>124</sup> The bill also needed to address the difficulty in receiving unpaid wages and damages. As Amy Carroll, the former Legal Director at MRNY and lead drafter of the WTPA, aptly said, "winning cases is easy but finding the money is hard."<sup>125</sup> From the very beginning of the campaign, organizers pitched the law as targeting lawbreakers; the messaging conveyed that law-abiding employers do not have anything to fear, because this law would impact only those who were stealing wages.<sup>126</sup> MRNY conducted extensive research on other states' labor laws and FLSA.<sup>127</sup> MRNY Workplace Justice Project Committee members were surprised to find out that even Arizona, a state that has come under scrutiny for its harsh anti-immigrant laws, offered better worker protections than NYS LL.<sup>128</sup>

In 2010 Senator Diane Savino and Assemblyman Carl Heastie introduced the WTPA in the New York State Senate and Assembly, respectively.<sup>129</sup> Advocates hailed the Act as a "key component of

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<sup>121</sup> *Advocacy Story*, *supra* note 3, at 154.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1.

<sup>125</sup> Interview with Amy Carroll, *supra* note 106.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 23 ARIZ. REV. STAT. ANN. §§ 23-362, 364 (2007) (Arizona's revised labor law, the "Raise the Minimum Wage for Working Arizonans Act," which includes similar enforcement provisions to the WTPA). Arizona has come under fire for the anti-immigrant bill SB1070. See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

<sup>129</sup> See *Senator Savino Introduces Bill to Protect Workers from Wage Theft*, N.Y. STATE SENATOR DIANE J. SAVINO, <http://www.nysenate.gov/video/2010/mar/12/senator-savino-introduces-bill-protect-workers-wage-theft> (last visited Oct. 11, 2011). The Wage Theft Prevention Act was supported by various organizations in addition to MRNY, including United Food & Commercial Workers Local 1500, Small Business United For Health Care, The Working Families Party, Retail, Wholesale & Department Store Union, 32BJ SEIU, New York Hotel & Motel Trades Council, 1199 SEIU, Drum Major

the fight to end wage theft in New York.”<sup>130</sup> After a series of amendments to the bills, negotiated over a nine-month period, the WTPA passed in both houses of the New York State Legislature and was signed by Governor Patterson on December 13, 2010.<sup>131</sup> The law was enacted on April 9, 2011.<sup>132</sup> Subsequent sections of this paper will discuss key provisions of the WTPA and its effect on NYS LL, and how it better addresses the insidious problem of wage theft in New York State than the former NYS LL. Key provisions include: increasing economic incentives for employers to comply with the law, thus deterring employers from violating the NYS LL; protecting workers against unlawful retaliation by increasing penalties for employers; ensuring that workers are able to collect unpaid wages after judgments in their favor; improving record-keeping provisions; and expanding the required notice given to employees about wage rates. These provisions will be discussed in detail in subsequent sections of this paper.

b. *New Law for Workers’ Rights: A Discussion of Substantive Sections and Goals of the WTPA*

The following sections describe the main goals of the WTPA. Topics include substantive changes to the NYS LL and MRNY’s reasons for targeting specific provisions.

i. *Economic Incentives for Employers to Comply with the Law*

Workers’ rights advocates in New York have long complained that former NYS LL provisions did not effectively deter employers from breaking the law and committing wage theft.<sup>133</sup> Increasing economic incentives for employers to comply with the law is a key theme of the WTPA, in hopes of deterring wage theft. Prior to the WTPA, NYS LL allowed for liquidated damages of an additional

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Institute for Public Policy, New York State AFL-CIO, Morton Williams Supermarkets, The National Employment Law Project, New York State Trial Lawyers Association, New York Communities for Change, Workers Rights Law Center, and MFY Legal Services, Inc.

<sup>130</sup> Annette Bernhardt, *Testimony Before the New York City Council, Committee on Civil Service and Labor Regarding Proposed Resolution 245-A* (Nov. 10, 2010), available at [www.nelp.org/page/-/Justice/.../NYCWagethefttestimonyNov2010](http://www.nelp.org/page/-/Justice/.../NYCWagethefttestimonyNov2010).

<sup>131</sup> *Governor Patterson Signs Into Law the Wage Theft Prevention Act*, LABOR AND EMP’T N.Y. (Dec. 20, 2010, 12:50 PM), [http://nysbar.com/blogs/LELblog/2010/12/governor\\_patterson\\_signs\\_into\\_l\\_3.html](http://nysbar.com/blogs/LELblog/2010/12/governor_patterson_signs_into_l_3.html).

<sup>132</sup> *Id.*

<sup>133</sup> See *Advocacy Story*, *supra* note 3, at 154.

25% of the unpaid wages,<sup>134</sup> an amount thought to be token and no real deterrence.<sup>135</sup> The WTPA increased the maximum amount of liquidated damages up to 100%,<sup>136</sup> meaning that employers may now have to pay up to double the amount of wages owed to workers. Like the WTPA, twenty-one states plus the District of Columbia provide for double damages,<sup>137</sup> while seven states provide for treble damages (back pay plus 200% liquidated damages) for minimum wage violations and/or payment of wages violations.<sup>138</sup> This increase may help deter employers from violating the NYS LL, since they will suffer greater economic consequences and have to pay double the amount they would have had to pay workers in the first place. This increase in liquidated damages provides that a worker may receive an equal amount of liquidated damages under NYS LL or FLSA (workers are able to recover 100% liquidated damages under FLSA).<sup>139</sup>

ii. Protecting Workers Against Retaliation by Punishing Employers who Retaliate

Illegal retaliation was one of the main concerns of MRNY members and staff, because they saw the threat as preventing employees from pursuing claims for unpaid wages or workplace violations.<sup>140</sup> Many MRNY members feared employers would call

<sup>134</sup> N.Y. LAB. LAW § 198(1-a) (McKinney 2009), amended by L. 2010, c. 564 § 7.

<sup>135</sup> See *Advocacy Story*, *supra* note 3, at 154–55.

<sup>136</sup> N.Y. LAB. LAW § 198 (McKinney 2011).

<sup>137</sup> Alaska: ALASKA STAT. § 23.10.110(a) (1995); Arkansas: ARK. CODE ANN. § 11-4-218(a)(2) (2006); California: CAL. LABOR CODE §§ 1194.2(a) (West 2011), 2673.1(e) (West 1999); Colorado: COLO. REV. STAT. § 8-4-109(3)(a)-(b) (2007); Connecticut: CONN. GEN. STAT. §§ 31-68(a) (1963), 31-72 (1967); Weems v. Citigroup, Inc., 289 Conn. 769 (2008); District of Columbia: D.C. CODE § 32-1012(a) (1993); Florida: FLA. STAT. § 10.24(e) (2004); Georgia: GA. CODE ANN. § 34-4-6 (1970); Hawaii: HAW. REV. STAT. § 387-12(b) (1999); Indiana: IND. CODE § 22-2-2-9 (1986); Kansas: KAN. STAT. ANN. § 44-315(b) (1999); Kentucky: KY. REV. STAT. ANN. § 337.385(1) (West 2010); Minnesota: MINN. STAT. § 177.27(8) (2009); Missouri: MO. REV. STAT. § 290.527 (2006); Montana: MONT. CODE ANN. §§ 39-3-206(1) (1993); MONT. CODE ANN. § 39-3-407 (1979); North Carolina: N.C. GEN. STAT. § 95-25.22(a1) (1991); North Dakota: N.D. CENT. CODE § 34-14-09.1(2) (1989); Oklahoma: OKLA. STAT. tit. 40, § 197.9 (1965); Oregon: OR. REV. STAT. § 652.230(1) (1995); South Dakota: S.D. CODIFIED LAWS § 60-11-7 (2008), Vermont: VT. STAT. ANN. tit. 21, §§ 342a(b) (2006); 395 (2001); and Wisconsin: WIS. STAT. §§109.03(5) (2011); § 109.11(2)(b) (1993).

<sup>138</sup> Arizona: ARIZ. REV. STAT. ANN. §§ 23-355(a), 23-364(g) (2012); Idaho: IDAHO CODE ANN. §§ 44-1508(2), 45-615 (West 2012); Maine: ME. REV. STAT. tit. 26, §§ 626-A, 670 (2012); Massachusetts: MASS. GEN. LAWS ch. 151, §§ 1B, 20 (2012); Michigan: MICH. COMP. LAWS §§ 408.393, 408.488 (2012); New Mexico: N.M. STAT. ANN. § 50-4-26(c) (2012); and Ohio: OHIO CONST. art. II § 34a.

<sup>139</sup> 29 U.S.C. § 216 (2011).

<sup>140</sup> Interview with Amy Carroll, *supra* note 106.

immigration officials if they spoke out about abuses at the workplace.<sup>141</sup> The WTPA changes key provisions in the NYS LL to more effectively deter employers from unlawfully retaliating against a worker who speaks up about violations such as unpaid wages or workplace safety issues. Nine other states and the District of Columbia also include anti-retaliation provisions in their labor laws.<sup>142</sup> While the NYS LL has always outlawed illegal retaliation,<sup>143</sup> the WTPA expands the protection given to workers and grants the NY DOL more enforcement powers. For example, the WTPA expands the types of criminally prohibited retaliation to include retaliatory actions taken against workers complaining about nonpayment and exercising any other wage and hour rights, closing loopholes allowed under prior law.<sup>144</sup> Threats are now included as a form of retaliatory conduct. Protection against retaliation applies as long as the employee has a good faith belief that the employer has violated the labor law.<sup>145</sup> Under the WTPA, “any person” is prohibited from retaliating against an employee, not just the employer.<sup>146</sup> Regarding costs to employers who retaliate, the NY DOL had the power to fine an employer up to \$10,000.<sup>147</sup> With the passage of the WTPA, the DOL can now order the person who retaliated against the employee to pay the employee up to \$10,000 in liquidated damages as well.<sup>148</sup>

The WTPA contains similar provisions regarding retaliation as those contained in FLSA. Under FLSA, “any person”<sup>149</sup> who willfully retaliates against an employee may be “subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both.”<sup>150</sup> FLSA also provides for such “legal or equitable relief as may be appropriate,” including reinstatement of the employee.<sup>151</sup> FLSA also provides for liquidated damages equal to

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<sup>141</sup> *Id.*

<sup>142</sup> Arizona: ARIZ. REV. STAT. ANN. §§ 23-364(b), (g) (2012); California: CAL. LAB. CODE §§ 98.6, 1171.5 (West 2012); Connecticut: CONN. GEN. STAT. § 31-69b (2012); District of Columbia: D.C. CODE § 32-1010 (2012); Idaho: IDAHO CODE ANN. § 44-1509 (2012); Illinois: 802 ILL. COMP. STAT. 105/11(c) (2012); Massachusetts: MASS. GEN. LAWS ch. 151 § 19(1) (2012); Michigan: MICH. COMP. LAWS § 408.483 (2012); New Mexico: N.M. STAT. ANN. § 50-4-26.1 (2012); and Ohio: OHIO CONST. art. II, § 34a.us

<sup>143</sup> N.Y. LAB. LAW § 215 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.

<sup>144</sup> N.Y. LAB. LAW § 215(3) (McKinney 2011).

<sup>145</sup> *Id.* § 215(1)(a).

<sup>146</sup> *Id.*

<sup>147</sup> N.Y. LAB. LAW § 215 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.

<sup>148</sup> N.Y. LAB. LAW § 215(1)(b) (McKinney 2011).

<sup>149</sup> 29 U.S.C. § 215(a)(3) (2011).

<sup>150</sup> *Id.* § 216(a) (2011).

<sup>151</sup> *Id.* § 216(b) (2011).

the amount of lost wages, but does not provide for up to \$10,000 in liquidated damages, as does NYS LL, altered by the WTPA.<sup>152</sup>

iii. Ensuring that Workers are Able to Collect Unpaid Wages by Granting Courts and the NY DOL the Necessary Mechanisms to Enforce Judgments

WTPA provisions address the fact that many MRNY members never receive payment after they receive judgments in their favor. Under prior NYS LL, the NY DOL did not have the power to obtain asset information in order to assist with collecting unpaid wages,<sup>153</sup> nor does FLSA provide this power to the U.S. DOL.<sup>154</sup> The WTPA grants courts and the NY DOL the power to freeze assets and order increased penalties after employers default on judgments. If the Labor Commissioner of the NY DOL issues an Order to Comply against an employer and they have yet to pay the employee the wages due, the NY DOL may now order the employer to provide a list of their assets ten days after the appeal period ends.<sup>155</sup> In addition, if the employer does not provide the NY DOL with a list of assets (such as bank accounts and real property), courts have the authority to award up to \$10,000 civil penalty for lack of compliance.<sup>156</sup> This is extremely important because often low-wage workers receive a judgment in their favor but never see the money, because, for example, the employer has transferred his or her assets to someone else, sold the business and moved on, or has disappeared and is nowhere to be found. Finally, the WTPA also provides that where an employer defaults on a final judgment or Order to Comply for more than ninety days, the employer must pay an additional 15% in damages.<sup>157</sup> These increased penalties are meant to deter employers from violating the NYS LL, and portray the message that it is cheaper for employers to comply with rather than violate the law.

iv. Improved Record-Keeping Provisions under the WTPA

The WTPA strengthens existing record-keeping requirements for employers, allowing workers to have more complete information about their wage rates and hours worked. MRNY included these provisions to increase transparency and provide workers with

<sup>152</sup> *Id.*; N.Y. LAB. LAW § 215(1)(b) (McKinney 2011).

<sup>153</sup> N.Y. LAB. LAW § 196 (McKinney 2009), *amended by* 2010 N.Y. SESS. LAWS 1452.

<sup>154</sup> This provision is not listed in FLSA.

<sup>155</sup> N.Y. LAB. LAW § 196(1)(d) (McKinney 2011).

<sup>156</sup> *Id.*

<sup>157</sup> N.Y. LAB. LAW §§ 198(4), 218(1), 219(1), 663(4) (McKinney 2011).

important information about their wages due.<sup>158</sup> In addition to former NYS LL provisions requiring accurate payroll records, the law now states that employers must keep records on an ongoing basis.<sup>159</sup> For example, employers may not create records after the period of time the employee worked. This helps to prevent fraudulent record-keeping on part of employers, which can be used in an attempt to refute NY DOL investigations regarding unpaid wages or overtime. Additionally, payroll records must now include information regarding how the employee is paid.<sup>160</sup> If the employee is paid by piece rate, the record must detail what rates apply and the number of pieces paid at each rate.<sup>161</sup> While former law required that employers give employees wage statements or pay stubs,<sup>162</sup> the WTPA provides that pay stubs contain additional information, such as the employer's name, address and phone number, dates covered by the payment, and hours worked, including overtime hours.<sup>163</sup> FLSA contains similar provisions to the WTPA; under FLSA, an employer is required to "make, keep and preserve" employment records and state how an employee is paid (for example, by shift), but FLSA does not specify that employers must keep the records on an ongoing basis.<sup>164</sup> Under FLSA, employers are required to keep records for three years,<sup>165</sup> compared to six years under the WTPA.<sup>166</sup>

v. Improved Notice Given to Employees about Wage Rates

The WTPA improves former labor law provisions regarding the wage rate notice that is given to employees prior to employment—increasing the information to be provided, and requiring annual updates—and requires notice of labor law violations to be posted in the workplace. The WTPA also allows for workers to receive up to \$2,500 in damages if they do not receive a wage rate notice within their first ten business days on the job, which helps deter employers from non-compliance with the law.<sup>167</sup>

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<sup>158</sup> *Advocacy Story*, *supra* note 3, at 155.

<sup>159</sup> N.Y. LAB. LAW § 195(4) (McKinney 2011).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> N.Y. LAB. LAW § 195 (McKinney 2009), amended by 2010 N.Y. SESS. LAWS 1452.

<sup>163</sup> N.Y. LAB. LAW § 195(3) (McKinney 2011).

<sup>164</sup> 29 U.S.C. § 211(c) (2011).

<sup>165</sup> *Id.*; U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FACT SHEET #21: RECORDKEEPING REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs21.htm>.

<sup>166</sup> N.Y. LAB. LAW § 195(4) (McKinney 2011).

<sup>167</sup> *Advocacy Story*, *supra* note 3, at 155; N.Y. LAB. LAW § 198(1-b) (McKinney 2011).

Like the improved record-keeping provisions, MRNY targeted wage-rate notice provisions to increase transparency and information available to the worker.<sup>168</sup> Translation of documents was also a concern of MRNY, because English is a second language for many MRNY members.<sup>169</sup> While the former law required employers to give written notice to each employee about wage rates when they are hired,<sup>170</sup> the WTPA requires employers to provide each new hire and all employees written notice of their wage rates by February 1st of each year.<sup>171</sup>

The WTPA also expands what must be included in the written notice of wage rates. The notice must now include how the employee is paid—by the hour, shift, or day, for example—which will help advocates and the NY DOL better calculate worker’s correct wages.<sup>172</sup> The official employer name and any names that the employer uses for business, as well as addresses and phone numbers, must now be included on the notice of wage rate.<sup>173</sup> This helps advocates, the NY DOL, and the workers themselves correctly identify their employer (since employers often hide behind various “doing business as” names) and contact or locate employers.<sup>174</sup> Wage rate notices must also include any allowances taken out of employees’ paychecks.<sup>175</sup> While former NYS LL did not require that the notice be in any language other than English,<sup>176</sup> the notice must now be in English and in the employee’s native language; employers may use language templates prepared by the NY DOL.<sup>177</sup>

The WTPA also provides that the NY DOL Commissioner may publicly post violations of the labor law for up to a year in a place visible to employees.<sup>178</sup> For willful violations, the NY DOL Commissioner may post a summary of violations for up to ninety days in a location visible to the public, with misdemeanor charges possible for those who tamper or remove the notice without permission.<sup>179</sup>

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<sup>168</sup> *Advocacy Story*, *supra* note 3, at 155; Interview with Amy Carroll, *supra* note 106.

<sup>169</sup> Interview with Amy Carroll, *supra* note 106.

<sup>170</sup> N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* L.2010, c. 564 § 3.

<sup>171</sup> N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Interview with Amy Carroll, *supra* note 106.

<sup>175</sup> N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).

<sup>176</sup> N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* N.Y. LAB. LAW § 195 (McKinney 2010).

<sup>177</sup> N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).

<sup>178</sup> *Id.* § 219-c.

<sup>179</sup> *Id.*

Therefore, employees can now be fully aware of workplace violations committed by their employer, and know to be on the lookout for similar violations. FLSA does not contain a similar provision.<sup>180</sup> MRNY chose to supplement the wage-rate notice provision because of the need for increased language access for immigrant workers. As a result, the improved wage notice requirements allow workers to be aware of correct contact information for their employers as well as important information regarding how they are paid, information that helps facilitate wage and hour claims.

vi. Providing Enforcement Tools to the NY DOL and Improving Agency Process

The WTPA also codifies best practices of the NY DOL and gives the agency tools to more effectively carry out their responsibilities. Based on MRNY Legal Department's experience working with the NY DOL, the organization wanted to provide tools to enable the agency to more efficiently resolve wage and hour violation claims. The WTPA closed various loopholes, clarified inconsistencies in the NYS LL, and codified good practices of the NY DOL, so that pro-worker policies would not be changed by subsequent administrations.<sup>181</sup> For example, the WTPA codifies the NY DOL's practice of keeping employees' identities confidential during an investigation, until necessary to disclose in order to resolve a case.<sup>182</sup> The WTPA also codifies the agency's practice of investigating third party complaints.<sup>183</sup> Prior law contained a loophole that only gave the NY DOL authority to investigate complaints or bring criminal proceedings under Article 6 (nonpayment of wages) of the NYS LL, and not under Article 5 (meal breaks), Article 19 (minimum wage), or Article 19-a (farm workers).<sup>184</sup> The WTPA also tolls the statute of limitations during an NY DOL investigation.<sup>185</sup> This prevents workers from having cases eventually brought in court dismissed because of delays in agency investigations.<sup>186</sup> The new law also gives the NY DOL discretion to assess up to 100% liquidated

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<sup>180</sup> *But see* 29 U.S.C. § 218b (2011) (employers must post notice of enrollment in a health plan).

<sup>181</sup> Interview with Amy Carroll, *supra* note 106.

<sup>182</sup> N.Y. LAB. LAW § 196-a(a) (McKinney 2011).

<sup>183</sup> *Id.* § 196(1)(b); Interview with Amy Carroll, *supra* note 106.

<sup>184</sup> N.Y. LAB. LAW § 196 (McKinney 2010), *amended by* [L 2010, c.564 § 4]; N.Y. LAB. LAW § 218 (McKinney 2010), *amended by* [L.2010, c. 564, § 11]; N.Y. LAB. LAW § 219 (McKinney 2010), *amended by* [L.2010, c. 564, § 12; N.Y. LAB. LAW § 219-c (McKinney 2011).

<sup>185</sup> N.Y. LAB. LAW § 198(3) (McKinney 2011).

<sup>186</sup> Interview with Amy Carroll, *supra* note 106.

damages during negotiations,<sup>187</sup> increasing the agency's bargaining capabilities to reach settlements quickly.<sup>188</sup>

#### IV. OBJECTIONS TO THE WTPA

Objections to the WTPA include a recent NYS Senate bill that would repeal the WTPA. Bill S.4452, titled "An Act to Repeal the Wage Theft Prevention Act," was introduced on April 6, 2011, by Senator John DeFrancisco, a Republican representing Syracuse and neighboring areas.<sup>189</sup> The justification for the bill claims that New York State has some of the most "anti-business laws in the country, which are making it increasingly difficult for businesses to justify remaining in the state."<sup>190</sup> It proceeds to state that the WTPA increases the burden on businesses and potential liability on employers, "when many are already struggling to survive."<sup>191</sup> Senator DeFrancisco, perhaps sensing that repealing the entire WTPA would not be possible, also introduced Bill S.6063A, calling for the elimination of the annual notice requirement mandated by the WTPA.<sup>192</sup> The bill passed the Senate on February 29, 2012, and is currently in the New York State Assembly for consideration.<sup>193</sup>

Additionally, business groups such as the National Federation of Independent Business and the Business Council of New York State have lobbied against the WTPA.<sup>194</sup> New York State Assembly Minority Leader Brian M. Kolb claims that the WTPA will steal jobs from New York State and create endless paperwork requirements for employers.<sup>195</sup> Assemblyman Kolb also claims that "a few bad ap-

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<sup>187</sup> The law mandates up to 100% liquidated damages in an "order to comply," which is issued if settlement is not reached. See N.Y. LAB. LAW §§ 198, 663 (McKinney 2011).

<sup>188</sup> Interview with Amy Carroll, *supra* note 106.

<sup>189</sup> S.4452, 2001 S. (N.Y. 2011), available at <http://open.nysenate.gov/legislation/bill/S4452-2011>. As of this writing, the bill was referred to the Labor Committee on January 4, 2012. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> S.6063A (N.Y. 2012), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=S06063&term=&Summary=Y&Actions=Y&Votes=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=S06063&term=&Summary=Y&Actions=Y&Votes=Y&Text=Y)

<sup>193</sup> *Id.*

<sup>194</sup> See *Advocacy Story*, *supra* note 3, at 157; see also Press Release, Assembly Minority Leader Brian M. Kolb, *Stop Thief! So-Called "Wage Theft Prevention Act will Steal Away More Jobs and Hurt Businesses,"* (Apr. 8, 2011) available at <http://assembly.state.ny.us/Minority/20110408/>.

<sup>195</sup> Kolb, *supra* note 194; see also Brian M. Kolb, *Leader Kolb Again Recognized As A Champion of Small Business—But There Is Still More Work To Do!*, ASSEMBLYMAN BRIAN M. KOLB (Aug. 24, 2012), <http://assembly.state.ny.us/mem/Brian-M-Kolb/story/49584/>

ples” commit wage theft, therefore the WTPA is unnecessary.<sup>196</sup> Each argument will be addressed in the following paragraphs.

WTPA opponents argue that the law’s provisions are more costly and time-consuming for employers. The WTPA alters existing record-keeping requirements in the NYS LL by requiring additional information on pay stubs, such as employer names and addresses.<sup>197</sup> The law also requires that employers provide their employees with annual notice of their wage rates, instead of only at the time of hire,<sup>198</sup> the provision attacked by the recent passage of NYS Senate Bill 6063A.<sup>199</sup> Indeed, the sample form provided by NY DOL is a single page,<sup>200</sup> but Sen. DeFrancisco calls the requirement a “massive, costly mandate on every employer in the state.”<sup>201</sup> The WTPA requires that these notices be translated into the employee’s native language, and the employer may use document templates translated into different languages provided by the NY DOL.<sup>202</sup> If the NY DOL does not provide a template for the language identified by the employee as his or her primary language, the employer may satisfy his obligation under the law by providing the notice to the employee in English alone.<sup>203</sup> An employer does not have to pay to translate the wage rate notices.<sup>204</sup>

Employers were also required to furnish pay stubs prior to the law.<sup>205</sup> The WTPA provisions create minimal increased paperwork requirements for employers and are not unduly burdensome. It does not mandate any increased business costs, such as an increase in wages. The WTPA will in fact help law-abiding businesses save money. Honest employers will no longer face unfair competition by competitors who save on labor costs by withholding wages due.<sup>206</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> N.Y. LAB. LAW § 195(3) (McKinney 2011); *see also supra* text accompanying notes 158–66.

<sup>198</sup> N.Y. LAB. LAW § 195(1)(a) (McKinney 2011).

<sup>199</sup> *See* S.6063A, *supra* note 192.

<sup>200</sup> The sample form provided by the NY DOL is available at <http://www.labor.ny.gov/formsdocs/wp/WTPA%20Sample%20Wage-Statement.jpg>.

<sup>201</sup> Dave Jamieson, *Wage Theft Law Targeted for Repeal by New York GOP*, THE HUFFINGTON POST (Mar. 27, 2012, 5:26 PM), [http://www.huffingtonpost.com/2012/03/13/wage-theft-law-new-york\\_n\\_1342919.html](http://www.huffingtonpost.com/2012/03/13/wage-theft-law-new-york_n_1342919.html).

<sup>202</sup> N.Y. LAB. LAW § 195(1)(b) (McKinney 2011). Templates are provided by NY DOL at <http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>.

<sup>203</sup> N.Y. LAB. LAW § 195(1)(c) (McKinney 2011).

<sup>204</sup> *See id.* (noting that if an employee speaks a language for which a template is not available from the NY DOL, the employer may comply with this requirement by providing an English-language notice or acknowledgment).

<sup>205</sup> N.Y. LAB. LAW § 195 (McKinney 2009), *amended by* [L.2010, c. 564, § 3].

<sup>206</sup> *See Advocacy Story, supra* note 3, at 157.

Another argument against the WTPA is that only certain employers, “a few bad apples,” steal wages from employees, but all employers must comply with the new law. While it is difficult to know exactly how many employers commit wage theft, statistics reveal that it is a widespread problem. As stated previously, it is estimated that wage theft steals \$1 billion from New York City workers. In 2010 the NY DOL collected \$26.6 million in illegally underpaid wages.<sup>207</sup> The statistics show that the problem of wage theft is endemic and widespread. It is highly unlikely that a problem of this magnitude is created by a few bad apples; but rather it is likely the product of systemic acceptance of lax enforcement and inadequate labor laws.

Finally, WTPA opponents argue that the law will cause businesses to leave New York State en masse, because of increased requirements and costs to businesses. The WTPA is part of a nationwide movement of state labor law reform to fight wage theft.<sup>208</sup> Many states have passed wage theft laws in the last five years.<sup>209</sup> As most wage theft laws are recent, it is difficult to gather statistics regarding the number of businesses who have left states that have increased protections against wage theft. Analyzing business statistics may provide insight regarding the effect of pro-worker laws on business presence in New York State. U.S. Census Bureau data shows a steady increase in the number of businesses in New York State before the implementation of the Unpaid Wages Prohibition Act in 1997 through 2008, with a slight decline in 2009.<sup>210</sup> It could therefore be inferred that businesses did not leave

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<sup>207</sup> Press Release, N.Y. State Dep’t of Labor, Labor Department Returns \$26.6 Million in Back Wages to Workers in 2010: Second Highest Total in Labor Department History (Jan. 3, 2011), *available at* <http://www.labor.ny.gov/pressreleases/2011/january-03-2011.shtm>.

<sup>208</sup> See the Wage Theft Campaign Map, <http://wagetheft.org/campaignmap/campaignmap.html> for a list of current wage theft campaigns across the country, including state and local campaigns. WAGE THEFT, <http://wagetheft.org/campaignmap/campaignmap.html> (last visited Nov. 12, 2012); *see also* TIM JUDSON & CRISTINA FRANCISCO MCGUIRE, WHERE THEFT IS LEGAL: MAPPING WAGE THEFT LAWS IN THE 50 STATES (June 2012), *available at* <http://www.progressivestates.org/wagetheft>. The Progressive States Network report states that New York and Massachusetts, the highest ranked states, have barely passing grades and have just recently begun addressing wage theft, while the vast majority of states have few protections, if any. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See* U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES: NEW YORK-ALL INDUSTRIES-BY YEAR, <http://www.census.gov/epcd/susb/latest/ny/NY-.HTM>. In 1996, New York State had 411,120 total firms, in 2002 the state had 428,425 firms, and in 2008 the state had 443,992 firms. *Id.* In 2009, New York State had 441,241 total firms, a slight decline from 2008. U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES: HISTORICAL DATA TABULATIONS BY ENTERPRISE SIZE-2009, U.S. & STATES, TOTALS, <http://>

New York State because of the Unpaid Wages Prohibition Act, an act with similar goals as the WTPA.<sup>211</sup> While it is too soon to tell if businesses will leave New York State because of the WTPA, the law does not create undue burdens on employers and only targets employers who violate the law.

The WTPA will even the playing field by reigning in unlawful employers who economically benefit by not complying with the law. The WTPA will help all employers compete fairly, thus fostering a business environment that will encourage business growth in New York. As WTPA advocates have pointed out since the beginning of the campaign, law-abiding employers have nothing to fear.<sup>212</sup>

#### V. IMPLEMENTATION OF THE WTPA AND HOPE FOR THE FUTURE OF WORKERS' RIGHTS IN NEW YORK STATE

While it is too early to chart the WTPA's progress, workers' rights advocates are hopeful, and they are already seeing results. "At long last, this puts real teeth in New York's Labor Law," said Andrew Friedman, former Director of MRNY, after the WTPA was signed into law.<sup>213</sup> In March of 2010, an upscale restaurant in New York City agreed to hand over \$200,000 to settle a NY DOL investigation into the restaurant's practice of wage and hour violations and retaliatory firing of organized workers.<sup>214</sup> The NYS Attorney General's office stated that \$20,000 of the settlement, liquidated damages for workers, was made possible by the WTPA, and that this case is an example of how the law provides new remedies that effectively protect workers.<sup>215</sup> In order to ensure that the WTPA is a successful tool against wage theft, effective enforcement and investigation by the NY DOL is needed, as well as strong education and outreach efforts.

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[www.census.gov/econ/susb/data/susb2009.html](http://www.census.gov/econ/susb/data/susb2009.html). A firm is defined as a "business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control." DEFINITIONS, U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES, *available at* <http://www.census.gov/econ/susb/definitions.html>.

<sup>211</sup> See *supra* text accompanying notes 108–20.

<sup>212</sup> See *Advocacy Story*, *supra* note 3, at 157–58.

<sup>213</sup> Dolnick, *supra* note 5.

<sup>214</sup> Daniel Massey, *Manhattan Eatery Forks Over Cash for Wage Theft*, CRAIN'S NEW YORK BUS. (Mar. 1, 2012, 3:48 pm), [http://www.crainsnewyork.com/article/20120301/LABOR\\_UNIONS/120309990](http://www.crainsnewyork.com/article/20120301/LABOR_UNIONS/120309990).

<sup>215</sup> *Id.*

A. *Enforcement of the New Law*

Many workers' rights advocates have critiqued the NY DOL's actions regarding enforcement and investigation of wage and hour complaints. A December 2006 report by the Campaign to End Wage Theft, a coalition of over twenty-four community organizations in New York State (including MRNY), detailed suggestions regarding how the NY DOL could improve their enforcement of wage and hour laws.<sup>216</sup> The report listed six recommendations:

- (1) Aggressively investigate complaints and pursue all remedies provided by law,
- (2) Systematically and proactively investigate high-violation industries,
- (3) Partner with community and labor groups for expertise and worker outreach,
- (4) Improve responsiveness to the needs of immigrant workers,
- (5) Improve coordination with state and local enforcement agencies to protect workers, and
- (6) Make the NY DOL more accessible, accountable, and transparent.<sup>217</sup>

As MRNY felt strongly about the need to give the NY DOL more tools to be able to do their job effectively, the WTPA addresses many of the community organizations' concerns listed in the 2006 report.<sup>218</sup> For example, the report asked that the NY DOL fully protect workers from retaliation by adopting a formal policy to keep all names of employees who file a complaint confidential.<sup>219</sup> The WTPA codifies this practice of maintaining confidentiality.<sup>220</sup> The report also recommended strengthening the consequences for employer misconduct in order to deter employers from relying on violating worker rights as a business practice and protecting workers from unlawful retaliation.<sup>221</sup> The WTPA addresses both of these issues.<sup>222</sup>

Advocates are hopeful that WTPA provisions granting the NY DOL more power to do their work, combined with recent funding for the agency, will improve enforcement. The NY DOL Labor Standards Division<sup>223</sup> budget has increased over the past few years. For the fiscal year of 2010–11, the Department's budget was

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<sup>216</sup> CAMPAIGN TO END WAGE THEFT, *supra* note 108.

<sup>217</sup> *Id.* at 3.

<sup>218</sup> *See supra* text accompanying notes 181–88.

<sup>219</sup> CAMPAIGN TO END WAGE THEFT, *supra* note 108, at 6.

<sup>220</sup> N.Y. LAB. LAW § 196-a (McKinney 2011).

<sup>221</sup> CAMPAIGN TO END WAGE THEFT, *supra* note 108, at 16.

<sup>222</sup> *See supra* text accompanying notes 133–152.

<sup>223</sup> *See* DEP'T OF LABOR, LABOR STANDARDS, [http://www.labor.ny.gov/workerprotection/laborstandards/labor\\_standards.shtm](http://www.labor.ny.gov/workerprotection/laborstandards/labor_standards.shtm) (last visited Aug. 15, 2011) (Department of Labor Standards is charged with enforcement of wage and hour laws); *see also* MEYER & GREENLEAF, *supra* note 25, at 71.

\$17,474,000, an increase from \$14,411,000 in the 2006–07 fiscal year.<sup>224</sup> The NY DOL estimates that over the past five years there has been a 5% increase in the number of full-time employees working on wage and hour enforcement.<sup>225</sup> However, the NY DOL reports an average delay of one-and-a-half years before an investigation begins, due to the large volume of cases.<sup>226</sup> The agency reports that large quantities of wages, fines, and penalties go uncollected: in 2009, \$45,608,966 went uncollected, a dramatic increase from \$13,637,494 in 2005.<sup>227</sup>

*B. Education and Outreach Necessary for Effective Implementation of the WTPA*

Changing the law alone will not solve wage theft; the NY DOL and community organizations must have effective outreach programs in the community. If the NYS LL is truly going to deter employers from breaking the law, then they must know about it. The NY DOL has created resources, such as a WTPA fact sheet, and addressed Frequently Asked Questions, available on its website under “Wage and Hour,” so that employers may learn more about the WTPA.<sup>228</sup> The fact sheet details the main provisions under the WTPA, and is geared towards employers.<sup>229</sup> The Frequently Asked Questions document about the Wage Theft Prevention Act appears to be comprehensive, and states that NY DOL officers will address inquiries submitted by e-mail in a “timely manner.”<sup>230</sup> While the NY DOL website materials are a good starting point for outreach and implementation, this must not be the only employer-outreach the Department does.

In order for there to be effective implementation of the WTPA, organizations like MRNY must conduct outreach about the new provisions as well.<sup>231</sup> In the case of MRNY, the organization’s Brooklyn and Queens offices have Workplace Justice Project committees, and two workers rights organizers; the groups meet weekly,

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<sup>224</sup> MEYER & GREENLEAF, *supra* note 25, at 71.

<sup>225</sup> *Id.* at 77.

<sup>226</sup> *Id.* at 130.

<sup>227</sup> *Id.* at 144.

<sup>228</sup> *Wage Theft Prevention Act: FAQ*, N.Y. STATE DEP’T OF LABOR, <http://www.labor.ny.gov/workerprotection/laborstandards/PDFs/wage-theft-prevention-act-faq.pdf> (last visited May 12, 2011).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Kirk Semple, *A Boon for Nannies, if Only They Knew*, N.Y. TIMES, Apr. 14, 2011, <http://www.nytimes.com/2011/04/15/nyregion/few-domestic-workers-know-about-law-protecting-them.html>.

with organizers and worker/members taking on leadership roles within each group.<sup>232</sup> Members participate in planning campaigns, direct action such as protests or boycotts, and skills trainings.<sup>233</sup> Members of the Workplace Justice Project committees who were active in the WTPA campaign helped develop a PowerPoint training, and have given the training to all MRNY member committees.<sup>234</sup> The passage of the WTPA has not only given MRNY the opportunity to conduct more “know your rights” trainings about workers’ rights under the NYS LL, but also the opportunity to talk about the increased protections for workers under the WTPA.<sup>235</sup> MRNY Legal Department staff and Workplace Justice Project members continue to conduct workers’ rights trainings for social service agencies and community groups in New York City and Long Island, training other advocates about the new law.<sup>236</sup> They also conduct trainings for frontline social service workers and staff who work with immigrants and may not know how to issue spot for wage and hour violations.<sup>237</sup>

Workers’ rights organizations must also continue to educate workers that, regardless of their immigration status, they can seek redress under the NY DOL<sup>238</sup> (in addition to FLSA, if workers qualify).<sup>239</sup> “There is a huge misperception in general about whether the [labor] law protects workers, regardless of their immigration status,” said Amy Carroll, former Legal Director for MRNY. “Employers add to this misconception by threatening workers, saying that they will call immigration if workers report unpaid wages or unsafe working conditions.”<sup>240</sup> MRNY’s current outreach is another way to educate the immigrant community in New York City about this misperception. The NY DOL also has a six-person Bureau of

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<sup>232</sup> See MAKE THE ROAD NEW YORK, [http://maketheroad.org/whatwedo\\_workplace.php](http://maketheroad.org/whatwedo_workplace.php) and [http://maketheroad.org/howwework\\_community.php](http://maketheroad.org/howwework_community.php) (last visited May 12, 2011) (providing more information on MRNY’s Workplace Justice Project); see also *Advocacy Story*, *supra* note 3, at 154.

<sup>233</sup> *Advocacy Story*, *supra* note 3, at 154.

<sup>234</sup> Interview with Amy Carroll, *supra* note 106.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See 2003 N.Y. Op. Atty. Gen. F3, *supra* note 105.

<sup>239</sup> See *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987); see also *Centeno-Bernuy v. Perry*, 2009 Dist. LEXIS 103580, 19-20 (W.D.N.Y. July 14, 2009) (applying FLSA protections to citizens and non-citizens alike).

<sup>240</sup> Interview with Amy Carroll, *supra* note 106; see also *Rivera v. NIBCO*, 364 F.3d 1057, 1064 (9th Cir. 2004) (finding that undocumented workers are especially vulnerable to workplace abuse, discrimination, and exploitation as well as the fear of being turned over to immigration officials).

Immigrant Workers' Rights that conducts outreach in immigrant communities.<sup>241</sup>

A mix of legislative reforms and community activism is needed in order to target wage theft. The WTPA is a positive step in the fight against wage theft in New York State. We cannot change the law and expect for wage theft to magically disappear; outreach to employers and workers is needed, including immigrant workers who are not aware that their minimum wage rate is in violation of the law, in addition to better enforcement and investigation by the NY DOL.<sup>242</sup>

#### CONCLUSION

Wage theft is a widespread problem in New York, especially amongst low-wage workers. Specifically, wage theft disproportionately affects immigrant and women low-wage workers in our communities.<sup>243</sup> Prior NYS LL did not effectively deter employers from violating the law. "The fines were so minimal that many rogue employers saw them as the cost of doing business," said Senator Diane Savino, lead sponsor of the WTPA.<sup>244</sup> Advocates hope that the WTPA will be an effective tool against wage theft in New York State, because the law offers greater protections for workers against wage theft, and we have already seen positive results for workers. Outreach and education by the NY DOL and workers' rights organizations is necessary for further effective implementation of the WTPA. The WTPA is an impressive victory for victims of wage theft in the state, and attempts to repeal the bill must be resisted.

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<sup>241</sup> MEYER & GREENLEAF, *supra* note 25, at 163.

<sup>242</sup> See GORDON, *supra* note 107, at 30.

<sup>243</sup> See *supra* notes 15–25 and accompanying text.

<sup>244</sup> Dolnick, *supra* note 5 (quoting New York State Senator Diane J. Savino, a Democrat who was the lead sponsor of the WTPA Senate bill).