



August 31, 2018

Re: Critical issues facing low-wage workers in New York State

Dear candidate for Attorney General:

We are members of the New York City Low-Wage Worker Task Force an organization of attorneys and advocates for low-wage workers in New York City. We are writing to urge you to place the concerns of New York's low-wage workers at the center of your priorities. This letter describes a number of issues of critical importance in low-wage communities throughout the State. The letter also provides background about important litigation and legislative efforts that would help low wage workers.

Low-wage workers in New York City and throughout New York State have historically suffered under exploitative and unlawful working conditions and have lacked power in their workplaces, and 2018 has been no different. With the advent of the "gig" economy and the increase of contingent work, the exploitation of low-wage workers has risen dramatically. Workers are being misclassified as independent contractors at increasing levels, resulting in lower wages and the inability to access benefits such as unemployment insurance, workers compensation, and medical insurance. Workers of color are facing higher levels of discrimination and harassment in the current climate. Immigrant workers in particular are at risk of exploitation, retaliation, and deportation if they try to enforce their rights. Low-wage female workers also face sexual harassment and violence in the workplace.

We would welcome the opportunity to speak with you about these issues in the near future. In addition, we ask you to commit that, as Attorney General, you and your staff would hold a quarterly meeting with the Low-Wage Worker Task Force, so that we can be in continuing conversation about the struggles of New York's low-wage workers, and what the Attorney General's office can do to combat the difficulties they face.

The New York Attorney General is uniquely positioned to use the law to improve the lives of vulnerable New Yorkers. We hope that you will commit to using your position in support of New York's low-wage workers.

The following are the most critical initiatives in the issue areas we work on:

1. Immigrant Worker Exploitation and Retaliation

The current political climate has resulted in a significant increase in the frequency and severity of retaliation against immigrant workers who assert their rights in the workplace. This includes employers who: fire workers for complaining about illegal working conditions; threaten workers with immigration consequences, including deportation, for complaining; and impede workplace investigations by telling workers that investigators are ICE (Immigration and Customs Enforcement) agents.

The following are our priorities in this issue area:

- Prosecute cases involving claims brought by immigrant workers reporting retaliation, particularly threats of deportation and other immigration consequences;
- Issue U visa certifications for immigrants who are victims of qualifying criminal activities, including but not limited to victims of retaliation who are subject to practices that amount to perjury, obstruction of justice, and witness tampering;
- Pursue the maximum amount of liquidated damages for retaliation permitted under NYLL §215, currently set at \$20,000 per person per violation; and
- Publicize judgments and settlements obtained by the Attorney General's office against employers who engage in retaliation.

2. Wage Theft

With over a billion dollars stolen from workers every year, New York is experiencing a wage theft epidemic. The ability of low-wage workers to collect their stolen wages is limited by inadequate laws which prevent judgments from being enforced as well as extremely limited enforcement resources at the New York State Department of Labor, which employs approximately 100 investigators statewide to handle more than 5,000 wage claims a year.

The SWEAT (Securing Wages Earned Against Theft) legislation would create a wage lien remedy for all employees and grounds for attachment when wages are stolen. This bill would prevent wage thieves from hiding all of their assets so that money is still available to pay the worker the wages they've earned. This measure passed the Assembly but not the Senate. More information can be found here: <https://www.nysenate.gov/legislation/bills/2015/A5501>

3. The ABC Test: Protecting Workers from Misclassification

New York is behind the curve in addressing employee misclassification. Eighty years after the passage of New Deal labor laws, there is still significant confusion over who is an employee; moreover, fact-intensive inquiries based on common-law standards abound, and allow misclassifying employers to claim that each minor tweak they make to their workers' working conditions can change the entire analysis of employee status.

Applying the ABC test to all workers in New York would protect vulnerable low-wage misclassified employees. The ABC test, which has already been adopted for workers in the

construction and commercial goods transportation industries in New York and for all workers in several other states, essentially finds any workers who perform services within the employer's usual course of business to be employees. Under the ABC test, the burden of showing that a worker is an independent contractor is on the putative employer. Application of the test should be expanded to all workers in New York.

4. Responding to Forced Arbitration by Increasing Public Enforcement Capacity

As a result of inadequate public enforcement resources and recent court decisions that undermine private enforcement actions by limiting class actions and forcing workers into arbitration, workers' ability to enforce their rights has been severely curtailed.¹ Employers are moving quickly to have their employees waive their rights to bring any employment or wage-related disputes in court and to instead require that these disputes be arbitrated. We urge you to pursue litigation in cases where arbitration agreements would effectively prevent workers from coming together and enforcing their rights.

The EmPIRE (Empowering People in Rights Enforcement) Worker Protection Act, would allow the Commissioner of Labor to delegate state enforcement authority to private actors, so that individuals can bring public enforcement actions on behalf of the state to enforce the New York Labor Law in pursuing wage theft and other violations of the Labor Law.

5. Giving a Fair Chance to People with Arrest or Conviction Records

While it is now widely agreed that our criminal justice system penalizes many people unfairly and discriminates against black and brown people, many New Yorkers with past arrests and convictions continue to struggle to re-enter society. Success in the workforce is a critical stabilizing factor for formerly justice-involved individuals, yet many face roadblocks as they try to gain financial independence.

The following would significantly help formerly justice-involved individuals get a fair chance:

- **Preventing Employment Discrimination Against People Whose Criminal Cases Have Been Adjourned in Contemplation of Dismissal.** The New York State Human Rights Law prohibits employers and licensing agencies from discriminating against individuals whose criminal cases have been terminated in their favor. Most misdemeanor arrests that are terminated in an individual's favor are first "adjourned in contemplation of dismissal," or ACD'd. A criminal case is only ACD'd if the prosecutor believes that the defendant should not be convicted of any offense; an ACD does not involve a guilty plea, and the defendant may be entirely innocent. Only a tiny percentage of ACD'd cases are ever returned to the calendar for conviction. Yet, New York State currently permits

¹ For example, hundreds of millions of dollars of unpaid Uber drivers' wages will not be recovered unless the New York State Attorney General takes action. While six members of New York Taxi Workers Alliance are pursuing a wage theft claim in federal court because they opted out of the arbitration clause in Uber's contract, approximately 80,000 drivers who did not opt out of arbitration will never recover the millions unlawfully deducted from their pay.

employers and licensing agencies to discriminate against workers because of an ACD'd case until the conclusion of the six-month to one-year adjournment period. The following measure would protect low-wage workers' ability to financially support themselves and their families by extending the protections of the New York State Human Rights Law to individuals whose criminal cases have been ACD'd:
<https://www.nysenate.gov/legislation/bills/2017/s3205>.

- **The Statewide Fair Chance Act.** Expanding New York City's "ban-the-box" legislation to the entire state would give job seekers the opportunity to be considered on their merits, and recourse against employers who use unlawful blanket bans on applicants with records. Fair Chance legislation prohibits employers from inquiring about applicants' criminal records until after making a conditional job offer. Once an offer has been made and the employer has performed a background check or required the applicant to disclose their record, the employer is required to provide the applicant with a detailed Article 23-A analysis addressing any concerns, and to hold the job open for at least three business days to give the applicant the opportunity to respond to the employer's concerns.
- **Sealing / Expungement Legislation.** Criminal Procedure Law 160.59, enacted in 2017, allows individuals with convictions in New York State to have their cases sealed after ten years, as long as they have no more than two convictions, only one of which can be a felony. Violent felonies, A felonies, and sex offenses are not eligible for sealing. While this law was a good start, it excludes thousands of low-wage workers, including those with multiple convictions that are more than ten years old and those with more recent but very minor convictions. Expanding the kinds of cases that can be sealed will open up opportunities for individuals with old records to join the workforce and build stable lives.
- **Pursue Complex FCRA Litigation.** The Attorney General should work with his or her counterparts in other states to go after background check companies that are violating the federal and state-level Fair Credit Reporting Acts, in order to ensure that these companies respect the privacy rights of individuals with criminal convictions and accurately report their information to potential employers.

6. Whistleblower Legislation

New York State provides very little, if any, protection from retaliation for workers who disclose violations of law by their employers. Whistleblower legislation such as <https://www.nysenate.gov/legislation/bills/2017/A5757> would provide real protection from retaliation.

7. Preventing Intimidation Based on Non-Compete Clauses

Increasingly, we are seeing low-wage workers whose employers require them to sign legally unenforceable non-compete clauses that purport to prohibit the employees from going to work for a different sandwich maker, nail salon, home health agency or even consumer of home care services. These provisions are used to intimidate workers to prevent them from leaving jobs that are exploitive. We have even seen employers sue workers under such clauses, only to drop the

lawsuit when the worker obtains counsel. These tactics violate prohibitions against coerced labor and likely violate the Thirteenth Amendment prohibition against involuntary servitude.

Targeted criminal and civil enforcement of labor trafficking laws against employers that deploy non-compete clauses against low-wage workers would deter such practices.

8. Farmworkers

Farmworkers in New York State are excluded from multiple state laws -- including labor laws requiring overtime pay and a day of rest, and the State Employment Relations Act (“SERA”) -- which protect other workers in the state. In New York, one of the country’s major agricultural states, as many as 100,000 workers are affected by these exclusions.

The exclusion of farmworkers from the SERA (which protects collective action by workers) is currently being challenged in the case *Hernandez v. State of New York* (2143-16, Supreme Court, Albany County) and is presently on appeal to the Third Department. Legislation is also pending, the Farmworker Fair Practices Act, A1223/S2721, to amend state law so that farmworkers are covered by laws that apply to other workers in the State.

9. Protect workers from discrimination where there are less than four employees

Currently, with limited exceptions for domestic workers, the State Human Rights Law does not protect workers from discrimination if the employer has fewer than four employees. Smaller employers are free to discriminate on any or all of the grounds otherwise prohibited in hiring, firing, taking other adverse actions, or harassing a worker. Workers such as legal secretaries or receptionists in a one-person medical practice are presently subject to this type of offensive treatment. Amending the State Human Rights Law to eliminate the requirement that an employer have at least four employees would protect all employees from discrimination.

10. Requiring LLCs to name their principal officer and update periodically

As mentioned above, one of our great frustrations is the inability to enforce judgments against employers that steal their workers’ wages or otherwise exploit them. One of the means by which unscrupulous employers evade legal responsibility for exploitation and abuse is by creating corporations that they control without ever identifying themselves to their employees. Even though the individuals who control the workers’ employment are “employers” under the Labor Law, if the workers cannot identify who they are, particularly where there are language barriers, the individuals can avoid being sued and can close down the corporation or deplete its assets if the corporation is sued. Requiring all LLCs to identify certain responsible individuals, e.g., officers and managers of the corporation, and requiring updates to that information would help low-wage workers recover their stolen wages.

11. Prevent disparate impact by Coordinating between Labor and Civil Rights Bureaus

We often see workplaces that are not only exploitative but segregated by sex and race, nationality, or ethnicity. Wage theft is sometimes directed at a particular disfavored group. We

also see unfair practices that disparately impact certain groups. For example, policies that impact overall earnings, such as just-in-time scheduling, can also have disparate impacts on people with caregiving responsibilities or their own need for medical appointments. Proactive coordination between the Labor and Civil Rights Bureaus would help to address these overlapping issues of exploitation and discrimination.

12. Protect New York's Most Exploited Workers

We urge the next Attorney General to maintain an open dialogue with the New York City Low-Wage Worker Task Force to discuss referrals of cases that would benefit from the AG's involvement. Our organizations, through our partnerships with community based groups and worker centers, can help the Attorney General identify particularly egregious cases of wage theft and scams that prey on low wage and immigrant workers. In our experience, industries such as building services, home health services, construction and beauty salons are often rife with wage and hour violations. In some cases, such as with the Building Services Wage Order, State policies end up advancing the interests of the industry at the expense of the least powerful workers.² We also encourage the next Attorney General to continue to pursue criminal penalties against employers who engage in violations of the New York Labor Law.

Please contact Nicole Salk, Brooklyn Legal Services, at (718) 237-5544 for more information.

Sincerely,

The Low-Wage Worker Task Force

The following organizations have signed on to this letter: A Better Balance, Catholic Migration Services, Community Development Project (of UJC), Community Service Society of New York, Latino Justice, The Legal Aid Society, Mobilization for Justice, Legal Services NYC, Make the Road NY, National Center for Law and Economic Justice, New York Legal Assistance Group, New York Taxi Workers Alliance, UAW Region 9A, Volunteers of Legal Service, and Youth Represent.

²The Building Services Wage Order (BSWO) was enacted in 1953 (Minimum Wage Order Number 9) to ensure that janitors/porters were paid a fair wage. When initially enacted, the BSWO protected janitors /porters by establishing a living wage but it has come full circle and it now stands as a barrier to its stated goal. Janitors in some buildings are paid nothing but instead are given a small, broken down, and often illegal apartment as their only compensation despite the BSWO directive that employers can only credit 85% of the 1975 rental rate of the janitor's apartment towards wages; employers regularly ignore this legal mandate. The BSWO uses a convoluted formula to determine the janitor's rate of pay. A janitor's weekly rate of pay is determined by multiplying a prescribed rate by the number of apartments in their building, regardless of the hours the janitor spends working per week. That method causes many janitors to receive less than the statutory minimum hourly wage and has the unintended result of loss of critically needed wages to this class of low-wage workers.