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Statement of

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Before the United States House of Representatives
Committee on Appropriations
Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Hearing

"Combatting Wage Theft: The Critical Role of Wage and Hour Enforcement"

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Good morning, Chairwoman DeLauro, Ranking Member Cole, and distinguished members of the Subcommittee. I am pleased to provide this testimony to address the importance of wage and hour enforcement in protecting our Nation's workers.[1]

I. What Is "Wage Theft"?

I have devoted most of my work over the past quarter-century, and virtually all of my work since mid-2005, to wage and hour issues. I served as Administrator of the U.S. Department of Labor's Wage and Hour Division. And I can state unequivocally that the phrase "wage theft" is not a concept recognized under federal wage and hour law. Nor should it be.

Instead, "wage theft" represents an amorphous cluster of notions, some of which involve violations of federal law and some of which do not. "Wage theft" is more of a rallying cry than a legal term. That being said, because the phrase has worked its way into the title of this hearing, it is worth defining the terms we use so that a catchy slogan does not displace informed analysis.

The concept of "theft" has a well-settled legal meaning. Black's Law Dictionary defines "theft" as "[t]he felonious taking and removing of another's personal property with the intent of

[1] I am testifying today in my individual capacity. The opinions expressed are my own and do not necessarily reflect the views of my firm, its attorneys, its clients, or anyone else.

depriving the true owner of it; larceny"[2]—in short, a perpetrator intending to steal property knowing that is not his or hers to take. Theft is a serious crime, and it can result in prison time, subject to the due process requirements of trial by jury, proof beyond a reasonable doubt, etc.

In the context of wages, it is exceedingly rare for an employer to pay an employee wages and then to steal some or all of that money back from the employee. In legal terms, true "theft" of wages is uncommon. When it occurs, state criminal and civil laws already provide a robust penal and remedial structure, as with theft of non-wage property.

The much more common scenario is that an employer fails to pay wages allegedly owed. Sometimes, the employer clearly owes the employee the wages, understands that it owes the money, and has the ability to pay, yet chooses not to pay. There is a broad consensus among businesses and workers alike that such an employer is a bad actor engaging in something at least akin to theft and who needs to compensate the workers and face punishment for these misdeeds.

This type of situation may constitute fraud or theft of services under state law, or even theft itself. Under federal law—assuming the Fair Labor Standards Act (the "FLSA")[3] applies—this conduct would amount to a willful FLSA violation, subjecting the employer to civil money penalties of up to $2,014 per violation[4] and an additional year of liability.[5] The FLSA provides for criminal liability for certain willful violations, with fines of up to $10,000, as well as imprisonment for up to six months for repeat offenders.[6]

This type of knowing, willful, intentional refusal to pay wages that are indisputably due is the image that most naturally comes to mind when one hears a vague and loaded term like "wage

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[2] *Theft*, BLACK'S LAW DICTIONARY (8th ed. 2004).

[3] 29 U.S.C. §§ 201-19.

[4] *See id.* § 216(e)(2); 29 C.F.R. §§ 578.3(a), 579.1(a)(2).

[5] *See* 29 U.S.C. § 255(a).

[6] *See id.* § 216(a).

theft." This conduct is already illegal, and often criminal, under state law. And when this type of violation involves wages owed under the FLSA, the result can be a federal crime as well.

II. What Is *Not* "Wage Theft"?

For purposes of federal wage and hour enforcement, it is misleading and inappropriate to label anything other than the willful, intentional non-payment of wages indisputably owed under the FLSA or another federal statute as "wage theft." The FLSA does not federalize all facets of wage payment nationwide; it merely establishes a floor relating to minimum wage, overtime, and child labor. The Wage and Hour Division has no business enforcing, for example, California's meal and rest period laws, New York's spread-of-hours pay requirements, or a promise under Texas common law to pay a bonus or an hourly rate above minimum wage.

It is equally inappropriate to use a term like "wage theft" when describing circumstances where conduct is not willful or intentional. The FLSA is so confusing that even the Department of Labor itself has repeatedly violated it over the years—certainly through no desire to "steal" wages. The Wage and Hour Division misclassified its entire cadre of investigators as exempt from overtime for the first three decades-plus of its existence until another agency took a closer look during the 1970s, forcing a reclassification.[7] More recently, in 2016, the Department paid $7 million to settle a claim that it had misclassified thousands of employees as exempt.[8]

Where the facts are reasonably in dispute, the law is sufficiently ambiguous that the obligation to pay is unclear, or an employer was not aware that it owed the wages at issue, there may well be an FLSA violation, in which case the law provides make-whole remedies for the

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[7] Improving the Federal Wage and Hour Regulatory Structure: Hearing Before the Subcomm. On Workforce Protections of the H. Comm. On Education and the Workforce, 113th Cong. (July 23, 2014), Statement of Paul DeCamp at 7.

[8] *See* Brian Amaral, *Labor Dept. Pays $7M to Resolve Union OT Saga*, EMPLOYMENT LAW360, Aug. 12, 2016.

workers plus costs and reasonable attorneys' fees[9], as well as a presumption of double damages.[10] But this type of situation has virtually nothing in common with felonious "theft." These non-purposeful errors are qualitatively different from the category of "worst of the worst" violations discussed in the preceding section. Lumping all of these scenarios together under a broad heading of "wage theft" obscures critical differences and leads policy astray.

In short, it is fundamentally unfair to impose criminal or quasi-criminal punishment where an employer was not on clear notice of what the law requires and did not act with criminal intent. In my experience, the vast majority of wage and hour violations fall into this category. Protect workers and make them whole, but do not treat unintentional FLSA violators like felons.

III. The State Of Wage And Hour Enforcement

In FY2018, the Wage and Hour Division recovered an all-time high for the agency of $304.9 million in back wages on behalf of more than 265,000 workers.[11] The average time to resolve a complaint declined from a peak of 177 days in FY2011 to 100 days.[12] In fifteen low-wage industries, the agency recovered an impressive $149.3 million on behalf of more than 171,000 workers.[13] Over the past five years, the agency recovered more than $1.3 billion in back wages, helping more than 1.3 million workers.[14] The agency has also conducted more than 15,000 compliance assistance events over the past five years to inform workers and employers about what federal wage and hour laws require, including 3,643 events in FY2018 alone.[15]

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9 *See* 29 U.S.C. § 216(b).

10 *See id.* §§ 216(b), 260.

11 *See* www.dol.gov/whd/data/datatables.htm#panel1 (last visited Apr. 3, 2019).

12 *See id.*

13 *See id.*

14 *See* www.dol.gov/whd/data/ (last visited Apr. 3, 2019).

15 *See* www.dol.gov/whd/data/datatables.htm#panel1 (last visited Apr. 3, 2019).

Federal wage and hour public enforcement is strong and active, delivering historically high levels of protection and results for the Nation's workers. And, of course, private enforcement—in the form of claims presented by workers through informal demands, arbitration, and litigation—continues at a very brisk pace, with a strong plaintiffs' bar aggressively pursuing wage and hour cases against employers in a broad range of industries.

IV. Other Current Policy Issues

When discussing "wage theft," worker advocates often turn to such topics as overtime exemptions, worker classification, joint employment, and minimum wage. Correctly understood, those issues are entirely distinct from the kinds of concerns one can fairly refer to as "wage theft." Instead, these other topics relate *not* to stopping unscrupulous employers from cheating their workers, but instead to *increasing* workers' underlying wage rights, thereby entitling them to higher pay or imposing wage liability on businesses or individuals not otherwise liable for these payments. These issues are not properly part of a "wage theft" hearing. But for the record:

- The Department's recent overtime, regular rate, and joint employment regulatory proposals are fair, sensible, even-handed approaches to these issues in line with where the law has been over most of the FLSA's eight-decade history.
- Increasing minimum wage too steeply incentivizes businesses to automate. To a low-skill worker with no job, minimum wage is a barrier to employment, not a safeguard.
- The best protection for workers is clear, understandable, easily enforced legal standards. The vast majority of employers consist of decent people who care about their workers and want to do right by them. Federal wage and hour law should help make that happen.

Madam Chairwoman, this concludes my prepared remarks. I will be happy to answer any questions you or the Members of the Subcommittee may have.