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Executive Director

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The Honorable Virginia Foxx  
The Honorable Robert Scott  
The Honorable Bradley Byrne  
The Honorable Mark Takano  
U.S. House of Representatives  
Committee on Education and the Workforce

Dear Representatives Foxx, Scott, Byrne and Takano:

On behalf of the National Employment Law Project (NELP), a non-profit and non-partisan 501(c)(3) organization that advocates on behalf of low-wage and unemployed workers, I ask that this letter be made part of the official record of the February 16, 2017 hearing of the Subcommittee on Workforce Protections entitled "Federal Wage and Hour Policies in the Twenty-First Century Economy."

NELP has extensive expertise on the enforcement of our nation's wage and hour laws, and particular expertise in the widespread and ever-growing practice of employers misclassifying workers as independent contractors. These are areas of significant concern which require a vigilant and strategic Wage and Hour Division at the US Department of Labor in order to ensure that workers are paid the wages to which they are entitled.

### **Enforcement of the Fair Labor Standards Act**

Approximately 42 percent of workers in America earn under \$15 per hour.<sup>1</sup> They are nursing assistants, home care workers, janitors, waiters and waitresses, cashiers, truck drivers, auto workers, and many others who keep our families and businesses going.<sup>2</sup> They are also disproportionately women, people of color, and immigrants.<sup>3</sup> As the real value of wages generally continues to decline<sup>1</sup> and income inequality worsens, ensuring that low-wage workers are paid the minimum wage and overtime required by law must be a priority.

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<sup>1</sup> Irene Tung et al, The Growing Movement for \$15 (Nov. 2015) at 1, <http://nelp.org/content/uploads/Growing-Movement-for-15-Dollars.pdf>.

<sup>2</sup> *Id.* at 6–8.

<sup>3</sup> Annette Bernhardt et al, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009) at 9, <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>; see also *supra* note 1.

A seminal 2009 study by the National Employment Law Project and other academic partners surveyed over 4,000 low-wage workers and found that 26 percent were paid less than the required minimum wage in the previous work week, and nearly two thirds experienced at least one pay-related violation in the previous week, such as failure to pay overtime, not being paid for all hours worked, and stolen tips.<sup>4</sup> That study also found that apparel and textile manufacturing, personal and repair services, and private households yielded the highest minimum wage violations —all exceeding 40 percent. Child care workers experienced the highest violations of any job, with 66 percent reporting not being paid the minimum wage in a given week and 90 percent facing overtime violations. The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations.

A more recent NELP study of business outsourcing found that the restructuring of employment arrangements through multi-layered contracting, the use of staffing or temp firms, franchising, and other means can result in poor working conditions and a lack of corporate responsibility.<sup>5</sup> The report focused on non-compliance in some of our largest and fastest-growing sectors. In the fast food industry, for example, nearly 90 percent of fast food workers suffered some sort of wage theft on the job. In the warehouse and logistics industry, 23.1 percent suffered minimum wage violations and 67.8 percent suffered overtime violations. About 80 percent of port truck drivers who transport goods from ports to railheads or logistics firms are misclassified as independent contractors.

Given these realities, we need a strong US Department of Labor that will engage in strategic and aggressive enforcement of the nation’s wage and hour laws. An effective enforcement scheme must protect workers who come forward to raise complaints, and must also include strong public and private enforcement tools to better guarantee compliance; and help ensure collection of owed wages.

Strategic enforcement means not just relying on complaints that walk through the proverbial doors of DOL, but instead, using all available data to determine enforcement priorities that will have impact beyond just one employer. In recent years, the Wage and Hour Division has focused on particular industries that employ large numbers of vulnerable workers – people who earn low wages, who probably lack good knowledge of their rights, and are too scared of retaliation to file a formal complaint about unpaid wages. Industries that meet these criteria hotel and motel, agriculture, janitorial services, fast food and full service restaurants, home care and other healthcare segments, retail and logistics, and some segments of manufacturing like garment production.

The benefits of strategic enforcement is that it is focused on changing the employer practices that lead to violations. These kinds of investigations require carefully mapping business relationships, figuring out how to use enforcement resources to have the greatest impact on an industry as a whole, so that the deterrence value goes beyond the one employer being investigated.

In addition to making extensive use of strategic enforcement, in order for DOL to adequately address wage theft in all its forms, it must dedicate sufficient resources and staff to enforce the law. Due to insufficient resources, public enforcement of wage and hour laws have significant difficulty keeping up

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<sup>4</sup> Id.

<sup>5</sup> Catherine Ruckelshaus, et al, “Who’s The Boss: Restoring Accountability for Labor Standards in Outsourced Work,” May, 2014, <http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf>.

with violations. On the federal level, the U.S. Department of Labor, which is responsible for enforcing federal wage, child labor and other laws has just over 1,000 investigators nationwide who are tasked with enforcing these laws in more than 7 million workplaces.<sup>6</sup> Because of these scarce resources, the average employer has just a .001% chance of being investigated by U.S. DOL Wage and Hour Division or Occupational Safety and Health Administration in any given year.<sup>7</sup> And on the state level, according to a nationwide survey, states have the equivalent of one inspector for every 146,000 workers. Most states have fewer than ten investigators.<sup>8</sup>

An enforcement team must, at a minimum, be able to issue rules and regulations; conduct thorough investigations; perform outreach and education geared to both workers and employers; resolve complaints in a timely manner from start to finish; and recover the wages owed to workers. A well-resourced investigation and enforcement team should develop programs seeking to ensure that employers comply with the law; it should also collect and analyze data to identify gaps and strategically target enforcement. Too many workers are afraid to report violations, worrying that they will lose their jobs, or worse, if they do so. Absent a strategic enforcement agenda, geared toward high-violation industries with high concentrations of vulnerable workers, DOL and the Wage and Hour Division cannot succeed in performing their missions.

And given DOL's very limited resources, it is clear that community-based organizations, who have ties to workers in specific industries and sectors, as well as their roots in certain racial or ethnic communities, can assist enforcement through outreach and education; detection and reporting of violations; filing complaints; and identifying high-violation industries and employers for proactive investigations.<sup>9</sup> As NELP outlines in a 2011 report, some specific ways to engage community groups include:<sup>10</sup>

- Conferring regularly with community advocates, state enforcement agencies, and other stakeholders to discover community needs and to work out partnerships.
- Convening task forces on specific problem areas or industries, inviting workers' advocates and stakeholders to share information and participate in other appropriate ways.
- Designating staff to act as liaisons to immigrant worker groups, attend events, and act as a resource.

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<sup>6</sup> See FY 2011 Congressional Budget Justification from U.S. DOL Wage and Hour Div., <http://www.dol.gov/dol/budget/2011/PDF/CBJ-2011-V2-03.pdf> (stating that for 2011, WHD expect to have 1,006 full time investigators, a number that has not changed significantly).

<sup>7</sup> U.S. DOL Comprehensive FLSA Powerpoint, available at [www.dol.gov/whd/flsa/comprehensive.ppt](http://www.dol.gov/whd/flsa/comprehensive.ppt) (stating that more than 130 million workers in more than 7 million workplaces are covered by the Fair Labor Standards Act).

<sup>8</sup> Policy Matters Ohio, Investigating Wage Theft: A Survey of the States, 2010, <http://www.policymattersohio.org/WageTheft2010.htm>.

<sup>9</sup> For a more detailed discussion of the importance of community-based partners, see Diego Rondón Ichikawa and Rebecca Smith, Delivering \$15: Community-Centered Wage and Hour Enforcement in Seattle (Oct. 2014) at 12–15, <http://www.nelp.org/content/uploads/2015/03/Delivering-15-Community-Centered-Wage-and-Hour-Enforcement-Seattle.pdf>.

<sup>10</sup> National Employment Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft (2011) at 39, <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

- Implementing community-safeguarding models that designate certain stakeholders to educate the community about the agencies' priorities and policies, especially in underserved areas.

Next, when workers report violations, they should recover all the wages they are owed in addition to damages that compensate the worker for the time, effort, risk, and costs associated with reporting unpaid wages as well as costs resulting from not receiving those wages in the first place (i.e. late fees on monthly bills). The Fair Labor Standards Act allows workers to recover double the amount of wages owed (and some allow for triple the amount of wages owed or a fixed amount for each day a violation took place). Without such compensation, there would be little to deter an employer from violating the law—violating employers would only have to pay the wages they were required to pay in the first place.

Anti-retaliation protection is also essential for effective wage enforcement. Workers need strong protection so they will not be vulnerable to employer harassment and retaliation when they report a violation. This is especially important because enforcement relies heavily on workers coming forward and filing complaints. Retaliation is common—a national survey found that 43 percent of workers who complained to their employer about their wages or working conditions experienced retaliation.<sup>11</sup> A national survey found that 20 percent of workers never made a complaint because they feared retaliation or thought it would not make a difference.<sup>12</sup> DOL must pursue the fullest extent of penalties on employers when they engage in retaliation.

### **Misclassification of Employees as Independent Contractors**

With increasing frequency, employers misclassify employees as “independent contractors,” either by giving their employees an IRS Form 1099 instead of a Form W-2, or by paying the employee off-the-books and providing no tax forms or tax reporting and withholding. The “advantages” of this approach are many including: (1) evading responsibility for compliance with virtually all employment laws; (2) saving upwards of 30% on personnel costs including taxes, FICA, workers compensation and unemployment insurance; and (3) gaining unfair competitive advantages in bidding processes.

Misclassification is one of the trends that is most damaging to the goal of fostering a good-jobs economy. At NELP, we see janitors, home care workers, construction laborers and drywallers, cable installers, delivery persons, and even restaurant servers – these are the workers we see who are called non-employees by their employers. They are not running their own businesses by any definition. They want to work and they too often accept whatever arrangement gets them a job. And not coincidentally, the same occupations with high rates of independent contractor misclassification are among the jobs with the highest numbers of workplace violations.<sup>13</sup>

Workers lose out on labor and employment protections including workers' compensation, unemployment insurance, fair pay, and health and safety safeguards. They also bear a tax burden that

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<sup>11</sup> Id. at 55.

<sup>12</sup> Id.

<sup>13</sup> See, National Employment Law Project, *Holding the Wage Floor*, [http://nelp.3cdn.net/95b39fc0a12a8d8a34\\_iwm6bhbv2.pdf](http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf)

their employers are supposed to incur. It hurts law-abiding employers who treat their workers as employees but who cannot compete with those who perpetrate fraud. This has resulted in a race to the bottom and rewards cheaters. This affects the quality of what should be middle class jobs that could stimulate our economy.

This is no small problem. A 2000 study commissioned by the US Department of Labor found that up to 30% of firms misclassify their employees as independent contractors.<sup>14</sup> Many states have studied the problem and find high rates of misclassification, especially in construction, where as many as 4 in 10 construction workers were found to be misclassified.<sup>15</sup>

But as shocking as these numbers are, most of these studies do not capture the so-called “underground economy,” where workers are paid off-the-books, sometimes in cash.<sup>16</sup> These workers are *de facto* misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules. Many of these jobs are filled by immigrant and lower-wage workers.<sup>17</sup> This type of payroll fraud is common in the following industries: construction,<sup>18</sup> day labor,<sup>19</sup>

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<sup>14</sup> Lalith de Silva *et al.*, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” i-iv, *prepared for* U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>15</sup> See Fiscal Policy Institute, “New York State Workers Compensation: How Big is the Shortfall?” (January 2007); Michael Kelsay, James Sturgeon, Kelly Pinkham, “The Economic Costs of Employee Misclassification in the State of Illinois” (Dept of Economics: University of Missouri-Kansas City: December 2006); Peter Fisher *et al.*, “Nonstandard Jobs, Substandard Benefits”, Iowa Policy Project (July 2005); Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004); State of New Jersey, Commission of Investigation, “Contract Labor: The Making of an Underground Economy” (September 1997).

<sup>16</sup> Bear Stearns in 2005 estimated that the U.S. is losing \$35 billion annually due to off-the-books employment. Justich and Ng, “The Underground Labor Force is Rising to the Surface,” at p. 3, Bearns Stearns Asset Management (2005).

<sup>17</sup> Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004), at p. 8.

<sup>18</sup> Workers Defense Project, “Building Austin, Building Injustice: Working Conditions in Austin’s Construction Industry” (2009); Francois Carre, J.W. McCormack, *et al.*, “The Social and Economic Cost of Employee Misclassification in Construction” 2, Labor & Worklife Program, Harvard Law School and Harvard School of Public Health, Dec. 2004, [http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work\\_Misclass\\_Stud\\_1.pdf](http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work_Misclass_Stud_1.pdf)

<sup>19</sup> Abel Valenzuela and Nik Theodore, [On the Corner: Day Labor in the United States](#) (January 2006).

janitorial and building services,<sup>20</sup> home health care,<sup>21</sup> agriculture<sup>22</sup>, poultry and meat processing,<sup>23</sup> high-tech,<sup>24</sup> delivery,<sup>25</sup> trucking,<sup>26</sup> home-based work,<sup>27</sup> and the public<sup>28</sup> sectors.

This isn't a faceless problem. Here are but a few stories of how misclassification plays out in the real world for low-wage workers:

- Faty Ansoumana, an immigrant from Senegal, worked as a delivery worker at a Gristede's grocery store in midtown Manhattan. He worked as many as seven days a week, 10-12 hours a day and his weekly salary averaged only \$90. He and his fellow delivery workers, who had similar pay and hours, were all hired through two middlemen labor agents, who in turn stationed the workers at grocery and pharmacy chain stores throughout the City. The workers all reported directly to the stores and provided deliveries pursuant to the stores' set delivery hours and under the stores' supervision. Many delivery workers were required to bag groceries and to do other non-delivery work, including stocking shelves. When NELP challenged the abysmally low pay, the stores said the workers were not their employees, and the labor brokers said the deliverymen were independent contractors.<sup>29</sup> We were able to recover \$6 million for the over 1,000 workers in the lawsuit, but only after overcoming the stores' claims that they were not responsible.
- Janitors from Central and South America and Korea were recruited by a large building services cleaning company, Coverall, Inc., to clean office buildings in MA and other states. The janitors were "sold" franchise agreements for tens of thousands of dollars, permitting them to clean certain offices assigned by Coverall. The janitors were told where to clean, what materials to use, and were not permitted to set their own prices for the cleaning services. When one janitor quit when she couldn't make ends meet, she applied for unemployment benefits in MA and was told she was an "independent contractor" and not eligible. She challenged that decision and

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<sup>20</sup> See *Bulaj v. Wilmette Real Estate and Management Co., LLC*, 2010 WL 4237851 (N.D.Ill.2010); *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006); *Vega v. Contract Cleaning Maintenance*, 10 Wage & Hour Cases 2d (BNA) 274 (N.D. IL 2004).

<sup>21</sup> See *Crouch v. Guardian Angel Nursing, Inc.*, 2009 WL 3737887 (M.D.Tenn.2009); *Bonnette v. Cal. Health & Welfare Agcy.*, 704 F.2d 1465 (9<sup>th</sup> Cir. 1983).

<sup>22</sup> *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7<sup>th</sup> Cir. 1988).

<sup>23</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 30.

<sup>24</sup> *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9<sup>th</sup> Cir. 1996).

<sup>25</sup> *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).

<sup>26</sup> See Smith, Bensman, Marvy, "The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports," (2010), [http://nelp.3cdn.net/000beaf922628dfea1\\_cum6b0fab.pdf](http://nelp.3cdn.net/000beaf922628dfea1_cum6b0fab.pdf); Steven Greenhouse, The New York Times, *Clearing the Air at American Ports*, <http://www.nytimes.com/2010/02/26/business/26ports.html>.

<sup>27</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 31.

<sup>28</sup> Phillip Mattera, "Your Tax Dollars at Work... Offshore," Good Jobs First (July 2004) [http://www.goodjobsfirst.org/publications/Offshoring\\_release.cfm](http://www.goodjobsfirst.org/publications/Offshoring_release.cfm).

<sup>29</sup> *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).

Massachusetts' Supreme Judicial Court ruled in her favor. NELP wrote an *amicus* brief in Coverall and provided assistance.<sup>30</sup>

- Home health care workers in Pennsylvania were hired as employees by a home health care agency to place them in individual homes, where they cared for elderly and disabled people. The employees were not paid overtime or for their time spent traveling from household to household during their workdays, and they brought a lawsuit with NELP's help to claim their unpaid wages. Several months after the lawsuit was filed, the home care agency told each of these employees that they had to sign an agreement calling them "independent contractors" if they wanted to keep their jobs. Nearly all of the workers did so to keep their jobs, even though none of the other aspects of their job conditions, pay, or assignment and direction changed, and none was running an independent business.<sup>31</sup>

Workers and high-road businesses aren't the only victims. Federal and state governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Several government studies document the extent to which misclassification drains federal revenues:

- A 2000 study commissioned by the U.S. Department of Labor (DOL) – the "Planmatics" study – found that misclassification exacts an enormous toll: misclassifying just one percent of workers as independent contractors would cost unemployment insurance (UI) trust funds \$198 million annually.<sup>32</sup>
- A 2009 report by the Government Accountability Office (GAO) estimated independent contractor misclassification cost federal revenues \$2.72 billion in 2006.<sup>33</sup>
- In 2012 California's Employment Development Department's (EDD) Tax Branch conducted 4,290 audits and investigations, resulting in assessments totaling \$230.6 million, and identifying 89,063 unreported employees. EDD's Compliance Development Operations which concentrates on the underground economy, conducted 2,600 joint inspections,

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<sup>30</sup> *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJ-C-09682, 447 Mass. 852 (2006).

<sup>31</sup> *Lee's Industries, Inc. and Lee's Home Health Services, Inc. and Bernice Brown*, Case No. 4-CA-36904 (Decision by National Labor Relations Board Division of Judges), 2/25/10.

<sup>32</sup> Lalith De Silva, *et al.*, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>33</sup> U.S. General Accounting Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), <http://www.gao.gov/products/GAO-09-717>. See also, Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, and Agency-Wide Employment Tax program and Better Data are Needed* (February 4, 2009), <http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf> (explaining that "Preliminary analysis of Fiscal-Year 2006 operational and program data found that underreporting attributable to misclassified workers is likely to be markedly higher than the \$1.6 billion estimate from 1984.")

identified 13,226 previously unreported employees, assessed \$36 million in payroll tax assessments and assessed over \$9 million on fraud cases in 2012.<sup>34</sup>

- The New York Joint Enforcement Task Force on Employee Misclassification said in February 2013 that since its inception in 2007, it has identified over 88,700 instances of employee misclassification and discovered over \$1.4 billion in unreported wages and conducted 142 joint sweeps. In 2012, the JETF identified over 20,200 cases of employee misclassification; discovered over \$282.5 million in unreported wages; and assessed over \$9.7 million in unemployment insurance taxes.<sup>35</sup>

### **Conclusion**

The challenges facing our nation's workers are significant, and the methods by which they are being denied the wages they have earned are extensive and varied. It is more important than ever before that DOL's Wage and Hour Division has sufficient resources to combat wage theft in all the ways that it happens, and that it uses its resources as strategically as possible

Thank you for the opportunity to submit this letter to the official record.

Sincerely,



Christine L. Owens  
Executive Director

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<sup>34</sup> California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities*, report to the California Legislature (June 2013),

[http://www.edd.ca.gov/about\\_edd/pdf/Fraud\\_Deterrence\\_and\\_Detection\\_Report13.pdf](http://www.edd.ca.gov/about_edd/pdf/Fraud_Deterrence_and_Detection_Report13.pdf).

<sup>35</sup> *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, (February 1, 2013),

<http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf>.