

A grayscale photograph of the Seattle skyline, featuring the Space Needle prominently in the center. The city is densely packed with skyscrapers and buildings, with some trees visible in the foreground. The overall tone is professional and urban.

# **DELIVERING \$15:** Community-Centered Wage and Hour Enforcement in Seattle

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**NELP**

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## About NELP

For more than 40 years, the National Employment Law Project has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. For more information please contact Rebecca Smith at [rsmith@nelp.org](mailto:rsmith@nelp.org)

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# INTRODUCTION & KEY FINDINGS

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**T**he City of Seattle made history last June, becoming the first big city in the nation to adopt a \$15-per-hour minimum wage. This is a significant victory for the city and for the more than 100,000 low-wage workers in Seattle who are now closer than ever to earning a living wage.<sup>1</sup> It is an impressive step towards reversing the rising income inequality that threatens our economy.

But the work to ensure a \$15 minimum wage for all does not stop with the passage of the bill. The next step is to build a robust enforcement system that delivers on the promise of fair wages to all low-wage workers in the city. In September, Seattle made another huge stride in this direction by becoming only the second city in the country to create a city agency dedicated to enforcement of labor standards, and to include in its budget community contracts for outreach and education.

This report, based on data and enforcement models from Washington State and around the country, is intended to present a vision of an efficient, strategic enforcement plan that compensates workers for wage violations and ensures a level playing field and fair competition for businesses that comply with the law. It is intended to supplement, not supplant, the excellent work of the Mayor's Labor Standards Advisory Group, which developed the outlines of an enforcement strategy, anchored in the new Division of Labor Standards Enforcement (DLSE).<sup>2</sup>

Building on this outline and learning from the experience of other jurisdictions and from experts who have studied minimum wage enforcement, Seattle can create a fair, strategic, and realistic enforcement system that ensures that workers are not cheated out of the city's promise of an increased minimum wage. That system should include at least four parts: (1) a robust worker and employer education program; (2) an efficient and strategic enforcement plan that employs a combination of complaint-driven and agency-directed investigations to restore minimum wages to all affected workers in a company and protect law-abiding businesses; (3) penalties and compensation that meaningfully protect workers from retaliation, deter violations, and enlist the help of the private bar; and (4) strong partnerships that take advantage of the best skills of government and of community organizations.

While Seattle's DLSE will enforce its Paid Sick and Safe Time, Job Assistance, Wage Theft and Minimum Wage Ordinances, this paper focuses on the Minimum Wage Ordinance as the newest and most complex of the city's labor standards.

## KEY FINDINGS:

**Violation of wage laws is a huge national problem.** Among many studies of low-wage industries, a survey of 4,000 workers in Los Angeles, New York, and Chicago found rampant wage and hour violations in low-wage industries and occupations.

**Existing resources are not up to the task.** Wage and hour enforcement agencies are notoriously understaffed. The U.S. Department of Labor's Wage and Hour Division (DOL) has one investigator for every 171,744 employees in the greater Seattle area. The Department of Labor and Industries has one investigator for every 157,337 employees statewide. In 2005, the annual probability of an employer being inspected by DOL was below .001 percent.

### Seattle's enforcement strategy should include both complaint-based and agency-initiated directed investigations.

- **Complaint-based enforcement captures only a small portion of labor-standards violations.** For every complaint-based investigation conducted by the U.S. Department of Labor, 130 cases of overtime violations go unaddressed.
- **Employer retaliation prevents many workers, including the most vulnerable, from filing meritorious claims.** For example, undocumented workers are more than twice as likely to experience minimum wage violations as other low-wage workers. Unauthorized immigrant women suffer even higher minimum wage violations than men.
- **Seattle can build an effective, efficient enforcement system by including agency-initiated directed investigations.** Nationally, directed investigations result in a future probability of compliance that is more than four times higher than that achieved by complaint-based investigations.
- **Research and enforcement data can identify high-risk industries.** These show high incidences of violations in particular industries affecting particular workers. Many of these have also become "fissured" industries with multiple layers of subcontractors and labor intermediaries. Seattle's labor agency can benefit from this research as it develops its own criteria.
- **Consultation with business can help Seattle hone its directed investigation strategy.** Because businesses often recognize that violations of labor laws give competitors the edge, DOL reports that many of its investigations are the result of employer complaints.

## The city should draw on the experience and trust of community groups for smart enforcement.

- **Enlisting the help of groups on contract with the city takes advantages of the strengths of both government and community.** Community groups can reach low-wage workers of diverse languages, cultures and in diverse industries. They can offer support to workers who may be afraid to make a complaint directly to the city. Having community groups do outreach, case preparation, witness interviews, initial negotiation and triage frees up the city to prepare and file solid cases.
- **Seattle's Division of Labor Standards Enforcement must be adequately funded, both inside the city and in the community contracts.** The only other city with a city office of labor standards and community contracts, San Francisco, has a budget of \$3.7 million, with nearly \$500,000 in community contracts. Seattle should devote more funding to both.
- **Existing models can show Seattle the way to design and administer its contract.** At least five effective models exist that can guide Seattle. San Francisco's Office of Labor Standards Enforcement contracts and the Occupational Safety and Health Administration's walkaround program provide two key blueprints.

## Seattle needs additional enforcement tools to be effective.

- The best enforcement tools include a private right of action, higher civil money penalties, damages for retaliation and beefed-up compensation to workers. Seattle should amend the minimum wage ordinance to incorporate these elements.

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# DIRECTED INVESTIGATIONS ARE PROVEN EFFECTIVE IN ENFORCING WAGE-AND-HOUR LAWS

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## What's wrong with complaint-based wage and hour enforcement?

**Effective and strategic enforcement systems begin with the understanding that complaint-driven approaches alone are not effective.** In the early years of the Fair Labor Standards Act (FLSA), complaint-driven systems were the primary means of enforcement.<sup>3</sup> However, the experiences of the U.S. Department of Labor's Wage and Hour Division (WHD), which enforces federal wage-related laws, and the Washington Department of Labor and Industries (L&I), which enforces our state's wage-related laws, show that directed enforcement—enforcement actions taken by the agency based on its own research and knowledge, rather than on worker complaints—is essential to uphold the city's mandate. This principle is also supported by public and private studies.

**Complaint-driven inspections only capture a small portion of labor-standards violations, and they often narrowly focus on the case of the complaining worker.** Complaint-driven models are premised on the assumption that workers will freely come forward and inspections will be triggered by their complaints. However, data show that the majority of workers do not file complaints when they experience workplace violations, allowing employers to “fly under the radar.” According to a study conducted by Dr. David Weil, now administrator of the WHD, for every one complaint case conducted by the WHD, 130 cases of employees paid in violation of overtime laws go undetected.<sup>4</sup> This should come as no surprise. For a complaint to be effective, workers must first be familiar with their rights and the administrative process, feel comfortable

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speaking English, and overcome any fear of retaliation or other employer reprisals.

Complaint-driven inspections narrowly focus on the case of the complaining worker, ignoring entire worksites with workers who suffered the same grievances but did not file a formal complaint. Enforcement is meant to satisfy two goals: first, making the aggrieved worker whole, and second, deterring future violations to protect future employees and current employers in the industry from the unfair competition. Sole reliance on complaint-driven inspections satisfies neither goal. They restore lost wages to very few aggrieved workers and may incentivize further violations by allowing violators to get away with paying only a fraction of what they owe.

**Employer retaliation and threats of retaliation prevent many workers from filing complaints, even when they experience severe workplace violations.** In a landmark survey of 4,000 low-wage workers in New York City, Los Angeles, and Chicago, 20 percent indicated they did not complain during the past 12 months even though they had experienced a seri-

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**Among workers that filed complaints or attempted to form a union, 43 percent experienced one or more forms of illegal retaliation from their employer or supervisor, including being fired or suspended, threatened with calling immigration authorities, or threatened with cuts to their hours or pay.**

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ous problem such as dangerous working conditions, discrimination, or not being paid the minimum wage.<sup>5</sup> Over half (51 percent) of these workers said they did not file a complaint because they were afraid of losing their job.<sup>6</sup> And another 10 percent were afraid they would have their hours or wages cut.<sup>7</sup> Among workers that filed complaints or attempted to form a union, 43 percent experienced one or more forms of illegal retaliation from their employer or supervisor, including being fired or suspended, threatened with calling immigration authorities, or threatened with cuts to their hours or pay.<sup>8</sup>

Retaliation is particularly common for undocumented immigrant workers who speak up about labor-standards violations, deterring many from filing complaints and allowing unscrupulous employers to continue bad practices. Most undocumented immigrants work in traditionally low-wage occupations in construction, manufacturing, and service industries, where workers face the greatest risk of exploitation.<sup>9</sup> Washington has approximately 190,000 undocumented workers—five percent of the labor force.<sup>10</sup>

**Undocumented workers are more likely to experience workplace violations.** Foreign-born workers who lack work authorization are far more likely to experience violations of wage and hour laws.<sup>11</sup> The survey of over 4,000 low-wage workers showed that unauthorized foreign-born workers were more than twice as likely to experience minimum wage violations as other low-wage workers.<sup>12</sup> Of these workers, women were 17 percent more likely than men to experience these violations.<sup>13</sup> A Chicago-specific report found that undocumented immigrants were 15 percent more likely to experience nonpayment of wages or underpayment of wages than their documented immigrant counterparts.<sup>14</sup> In Los Angeles, almost 76 percent of undocumented workers worked “off the clock” without pay, and over 85 percent had not received overtime pay, experiencing violations at higher rates than their native-born counterparts.<sup>15</sup> Unfortunately, wage violations against undocumented workers often go unreported. This is because unscrupulous employers may threaten to alert immigration or local law enforcement if the worker speaks up about the abuse or asks questions about workplace protections.<sup>16</sup>

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**Complaints are not an effective tool where agencies have limited resources and must enforce various laws in large jurisdictions.** The fundamental challenges most workplace regulatory agencies face arise from limited resources, resulting in limited investigatory capacity. As a result of these limitations, employers and industry sectors face a trivial likelihood

of investigation. In 2005, the annual probability of receiving an inspection by the WHD was well below 0.001 percent, or one in 100,000.<sup>17</sup> In turn, reduced enforcement diminishes the pressure for compliance with workplace laws in many sectors, contributing to the growth of workplace violations.<sup>18</sup>

**The WHD has one investigator for every 171,744 employees in the greater Seattle metropolitan area.**<sup>19</sup> Nationwide, the WHD has 1,100 investigators with jurisdiction over 135 million workers in 7.5 million establishments.<sup>20</sup> These investigators enforce 28 worker-protection laws, including the Fair Labor Standards Act, the Family and Medical Leave Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Davis-Bacon Act. In Washington, the WHD has 18 investigators.<sup>21</sup>

**Washington's Department of Labor and Industries (L&I) has one investigator for every 268,580 employees in the Seattle metropolitan area, including Bellevue and Everett.**<sup>22</sup> State labor agencies also struggle to maintain proper staffing to enforce their labor-standards laws. A national survey of state labor agencies showed that there are approximately 659.5 state investigators enforcing state minimum wage-related laws in the entire country.<sup>23</sup> In rough figures, this means that there is one state wage-and-hour investigator for every 146,000 workers in the United States.<sup>24</sup>

In Washington, the ratio of investigators to employees is even lower than the national average. L&I has 16 investigators statewide<sup>25</sup> to investigate wage claims under the Wage Payment Act—one investigator for approximately every 157,337 employees.<sup>26</sup> More than half of Washington's workforce works in the Seattle region, where there are two L&I agents in Seattle, two in Tukwila, and one in Everett.<sup>27</sup> L&I relies on wage complaints to trigger investigations. The Wage Payment Act requires L&I investigators to investigate every wage complaint, regardless of the amount of the complaint, limiting resources available for more strategic models of enforcement.

## **A mix of enforcement strategies that includes directed investigations yields better results.**

**Directed violations have been shown to increase compliance rates.** Efficient use of limited city resources requires prioritization. Dr. David Weil, who now serves as Administrator of the U.S. Department of Labor's Wage and Hour Division (WHD), created a statistical model to look at the impact of both complaint-driven and directed investigations on compliance behavior of fast-food outlets.<sup>28</sup> The study shows how a prior year's directed and complaint-driven investigations of the top-20 outlets in a local area affects compliance of other fast-food outlets in the same area the following year. The results are illuminating. Directed investigations were estimated to reduce back wages by \$1,466 per investigation the following year, while complaint-

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driven investigations reduced them a mere \$2.55. Directed investigations were estimated to result in a 56 percent probability of compliance the following year, while complaint-driven investigations yielded only a 13 percent probability.<sup>29</sup> Directed investigations were estimated to lower the number of employees paid in violation of the law by 14 the following year, while complaint-driven investigations lowered it only 6.37 employees.<sup>30</sup> The data point to two conclusions. First, they show that directed investigations increased compliance rates in all categories, reducing the severity of wage violations. Second, they show that directed



industry initiatives have a ripple effect on employers within the same industry in succeeding years.<sup>31</sup>

**Investigations directed at high-risk industries are more efficient than traditional complaint-driven investigations.**

Strategic enforcement results from fundamental need to apply limited resources effectively. Research shows that labor-standards violations, particularly for low-wage, vulnerable workers, are concentrated in specific industries and occupations that need focused attention by the city. In an era of declining resources for enforcement agencies, agencies need to make effective use of their resources and choose cost-efficient options by directing investigations to industries and occupations that are known to have the highest risk of violating labor standards.

**Research tells us where the lowest earners work in Seattle.**

The report commissioned by the Seattle City Council and produced by the Evans School of Public Affairs at the University of Washington tells us the demographics of workers in Seattle who earn \$15 or less per hour.<sup>32</sup> In Seattle, 101,709 workers make \$15 or less per hour, representing almost a quarter of the Seattle workforce (23.6 percent).<sup>33</sup> Accommodation and Food Services is the industry with the highest percentage (82 percent) of workers that earn \$15 per hour or less. It is followed by Retail Trade (59 percent), Manufacturing (31 percent), and Health Care and Social Assistance (29 percent).<sup>34</sup> Together, these industries employ more than one-third (38 percent) of Seattle's workforce.<sup>35</sup>

**The experience of state and federal agencies and public-private studies tells us which industries and occupations are at high risk of violating the law.**

All of the industries highlighted in the University of Washington report have been found time and again by L&I, the WHD, and public and private studies to be industries where the most wage and hour violations occur.

According to L&I data collected between 2009 and 2013, most of the closed wage claims (14,799 claims) throughout the state during this period were concentrated in a few industries: service, construction, food service, retail and sales.<sup>36</sup> Service constituted 27 percent of the claims, including occupations such as landscaping, janitorial, staffing and temp, and private security firms.<sup>37</sup> Construction represented 20 percent of the claims (2,484 claims).<sup>38</sup> Food service accounted for 18 percent of the claims (2,161 claims).<sup>39</sup> Retail and sales made up 9 percent (1,061 claims).<sup>40</sup> In total, these four industries represent almost three-quarters of wage claims (74 percent) during this period. In Seattle, food service constituted 22 percent of violations and complaints otherwise resolved or paid; and construction and service each accounted for 12 percent.<sup>41</sup>

According to WHD data collected between 2009 and 2013, most of the wage claims (152 claims) in Seattle during this period were also concentrated in a few industries: restaurant and hotel, state and federal employees, home and healthcare, services, construction, retail and grocery, and manufacturing.<sup>42</sup> Restaurant and hotel represented 17 percent of the claims. Home and healthcare made up 12.5 percent of the claims, including occupations such as hospitals and elderly care. Services constituted 10 percent of the claims, including occupations such as armored car services and janitorial services. Federal and state employees accounted for 13 percent of the claims, construction made up 7 percent, retail and grocery constituted 6 percent, and manufacturing made up 5 percent. In all, these industries represented almost three-quarters (70.5 percent) of the cases where WHD found wage violations.

In 2011, the WHD pledged to “use its directed investigations to increase WHD presence in high-risk industries, i.e., those industries with high minimum wage and overtime violations and among vulnerable worker populations where complaints are not common.”<sup>43</sup> The WHD has increasingly embraced directed investigations—40 percent of its investigations

are directed at high-risk industries<sup>44</sup>—and focused on a few concentrated industries and occupations.<sup>45</sup> This strategy ensures that the agency is a noticeable and highly visible presence in high-risk industries.<sup>46</sup>

Prior to his appointment as administrator of the WHD, the U.S. Department of Labor commissioned Dr. Weil to recommend models of strategic enforcement, and he suggested that WHD prioritize industries for investigations by considering three criteria: (1) sectors with large concentration of vulnerable workers; (2) sectors where the workforce is particularly unlikely to step forward; and (3) sectors where the WHD is likely to be able to change employer behaviors in a lasting and systematic manner.<sup>47</sup> Based on these criteria, Dr. Weil advised the WHD to prioritize the following industries:

- Eating and drinking establishments
- Hotel and motel
- Residential construction
- Janitorial services
- Moving companies and logistic providers
- Agricultural products
- Home health and health care services
- Grocery stores
- Retail trade
- Landscaping and horticultural services<sup>48</sup>

**These industries have historically high rates of labor-standards violations and represent a disproportionate share of low-wage workers.**<sup>49</sup> Studies and surveys highlight many of these industries as having high rates of wage violations.<sup>50</sup> Workers in these industries have characteristics that undermine their likelihood of filing complaints. They have low union density and a high proportion of immigrant workers.<sup>51</sup>

**Many of these industries have become “fissured” workplaces, which correlates to higher rates of workplace violations.**<sup>52</sup> Fissured industries are those sectors that increasingly rely on a wide variety of organizational structures that redefine employment relationships: subcontracting, third-party management, franchising, independent contracting, and other contractual forms that alter who is the employer of record

or make the worker-employer relationship tenuous and less transparent.<sup>53</sup> The WHD’s directed investigations are concentrated in these high-risk fissured industries, including construction, janitorial work, hotel/motel, food services, and home health care.<sup>54</sup>

**Public and private surveys also reflect the experiences of L&I and the WHD, showing that specific industries have the highest risk of labor-standards violations.** The 2009 study that surveyed 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York City found rampant workplace violations in specific industries and occupations. The following charts represent the percentage of surveyed workers who suffered workplace violations in various industries and occupations in those cities.

Other public and private studies across the country also find high violation rates of labor-standards laws in specific industries and occupations:

**Food Establishments:** A recent initiative by the Portland district office of the WHD (with jurisdiction over Oregon, Idaho, and southern Washington) confirms that food establishments are a high-risk industry. The office conducted more than 110 restaurant investigations in 2012, finding that 79 percent of investigated employers violated the Fair Labor Standards Act.<sup>55</sup> A national survey of over 4,000 workers in eight regions—New York City, Chicago, Detroit, Los Angeles, Maine, Miami, New Orleans, and Washington, D.C.—showed that 46.3 percent of restaurant workers experienced overtime violations.<sup>56</sup>

**Hotel:** A U.S. Department of Labor survey found a 56 percent compliance rate for wage-and-hour laws in the hotel/motel industry in the Southeast region of the United States.<sup>57</sup>

**Retail:** A survey of 436 retail workers in New York City found that more than one-third were not paid overtime, and approximately one in six workers reported working off the clock.<sup>58</sup>

**Table 1: Industries and Occupations with High Rates of Minimum Wage Violations<sup>59</sup> (top five)**

INDUSTRY		OCCUPATION	
Personal & repair services	42.3%	Child care workers	66.3 %
Private households	41.5%	Beauty, dry cleaning & general repair workers	49.6%
Retail & drug stores	25.7%	Maids & housekeepers	43.2%
Grocery stores	23.5%	Retail salespersons & tellers	28.2%
Security, building, & grounds services	22.3%	Building services & grounds workers	26.0%

**Table 2: Industries and Occupations with High Rates of Overtime Violations<sup>60</sup> (top five)**

INDUSTRY		OCCUPATION	
Personal & repair services	91.8%	Child care workers	90.2 %
Private households	88.6%	Stock/office clerks & couriers	86.0%
Retail & drug stores	83.4%	Home health care workers	82.7%
Home health care	73.6%	Beauty, dry cleaning, & general repair workers	81.9%
Residential construction	70.5%	Waiters, cafeteria workers, & bartenders	77.9%

**Table 3: Industries and Occupations with High Rates of Off-the-Clock Violations<sup>61</sup> (top five)**

INDUSTRY		OCCUPATION	
Home healthcare	87.5%	Home health care workers	90.4 %
Social assistance & education	83.6%	Stock/office clerks & couriers	76.6%
Private households	82.6%	Cooks, dishwashers, & food preparers	72.9%
Personal & repair services	76.8%	Building services & grounds workers	72.5%
Grocery stores	75.2%	Child care workers	68.8%

**Construction/Landscaping:** A national survey of 2,660 day laborers in 20 states found that nearly 50 percent of the surveyed workers experienced wage-and-hour violations in the prior two months, and 44 percent were denied breaks.<sup>62</sup>

Both the experiences of L&I and the WHD and the data from public and private studies should inform the city that these industries and occupations are at a high risk for workplace violations.

**Wage theft hurts honest business as well: business owners can help direct investigations.** Of course, this data alone is not intended as an all-inclusive list of industries for the city's directed-investigations focus. Circumstances in Seattle are not identical to those in Los Angeles, Chicago and New York. The agency assigned to enforce the ordinance will need to build relationships with both business and community organizations to assist it in honing its plan for directed investigations. These partners can help identify parts of the low-wage labor market where minimum wage violations have become a business model that force competitors to cut corners, as well as individual firms that are violating the law. In fact, because businesses often recognize that violations of labor laws give unscrupulous employers a competitive edge, the U.S. Department of Labor reports that many of the complaints that it investigates come from businesses.

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## WORKER STORY: DAIVON YOUNG

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**D**aivon Young is the sole bread-winner of his young family, including his wife and a ten month old son, Malichi. Beginning in August 2012, Daivon worked for two years as a security guard for a company called Security Industry Specialists, on the Amazon campus in downtown Seattle. He commuted 30 miles to and from work every day.

Daivon worked a basic 12-hour per day, 3 days per week shift. He sometimes was able to pick up extra shifts, increasing his workweek to over 40 hours per week. He was not always paid overtime for these hours above 40. Other co-workers were also shorted on their checks.

Every day, Daivon had to clock in at precisely 6:38 a.m. and be present for a briefing. If he clocked in even one minute late, he would be disciplined. But neither Daivon nor his coworkers were paid for the beginning of the mandatory briefing, resulting in many hours of “off-the-clock” work.

Daivon knows of many employees at SIS who have the same complaints, but has seen over a dozen workers fired over the two years that he worked at SIS for complaining about working conditions. He no longer works at SIS and feels more secure making complaints about the unpaid overtime, but has talked to co-workers who are terrified to come forward, because they can’t afford to lose their jobs.

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# ADEQUATELY-FUNDED COMMUNITY-BASED PARTNERSHIPS CAN EXTEND THE CITY'S COMPLIANCE EFFORTS

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**I**n addition to directed investigations, the best way to secure compliance is to form public-private enforcement contracts. These contracts take advantage of the competencies of the city and of community groups. The city has the power to file complaints, assess penalties, direct investigations, and even go to court if necessary. But even the best-trained investigators cannot be in all places and cannot understand every industry in our city. Community groups can and are in all places and can and do understand the industries where their members work.

**Community groups can help the city reach the most vulnerable workers.** While most businesses can learn about Seattle's minimum wage through public-service announcements, written fact sheets, webinars, and web-based self-assessment, among other means, the most vulnerable workers do not have access to these mediums. Many do not speak English. Many do not read written materials. Many learn best one on one or in small groups in a trusted location from a trusted ally. Some immigrant workers, due to experiences in their home countries, will not look to the city for education.

But community organizations with extensive ties in local communities, foreign-language ability, and skills in popular education can fill this role in partnership with the city. Non-profits in our neighborhoods understand their unique languages, cultures and the industries that operate there. These groups can help get the word out to employers and employees alike about the complicated minimum wage levels in existence at various worksites. They can work with the city to ensure that all of Seattle's low-wage workers learn their rights under the new law.

**Community groups can help the city efficiently use its resources. Community groups have contact with working people every day.** They hear from workers about bad bosses. They can help the city direct its resources to the few Seattle employers who know the law and choose not to follow it. Community groups can offer support to workers who have been victimized by wage violations, since workers fearing retaliation may not want to make a complaint directly to a city official. They can interview workers and witnesses in an atmosphere of trust and engage in the patient fact investigation and document-gathering that are the basis of a solid investigation.

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Community groups can also perform a triage function that ensures that the city's resources are not wasted on meritless cases. They can evaluate claims and decide which ones are not provable. They can also informally resolve worker complaints without requiring the city's intervention.

**Both the city office and community contracts must be adequately funded.** Of course, adequate enforcement presumes that the agency tasked with enforcement be adequately funded. To determine funding levels for Seattle’s Division of Labor Standards (DLSE), a comparison to the budget for its nearest model—and the only other city in the United States with a city office of labor standards enforcement -- is appropriate.

The San Francisco Office of Labor Standards Enforcement, discussed further below, has 20 paid staff and a \$3.7 million budget, to serve a working population of 450,000, with disproportionately higher numbers of San Francisco’s workers in higher-wage finance, management, professional scientific and related occupations.<sup>63</sup> Seattle’s working population is 384,000.<sup>64</sup> Based on working age population alone, a comparable budget for Seattle’s DLSE would be \$3.1 million.

San Francisco’s OLSE is underfunded in two significant ways: First, at this low level of staffing, OLSE is unable to do any follow up with violators.<sup>65</sup> In Seattle, the Mayor’s Labor Standards Advisory Group recommended that all employers who have violated the law would receive a follow up visit from the DLSE.<sup>66</sup> Second, at this staffing level, the San Francisco office is unable to do any directed investigations.<sup>67</sup> For Seattle to implement an effective directed investigation strategy, additional investigative staff would be necessary.

For a system that uses community contracts to work, the contracts must also be adequately funded. Small grants that fund only a fraction of an FTE will not allow community groups to offer a full range of services. Nor will larger grants that are limited to one population sufficiently extend the reach of the city’s own outreach service to the many languages, cultures, neighborhoods and industries that make up Seattle. San Francisco devotes \$462,000 of its budget for community contracts with only five groups representing a handful of industries and languages, to enforce a minimum wage law that has been in effect for over a decade.<sup>68</sup> For Seattle’s community contracts to reach all low-wage workers and cover the complexities of a new law, the funding for contracts would need to be substantially higher than San Francisco’s.

## Models of community-based enforcement.

Community partnerships have been tried and tested in different forms by other cities and states. The following are brief explanations of some of the more successful partnerships that have strengthened labor-standards enforcement and created strong community models to achieve labor-law compliance.

### 1. San Francisco’s Office of Labor Standards Enforcement (OLSE): Contracting with community groups for education, outreach, and referrals

Since 2009, the OLSE has entered into contracts with various community groups to increase awareness and understanding of wage violations and of San Francisco’s labor laws, including the Minimum Wage Ordinance, the Paid Sick Leave Ordinance, and the Health Care Security Ordinance. The OLSE contracts with community groups experienced in labor-law education, outreach to low-income and immigrant communities, training workshops, and counseling.<sup>69</sup> The OLSE currently contracts with six contractors—one prime contractor and five subcontractors—which include worker centers, ethnic-based community groups, and legal-aid organizations.<sup>70</sup> The OLSE’s budget for the organizations was \$462,000 per year in FY 2012-13.<sup>71</sup>

The community groups provide two types of basic services: education and outreach, and consultation and referral.<sup>72</sup> The community groups reach out to low-wage and immigrant workers, distributing literature and flyers and holding know-your-rights sessions.<sup>73</sup> They consult workers with potential claims, make attempts to settle cases, and make referrals to the OLSE.<sup>74</sup> Approximately 30 percent of complaints received by OLSE come from the contracted community groups.<sup>75</sup>

Community groups sometimes ask the OLSE investigators to act as an undercover witnesses in public places during mediations between the worker and employer. During these mediations, if the employer admits to violating San Francisco’s wage-related laws, the investigator has the ability to issue citations.

## **2. OSHA Walkarounds: Supporting workers in workplace interviews**

The Occupational Safety and Health Administration (OSHA) conducts worksite inspections to ensure compliance and help employers and workers reduce and prevent workplace hazards, injuries, and deaths.<sup>76</sup> OSHA inspectors at a specific worksite and inform the employer of the scope of the inspection, walkaround procedures, and employee interviews.<sup>77</sup> Under the statute, an authorized representative of the employee also has the right to accompany the compliance officer. The employer can also select a representative to accompany the compliance officer during the investigation.

Both the Occupational Safety and Health Act<sup>78</sup> and the Mine Safety and Health Acts provide employees with the explicit right to representation during OSHA inspections “for the purposes of aiding such inspection.”<sup>79</sup> OSHA policy allows employees to authorize representatives not employed by that employer, including community organizations, to assist an OSHA investigator during an inspection.<sup>80</sup> In order to appoint a walkaround representative who is not an employee, the OSHA inspector must first determine that such designation is “reasonably necessary to the conduct of an effective and thorough physical inspection.”<sup>81</sup> OSHA recognizes that community organizations have experience and skill evaluating similar working conditions, and experience with non-English-speaking workers.<sup>82</sup> Importantly, “workers in some situations may feel uncomfortable talking to an OSHA [official] without the trusted presence of a representative of their own choosing.”<sup>83</sup>

During the inspection, walkaround representatives can aid OSHA inspectors by assisting with technical questions such as industrial hygiene or safety engineering; identifying employees with knowledge of the working conditions, hazards, and potential violations; translating employee statements; and facilitating contacts with employees who are either unfamiliar with the inspection process or reluctant to have contact with the OSHA inspector or other agency representatives.

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**In San Francisco, community groups reach out to low wage workers, consult with them on their claims and make referrals to the Office of Labor Standards Enforcement. Approximately 30 percent of complaints received by OLSE come from the contracted community groups.**

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## **3. Wage and Hour Watch: Using community groups as the agency’s eyes and ears**

The Wage and Hour Watch (W&HW) program was a short-lived program launched by the New York State Department of Labor in 2009, ending a year later in 2010. The program aimed to address wage violations in New York State, focusing on a variety of illegal practices, including payment of subminimum wages, nonpayment of wages, failure to pay overtime, tip stealing, and other similar violations.<sup>84</sup>

Modeled after neighborhood watch programs, the W&HW program promoted labor education and compliance through formal partnerships between the New York State Department of Labor, the U.S. Department of Labor, and community groups and unions.<sup>85</sup> The program identified and trained leaders to serve as members of particular geographic zones.<sup>86</sup> Within those zones, the members held know-your-rights trainings, provided employers with information about compliance, and distributed literature to workers in supermarkets, laundromats, nail salons, and other community settings.<sup>87</sup> The members often worked in and lived in the communities under their watch, so they were better able to gather tips for the state labor department.<sup>88</sup>



#### **4. The Maintenance Cooperation Trust Fund (MCTF): Labor-management partnerships**

MCFT is a California janitorial nonprofit established in 1999. It was created through a labor-management partnership pursuant to an agreement between a janitorial union and the employers with which it had contracts.<sup>89</sup>

MCTF's mission is to abolish unfair business practices that harm businesses and workers alike in the janitorial industry. It accomplishes this mission through education of workers and employers, investigating cleaning contractors' labor conditions, and enhancing enforcement by public agencies and private attorneys.<sup>90</sup> Signatory contractors pay between \$.01 and \$.05 for every hour worked by their employees to fund MCTF.<sup>91</sup>

MCTF inspectors interview janitors at the worksite, determine which contractor employed them, and establish the dates and hours worked, basically conducting a "wage audit."<sup>92</sup> MCTF files and refers cases to the state agency or the private bar, and it continues to assist during the investigatory process. MCTF has assisted in the collection of more than \$26 million in unpaid wages for more than 5,000 janitors.<sup>93</sup>

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**MCTF inspectors interview janitors at the worksite, determine which contractor employed them, and establish the dates and hours worked, basically conducting a wage audit.**

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## WORKER STORY: JOAQUIN CADENA

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**J**oaquin Cadena lives in Seattle with his wife and three children, ages 6 to 18. He has worked as a drywaller for over 13 years. In the spring and summer of 2012, he, along with twelve other workers, worked with a drywall company called Leeder's Drywall, in four public projects, including three public housing projects and a library. Most of this work was located in the City of Seattle.

The contractor for whom Joaquin worked paid him a daily rate of \$110 per day. Joaquin worked ten to eleven hours per day, six days a week. His total wages amounted to less than the 2012 state minimum wage of \$9.02 per hour, (taking into account the extensive overtime hours that he worked, and time and a half pay he should have received). His co-workers were similarly shorted on pay. None received the extra pay that they are entitled to under prevailing wage laws.

Joaquin estimates that he is owed over \$67,000 in pay. He and his co-workers have been trying to recover their wages for two years. After they made their initial demands, the boss threatened a co-worker, saying that if he did not withdraw his demand, the police or immigration authorities might get involved and might arrest his family.

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# SEATTLE'S WAGE AND HOUR ENFORCEMENT AGENCY NEEDS ADDITIONAL TOOLS TO BE EFFECTIVE

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Community-based enforcement of Seattle's minimum wage takes advantage of the best skills of neighborhood and business groups, but it will not, by itself, ensure that Seattle's low-wage workers get the wages they are entitled to. The city must also have enforcement powers like those of other jurisdictions. This section outlines the ways in which Seattle's ordinance must be strengthened.

**Seattle is the only city with a minimum wage law that does not grant a private right of action.** The three cities in California with minimum wage laws all grant a private right of action: Richmond allows aggrieved workers to file suit for back pay, reinstatement, compensatory and punitive damages, and reasonable attorneys' fees and costs;<sup>94</sup> San José and San Francisco's minimum wage laws allow the aggrieved worker or a third party to file in court to seek unlawfully withheld back wages plus interest, attorneys' fees and costs, and an additional remedy of \$50 for each day that the violation occurred;<sup>95</sup> Santa Fe and Albuquerque's minimum wage laws similarly allow for a private right of action, including double damages and attorney's fees.<sup>96</sup> Washington, D.C. grants a private right of action to recover unpaid wages, liquidated damages, and attorneys' fees and costs.<sup>97</sup>

Although workers in Seattle may have a private right of action through state law to enforce Seattle's minimum wage, that right is insufficient and will only benefit a few workers. Washington law permits workers to file claims for violations of state minimum wage and overtime laws<sup>98</sup> and for failing to pay wages required by contract or ordinance (a 49.52 claim).<sup>99</sup> Workers in Seattle are limited to a 49.52 claim when seeking to enforce their rights under the Seattle minimum wage

law. The only remedy available under a 49.52 claim is double damages, meaning a worker will either receive double damages or nothing at all. Washington courts do not commonly grant this remedy.

Workers rarely prevail on 49.52 claims because they must show there is no "bona fide dispute" over wages owed them.<sup>100</sup> This means that if the employer raises any genuine issue as to whether it owes a worker money, the worker will always lose. Bona fide disputes commonly arise in wage claims, and they will likely arise more frequently in Seattle, where wage determinations are the result of complicated calculations of benefits and employer size. For example, an employer may argue confusion about how much to raise the wage for a particular employee; how to calculate an employer who has more than 499 employees for three out of six months; or how to count the number of employees (i.e., whether an owner or partial owner counts as an employee). Workers faced with these complex factual and legal issues will lose their claim merely because the employer claims a dispute exists, not because they do not have a valid claim for wages. For these reasons, the city needs to provide Seattle workers a clear and adequate private right of action.

**Seattle's law needs to show zero tolerance for retaliation.** As noted above, low-wage workers face significant risks of retaliation for speaking up about wage violations. While the city's minimum wage ordinance expressly prohibits retaliatory acts, including immigration-related retaliation, it prescribes no penalties or remedies, effectively nullifying its effect.<sup>101</sup> Retaliation and the threat of retaliation prevent many workers from speaking out. The U.S. Supreme Court said, "the 'primary purpose' of anti-retaliation provisions in federal

employment laws is “[m]aintaining unfettered access to statutes’ remedial mechanisms.”<sup>102</sup> Absent strong penalties—or any express penalties as is currently the case—that deter employers from engaging in retaliatory acts, workers will be denied access to the remedial purpose of the city’s minimum wage law.

**Higher penalties for wage violations are associated with lower levels of recidivism.** Under the current minimum wage ordinance, an employer who steals thousands of dollars from an employee may be subject to a maximum penalty of \$500, which for some egregious violators can simply be written off as the cost of doing business.<sup>103</sup> The current penalty structure is insufficient to address the epidemic of wage violations. Studies show that higher civil monetary penalties are associated with lower probabilities of subsequent violations.<sup>104</sup> Results suggest that employers respond to civil monetary penalties by improving their overall compliance.<sup>105</sup>

States around the country have increased the damages that workers can collect from employers who fail to pay the wages required by law. Eight other states allow at least treble (triple) damages for minimum wage violations and/or other wage violations.<sup>106</sup>

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# RECOMMENDATIONS

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## **Administrative recommendations under the existing Seattle minimum wage ordinance:**

### **1. Engage in directed investigations**

The city should use its precious resources wisely. It should engage in both complaint-driven and directed investigations. Its directed investigations should be geared towards industries and occupations known to have high rates of minimum wage violations and other labor violations. These industries and occupations are well documented by the experience of L&I and the WHD and by public and private studies and surveys. Investigations in these industries and occupations may be directed, in part, by input from employers and workers.

The city should develop criteria, as does the WHD, to determine where to direct investigations. These should include (1) sectors with a large concentration of vulnerable workers; (2) sectors where the workforce is particularly unlikely to step forward; and (3) sectors where the enforcement agency is likely to be able to change employer behaviors in a lasting and systematic manner, including “fissured” industries.

### **2. Draw on the experience and trust of community groups for smart enforcement**

The city should contract with groups who are connected to and trusted in their communities. Community groups can assist the city in delivering high-quality worker education to low-wage workers in culturally and linguistically appropriate ways. Community groups can interview witnesses and take statements in an atmosphere of trust. Community groups and employer groups each have deep knowledge of the industries where their members work. Employer groups and individual employers often know which of their competitors is gaining an edge by violating the law. Each can inform the city where to direct investigations. The community contractors should accompany investigators on worksite inspections, as is commonly done in OSHA investigations.

For community involvement to be effective, community contracts need to be large enough that they can effectively support the city’s own efforts.

### **3. Increase transparency of completed investigations**

The city should maintain a public database with a list of violators. Transparency is essential to successful enforcement and ensuring compliance. The community, employers, and workers in Seattle should have access to information about violators in the city. The WHD maintains a public database where individuals can search and see which businesses violated workplace laws.<sup>107</sup> L&I maintains a similar website where individuals can see whether businesses, contractors, or licensed professionals violated workers' compensation or other workplace laws.<sup>108</sup> Such a database can help identify repeat or egregious violators for prosecution under the city's violations-of-services law.

## **Further legislative recommendations:**

### **1. Allow workers an explicit private right of action**

The city should grant workers a clear private right of action, as is common in both city and state labor-standards laws. Currently, the ordinance does not clearly allow workers the right to file in court for a violation of Seattle's minimum wage laws. The city alone will not have the capacity to police all workplaces and provide the necessary relief that workers should receive when their workplace rights are violated.

### **2. Strengthen remedies and penalties for retaliation**

The city should provide adequate penalties for employers that engage in retaliatory acts against employees trying to assert their rights under the ordinance. Absent strong penalties that deter employers from engaging in retaliatory acts, this language of the ordinance amounts to a dead letter.

The city should also provide remedies for employees who are subject to retaliatory actions, in amounts to compensate them for lost wages and deter further violations.

### **3. Require violators to pay treble damages**

The city should require employers to pay employees' wages owed plus 200 percent in liquidated damages, i.e., treble damages. Researchers and advocates alike have identified weak damages as a key obstacle to ensuring that workers are paid the wages they are owed.

There should be no "free pass" for first-time violators, as an employer who is caught for the first time may well have subjected dozens of workers to violations totaling thousands, or even tens of thousands, of dollars. Workers have a right to the wages they earned, and the city must not take away that right by granting free passes to employers. The state does not allow first-time offenders to go unpunished for wage violations, and the city should not either.

## ENDNOTES

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7. Id.
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18. David Weil, Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division 5 (Boston Univ., 2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.
19. Calculation by the National Employment Law Project (NELP) based on the following sources. E-mail from Ambreen Tariq, Compliance Specialist, Wage and Hour Div. of the U.S. Dep't of Labor, to author (July 24, 2014, 6:39 PST) [ WHD E-mail] (on file with author); Emp't Security Dep't, Washington employment estimates, seasonally adjusted (2014) [ ESD] (noting that there are 1,545,700 seasonally adjusted nonagricultural wage and salary workers in Seattle-Bellevue-Everett in June 2014), available at <https://fortress.wa.gov/esd/employmentdata/docs/economic-reports/wa-current-employment-seasonally-adjusted.xlsx>. The WHD has jurisdiction over public and private sector employees, so both sectors are included in the calculation.
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24. *Id.*
  25. Morris, *supra* note 22.
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  29. *Id.*
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  31. *Id.*
  32. UW Report, *supra* note 1.
  33. *Id.* at 7 (noting that there are 430,268 workers in Seattle).
  34. *Id.* at 24.
  35. *Id.* at 21.
  36. Issac M. Sederbaum, Wage Theft in Washington: An Examination of Labor & Industries Claims 2009-2013 (June 1, 2014) (unpublished Master in Public Admin. Thesis, Univ. of Wash., Daniel J. Evans School of Public Affairs) (on file with author).
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  38. *Id.*
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  40. *Id.*
  41. Karina Bull, Investigator at the Seattle Office for Civil Rights, Washington Department of Labor & Industries Seattle Wage & Hour Enforcement - 2013 (May 20, 2014) (unpublished tables) (on file with author).
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  44. Laura Fortman, Deputy Adm'r, U.S. Dep't of Labor Wage and Hour Division, presentation to the City of Seattle Labor Standards Advisory Group (July 1, 2014).
  45. Fine, *supra* note 3 at 832. Directed investigations, as opposed to complaint-driven investigations, increased from 22 percent in the first quarter of 2011 to 35.7 percent in the fourth quarter of 2011. *Id.* The WHD added 250 field investigators in 2011. *Id.*
  46. USDOL Budget, *supra* note 43, at 28.
  47. Weil, *supra* note 18, at 2.
  48. *Id.* 77. Within each of these industries, Dr. Weil recommends that specific business structures and workplaces should be the focus of strategic focus and investigations. For example, within food establishments, labor agencies should focus on franchised entities, which tend to have higher labor standards violations.
  49. *Id.* 20–21.
  50. See *infra* p. 9–10.
  51. *Id.* at 76
  52. David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many And What Can Be Done To Improve It* 8, 16 (Harvard Univ. Press, 2014).
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  56. Restaurant Opportunities Center United, *Behind the Kitchen Door: A Multi-Site Study of the Restaurant Industry* (2011), available at <http://rocunited.org/2011-behind-the-kitchen-door-multi-site-study/>.
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  59. BERNHARDT, *supra* note 5, at 31. Both (i) apparel and textile manufacturing and (ii) carwash workers, parking lot attendants & drivers are not included in these charts because they are less significant industries in Seattle than Chicago, L.A., and N.Y.C.
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  61. *Id.* at 35–36.
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  63. American FactFinder, *Industry by Sex and Median Earnings in the Past 12 months (in 2012 inflation-adjusted dollars) for the Civilian Employed Population 16 years and over, San Francisco City*, available at <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.



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78. 29 U.S.C. § 651 *et seq.*
79. Section 8(e) of the OSH Act says, "a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection." 29 U.S.C. § 657(e). Section 103(f) of MSHA has the same provision. 30 U.S. Code § 813(f).
80. Letter from Richard Fairfax, Deputy Assistant Secretary, OSHA, to Steve Sallman, Health and Safety Specialist, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Feb. 21, 2013) [OSHA Letter], available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604).
81. OSHA regulation says, "The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection." 29 C.F.R. § 1903.8(c).
82. *Id.*
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87. *Id.*
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91. Ruckelshaus, *supra* note 88, at 391.
92. Fine, *supra* note 4, at 567.
93. MCTF, *supra* note 89.
94. Richmond, Cal., Code of Ordinances art. II, ch. 2 § 60.110(a).
95. San José, Cal., Municipal Code § 4.100.090(B); San Francisco, Cal., Admin. Code § 12R.14(c).
96. Santa Fe, N.M., City Code ch. XXVII § 28-1.8(C); Albuquerque, N.M., Code of Ordinances § 13-12-5(B).
97. District of Columbia, Code of the District of Columbia § 32-1012.
98. RCW 49.46.020 (minimum wage) and .130 (overtime).
99. RCW 49.52.050 and .070.
100. *Wingert v. Yellow Freight*, 146 Wn.2d 841, 849 (2002) ("[a]n employer's nonpayment of wages is willful and made with the intentional action and not the result of a bona fide dispute as to the obligation of payment; In order to prevail, an employer must act "willfully" and

with the “intent to deprive the employee of any part of his wages.”).

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104. Systems Research and Applications Corporation, Reducing Recidivism: Evaluation of Goals, Measures, and Compliance Tools, and Options for Improvement 7 (2008) (A study commissioned by the U.S. Dep’t of Labor), available at <http://www.dol.gov/whd/resources/reducingRecidivism.pdf>.
105. *Id.*
106. See Arizona: Ariz. Stat. § 23-364 (minimum wage); Ariz. Rev. Stat. § 23-360 (payment of wages); Idaho: Idaho Code § 44-1508 (minimum wage); Idaho Code § 45-615 (payment of wages); Maine: 26 Maine Rev. Stat. § 626-A; Maryland: Md. Lab. Code § 3-507.1 (payment of wages) (up to quadruple); Massachusetts: Mass. Gen. Laws ch. 151 § 20 (minimum wage); Mass. Gen. Laws ch. 149 § 150 (payment of wages); Michigan: Mich. Comp. Law § 408.488 (payment of wages); New Mexico: N.M. Stat. Ann. § 50-4-26 (minimum wage); N.M. Stat. Ann. § 50-4-26 (payment of wages); and Ohio: Ohio Const. art. II § 34a (minimum wage).
107. See U.S. Dep’t of Labor, Data Enforcement, <http://ogesdw.dol.gov/views/search.php> (last visited Aug. 5, 2014).
108. See Wash. State Dep’t of Labor & Ind., Verify a Contractor, Tradesperson, or Business, <https://secure.lni.wa.gov/verify/> (last visited Aug. 5, 2014).

