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**Written Testimony of
Francisco Diez
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Joint Legislative Executive Budget Hearing on Workforce and Labor

March 1, 2023

Dear Assembly Member Latoya Joyner and Senator Jessica Ramos and members of the Joint Legislative Executive Budget Hearing on Workforce and Labor,

My name is Francisco Diez, and I am a Senior Policy Strategist at the Center for Popular Democracy. The Center for Popular Democracy is a network of high-impact base-building organizations that work to create equity, opportunity, and a dynamic democracy. In particular, I am testifying as to why AM Joyner's EmPIRE Worker Protection Act (A1893/S541) needs to be included in the budget as a revenue raiser that would eventually contribute close to \$30 million annually to the DOL's budget.

In recent years, our network has been deeply engaged in campaigns to win new workplace protection standards: increases to the minimum wage, reforming and expanding unemployment benefits, paid sick and family leave, and protections against volatile and unpredictable work schedules. These victories deliver real benefits to low-wage workers and their families. Yet under-enforcement risks rendering many of these legal rights – along with many well-established protections – hollow.

In the past several years, New York has taken the lead in worker protections, including increases to the minimum wage, paid family leave, and protections against gender-based pay discrimination. Constraints on enforcement, however, have blocked many working families from experiencing the real benefits of these policies. Potential future changes like proposed increases in the minimum wage will continue to face these obstacles unless public labor law enforcement is expanded.

Through our work, we have seen that too many employers bet on the state's limited enforcement capacity; they steal wages and benefits (an estimated \$3 billion annually¹) from their workers and allow toxic workplaces to fester with the expectation that it is unlikely they will be caught. Our labor laws are made hollow when workers do not have a reasonable expectation that employers who violate the law will be held accountable.

¹ Center for Popular Democracy, *By a Thousand Cuts: The Complex Face of Wage Theft in New York*, November 2016, <https://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf>.



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The EmPIRE Worker Protection Act creates a public enforcement action – similar to the long established *qui tam* action – allowing affected workers and labor unions to step into the shoes of the state, and following a notification process to the state, sue to enforce state labor law. The action, when victorious, allows for recovery of penalties that the Commissioner of Labor could recover, most of which returns to the state coffers to enable further public worker protection enforcement, and a portion of which is awarded to the workers who brought the action. The EmPIRE Act is common-sense legislation which will expand resources available for public enforcement and meet the needs of workers suffering from New York’s labor law enforcement crisis.

New York’s Current Enforcement Crisis

Effective enforcement of labor law has historically depended on a combination of public enforcement by the New York Department of Labor and private enforcement by harmed individuals bringing private lawsuits. Limits on government resources mean that labor violations subject to enforcement inevitably outstrip public enforcement capacity. Private litigation supplements public enforcement, penalizing violations that public regulators are unable to prosecute due to issues such as resource constraints or insufficient knowledge of violations.

However, a crisis of enforcement has emerged over recent decades. On the public side, capacity constraints have exacerbated as caseloads have risen and staffing levels declined. In 1966, the DOL had over 300 labor inspectors. As of the end of 2017, the DOL had 115 investigative officers handling 16,400 open cases.²

Meanwhile, on the private litigation side, fear of retaliation and other hurdles have posed obstacles to workers trying to address violations of their rights. In a more recent study by the Raise the Floor Alliance and the National Economic and Social Rights Initiative, 61% of workers who made a complaint to their employer faced retaliation, as did 80% of workers who made a complaint to a government agency and 89% of those who took group action to challenge employer practices.³

This risk of retaliation is even higher for immigrant workers, particularly given the current anti-immigrant climate. The recent Trump administration conducted multiple high-profile

² Make the Road NY, Center for Popular Democracy, *Coming Up Short: The State of Wage Theft Enforcement in New York* (2017), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf.

³ See Raise the Floor Alliance & National Economic & Social Rights Initiative, *Challenging the Business of Fear 13* (2016), <https://www.raisetheflooralliance.org/report>.



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workplace raids. The administration has also increasingly deployed ICE agents to make arrests at courthouses—making undocumented workers fear that bringing a civil action that requires them to appear at court could lead to arrest and deportation. Fear of immigration-related retaliation has unfortunately not diminished during the Biden administration, as right-wing attacks on immigrants continue to reverberate in national media.

While New York has strong anti-retaliation laws and recently expanded them to include new protections against immigration-related retaliation, a NELP 2019 study found that such strong anti-retaliation laws “remain under-utilized by low-wage workers” and are still “difficult and time-consuming to enforce.”⁴ While these laws “can address retaliation after the fact,” “they continue to expose workers to immediate financial and emotional consequences that dissuade workers from holding employers accountable.”

It is particularly scary for workers to come forward as named plaintiffs in employment law claims. Making matters worse, most courts do not allow workers to proceed anonymously (i.e., under a pseudonym) in wage theft cases, absent concrete evidence that they face much greater retaliation than the typical plaintiff.⁵ Because the typical plaintiff in employment law cases faces such a high risk of retaliation already, meeting this extra hurdle is quite difficult.

The EmPIRE Act expands the states’ enforcement power and grows revenue, without burdening public servants.

How the EmPIRE Act Expands Public Enforcement and Raises Revenue

New York can act to address the state’s lack of public enforcement capacity by passing the EmPIRE Act (A1893/S541). The EmPIRE Act would allow workers and labor organizations to stand in the shoes of the state and seek civil penalties, declaratory, and injunctive relief to address wage & hour violations, health & safety violations, and retaliation violations of the Labor Law.

⁴ See Laura Huizar, National Employment Law Project, Exposing Wage Theft Without Fear 21 (2019), <https://www.nelp.org/wp-content/uploads/Retal-Report-6-26-19.pdf>.

⁵ See, e.g., *Agerbrink v. Model Service LLC*, No. 14 Civ. 7841 (JPO)(JCF), 2016 WL 406385, at *10 (S.D.N.Y. Feb. 2, 2016) (“[C]ommonplace concerns over termination or blacklisting will not ordinarily justify anonymity unless the victim would suffer exceptional repercussions The plaintiff’s worries of ‘termination and blacklisting’ do not rise to the level of extraordinary consequences meriting anonymity.”); *Doe I v. Four Bros. Pizza, Inc.*, No. 13 CV 1505 (VB), 2013 WL 6083414, at *10 (S.D.N.Y. Nov. 19, 2013) (denying motion to proceed anonymously despite workers’ evidence that Defendants had “repeatedly threatened to ‘call the police or immigration on any one of their employees’ and have, in fact, followed through on those threats in certain instances.”).



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Claims brought under the EmPIRE are public in nature. The people or labor organizations filing claims do so on behalf of the state government, not in the name of any private party.

EmPIRE encourages robust enforcement of the Labor Law, awarding the workers affected by violations of the Labor Law a share of the civil penalties recovered. Where the state chooses not to intervene in the action, relators (i.e., those filing EmPIRE claims) who succeed are awarded 40% of all civil penalties they enforce, to be equitably distributed among affected workers. The remaining 60% goes to the state Department of Labor to fund public enforcement efforts. Where the state chooses to intervene in the action, 30% of the penalties recovered would be distributed among affected workers, while the remaining 70% would go to the Department of Labor. Prevailing relators would also be able to win injunctive and declaratory relief that brings lawbreaking employers into compliance with the Labor Law, as well as reasonable attorney's fees and costs for bringing the EmPIRE action.

EmPIRE will help all workers, but especially low-wage, non-union, and immigrant workers, as well as workers of color. These workers tend to see the most violations of their rights and the most instances of wage theft, while facing the most barriers in fighting back through the legal system. If a worker feels particularly vulnerable, EmPIRE gives them the option of staying anonymous and having a labor organization listed as the plaintiff in the claim.

The EmPIRE Act does not create any new requirements for employers. It simply expands public enforcement of labor laws already on the books here in New York.

The EmPIRE Act thus incentivizes more workers to play an active role in Labor Law enforcement and, in so doing, generates revenue for the New York State Department of Labor. The Act specifies that civil penalties recovered for the Department of Labor are "to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes."

Right now, the state leaves millions of dollars on the table in penalties against law-breaking employers. These penalties have already been authorized by New York statutes to deter companies from breaking the law, but the state rarely collects them to the full extent permitted by law. And more importantly, the DOL simply does not have the resources to enforce the Labor Law in every single workplace, and it never will even if the agency's funding is temporarily increased in this budget, or any given budget.

By contrast, when a relator brings a lawsuit under EmPIRE, 60% to 70% of the penalties recovered (depending on whether the state intervenes in the action) go to the



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state. The revenue will more than cover any administrative costs to the state associated with EmPIRE.

The similar Private Attorney General's Act (PAGA) in California has generated an average of \$67 million per year from 2016 to 2021. Those revenues have led to important expansions in public enforcement staff.⁶

We estimate that the EmPIRE Act would generate close to \$30 million per year once attorneys and labor organizations have become familiar with this new mechanism.

Because the revenues generated for DOL must be continuously appropriated to supplement and not supplant the funding of the agency for enforcement of the Labor Law, a permanent revenue stream for DOL's enforcement efforts would be created and protected.

It is critical that the Legislature pass a budget that includes the EmPIRE Worker Protection Act – to address the enforcement gap and create a dedicated revenue stream for future enforcement efforts for years to come.

Thank you for your time and consideration.

⁶ Rachel Deutsch, Rey Fuentes, Tia Koonse, California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations. (2020) Center for Popular Democracy, UCLA Labor Center, and Partnership for Working Families.
https://www.populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf