

**Testimony of Lorelei Salas**  
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**Before the**  
**New York State Assembly Standing Committees on**  
**Labor and Judiciary**

**Hearing on Wage Theft in New York State**

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The Department of Consumer Affairs (DCA) protects and enhances the daily economic lives of New Yorkers to create thriving communities. The agency fulfills its mission through educating, empowering and protecting residents and neighborhoods with low incomes, enforcing consumer protection and licensing laws, and through the its Office of Labor Policy and Standards (OLPS).

OLPS is responsible for enforcing municipal labor standards, educating workers and businesses about workplace protections and standards, providing intake and resource referrals for workers who encounter violations of their rights, engaging in policy work on behalf of workers, and conducting original research to improve workplace standards.

OLPS is the latest culmination of New York City’s growing agenda aimed at improving workplace conditions for its workers. OLPS has developed unique expertise in identifying and pursuing violations of City workplace rights and understanding and addressing the most pressing problems facing some of the most vulnerable workers. Beyond the laws it is empowered to enforce,<sup>1</sup> OLPS’ window into the challenges facing workers includes the issue of endemic wage theft in low-wage industries. Whether it be in cases OLPS investigates that present clear wage and hour violations, at OLPS’ annual public hearing on the state of workers’ rights, at smaller convenings OLPS hosts throughout the year, during meetings and collaboration with worker organizations, or individual complaints filed with OLPS, the prevalence of wage theft features prominently in workers’ narratives. And, where wage theft is present, there are almost certainly violations of other labor standards laws, including those enforced by OLPS.

OLPS submits these comments to the New York State Assembly Committees on Labor and Judiciary to share its experience in labor enforcement because the obstacles in the prevention and adjudication of wage theft faced by New York State are not unlike the challenges OLPS faces in holding employers accountable for their municipal labor law obligations. New York City has a significant local interest in compliance with labor laws, and in the real costs to local economies and communities when those laws are broken, especially since NYC’s economy includes almost

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<sup>1</sup> N.Y.C. Admin. Code § 20-901 et seq. (2017) (Paid Safe and Sick Leave Law); N.Y.C. Admin. Code § 20-926 et seq. (2015) (Mass Transit Benefits); N.Y.C. Admin. Code § 20-1201 et seq. (2017) (Fair Work Practices); N.Y.C. Admin. Code § 20-1301 et seq. (2017).

half of all private sector jobs in New York State.<sup>2</sup> Some of the lessons learned from OLPS' enforcement include the following:

1. Addressing Workplace Retaliation Must be a Priority in Labor Enforcement.
2. Proactive, Systemic Enforcement by Government Agencies is Needed to Combat Wage Theft and Other Workplace Violations.
3. Industry-wide cultures of Non-compliance with Labor Laws Require Sectoral, Multi-dimensional Directed Enforcement.
4. Creative Policy Solutions Need to Accompany Robust Outreach and Education to Fill a Gap in Workers' Knowledge About Their Rights.

### **Addressing Workplace Retaliation Must Be a Priority in Labor Enforcement.**

A critical problem faced by the workers that OLPS serves is the insidious impact of retaliation or the threat of retaliation on workers' exercise of any workplace rights. This is pronounced for workers who are particularly vulnerable to wage theft, such as immigrants, women, and workers of color.<sup>3</sup> And this problem appears to be worsening under the current federal administration.<sup>4</sup> Racist, sexist, and xenophobic rhetoric and policy choices have served to weaken existing standards and their enforcement.

Immigrant workers face additional obstacles in seeking to assert their rights. While labor standards generally apply regardless of immigration status, the absence of work authorization, compounds employers' already-potent threat of retaliating against workers through termination. Additionally, immigrant workers express a concern for losing a status already obtained, and being detained and deported, greatly undermining workers' willingness to report violations of these rights.

It can be extremely difficult to undo the harm caused by retaliation against workers who exercise their rights, especially if a worker has been fired or seriously disciplined. Such action by the employer sends a message to other workers: complain about workplace issues at your peril. In response to the chilling effect that retaliation, and the fear of retaliation, has on the realization of workplace rights, OLPS has designed and implemented a fast-track retaliation program. The "fast-track" retaliation program assigns cases of alleged retaliation to a specialized team which prioritizes contact with the worker and employer within just a few days of the first contact. The program expedites worker complaints about unlawful termination or threats of termination to

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<sup>2</sup> OFFICE OF THE NEW YORK STATE COMPTROLLER, NEW YORK CITY EMPLOYMENT TRENDS 2 (2018), <https://osc.state.ny.us/osdc/rpt10-2018.pdf>. As of October 2018, New York State had 8,218,800 private sector jobs. NYS Department of Labor, *NYS Unemployment Rate Dips to 4.0%, Matching All-Time Low*, <https://labor.ny.gov/stats/pressreleases/pruistat.shtm> <https://www.labor.ny.gov/stats/nyc/>. And New York City had 3,996,300 private sector jobs. NYS Department of Labor, *Labor Statistics for the New York City Region*, <https://www.labor.ny.gov/stats/nyc/>.

<sup>3</sup> NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, THE STATE OF WORKERS' RIGHTS IN NEW YORK CITY 11, (2017), <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2017.pdf>.

<sup>4</sup> NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, THE STATE OF WORKERS' RIGHTS IN NEW YORK CITY 22 (2017), <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2017.pdf>.

minimize the impact of retaliation on the worker and the entire workforce to ensure that working New Yorkers know they can assert their municipal labor rights without fear of reprisal.

OLPS' fast-track retaliation cases have involved small employers with ten employees and large employers with hundreds of employees across a variety of industries, including fast food, retail, restaurant, security services, childcare, cleaning services, construction, and cultural institutions. Since early 2018, OLPS's fast-track team has: resolved 15 cases after investigation, averaging 50 days from intake to final resolution; recovered \$36,255 for 12 unlawfully fired workers and separately secured the reinstatement of 3 workers; and filed 2 cases at the New York City Office of Administrative Trials and Hearings (OATH) where a pre-litigation resolution with the employer was not reached. For the most vulnerable workers, threats of retaliation operate as a barrier to the exercise of any and all other workplace rights. Building a compelling, credible enforcement deterrent to employer retaliation has been a critical OLPS priority and should be similarly prioritized by agencies and organizations that enforce workers' rights.

### **Proactive, Systemic Enforcement by Government Agencies is Needed to Combat Wage Theft and Other Workplace Violations.**

Effective enforcement requires taking an approach that will impact employers' calculus around compliance: a credible risk of being caught that will discourage violations before they happen. In addition to its complaint-based enforcement practice, in 2018 OLPS devoted substantial resources to building its expertise in the conduct of directed investigations. Such a strategy is a necessary complement to complaint-based enforcement, which on its own is often insufficient to reach the most vulnerable workers because of fears about retaliation or simply lack of knowledge about their rights. Directed investigations can also concentrate enforcement on particularly problematic sectors and change prevailing practices industry by industry.

The need for a systematic approach to shifting practices in industries where workers face barriers in reporting violations should inform enforcement in those industries. Government agencies must take a tailored approach to workers, sectors, and issues to ensure that workers who have historically been excluded from structures of power play a role in informing the development and application of policies that most directly impact them. This is part of the reason why OLPS engages deeply with worker organizations and stakeholders and hosts a variety of worker convenings and hearings each year. And OLPS' research assists in identifying problematic industries where proactive enforcement will have a meaningful impact on the lives of workers. Government agencies must adopt a mode of enforcement that is more deliberative and less reactive than a traditional complaint-based model, making the best use of limited resources.

### **Sectoral, Multi-Dimensional Directed Enforcement: Where One Violation is Found, Others Are Likely Occurring.**

In 2017 OLPS initiated its first large directed investigations initiative. The investigations targeted approximately 40 agencies in the home care industry because of the high rates of paid sick leave complaints OLPS had received against home care agencies and because the workforce is predominately women, immigrants, and workers of color. In addition to compliance with the Paid Sick Leave Law, OLPS examined compliance with wage and hour and wage parity standards to assess whether workers were paid the correct amounts for any sick time taken.

OLPS' directed investigations initiative of the home care industry revealed that employers who violate one set of workplace laws—wage and hour—are likely to have violated another—NYC Paid Sick Leave. The home health agency investigations found a range of consistently recurring problems, including:

- **Egregious denials of paid sick leave rights.** Cases of widespread denials of paid sick leave requests, workplace-wide restrictions on the use of paid sick leave, and retaliation for the exercise of paid sick leave rights.
- **Wage and hour violations.** Significant violations of minimum wage and overtime rights, hours shaving, inadequate compensation for 24-hour shifts, and other violations.
- **Lack of access to paid sick leave rights.** Pervasive violations of the notice and policy provisions of the PSSL law that create real obstacles to workers knowing about or how to access their paid sick leave rights.
- **Lack of transparency around wage parity.** Consistent lack of meaningful disclosure to workers of the benefits and supplements used to comply with wage parity, and the provision of low-level benefits raising serious questions about actual compliance with the law.
- **Lack of stability.** Persistent economic insecurity related to a lack of stable or sufficient hours of work.
- **Discrimination.** Favoritism and discrimination among the coordinators who control access to work assignments.
- **Harassment on the job.** Incidents of on-the-job harassment by clients, exacerbated by the private nature of home care work.

OLPS has resolved 22 HHA investigations with consent orders that cover 20,000 employees, and recovered more than \$65,000 in combined relief for workers and penalties. The consent orders require employers to undertake significant steps to further compliance, such as appointing a compliance officer and ensuring training for employees. In September 2018, OLPS filed 11 HHA cases at the Office of Administrative Trials and Hearings. Several of these cases include significant and pervasive violations of workers' paid sick leave rights and could result in substantial payments of relief for over 13,500 workers who have been denied access to paid sick leave.

Additionally, for those violations that OLPS uncovered over which it does not have jurisdiction, OLPS partnered with the New York State Office of the Attorney General (NYSOAG) in two cases covering over 6,000 home health aides. In these cases, OLPS' preliminary investigation revealed violations of workers' paid sick leave, wage and hour, and wage parity rights. Because the HHA investigations also revealed evidence of non-compliance with the wage parity law, OLPS referred 13 cases to the NYSDOL and the Office of the Medicaid Inspector General for further investigation.

OLPS does not enforce New York State Labor Law, nevertheless, it knows that wage theft, and a host of other workplace violations, plague the workers it serves beyond the home care industry. Holistic enforcement of labor standards relies on a variety of different agencies. Partnerships across those jurisdictions are critical in ensuring that a strong message of intolerance for non-compliance is sent to employers.

### **Using Lessons Learned from Directed Enforcement to Strengthen Policy: Creating Transparency for Home Care Aides About Their Rights under NYS' Wage Parity Law.**

The 2017 HHA investigations initiative included interviews with close to 500 home care aides about their access to paid sick leave, pay practices, and receipt of benefits under the New York State wage parity law, which guarantees aides an elevated rate of compensation on Medicaid-funded work. These interviews revealed that many workers did not understand their rights or entitlements under the Wage Parity Law.

While the lack of transparency under the Wage Parity Law has led to a different form of wage theft than what is prohibited by the Wage Theft Prevention Act, under both laws workers benefit from greater transparency and information. OLPS has considered certain policy changes that could inform the changes the State seeks to make to the Wage Theft Prevention Act. In the case of wage parity, OLPS proposes: 1) requiring employers to make specific, itemized disclosures to workers on their pay stubs, as is already required by N.Y. Labor Law Section 195(3), about their wage parity benefits counted towards the worker's rate of pay; 2) clarification that employers cannot count the accrual of sick leave and the actual usage and payment of sick leave as two independent payments to the worker since the worker is only, in fact, paid once; and 3) establishing a clear complaint process for workers whose rights may have been violated.

The HHA investigations highlighted just one concrete example of workers' limited knowledge and understanding about what they are entitled to under labor laws and where the State might work to fill that gap. These gaps persist in all areas of labor and employment law, whether it be minimum wage, overtime, the tip credit, or the right to paid sick leave in New York City. OLPS also knows that limited knowledge about workplace rights by low-wage and part-time workers in particular means that these workers are less likely to assert those rights.<sup>5</sup>

The laws enforced by OLPS have a notice of employee rights requirement at the commencement of employment, not dissimilar to the disclosure required under the Wage Theft Prevention Act. These notices are available on the DCA website. And OLPS has strengthened notice requirements through rulemaking. OLPS rules specify the appropriate forms of delivery to ensure that workers receive the notice. And, to address the multiple languages spoken in New York City's workforce, OLPS' rules include language requirements for these notices. Additionally, OLPS frequently includes in its settlements training and notice requirements so that workers are aware of their rights.

In addition to legally-required notices, OLPS devotes significant resources to arming workers with knowledge. Based on DCA's initial roll-out of the Paid Sick Leave Law in 2014, we know

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<sup>5</sup> NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, THE STATE OF WORKERS' RIGHTS IN NEW YORK CITY 28 (2017), <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2017.pdf>.

that investment in widespread public awareness marketing is impactful. OLPS and other agencies must continue to make worker education a priority, and devote resources to publicizing changes in the law, posting information in public places like the subways and buses, making resources available electronically and in as many languages as possible, as well as in formats accessible to those with limited literacy, and conducting town hall meetings and know-your-rights workshops for workers. In short, educating workers about their rights must be a multi-pronged approach that includes enforcing and strengthening legal obligations to provide notices, conducting trainings, advertising, and making the information accessible in multiple languages.

## **Conclusion**

OLPS has the benefit of being established amidst the momentum of a smart, strategic grassroots movement that is visioning and demanding more from local government. While many of the challenges OLPS encounters might be decades-old, it has leeway to creatively respond to these challenges and adapt a response based on what is effective. The experience as an incubator of local labor standards enforcement strategy informs OLPS' future work and can also spark innovative ideas that can be adapted to the State's labor enforcement and beyond.