

May 14, 2019

Testimony before Joint Committee on Labor and Workforce Development on S.1066/H.1610, “An Act to Prevent Wage Theft, Promote Employer Accountability, and Enhance Public Enforcement”

Chairs Jehlen and Brodeur, Vice Chairs Lewis and Hay, and members of the Joint Committee on Labor and Workforce Development:

My name is Jeremy Thompson. I’m a Senior Policy Analyst with the Massachusetts Budget and Policy Center. MassBudget is an independent, non-partisan research nonprofit focusing on policy solutions that improve the lives of low- and middle-income people in Massachusetts.

Our Commonwealth has been leading the nation in advancing workers’ rights recently. Whether at the ballot box or in the Legislature, the passage of laws guaranteeing earned sick time, paid family and medical leave, protections during pregnancy, gender pay equity, banning the enforcement of non-compete agreements, and of course a \$15 minimum wage have put our Commonwealth at the front of the pack when it comes to justice for workers – especially low-wage workers.

Wage and hour laws sit atop a three-legged stool. One, workers need environments where they feel empowered to bring complaints of violations to enforcement agencies. Two, enforcement agencies must have the resources they need to respond to these complaints. Three, employers must feel compelled to comply with the laws.

Each leg is shaky at the moment. S.1066/H.1610 could help brace them.

Workers need to know their rights under wage and hour laws

Enforcement of wage and hour laws depends on workers bringing complaints. For this complaint-based approach to succeed, workers need to know when something is a violation. And to know if something is a violation, they have to be aware of the relevant laws, regulations, and reporting procedures – including protections against retaliation from the boss for speaking up.

How aware are workers of these rights? The experience of New York City may be instructive. As in Massachusetts, workers in New York City have recently gained significant new or improved workplace protections, including an expansion of paid sick days, paid family and medical leave, and a \$15 minimum wage.

But a survey conducted in the summer of 2017 found that:

- 55 percent of low-income New York City workers had heard little or nothing about paid sick days, which passed in 2014.¹
- 33 percent of low-income hourly workers had heard little or nothing about the New York City minimum wage going to \$15.²

A survey of hotel cleaners in Las Vegas found that nearly a quarter of those experiencing work-related pain said they didn't know they should tell their boss.³ A recent study of janitors in Minneapolis found a majority didn't even know what workers' compensation was.⁴

Here in Massachusetts, the Attorney General's Fair Labor Division does considerable outreach to make sure workers know their rights, from on-site investigations at businesses to free wage theft clinics in Boston, New Bedford and Springfield to making wage and hour posters available for workplaces in multiple languages.⁵ But New York City has made similar efforts, and too many low-wage workers are still unaware of their rights.

Fair Labor Division Funding

The Attorney General's Fair Labor Division (FLD) is a pivotal agent in addressing workplace violations. Like so many parts of state government, FLD has been forced to try and "do more with less" ever since the Legislature approved substantial [income tax cuts](#) favoring the highest-income earners around 2000. These cuts now cost the state \$4 billion in revenue per year.⁶

FLD has its own line item in the state budget. Because FLD enforces the state's wage and hour laws its funding needs to keep up with job growth. But from Fiscal Year (FY) 2001 through the current FY 2019 budget, FLD funding *per worker* has dropped over 24 percent, adjusted for inflation. Even under the FY 2020 proposed budget recently adopted by the House, per-worker funding would still be down about seven percent from FY 2001.⁷

Forced Arbitration

In the past, employers knew they could end up in court for violating wage and hour laws because systemic violations might have resulted in class action suits against the employer on behalf of large groups of workers. Nowadays, however, because 54 percent of non-union private-sector employers require their workers, as a condition of employment, to agree to settle disputes via **private arbitration** rather than through the courts, many employees are unable to bring class action suits.⁸ The practice of forced arbitration has spread immensely in the past three decades: in the 1990s, less than 10 percent of workplaces imposed this constraint on their employees' rights.⁹

Evidence shows that workers fare much worse in arbitration than in federal or state court.¹⁰ Research has also shown that more than 98 percent of workers subject to forced arbitration agreements never bother bringing their claims in the first place — claims they might have litigated if not for the presence of an arbitration requirement.¹¹

On May 21, 2018, the U.S. Supreme Court ruled in a case called *Epic Systems* that employers are allowed to require workers to sign arbitration agreements and waive their right to class actions as a condition of employment.¹² The result of this ruling may impact the Commonwealth's progress on workers' rights to date, and create additional challenges for workers who want to bring complaints of violations.

Whistleblower Enforcement

What can we do to brace this three-legged stool? S.1066/H.1610 offer one solution. In addition to holding lead employers accountable for the misdeeds of their subcontractors, the bills offer an innovative tool for enforcing wage and hour laws: **whistleblower enforcement**.

Under whistleblower enforcement, workers could sue their employers on behalf of the Commonwealth, and on behalf of other workers – even if they have been forced to sign arbitration agreements for their jobs. The Attorney General would retain the discretion to investigate complaints, and the responsibility for ensuring the quality of whistleblower enforcement actions.

If the whistleblower wins in court, most of the resulting penalties would go to the Attorney General’s Office (AGO); a portion would go to the workers. Importantly, one-quarter of the AGO’s share would be set aside in a fund that supports community-based non-profits doing training, outreach, and technical assistance on workplace rights.

Whistleblower enforcement offers an innovative approach to stabilizing the three-legged stool holding up wage and hour laws. It maintains workers’ ability to hold employers accountable in court; it provides the Attorney General’s Office with much-needed funding; and it creates a permanent infrastructure for grassroots education and enforcement of workplace rights.

Thank you for considering my testimony.

Jeremy B. Thompson
Senior Policy Analyst
Massachusetts Budget and Policy Center
15 Court Square, Suite 700
Boston, MA 02108
jthompson@massbudget.org

¹ Nancy Rankin and Irene Lew, Community Service Society of New York, January 2018, “Expanding Workers’ Rights - What it Means for New York City’s Low-Income Workers,” p. 15 [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/expanding_workers_rights_-_Final_1_12_18_-_web.pdf].

² Rankin and Lew, p. 24.

³ Teresa Scherzer, Reiner Rugulies, and Niklas Krause, “Work-Related Pain and Injury and Barriers to Workers’ Compensation among Las Vegas Hotel Room Cleaners,” *American Journal of Public Health* 95 (2005): 483.

⁴ Deirdre R. Green, Susan Goodwin Gerberich, Hyun Kim, Andrew D. Ryan, Patricia M. McGovern, Timothy R. Church, Adam Schwartz, Rony F. Arauz, “Knowledge of Work-Related Injury Reporting and Perceived Barriers Among Janitors,” *Journal of Safety Research* 69 (2019): 6.

⁵ “AG Healey Advises Public About 2019 Minimum Wage Increase,” December 27, 2018

[<https://www.mass.gov/news/ag-healey-advises-public-about-2019-minimum-wage-increase>].

⁶ Kurt Wise, Massachusetts Budget and Policy Center, March 27, 2019, “Income Tax Cuts Cost Massachusetts Over \$4 Billion Annually, and Benefits Mostly Go to Highest Incomes,” p. 1

[http://massbudget.org/reports/pdf/PITCutsStateTaxDeclines_3-27-2019.pdf].

⁷ MassBudget’s Budget Browser [http://massbudget.org/browser/line_item.php?id=0810004500] and Bureau of Labor Statistics non-farm jobs [<https://beta.bls.gov/dataViewer/view/timeseries/SMS2500000000000001>].

⁸ Alexander J.S. Colvin, Economic Policy Institute, April 6, 2018, “The growing use of mandatory arbitration,” p. 5 [<https://www.epi.org/files/pdf/144131.pdf>].

⁹ Colvin, p. 4.

¹⁰ Katherine V.W. Stone and Alexander J.S. Colvin, Economic Policy Institute, December 7, 2015, “The arbitration epidemic,” p. 19 [<https://www.epi.org/files/2015/arbitration-epidemic.pdf>].

¹¹ Cynthia Estlund, March 1, 2018, “The Black Hole of Mandatory Arbitration,” *North Carolina Law Review* 96 (2018): 696 [<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=5972&context=nclr>].

¹² *Epic Systems Corp. v. Lewis*, No. 16-285 [https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf].