

WORKING HANDS LEGAL CLINIC

Bringing Justice to the Community!

This is a working paper produced by the staff of the Working Hands Legal Clinic and the Latino Union of Chicago. We want to thank the countless other advocacy organizations and enforcement agencies across the country who took the time to share their experiences with us and to acknowledge the work of all of the volunteers who helped to assemble this information. We particularly want to acknowledge the work of Anna Lusero and Alex Kannan. We hope this document will evolve into a useful for organizations around the country who are advocating for wage theft statutes/ordinances. We invite comments, feedback and ideas from advocates who have experiences to share at wagetheftproject@workers-law.org. Finally, we wish to acknowledge the general support for this project of the Public Welfare Foundation and additional support of the Chicago Bar Foundation, the Lawyers Trust Fund of Illinois and the Field Foundation of Chicago.

WAGE THEFT ENFORCEMENT IN THE NEW ECONOMY

A compilation of best practices and model language

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Low wage workers are facing an epidemic in the United States today that is permeating our economy and contaminating our society. Workers nationwide are not being paid wages, robbed of their income by employers. This is a crime which goes unpunished for a multitude of reasons. Since federal labor laws are ineffective in dealing with wage theft, advocates are increasingly looking to states and municipalities to attack wage theft. Even in places that have wage theft laws, the recovery process is generally not user-friendly and is slow and inefficient. Demands take months or even years to result in an enforceable judgment which are then too often not enforceable. Mere legislation is inadequate if the government agencies responsible for filing, investigating and judging the cases are under-funded or not aware of the severity of the issue. A system that is viewed by workers as being inaccessible or develops a reputation for not providing justice ceases to be used as a tool by workers and no longer serves as a deterrent to employers. A solution to the practice of wage theft requires a broad movement for change: worker organizing, collaboration between organized labor, the business community, civil society and the government institutions to protect all workers' basic human right to fair pay.

WAGE THEFT ENFORCEMENT THROUGH LEGISLATION – DOES IT MAKE SENSE?

Passing legislation is not a magic wand. The long-term solution is to shift the balance of power so that the dynamics in our society that make day laborers and other low wage workers so easily exploited are no longer at play. As an intermediary step, however, we see benefits in an aggressive law enforcement campaign to both address the real crisis of non-payment of wages and in developing the organizational power to fight for true justice. In Illinois, we had experience in such a campaign when we fought for, and won, one of the strongest laws in the country to protect the rights of temporary staffing workers. In addition to the positive legislative changes and the ability for workers and state agencies to enforce the law, we saw the following benefits arise through the process of the struggle:

- ***Developing leadership:*** By having leaders involved from the beginning and identify priorities for change, and by including those leaders in every step of the process – from meeting with legislators, giving testimony, to negotiating the final language of the statute – these workers felt ownership of the final law and also realized their potential to make greater change;
- ***Highlighting abuses in the industry:*** By engaging in direct actions, cases, media events, public hearings, the campaign was able to highlight the widespread nature of abuses these workers regularly faced, but also highlight their organized response;
- ***Educating workers on the political process and the law:*** The campaign gave these workers a first-hand look at the political process and how they could impact it. In the end, the workers involved in this campaign understood the law intimately and recognized that they could defend their rights themselves, without the need to depend on attorneys or other professionals;
- ***Creating tools for further organizing:*** The new Day and Temporary Labor Services Act has given the worker centers new tools to do further organizing and develop more leadership, creating a increase in power for temporary staffing workers generally;

- **Building political capital:** Politicians and governmental agencies were forced to realize the growing movement for change among workers who traditionally had been relegated to the shadows and now recognize that they must deal with these workers and their organization. We now regularly have access to the Illinois Department of Labor, the Illinois Attorney General, the Governor and other legislators.

The Latino Union supported the campaign for the protection for temporary staffing workers even though the campaign did not directly impact their membership. Now, the experience and political capital built up in that campaign is the starting point for our campaign for wage enforcement.

STRATEGIES AND BEST PRACTICES FOR ENFORCEMENT IN THE NEW ECONOMY

In Illinois, thousands of day laborers and other low wage workers are routinely robbed of their earned wages. For these workers, the amounts owed reflect a significant loss. However, for many attorneys in the private bar and for the courts, the amounts of these claims are too small to address. Over ten thousand complaints are filed with Illinois' Department of Labor (IDOL) under Illinois's civil wage theft statute¹ each year. For IDOL, with limited resources and an antiquated enforcement scheme, chasing down small funds from so many shadowy employers requires a triage strategy that necessarily results in a cost-benefit analysis. Small wage theft claims too often do not make the cut or take so long and require so much time of the worker that they are often abandoned. As a result, community-based worker centers have attempted to step in and fill the gap through direct action, community pressure and *pro se* litigation. Though these strategies have had success, this is not a viable long-term solution and not what we believe is an effective use of worker centers' limited resources.

So how do workers effectively and efficiently recover stolen wages, especially small amounts? Of course, Working Hands Legal Clinic (WHLC), Latino Union of Chicago (LU) and our other worker center partners in Illinois join the chorus of advocates who are calling for a greater focus on the theft of wages by governmental enforcement agencies, state and federal, and for an increase in enforcement personnel. However, we seek to go beyond that discussion and look at how an enforcement scheme can result in more effective, efficient and timely resolution of small wage theft claims. Our suggestions for stronger legal enforcement are not intended to replace the great organizing and direct action work currently being done in many cities, but to provide tools to enhance those efforts.

The Parking Ticket Example

If you live in one of the many cities that have started to use "The Boot" for parking ticket violations, the sight of a ticket on your windshield probably evokes a feeling of dread. In the past, you could maybe ignore the ticket. But now, in all likelihood, you are going to pay that ticket because, if you don't, there are real consequences. Why does it work?

- Violations of the law are clearly defined and there is almost strict liability for a violation;
- A determination on liability is made swiftly and becomes final if not appealed quickly;
- High civil penalties are imposed for violations;
- There are real consequences for ignoring the violation, a doubling of the fine, seizure of property;
- The enforcement scheme pays for itself.



Why not apply the same type of aggressive enforcement scheme to wage theft?

CREATING A STRONG WAGE THEFT LAW: MODEL LANGUAGE

Many states and municipalities do not have specific wage theft statutes providing a right of action or a complaint process for employees who have not been paid wages for work done at the rate agreed to by the parties. When there is no specific wage theft statute, the victim can only turn to federal or state minimum wage law or

¹ The Illinois Wage Payment and Collection Act (IWPCA), 820 ILCS 115/1-16, gives workers the right to recover owed wages at the rate agreed to by the parties (as opposed to the Illinois Minimum Wage Law (IMWL) which governs payment of minimum wages and overtime as does the federal Fair Labor Standards Act (FLSA)).

traditional contract law to seek owed wages. Minimum wage laws limit recovery to the minimum wage, not to the rate agreed to between the parties. Traditional contract law tends to be less favorable to workers because courts generally presume contracts are between two equal parties, not between an employer and an employee, where there is a power differential. Advocating for a wage theft statute and a federal wage theft law are critical first steps in being able to effectively advocate for victims of wage theft. (An inventory of wage theft statutes developed by the National Employment Law Project is available at www.nelp.org.)

Below we have included model language for the elements we believe are important to include in a wage theft statute. Legal reasoning and support is provided in endnotes. We recognize that political realities may make it difficult to incorporate much of this model language, but we want to include the strongest language as a starting point.

- ***Include a broad definition of “Employer” and “Employee”***

Try to include a broad definition of “employer” and “employee” in the definition section that captures the non-traditional employment relations in the new economy. Also try to explicitly prohibit misclassification of employees as independent contractors.

Sample Language

"Employer" includes any individual, partnership, association, corporation, limited liability company, business trust, employment and labor placement agencies where wage payments are made directly or indirectly by the agency or business for work undertaken by employees under hire to a third party pursuant to a contract between the business or agency with the third party, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is employed.

"Employee" includes any individual suffered or permitted to work by an employer, but shall not include any individual:

- (1) who has been and will continue to be free from control and direction over the performance of the work, both under a contract of service with the employer and in fact; and
- (2) who performs work which is either outside the usual course of business of the employer; and
- (3) who is in an independently established trade, occupation, profession or business; and
- (4) who is deemed to be a legitimate sole proprietor or partnership. A sole proprietor or partnership is deemed to be legitimate if:
 - a. the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the employing entity for whom the service is provided to specify the desired result;
 - b. the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the employing entity;
 - c. the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools, equipment and a personal vehicle;
 - d. the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;
 - e. the sole proprietor or partnership makes its services available to the general public on a continuing basis;
 - f. the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
 - g. the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;
 - h. the sole proprietor or partnership performs the services for the employing entity under the sole proprietorship's or partnership's name;
 - i. the employer does not represent the sole proprietor or partnership as an employee to its customers; and
 - j. the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.

An employer who does not designate an individual as an employee as defined by this Section of this Act shall be liable to that employee for the amount of \$____ per violation which may be recovered through a complaint filed with the [Enforcement Agency] or through a private right of action as set forth in Section __ of this Act. Each day an employer does not properly classify an individual as an employee shall be a separate violation.

"Wages" shall be defined as any compensation owed to an employee by an employer pursuant to an employment contract or agreement, whether written or oral, between the parties, whether the amount is determined on a time, task, piece, or any other basis of calculation.

- *Define when wages are due*

Sample Language

Every employer shall be required, at least bi-weekly or semi-monthly, to pay every employee all wages earned during the semi-monthly pay period. Wages of executive, administrative and professional employees, as defined in the Federal Fair Labor Standards Act of 1939, may be paid once a month. Commissions may be paid once a month. At the request of a person employed by day or temporary staffing agency which, in the ordinary course of business, makes daily wage payments to employees, the agency shall hold the daily wages and make either weekly, bi-weekly or semi-monthly payments. Upon request of the employee, the wage shall be paid in a single check representing the wages earned during the period, either weekly or semi-monthly, designated by the employee. Day or temporary staffing agencies that make daily wage payments shall provide written notification to all daily wage payment employees of the right to request weekly or semi-monthly checks. The employer may provide this notice by conspicuously posting the notice at the location where the wages are received by the daily wage employees. In all cases, all earned wages shall be paid in not more than seven (7) days after the end of the regular pay period, including final wages.

- *Require written employment notices*

If possible, require employers to provide employees with written employment notices including rate of pay, payment procedures, and employer contact information, at time of hire. One of the primary obstacles in recovering owed wages for workers, particularly day laborers, is tracking down the employer. Requiring written employment notices would help eliminate this problem. Even though employers may routinely ignore this requirement, making failure to provide notice a *per se* violation gives advocacy organizations another tool to go after abusive employers, even before wage theft occurs.

Sample Language

An employer shall notify each employee, at the time of hiring, of the legal name and principal address of the employer and its principal officer(s), the rate of pay, the time and place of payment, and any deductions to be made. Such notification shall be in writing and shall be acknowledged by both parties. Employers shall also notify employees of any changes in the arrangements, specified above, in writing prior to the time of change. Any employer that fails to provide an employee with such notice shall be liable to that employee for an amount of \$_____ per violation, which may be recovered through a complaint filed with the [Enforcement Agency] or through a private right of action as set forth in Section ___ of this Act.

- *Create a record keeping requirement with a presumption in favor of employee.*

Create a record keeping requirement and an explicit presumption in favor of the employee in the absence of records showing the agreed upon rate of payment, the amount of work performed and the wages paid. In many cases, a worker is not paid for several days of work. Payment for work done previously was in cash or by personal check. There are no time and payroll records. There is often no record of employment at all, such as a written contract. In response to a wage claim by a worker, the employer ignores the investigation and does not cooperate. Under current wage and hour law, where an employer fails to keep required records, the burden of proof shifts to the employer to dispute the reasonable inference to be drawn from the worker's testimony.ⁱ However, too often wage claim investigators have a misguided sense that, "in fairness to both sides," they should not issue a determination "based on the employee's word alone." Even when an employer fails to respond to a wage claim and rebut the worker's testimony, investigators or enforcement agencies often refuse to make a determination in favor of the worker.ⁱⁱ We believe such discretion should be taken out of the hands of the enforcement agency by incorporating explicit language in a wage theft statute that makes it clear that where an employer fails to keep adequate records, there is a presumption that the employee is owed the wages s/he testifies to, subject to rebuttal by the employer.

Sample Language

Every employer subject to this Act shall make and keep for a period of not less than 5 years, true and accurate records of the name, address and occupation of each of its employees, the rate of pay, and the amount paid each pay period to each employee, the hours worked each day in each work week by each employee. Such records shall

be open for inspection or transcription by the Director [of enforcement agency] or the Director's authorized representative at any reasonable time. Every employer shall furnish to the Director or his authorized representative on demand a sworn statement of such records and information upon forms prescribed or approved by the Director. An employer's failure to make and keep records as required by this Section shall create a rebuttable presumption that the employee was not paid the owed wages complained of. In such an instance, an employer in violation of this Section of this Act shall bear the burden of proving that the complaining employee was paid all due wages, benefits, and wage supplements. If an employer fails to produce such evidence, damages may be awarded to any aggrieved employee based on a reasonable inference, even though the result may only be approximate.

- ***Provide for strong civil penalties and fines***

Some wage theft statutes tie the amount of penalties and fines to the amount of the claim. By requiring a minimum civil penalty and fine that is not tied to the amount of the claim, even small wage violators will be hit hard and will be deterred from violating wage theft laws again in the future.

Sample Language

An employer who fails to comply with a final determination by the [enforcement agency] or a final court judgment within 15 days after the time for appeal has expired shall be liable to the employee for an additional \$_____ dollars plus ___% of the amount of unpaid wages per calendar day of the delay in paying such wages to the employee. In addition, such employer shall be liable to the [enforcement agency] for \$_____ plus ___% of the amount of unpaid wages per calendar day of the delay in paying such wages to the employee.

- ***Create a strong anti-retaliation provision***

Many employees are fired or discriminated against after complaining about wage theft or filing a wage claim. Providing workers with a private right of action to sue employers civilly for retaliation claims provides advocates with one more tool to go after abusive employers.ⁱⁱⁱ

Sample Language

Retaliation

(a) Prohibition. It is a violation of this Act for an employer, or any agent of an employer, to retaliate through discharge or in any other manner against employee for exercising any rights granted under this Act. Such retaliation shall subject an employer or any agent of an employer, or both, to civil penalties pursuant to this Act or a private cause of action.

(b) Protected Acts from Retaliation. It is a violation of this Act for an employer or any agent of an employer to retaliate against an employee for:

- (1) making a complaint to an employer, or any agent of an employer, to a co-worker, to a community organization, before a public hearing, or to a State or federal agency that rights guaranteed under this Act have been violated;
- (2) causing to be instituted any proceeding under or related to this Act; or
- (3) testifying or preparing to testify in an investigation or proceeding under this Act.

- ***Create a private right of action with penalties, attorneys' fees for private enforcement of the law***

Sample Language

Private Right of Action.

(a) A person aggrieved by a violation of this Act or any rule adopted under this Act by an employer, or any agent of an employer, may file suit in [a court of competent jurisdiction] where the alleged offense occurred or where any employer, or any agent of an employer who is party to the action resides, without regard to exhaustion of any alternative administrative remedies provided in this Act. Actions may be brought by one or more employees for and on behalf of themselves and other employees similarly situated. An employee whose rights have been violated under this Act by an employer, or any agent of an employer, is entitled to collect:

- (1) in the case of a wage payment violation, the amount of any wages or other compensation unpaid by reason of the violation, plus [an equal amount/double the amount/a percentage] as liquidated damages;
- (2) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and
- (3) attorney's fees and costs.

(b) The right of an aggrieved person to bring an action under this Section terminates upon the passing of 5 years from the final date of employment by the employer, or any agent of an employer. This limitations period is tolled if an employer has deterred an employee's exercise of rights under this Act by coercion or threat or if an employer has failed to post notice of the rights contained within this Act.

- ***Create an effective and efficient administrative enforcement process for small claims***

Many states and municipalities do have wage theft laws on the books but across the country there are similar complaints that it is nearly impossible to recover owed wages in a timely manner, if at all. A secondary problem is that, unlike parking tickets or other illegal conduct, wage theft gets bogged down in an overly legalistic procedure rather than through an administrative procedure with short time lines. We suggest that establishing an administrative enforcement procedure for small claims which would resolve claims quickly where employers ignore a wage complaint, would move those in dispute through the legal process faster, and would free the government's resources up to focus on enhanced collection efforts. Elements of an effective and efficient enforcement procedure are described below.

Such an enforcement scheme raises questions of due process and separation of powers that are governed by each state's constitution. However, in Illinois, we looked at due process and separation of power challenges to other similar administrative enforcement procedures and have concluded that the hearing procedure outlined above would not violate the Due Process and Separation of Powers Clauses of the Illinois Constitution.^{iv}

Sample Language

For claims not exceeding \$_____, upon receipt of a complaint, the Director [of the enforcement agency], or authorized representative, shall:

(1) within 30 days, mail a notice by regular mail to the complainant and the employer. Such letter shall direct the parties to submit all documentation relevant to the claim by a date certain, but not more than ___ days after the complaint was filed, and to appear in person or telephonically for an investigative hearing. If the employer is a business registered in the state, sending such notice by regular mail to the address the business has registered with the state shall be deemed adequate notice. If the recipient is an individual employer, sending such notice to the address at which the individual's driver's license is registered, if available, shall be deemed adequate notice.

(2) Upon conclusion of the investigative hearing, if the investigator finds that any of the employee's wages are due and owing by the employer, the investigator shall issue a civil citation to the employer within 30 days for the amount of the owed wages, together with penalties and interest in accordance with Section ___ of this Act.

(3) In the event the employer fails to respond, the investigator shall find in favor of the employee in accordance with Section ___ of this Act.

(4) Either party may appeal the decision of the investigator to a hearing before an administrative law judge in the [enforcement agency] by filing an appeal in writing with _____ within 21 days of the investigator's decision. If no party appeals the decision of the investigator within the proscribed time limit, the finding of the investigator shall become a final determination. The time limit for appeal shall be extended only upon a showing of good cause for the delay. If appealed, the [enforcement agency] shall conduct an evidentiary hearing before an administrative law judge pursuant to Section ___ of the Administrative Procedures Act. The decision of the administrative law judge shall become a final determination.

(5) A final determination by the [enforcement agency] may be appealed to circuit court, whereby the governing standard of review shall be "against the manifest weight of the evidence." Such appeal shall be filed within 35 days from the date a copy of that decision was mailed by the [enforcement agency] to the party affected by the decision pursuant to the Administrative Review Act.

(6) After 30 days, if not appealed, the final determination by [enforcement agency] shall become an enforceable judgment.

- ***Require fees be paid to a dedicated fund for wage theft enforcement***

Any fines recovered should be restricted in their use only to enforce the wage theft law.

Sample Language

All moneys recovered as fees and civil penalties under this Act shall be paid into the [Wage Theft Enforcement Fund], a special fund which is hereby created in the State treasury. Moneys in the Fund may be used only for enforcement of this Act.

- ***Increase available methods of collection***

As difficult as it may be, in many cases getting a favorable decision on their wage claim is the easy part. Collecting on the money owed can prove to be even more difficult. We believe a combination of providing the enforcement agency with stronger tools to collect on a wage theft judgment, coupled with strong civil and criminal penalties, is critical to effective enforcement of wage and hour laws. Some examples of powers that could be given to the enforcement agency to help with collection are listed below. In addition, see the examples of wage enforcement and collection in Massachusetts and New York, below.

- Providing for liens on property of individual employers and businesses;
- Providing for tax liens, liens on social security numbers and garnishment of wages;
- Provide for revocation of business licenses or denial of business license for individual who has failed to comply with a judgment or final determination for owed wages;
- Provide for revocation of or denial of driver's license for individual who has failed to comply with a judgment or final determination for owed wages;

- ***Provide for strong criminal penalties with a rebuttable presumption of intent***

Many states have criminal penalties for wage theft but they typically have a high standard of proof and a low penalty, so even cooperative law enforcement agencies are hesitant to pursue criminal charges. Several states have made an effort to increase the criminalization of wage theft (see the summary of Massachusetts and New York laws, attached). In order to overcome the high standard of proof that a violation was willful, include a rebuttable presumption that the violation was willful if an employer fails to pay owed wages when they become due, and when an employer refuses to pay owed wages after a court or final administrative order finding that wages are owed. This will make it easier to satisfy the willful requirement and lead to more successful criminal prosecutions of abusive employers.^v

Sample Language

- (1) Failure of an employer to pay earned wages to an employee in the amount of \$_____ or less as provided in this Act, with intent to deny payment, annoy, harass, oppress, hinder, delay or defraud the person to whom such payment is due, upon conviction, is guilty of a Class __ misdemeanor. Failure of an employer to pay earned wages to an employee in the amount of \$_____ or more as provided in this Act, with intent to deny payment, annoy, harass, oppress, hinder, delay or defraud the person to whom such payment is due, upon conviction, is guilty of a Class __ felony. Failure of an employer or agent of an employer to pay owed wages within the time period proscribed in Section ___ of this Act or within 30 days after a final administrative determination or a final judgment of a court finds that such wages are due and owing shall create a rebuttable presumption that the underpayment was intentional.
- (2) An employer who is convicted of two or more wage theft violations within a __ day period, totaling \$_____ or more in the aggregate, as defined in paragraph (1) of this Section shall be guilty of a Class __ felony. In the case of a prosecution for separate transactions totaling more than \$_____ within a __ day period, such separate transactions shall be alleged in a single charge and provided in a single prosecution.

OTHER POSSIBLE CONSIDERATIONS FOR LEGISLATIVE ACTION

- (1) Create a private right of action for one employer who pays his employees against another who does not based on unfair business practice – A similar law exists in California and may create additional “allies” in fighting against abusive employers but it would be important to think through potential negative consequences;
- (2) Create an “Unpaid Wage Fund” to reimburse workers unable to recover owed wages and funded by additional wage theft fines – In Illinois, a similar fund was created by the Workers’ Compensation Commission to pay for injured workers employed by uninsured employers. At the end of each year, the fund is divided among uncompensated injured workers on a *pro rata* basis;
- (3) Create a special *pro se* wage court that expedited wage claims and applied the correct legal standard to wage and hour cases.

ⁱ **Record keeping requirements and presumption in favor of employee if employer fails to produce records:** In *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 688 (1946) and its progeny, the U.S. Supreme Court found when employers fail to keep

adequate and accurate records, the burden shifts to the employer to “negative the reasonableness of the inference to be drawn from the employee’s evidence.” An employee has carried out its burden if he proves that he has performed work for which he was improperly compensated and provided sufficient evidence to show the amount and extent of that work. *Id.* The burden then shifts to the employer to come forward with evidence to prove otherwise. *Id.* In the event the employer fails to provide such evidence, the court may then award damages to the employee, even though the result may only be approximate. *Id.* Unless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees’ evidence as to the amount of time spent in these activities in excess of the productive working time. *Id.* at 693.

ⁱⁱ Illinois’ wage theft statute actually uses the language “the Department [of Labor] shall have the power to “attempt to equitably adjust controversies between employees and employers. As a result, under previous conservative administrations in Illinois, IDOL routinely denied wage claims as “not supported by the evidence available.” We have also found that *pro se* courts in Illinois often function the same way, with workers routinely being denied their owed wages because they can’t produce a written contract and don’t have any evidence of the work done or wages owed other than their own testimony.

See Memo of Law on Viability of IDOL Civil Citations.

WORKING HANDS LEGAL CLINIC

Enforcement in the New Economy Project Due Process and Separation of Powers Issues in Administrative Enforcement Procedures

INTRODUCTION

Question Presented:

For purposes of this memorandum of law, we frame the question broadly as follows:

Can the Illinois Department of Labor (“IDOL”) adopt an administrative enforcement procedure that results in wage claim investigators issuing civil citations for violations of Illinois wage and hour statutes that results in an enforceable judgment after exhaustion of administrative proceedings and is appealable to circuit court only on a “gross error” or “contrary to the manifest weight of the evidence” standard? If so, what separation of powers and due process concerns are implicated?

We begin by asking whether the below-described hypothetical enforcement scheme for violations of Illinois wage and hour statutes is viable in Illinois.

After a complaint is filed with IDOL, a letter is sent by regular mail within 30 days to the employer (both to the business at the address registered with the state and/or to the individual with operation of control to the address the individual’s driver’s license is registered or listed on his/her personal tax return) directing the parties to submit all documentation relevant to the claim by a date certain and to appear in person or telephonically for an investigative hearing on a date certain. If the employer(s) fail to respond within said time period or fails to present adequate payroll records showing proper wages had been paid, the claims investigator would be bound to find in favor of the worker because of the presumption discussed below. Following the hearing, the claims investigator issues a civil citation to the employer for the owed wages, penalties and interest or dismisses the case.

The losing party would have 21 days to appeal that decision to a semi-formal hearing before an administrative law judge (ALJ) (modeled loosely on hearings before IDES). The decision of the ALJ, or if no timely appeal were made, the decision of the claims investigator becomes a final determination, appealable to circuit court only on a “gross error” or “contrary to the manifest weight of the evidence” legal standard within 35 days from the date that a copy of that decision was served upon the party affected by the decision pursuant to the Administrative Review Act. 735 ILCS 5/3-103. If not appealed, after a time set by state statute (30 days in Illinois), the final determination then becomes an enforceable judgment.

Short Answer

Yes. It is possible that an amendment to the relevant wage and hour statutes would be required to empower IDOL to utilize such an administrative enforcement scheme. However, Illinois courts have held that such an administrative procedure scheme would not be violative of Separation of Powers and Due Process Doctrines of the U.S. and Illinois Constitutions. An administrative agency may exercise both executive and judicial powers

within the same agency so long as there is some level of appeal for judicial review. In addition, notice to a party of an administrative proceeding by regular mail is a sufficient to meet due process requirements so long as the notice was “reasonably calculated to provide actual notice.” Finally, if an employer fails to appear at an administrative hearing without a showing of good cause, Illinois courts have held that an administrative agency may enter a default determination without violating due process rights.

DETAILED ANALYSIS

Question #1

Is an amendment to the relevant wage and hour statutes required to empower IDOL to implement an administrative enforcement procedure allowing the agency to issue civil citations that result in an enforceable judgment after exhaustion of administrative proceedings, appealable to circuit court only on a “gross error” or “against the manifest weight of the evidence” standard?

Answer

While it might be possible that a determination on a wage and hour claim made by IDOL could be enforced in circuit court, thereby avoiding the filing of a new complaint by the Illinois Attorney General’s office (“AG”), we consider it preferable to explicitly empower IDOL to implement such a procedure through clear language in the relevant statutes or through the ARA and then by reference to the ARA in the relevant wage and hour statutes.

Analysis

The procedure used by the Illinois Department of Employment Security (IDES) provides a model for efficient and informal but fair hearings which are set forth in the Unemployment Insurance Act. 820 ILCS 405/100 *et seq.* The IWPCA, on the other hand, does not set forth such a procedure and is ambiguous in stating that IDOL has the authority to “investigate and *attempt equitably to adjust controversies* between employees and employers in respect of wage claims arising under this Act” as well as issue subpoenas and examine and inspect company records to assist in the investigation. 820 ILCS 115/11(a).

Under the IDES administrative procedure, a determination is first made by a claims adjudicator which becomes final unless a party requests a review of that determination to a “referee’s hearing” within 30 days after such notification was mailed to his last known address. 820 ILCS 405/703; 820 ILCS 405/800. The referee must conduct a fair hearing to comport with constitutional due process requirements. *Cosby v. Ward*, 843 F.2d 967, 984-85 (7th Cir. 1988) (holding IDES must give clear notice of issues to be heard at hearings). Technical rules of evidence do not apply at a referee’s hearing, but the referee must still make a full inquiry of relevant facts and issues and rely on legally competent evidence. 56 Ill. Admn. Code §2720.250; *Menneweather v. Bd. Of Review*, 249 Ill. App.3d 980 (1992).

The referee holds a hearing and then issues a decision. That decision is final unless an appeal is taken to the Board of Review within 30 days. 820 ILCS 405/801. See *Automated Professional Tax Services, Inc. v. Dept. of Employment Security*, 244 Ill. App. 3d 485, 489 (1993) (affirming an administrative determination that an appeal from an adjudicator filed past the 30 day limit would not be considered; citing *Huggins v. Bd. Of Review*, 10 Ill. App.3d 140,143 (1973): “The decision of the referee, as the case may be, becomes final if an appeal is not timely filed within the plain language of the statute.”)

Under the Unemployment Insurance Act, a party can challenge the Board of Review’s decision only by filing suit circuit court within 35 days of receipt of the Board’s decision pursuant to the ARA. 820 ILCS 405/1100; 735 ILCS 5/3-101 *et seq.* The reviewing court may not conduct a new evidentiary hearing. *Grant v. Board of Review*, 200 Ill. App. 3d 732 (1990). Rather, it must uphold the Board’s factual findings *unless they are contrary to the manifest weight of the evidence*. 735 ILCS 5/3-110; *Henderson v. IDES*, 230 Ill. App. 3d 536

(1992) (emphasis added). A court can overturn the agency's factual finding if a conclusion opposite to the agency's finding is clearly evident from the evidence. *Thompson v. Bd. Of Review*, 457 N.E.2d 512 (1983).

The language of the ARA could be applied to claims of violations of wage and hour statutes. We are proposing to amend the ARA as follows: (*proposed language underlined*):

Commencement of action. Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision, except that in municipalities with a population of 500,000 or less a complaint filed within the time limit established by this Section may be subsequently amended to add a police chief or a fire chief in cases brought under the Illinois Municipal Code's provisions providing for the discipline of fire fighters and police officers.

The procedures set forth in this section shall apply to final determinations made by the Illinois Department of Labor pursuant to any or all of the following Acts: Illinois Minimum Wage Law ("IMWL"), Illinois Wage Payment Collection Act ("IWPCA"), Illinois Day and Temporary Labor Services Act ("IDTLSA"), the Employee Classification Act ("ECA"), and the Illinois Prevailing Wage Act ("IPWA").
735 ILCS 5/3-103

Question #2

In the hypothetical above, is it violative of the Separation of Powers Doctrine for an administrative agency such as IDOL to have both enforcement and judicial powers in issuing civil citations and conducting administrative review?

Answer

No. Illinois courts have consistently held that Illinois administrative agencies may exercise both enforcement and judicial powers so long as administrative decisions are subject to some form of judicial review.

Analysis

The "delegation to administrators or agencies of the quasi-judicial power to adjudicate rights is not invalid so long as there is an opportunity for judicial review of the administrative action. If the judiciary is given an adequate opportunity to review what has been done, the principle of separation of powers-or due process of law, is generally satisfied." *Van Harken v. City of Chicago*, 305 Ill. App. 3d. 972, 978 (1999) quoting *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 182 (1974)., quoting G. Braden & R. Cohn, *Illinois Constitution: An Annotated & Comparative Analysis*, 104-05 (1969).

In *Van Harken*, Illinois residents sought to contest parking tickets on the grounds the dual enforcement and judicial role of the enforcement agency violated the constitutionally required separation of powers. *Id.* Under Chi. Municipal Code §9-100-070, 080 (1980), attorneys are hired as hearing officers and they conduct a fact-finding investigation, and apply the law to the result. All findings are reviewable by the circuit court under the ARA. *Id.* at 978. The plaintiffs argued the ordinance violated the Separation of Powers Doctrine. *Id.* at 979. The court disagreed, noting the ordinance provides an option for seeking judicial review of the hearing officer's finding, which does not "usurp the entire power of the judicial branch of the government." *Id.*

Question #3

In the hypothetical IDOL administrative enforcement process described above, which may result in a final determination (or civil citation), does service by regular mail to the parties of the administrative proceedings and appeal rights violate due process rights?

Answer

No. So long as the notice was "reasonably calculated to provide actual notice" to the parties. While there is no case on point involving IDOL, we looked to case law involving other state enforcement agencies (such as IDES,

Department of Public Aid (“IDPA”), Secretary of State (“SOS”) and Department of Human Rights (“IDHR”)) and municipal enforcement agencies (such as Chicago and other municipalities parking enforcement schemes). The “reasonably calculated” standard is met if the notice is mailed to the last known address of the party as indicated by registration with the state in some manner such as registration of a business or registration of a driver’s license or vehicle with SOS. This would arguably extend to registration of an address with other state agencies as well, such as the address listed on business or personal tax returns with Illinois Department of Revenue (“IDOR”).

Analysis

In Illinois, unless a statute explicitly specifies otherwise, courts have consistently service is presumed to have occurred when notice is deposited in the regular mail to the last known address of a party so long as it is reasonably calculated to provide actual notice to the party. *Thompson v. Bernardi*, 112 Ill. App. 2d 721, 723 (1983); *Nudell v. Forest Preserve Dist.*, 333 Ill. App. 3d 518, 522 (2002);

In *Thompson*, Pursuant to the ARA In one case, an employee filed a complaint for administrative review of a decision by the IDES Board of Review denying him unemployment compensation. *Thompson*, 112 Ill. App. 2d at 722. The defendants responded with a motion to dismiss, alleging the Board had served plaintiff with a copy of its decision by mailing it to him and that the employee’s right to appeal had expired 35 days from the date of mailing. *Id.* The plaintiff contended that he had not, in fact, received the notice of the decision and argued the 35 day period should not run until he learned of the decision. *Id.* The plaintiff acknowledged he had previously received mail from the IDES, but claimed he had not received that decision. *Id.* However, the court found that, although representatives from IDES could not recall mailing that specific decision, testimony from IDES witnesses as to the agency’s procedure in mailing decisions was sufficient to establish that the decision was mailed and create the presumption that the decision was receive. *Id.* at 723.

The court found that, pursuant to the ARA, a decision is deemed to have been served once it has been deposited in the U.S. Mail. *Id.* at 723. In denying the plaintiff’s appeal, the court also held that, while plaintiff could rebut the presumption of receipt of the decision by denying it, the issue of actual receipt then “*becomes a question resolved by the trier of fact.*” *Id.* at 724. (emphasis in original).

The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency. *Thompson*, 112 Ill. App. 2d at 723. Furthermore, “it is established that when no method of service has been provided by statute, the decision of an administrative agency will be deemed served when mailed.” *Board of Education of St. Charles Community Unit School Dist., No. 303 v. Adelman*, 137 Ill. App. 3d 965, 968 (1985), citing *Cox v. Bd. Of Fire & Police Commissioners*, 96 Ill. 2d 399, 403 (1983).

On appeal, the plaintiff claimed he had not been notified of the Board’s decision denying him unemployment compensation. *Thompson*, 112 Ill. App. 2d at 723. Because of this, he claimed he was denied due process, and that the 35-day jurisdictional time limitation for filing a complaint should begin to run on the date of receipt, rather than the date of mailing. *Id.* However, the court affirmed defendants’ motion to dismiss and cited precedent holding where the administrative agency is required only to give **notice** of its decision by **regular mail**, and when the party aggrieved by the decision actually receives it within the 35-day period, the period begins to run on the date the decision was mailed. *Id.* See *Chin v. Ill. Dept of Public Aid*, 78 Ill. App. 3d. 1137 (1979); See also *Thompson v. Civil Service Commission*, 63 Ill. App. 3d 153 (1978).

The plaintiff testified he had not received notice of the Board’s decision, though he had received mail from the Department of Labor at his mailing address on previous occasions. *Thompson*, 112 Ill. App. 2d at 723. In response to this contention, the court cited previous precedent that held “the mailing of a properly stamped and properly addressed letter raises a presumption that the letter was received by the addressee. If the addressee denies the receipt of the letter then the presumption is rebutted and receipt becomes a question to be resolved

for the trier of fact.” *Id.* See *Orrway Motor Service, Inc. v. Ill Commerce Commission*, 40 Ill. App. 3d 896, 872 (1976), citing *Winkfield v. American Continental Insurance Company*, 110 Ill. App. 2d 156, 160 (1969).

Assessing the plaintiff’s credibility, the court affirmed and decided that since plaintiff’s only way of proving/disproving receipt of notice was his own testimony, the trial court had no obligation to believe him. *Thompson*, 112 Ill. App. 2d at 723. With the exception of mail being incorrectly addressed, a party is presumed to have received a properly mailed order. *Orrway*, 40 Ill. App. 3d 869 (1976).

There was an instance where service was deemed effective upon receipt of a copy of the administrative decision. See *A-1 Security Services, Inc. v. Stackler*, 61 Ill. App. 3d 285 (1st Dist. 1978). There, however, the act governing the procedure before that administrative agency provided for service by personal delivery or registered mail. *Id.* However, in *Chin v. Ill. Dept of Public Aid*, 78 Ill. App. 3d. 1137 (1979), where a doctor was issued a notice of termination by the Illinois Department of Public Aid via certified mail and claimed he had not received it, the court cited Section 4 of the Administrative Review Act, which governs judicial review of agency decisions with respect to the Medical Assistance Program:

“The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his last known residence or place of business.” 735 ILCS 5/3-103. As a result of this, the court in *Chin* held the 35-day period for filing a complaint for review began to run on the date the agency decision was deposited in the mail, and thus judicial review was barred because the doctor had failed to comply with jurisdictional requirements. *Chin*, 78 Ill. App. 3d 1137 (1979). Such an enforcement did not violate the doctor’s due process rights, who had at least 26 days in which to file a complaint for administrative review. *Id.*

Illinois courts have held that regular mail is sufficient means of providing notice of administrative proceedings even where those proceedings may result in the “taking of property.” *Guerrero v. Ryan*. 727 Ill. App. 3d 945 (1995). There, a motorist was notified via regular mail that his license had been suspended following an accident. *Id.* at 952. Even though he had moved right after the accident, the appellate court held the address on his driver’s license was valid for purposes of notification and did not violate due process. *Id.* The court reasoned that Illinois law mandates that SOS mail notice of a motorist’s driver’s license to the motorist’s address listed on his/her driver’s license. *Id.* Should a motorist move, s/he has an obligation to notify SOS of the change of address within 10 days. *Id.* at 953.

In *Guerrero*, SOS mailed the notice of suspension of the motorist’s driver’s license to the address listed on his driver’s license, stating his license would be suspended in a month and a half if he did not post bond or submit other proof of financial responsibility. *Id.* at 951. The notice also stated the motorist could request an administrative hearing within 15 days of the notice. *Id.* The motorist moved locations shortly following the accident and alleged he never received the notice in fact. His license was then suspended by default according to SOS’s administrative procedures because he had missed the deadline to either post bond or request an administrative hearing. *Id.* The motorist argued his due process rights were violated because the notice was not sent by certified mail and that he was not given a hearing within a reasonable time. The court, however, held that mailing notice of driver’s license suspension by regular mail to the motorist at address listed on his driver’s license was “reasonably calculated to provide actual notice” and satisfied due process; mailing of notice by certified mail was not required. *Id.* at 949.

The Appellate Court of Illinois held an interest in a driver’s license was not a fundamental right, so deprivation of the motorist’s license was not subject to a strict scrutiny due process analysis. *Id.* at 954; U.S.C.A. Const. Amend. 14. Thus, mailing notice of a motorist’s driver’s license suspension by regular mail to the motorist at

the address listed on his driver's license was reasonably calculated to provide actual notice and satisfied due process; mailing of notice by certified mail was not required. *Id.* citing 625 ILCS 5/7-205 (a).

In reaching its conclusion, the court cited *Elmhurst Stamping & Manufacturing Co. v. AMAX Plating, Inc.* in which the Illinois Supreme Court previously held that service by regular mail is an inexpensive mechanism that is reasonably calculated to provide actual notice and the use of mails has also been deemed adequate by IL courts. *Elmhurst Stamping & Manufacturing Co. v. AMAX Plating, Inc.*, 67 Ill. App. 3d. 257, 260 (1978) (holding that in order to satisfy due process requirements in a suit by one corporation against another to collect its predecessor's outstanding debt, the form of notice provided should be likely to be received and plain to understand. *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 658 (1950); *Griffin v. Cook County*, 369 Ill. 380, 388 (1938). (Notice by publication coupled with mailed notice to known creditors was reasonably certain to reach those interested in the cause.)

A court may find that due process would be denied only if the party could show that notice was not received within the 35 day period (*Winkfield*, 110 Ill. App. 2d at 160 (1969) or if the plaintiff would not have had ample opportunity to file an appeal and obtain judicial review of the adverse agency decision. *See Angelo v. Bd. Of Review, Department of Labor*, 58 Ill. App. 3d 50 (4th Dist. 1978) (decision denying claimant unemployment compensation was received at 4 pm on the last day to file an appeal; court held due process requires claimant have a reasonable time after receipt of notification in which to file an appeal. This is because common knowledge of the capability of the postal service negates any conclusive presumption that it was so received). *Angelo*, however, is more of an outlier case that would be most likely applied in exceptional circumstances.

Question

In the hypothetical IDOL administrative enforcement process described above, would a default determination resulting from an employer's failure to appear at the hearing violate the employer's due process rights?

Answer

No. In a case before the IDHR, a similar state agency, the court held there would be no due process violation in upholding an order entering default against an employer for failure to show at a hearing without good cause.

Analysis

In one case dealing with an employer-employee discrimination suit, default was entered against the employer for not showing at the hearing. *Glassworks v. State of IL Human Rights Com'n.* 164 Ill. App. 3d 842, 844. There, the employer appealed from a default judgment entered against him on due process grounds and lost for failure to show good cause for not appearing at the administrative hearing. *Id.*

The Appellate Court of Illinois held the Human Rights Act did not deprive the defendant-employer of his due process rights by authorizing entry of a default judgment against it for failure to appear at a fact-finding conference. *Id.* at 848. The entry of default judgment for failure to comply with reasonable administrative procedural rules was not violative of due process because in this case, it was the employer's own failure to comply with reasonable procedures of the Act that resulted in an entry of default. *Id.*

Procedurally, if IDHR determines a fact-finding conference is necessary, a conference must be scheduled within 120 days. *Id.* at 849. If IDHR issues a notice of default, the defaulted party may request a review of that default from the Human Rights Commission. *Id.* If a default is sustained upon review by the Human Rights Commission, the matter must be set for a hearing on damages. *Id.*

In *Glassworks*, the employee filed a discrimination suit against the employer and a case investigator for IDHR began an investigation of the allegations in an effort to verify the information set forth in the employee's

charge. *Id.* at 844. A notice was sent to the employer and his attorney regarding the date of a fact-finding conference. *Id.* In addition to the notice, a questionnaire was provided for the employer to complete. *Id.*

Upon the employer's failure to appear at a hearing, the employer would have been allowed to avoid default judgment by submitting a statement of reasons justifying why the employer as well as his attorney did not attend the fact-finding conference. *Id.* The employer did not file such a statement, but rather a motion to vacate the proposed entry of the default. *Id.* at 845. IDHR denied the motion and entered default judgment against the employer for failure to show good cause in not attending the hearing (he was on a family vacation). *Id.* at 846.

Following this, the administrative law judge awarded damages to the employee, and the Human Rights Commission entered the order. *Id.* Upon the employer's refusal to comply, the Human Rights Commission issued an order directing IDHR to file suit in circuit court. *Id.* On appeal, the employer argued his due process rights were violated because a default judgment was entered against him for failure to appear at the hearing. *Id.* The court, however, held it was the employer's own failure to comply with reasonable procedures of the Act that resulted in default against him. *Id.* at 850.

Due process issues concerning the time limit to file an appeal

With respect to appealing notice sent by an administrative agency regarding a final determination, Illinois courts have found that a reasonable time frame to appeal does not violate due process. See *Thompson*, 112 Ill. App. 2d at 723 (35 day time limit to appeal Board's finding under IDES did not violate due process.)

Courts have likewise held that even shorter periods of time for filing are reasonable and do not violate due process. *Id.* See also *Gutierrez v. Bd. Of Review, Dept. of Labor*, 35 Ill. App. 3d 186 (1st Dist. 1975) (a nine day period in which to appeal an adverse decision by the IDOL was upheld). See also *In re Application of County Treasurer*, 26 Ill. App. 3d 753 (1st Dist. 1975) (seven day notice to contest a tax assessment was held to not violate due process.)

WORKING HANDS LEGAL CLINIC

Enforcement in the New Economy Project Massachusetts Wage Theft Enforcement Case Study

Note: *This memorandum is intended to foster discussion about viable options to improve recovery of wage theft through appropriate state agencies. The ideas contained herein reflect the opinions of the author and do not necessarily reflect the opinions of the organization or any person or persons affiliated with the organization or any state agency.*

I. Wage Theft Enforcement Provisions in Massachusetts Law

The labor laws of Massachusetts give the Attorney General's Office "all necessary powers" to investigate violations of wage and hour laws and to enforce penalties for such violations. M.G.L. c. 149, §2.

a. Criminal Penalties

Employers whom the Attorney General's Office finds to have violated wage and hour laws can be punished by a fine, terms of imprisonment, or both a fine and imprisonment. The maximum amount of the fine and the term of imprisonment depend on how many times the employer violates the law and whether the violation is willful. For first offenses, employers who are found to have willfully violated wage and hour laws "shall be punished" by a fine of not more than \$25,000, or by imprisonment of not more than one year. Employers who are found to have multiple willful violations shall be punished by a fine of not more than \$50,000, or by imprisonment of not more than two years.

Employers whom the Attorney General's Office finds to have violated wage and hour laws without a willful intent to do so shall be punished by a fine of not more than \$10,000, or imprisonment of not more than six months for a first offense. For subsequent non-willful violations, employers shall be punished by a fine of not more than \$25,000, or not more than one year of imprisonment.

b. Penalties Barring Contracting with the State

Contractors convicted of willfully violating wage and hour laws may be prohibited from contracting with the state or its agencies on any public works contracts or any public building from six months to five years, depending on the violation.

c. Civil Citation Penalties

As an alternative to initiating criminal proceedings, the Attorney General may issue a written warning or civil citation to an employer. For each violation, a separate citation may be issued requiring the employer to correct the violation, pay the employee owed wages, or pay a civil penalty to the State of not more than \$25,000 for each violation. Each failure to pay an employee the appropriate rate for any pay period may be deemed a separate violation. The civil penalty and owed wages must be paid within 21 days after the citation is issued.

d. Appeal

Any employer who receives a citation may appeal to the Division of Administrative Law Appeals (“DALA”). DALA is an independent agency established by the legislature to provide a neutral forum to hear appeals from decisions made by state agencies.

To appeal, the employer must file a notice of appeal with the Attorney General’s Office and with DALA within 10 days of receiving the citation. Every employer who appeals will receive a hearing before DALA. In order for DALA to vacate the citation, the employer has the burden to demonstrate by a preponderance of the evidence that the citation was issued erroneously.

An employer or employee who is unhappy with the decision of the DALA hearing officer may file an appeal in the Superior Court. The Superior Court may modify the DALA decision only if the DALA decision violates constitutional provisions, is based upon error of law, is made upon unlawful procedure, or is arbitrary or capricious, or abuse of discretion.

e. Failure to Pay or Comply with Order or Citation – Criminal Penalties, Lien on Property, Bar from Incorporating

If an employer fails to comply with the requirements in a citation or order issued by the Attorney General’s Office, or fails to pay a civil penalty or owed wages within 21 days of the issuance of the citation, or within 30 days of the hearing officer’s decision, the Attorney General’s Office may apply for a criminal complaint or seek indictment.

In addition, if civil penalties and owed wages remain unpaid 22 days after the citation was issued, or 31 days after a hearing officer’s decision, such penalty and owed wages, together with interest at the rate of 18% per annum, shall be a lien upon the real estate and personal property of the employer. The lien takes effect by operation of law on the day immediately following the date payment is due. Additionally, no officer of any corporation that has failed to pay any such penalty may incorporate or serve as an officer in any corporation that did not legally exist on the date the fine was due.

II. How Massachusetts’ Wage Theft Enforcement Works

Members of the Fair Labor Division of the Attorney General’s Office (“AGO”) meet with community organization and union leaders once a month to review cases and discuss enforcement issues. Over the past couple of years, the AGO has made impressive improvements to its enforcement procedures, including increasing language capacity and improving complaint forms, although there still can be frustrations with the time frames and outcomes of particular investigations. Many policies within the AGO are unwritten policies that shift with new administrations.

a. Investigation Process

There are no hard line rules about what should take place during the investigative process, nor are there timelines about when investigation should conclude or how long it should take. Although the statutory language for enforcement is strong, the investigative phase can be difficult because the AGO does not have sufficient resources to promptly and effectively investigate every wage and hour complaint it receives.

After the AGO receives a complaint from a worker that wages are owed, the complaint is processed in the system and then assigned to an investigator. The investigator generally sends a letter and a copy of the

complaint to the employer. The AGO does not send an employee's personal contact information to the employer. The investigator asks for a response to the allegations. In some cases, the AGO immediately demands payroll records. If the employer does not immediately agree to pay, there is a back and forth investigation and conversations with the employer and, in some cases, interviews with employees.

If there is a clear violation in the documents provided by the employee or employer, the AGO negotiates with the employer to get the payment of the owed wages. If an employer responds, but does not produce records for the employee, the AGO does not view the lack of records as a clear indication of underpayment.

After the investigation, the AGO weighs the evidence, the statements of the employer and employee, and then decides whether to proceed with penalties, keeping in mind the enforcement goals of restitution to employees, fairness to other businesses, and fairness to tax payers. There are no hearings held prior to the AGO decision whether or not to issue a citation.

The AGO tries to settle cases whenever possible to recover employees' wages, without the AGO having to issue a citation. In the cases where the AGO does not proceed with an investigation, the AGO issues private right of action letters allowing the employee to sue the employer civilly. Although the AGO does respond to small wage claims, due to resource limitations it may choose not to investigate small claims as much as it does larger claims dealing with higher amounts of money or large numbers of people. In cases where the employee has little evidence, the AGO will sometimes send a letter informing the employer of the law and requesting that the employer pay owed wages to the employee.

If during the investigation of a single complaint, the AGO notices potentially systemic violations, the AGO will broaden the investigation to all employee records and will seek restitution not only for the employee who complained, but for all employees.

The investigative process and the time taken to complete the investigation varies greatly depending on the details of a particular case, the employer's responses, and AGO staffing and resources.

b. When Employers Fail to Respond

If an employer does not respond, the investigator will follow up with a call or letter. If an employer never responds to the AGO, the AGO can issue a citation with a civil penalty, and require payment of owed wages based on the evidence provided by the employee. This is the AGO unwritten policy of how to deal with employers who do not respond and there are no hard and fast rules about when to issue citations when there is no response. Citations issued to employers who do not respond are referred to as citations due to "failure to respond" and they look exactly like citations issued to employers who have been involved in the investigative process. Once the citation has been issued, the employer can appeal to DALA and the burden shifts to the employer to prove that the citation was issued in error.

In these situations, even once the citation has been issued, it can be difficult to enforce. The only remedy the AGO has to recover the owed wages is through a lien on property or the social security number of the employer.

c. Penalties

The AGO does not issue citations or begin criminal prosecutions in every case, but usually only in cases with good evidence showing an employer owes wages.

Criminal prosecutions are used rarely and are usually only used for cases involving bounced checks, large numbers of workers, large amounts of money, or public works projects. Criminal penalties are usually

only enforced if there is a substantial amount of evidence because the standard of proof is higher for criminal prosecutions and the AGO requires more evidence before instituting such penalties.

Liens are put on property when an employer fails to pay; however, unless the property sells, it does not generate money to pay employees their owed wages. Employees can be left for years without being able to recover wages, even after the AGO has found that an employer owes money. After a lien has been entered, it cannot be removed until the fine is paid, even if an employer approaches the AGO and is willing to pay the owed wages. The fine must be paid before the lien can be removed. Although the statute authorizes the AGO to put liens on personal property, the AGO has not generally found it practical or effective to do so.

The AGO has barred contractors who have violated wage and hour laws from contracting with the state, but those provisions do not help to recover wages and it is not clear how much of a deterrent effect it has on employers.

The AGO does issue civil citations, but usually only in cases with good evidence against the employer. There are no guidelines about the minimum penalties that should be issued and cases are assessed on a case by case basis. It is not clear to what extent the threat of civil penalties has had any deterred effect on employers.

There are no written policies about how citations should be sent, but the unwritten policy is that the AGO mails citations by both certified and regular mail. If the certified mail comes back unsigned, the office imputes knowledge to the employer based on the citation sent by regular mail. If there has been no contact with the employer, the AGO sends the citation to any address on file with the court.

d. Appeals

At the appeals level, there are problems with the Division of Administrative Law Appeals (DALA) being very slow and unresponsive to appeals. Cases can be tied up and delayed in the appeals process for years; it can take a long time to even get a hearing. Even after a hearing has taken place, because DALA does not have to follow rules of civil procedure since it is an administrative agency, there are no time limits for when the hearing officer needs to issue a decision. People can wait for years for a decision after their hearing.

e. Community Awareness

The AG's office launched a public awareness campaign on workplace rights in July 2008. The campaign's goal is to educate workers, especially non-English speaking workers, about their labor rights. The campaign includes multilingual newspaper and radio advertisements, a website, and informational pamphlets.

III. Statutory Language

M.G.L.A. 149 – Massachusetts General Laws Annotated – Labor and Industries Chapter

§ 2. Enforcement of chapter

The attorney general shall, except as otherwise specifically provided, enforce the provisions of this chapter, and shall have all necessary powers therefor.

§ 3. Inspections and investigations

The inspection and investigation carried on by the attorney general shall be a regular and systematic inspection and investigation of all places of employment, other than places of employment of persons engaged in domestic service in the home of the employer, and the conditions of safety and health pertaining thereto.

§ 27C. Penalties for violations of certain sections by employers, contractors, subcontractors or their employees

(a)(1) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof, or staffing agency or work site employer who willfully violates any provision of [section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B](#) or [159C](#) or [section 1A, 1B](#) or [19 of chapter 151](#), shall be punished by a fine of not more than \$25,000 or by imprisonment for not more than one year for a first offense, or by both such fine and imprisonment and for a subsequent willful offense a fine of not more than \$50,000, or by imprisonment for not more than two years, or by both such fine and such imprisonment.

(2) Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman or employee thereof, or staffing agency or work site employer who without a willful intent to do so, violates any provision of [section 26, 27, 27A, 27B, 27F, 27G, 27H, 148, 148A, 148B](#) or [159C](#) or [section 1A, 1B](#) or [19 of chapter 151](#), shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months for a first offense, and for a subsequent offense by a fine of not more than \$25,000 or by imprisonment for not more than one year, or by both such fine and such imprisonment. A complaint or indictment hereunder or under the provisions of the first paragraph may be sought either in the county where the work was performed or in the county where the employer, contractor, or subcontractor has a principal place of business. In the case of an employer, contractor, or subcontractor who has his principal place of business outside the commonwealth, a complaint or indictment may be sought either in the county where the work was performed or in Suffolk county.

(3) Any contractor or subcontractor convicted of willfully violating any provision of [section 26, 27, 27A, 27B, 27F, 27G, 27H](#) or [148B](#) shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of five years from the date of such conviction. Any contractor or subcontractor convicted of violating any provision of [section 26, 27, 27A, 27B, 27F, 27G, 27H](#) or [148B](#) shall, in addition to any criminal penalty imposed, be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works or from performing any work on the same as a contractor or subcontractor, for a period not to exceed six months from the date of such conviction for a first offense and up to three years from the date of conviction for subsequent offense. After final conviction and disposition of a violation pursuant to this paragraph in any court, the clerk of said court shall send a notice of such conviction to the attorney general, who shall publish written notice to all departments and agencies of the commonwealth which contract for public construction and to the appropriate authorities of counties, authorities, cities and towns that such person is prohibited from contracting, directly or indirectly, with the commonwealth or any of its authorities or political subdivisions for the period of time required under this paragraph. The attorney general may take such action as may be necessary to enforce the provisions of this paragraph, and the superior court shall have jurisdiction to enjoin or invalidate any contract award made in violation of this paragraph.

(b)(1) As an alternative to initiating criminal proceedings pursuant to subsection (a), the attorney general may issue a written warning or a civil citation. For each violation, a separate citation may be issued requiring any or all of the following: that the infraction be rectified, that restitution be made to the aggrieved party, or that a civil penalty of not more than \$25,000 for each violation be paid to the commonwealth, within 21 days of the date of issuance of such citation. For the purposes of this paragraph, each failure to pay an employee the appropriate rate or prevailing rate of pay for any pay period may be deemed a separate violation, and the pay period shall be a minimum of 40 hours unless such employee has worked fewer than 40 hours during that week.

(2) Notwithstanding the foregoing, the maximum civil penalty that may be imposed upon any employer, contractor or subcontractor, who has not previously been either criminally convicted of a violation of the provisions of this chapter or chapter 151 or issued a citation hereunder, shall be no more than \$15,000, except that in instances in which the attorney general determines that the employer, contractor or subcontractor lacked specific intent to violate the provisions of this chapter or said chapter 151, the maximum civil penalty for such an employer, contractor or subcontractor who has not previously been either criminally convicted of a violation of the provisions of this chapter or said chapter 151 or issued a citation hereunder shall be not more than \$7,500. In determining the amount of any civil penalty to be assessed hereunder, said attorney general shall take into consideration previous violations of this chapter or said chapter 151 by the employer, the intent by such employer to violate the provisions of this chapter or said chapter 151, the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of the public contract or payroll involved.

(3) In the case of a citation for violating any provision of [section 26](#), [27](#), [27A](#), [27B](#), [27F](#), [27G](#), [27H](#) or [148B](#), the attorney general may also order that a bond in an amount necessary to rectify the infraction and to ensure compliance with [sections 26](#) to [27H](#), inclusive, and with other provisions of law, be filed with said attorney general, conditioned upon payment of said rate or rates of wages, including payments to health and welfare funds and pension funds, or the equivalent payment in wages, on said public works to any person performing work within classifications as determined by the commissioner. Upon any failure to comply with the requirements set forth in a citation, said attorney general may order the cessation of all or the relevant portion of the work on the project site. In addition, any contractor or subcontractor failing to comply with the requirements set forth in a citation or order, shall be prohibited from contracting, directly or indirectly, with the commonwealth or any of its agencies or political subdivisions for the construction of any public building or other public works, or from performing any work on the same as a contractor or subcontractor, for a period of one year from the date of issuance of such citation or order. Any contractor or subcontractor who receives three citations or orders occurring on three different occasions, each of which includes a finding of intent, within a three year period shall automatically be debarred for a period of two years from the date of issuance of the third such citation or order or a final court order, whichever is later. Any debarment hereunder shall also apply to all affiliates of the contractor or subcontractor, as well as any successor company or corporation that said attorney general, upon investigation, determines to not have a true independent existence apart from that of the violating contractor or subcontractor.

(4) Any person aggrieved by any citation or order issued pursuant to this subsection may appeal said citation or order by filing a notice of appeal with the attorney general and the division of administrative law appeals within ten days of the receipt of the citation or order. Any such appellant shall be granted a hearing before the division of administrative law appeals in accordance with chapter 30A. The hearing officer may affirm or if the aggrieved person demonstrates by a preponderance of evidence that the citation or order was erroneously issued, vacate, or modify the citation or order. Any person aggrieved by a decision of the hearing officer may file an appeal in the superior court pursuant to the provisions of said chapter 30A.

(5) In cases when the decision of the hearing officer of the division of administrative law appeals is to debar or suspend the employer, said suspension or debarment shall not take effect until 30 days after the issuance of such order; provided, however, that the employer shall not bid on the construction of any public work or building during the aforementioned 30 day period unless the superior court temporarily enjoins the order of debarment or suspension.

(6) If any person shall fail to comply with the requirements set forth in any order or citation issued by the attorney general hereunder, or shall fail to pay any civil penalty or restitution imposed thereby within 21 days of the date of issuance of such citation or order or within 30 days following the decision of the hearing officer if such citation or order has been appealed, excluding any time during which judicial review of the hearing officer's decision remains pending, said attorney general may apply for a criminal complaint or seek indictment for the violation of the appropriate section of this chapter.

(7) Notwithstanding the provisions of paragraph (6), if any civil penalty imposed by a citation or order issued by the attorney general remains unpaid beyond the time period specified for payment in said paragraph (6), such penalty amount and any restitution order, together with interest thereon at the rate of 18 per cent per annum, shall be a lien upon the real estate and personal property of the person who has failed to pay such penalty. Such lien shall take effect by operation of law on the day immediately following the due date for payment of such fine, and, unless dissolved by payment, shall as of said date be considered a tax due and owing to the commonwealth, which may be collected through the procedures provided for by chapter 62C. In addition to the foregoing, no officer of any corporation which has failed to pay any such penalty may incorporate or serve as an officer in any corporation which did not have a legal existence as of the date said fine became due and owing to the commonwealth.

(c) Civil and criminal penalties pursuant to this section shall apply to employers solely with respect to their wage and benefit obligations to their own employees.

WORKING HANDS LEGAL CLINIC

Enforcement in the New Economy Project New York Wage Theft Enforcement Case Study

Note: *This memorandum is intended to foster discussion about viable options to improve recovery of wage theft through appropriate state agencies. The ideas contained herein reflect the opinions of the author and do not necessarily reflect the opinions of the organization or any person or persons affiliated with the organization or any state agency.*

I. Payment of Wages Law

In New York, a manual worker, also defined as a laborer, “shall be paid weekly and not later than seven (7) calendar days after the end of the week in which the wages are earned” or not less frequently than semi-monthly, if in accordance with certain exceptions or agreed to terms of employment. McKinney’s Labor Law § 191. The Commissioner has the power to: (1) investigate and attempt to adjust controversies equitably, (2) take assignments of claims for wages from employees and sue employers on wage claims thus assigned, (3) institute proceedings on account of any criminal violation of any provision of this article. McKinney’s Labor Law § 196.

Under New York law, every employer is required to notify his employees when they are hired, of the rate of pay and the designated regular pay day. The employer must also “establish, maintain, and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee.” The employer is also required to give each employee a statement with every payment of wages listing gross wages, net wages, and deductions. McKinney’s Labor Law § 195.

Any employee may file a complaint with the Commissioner regarding wage theft violations. This starts an investigation of the employee’s claim that results in a statement setting the appropriate remedy, if any. McKinney’s Labor Law § 196-a. An employer’s failure to keep adequate records does not bar the employee’s claim and places the burden on the employer to prove that the employee was paid wages, benefits, and wage supplements. *Id.* The Commissioner, in name of the state, may recover five hundred dollars (\$500) from any employer every time he or she fails to pay the employee’s wages. McKinney’s Labor Law § 197.

If the employee or the Commissioner prevails in a wage claim action against an employer, the court may grant the employee in addition to ordinary costs, a reasonable sum not exceeding fifty (\$50) dollars for expenses, which may be taxed as costs. The court may also grant reasonable attorney’s fees and, if the employer’s failure to pay was willful, an additional 25% of the owed wages as liquidated damages. An employee’s claim must commence within six years of the employer’s alleged failure to pay. McKinney’s Labor Law § 198.

Every employer who does not pay an employee’s wages in accordance with the law, shall be guilty of a misdemeanor for the first offence and, upon conviction, shall be fined not less than \$500 nor more than \$20,000 or imprisoned for not more than one year. If subsequent offenses occur within six years of the first conviction, the employer shall be guilty of a felony and, upon conviction, fined not less than \$500 nor more than \$20,000 or imprisoned for not more than one year plus one day, or punished by both fine and imprisonment for each offense. McKinney’s Labor Law § 198.

If the Commissioner finds that the employer was convicted of violating any of the provisions of the Payment of Wages Law or that the employer still hasn't paid the employee's wages after a judgment was entered against him and ten days passed after the deadline to appeal expired and no appeal is pending, the Commissioner may require the employer to deposit a bond. The commissioner has the discretion to decide the amount of the bond, together with two or more sureties. The bond will be payable to the commissioner on the condition the employer must pay the employee within two years in accordance with the provisions of this law. The bond is also conditioned on the employer's payment of any judgment entered against him.

The commissioner's **demand for the bond** may be made by certified or registered mail. If the employer does not furnish the bond within 10 days, the commissioner may bring an action in the Supreme Court on behalf of the state of NY to compel the employer to furnish the bond. If the employer does not provide the bond, the court will force the employer to stop doing business until he supplies the bond. The employer has the burden of proving either the bond is unnecessary or the amount is excessive. If the court finds there is just cause for the bond, and that it is reasonably necessary to secure prompt payment of the employee's wages, the court may enjoin the employer from doing business. The court has the power to make other orders appropriate to compel compliance. McKinney's Labor Law § 196 (d).

The commissioner has the power to issue any rules and regulations he determines and deems necessary in order to carry out the provisions of this law. McKinney's Labor Law § 199.

An employee who files a wage theft complaint will receive a written description of the anticipated processing of the complaint, including investigation, case conference, potential civil and criminal penalties and collection procedures. The employee will be notified in writing of any future case conference and given the opportunity to attend. Also, the employee will be notified in writing of any award regarding collection of back wages and civil penalties. If the commissioner seeks criminal penalties against the employer, the employee will be notified of the outcome of prosecution. McKinney's Labor Law § 199-a.

II. Theft of Services Law

This law is likely not applicable to theft of wages claims. The statute's language very specifically defines what constitutes theft of services under the law. Examples of these include: (1) knowingly paying with a stolen credit or debit card, (2) refusing to pay after services were rendered in a restaurant, hotel, etc, and (3) avoiding utilities payments. McKinney's Penal Law § 165.15. None of the laws' provisions include language sufficiently broad to apply to theft of wages claims.

III. How are New York's laws different from Illinois'?

Under Illinois law, theft of labor or services is committed when a person obtains the temporary use of labor of another which is available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the labor. 720 ILCS 5/16-3. However, the Attorney General conservatively interpreted the statute as requiring proof of multiple bounced checks to prove the statute's "knowing" standard. A person convicted of theft is guilty of a Class A misdemeanor. Id.

Under Illinois Deceptive Practices Law, a person commits a deceptive practice when there is an intent to defraud and the person issues a bounced check. Failure to have sufficient funds on the day the check was issued is prima facie evidence that the offender knows the check will bounce. A person can also violate the law when he issues a check exceeding \$150 in payment of labor services knowing that the check will bounce and subsequently, fails to provide funds after receiving notice the check bounced. A person convicted the first time is guilty of a Class A misdemeanor; if convicted the second time, the person is guilty of a Class 4 felony. 720 ILCS 5/17-1.