

Clearinghouse REVIEW

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Advocacy Stories

The Campaign to Pass New York's Wage Theft Prevention Act

Every payday thousands of New York workers are robbed of their wages. In New York City alone more than \$18 million is stolen by employers from low-wage workers each week—adding up to nearly \$1 billion each year (Annette Bernhardt et al., National Employment Law Project, *Working Without Laws: A Survey of Employment and Labor Law Violations in New York City 44* (2010), <http://bit.ly/bZ5qMx>).

Nationwide over a quarter of low-wage workers receive less than the minimum wage rate required by law: 60 percent of those are underpaid by more than \$1.00 per hour (Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 21* (2009), <http://bit.ly/m2Xdef>). Of low-wage workers who work more than forty hours per week, 76 percent do not receive the legally mandated time-and-a-half overtime rate (*id.* at 21–22). These workers average eleven hours of unpaid or underpaid overtime each week (*id.*). Workers who speak out against abuse are routinely subjected to retaliation: firing, demotion, harassment, stalking, or threats to “call immigration” on the workers or their friends and family members (*id.* at 24).

At Make the Road New York we have been using direct action, organizing, and legal services to help immigrant workers challenge wage abuses for the past fourteen years—and winning millions of dollars in stolen wages and damages. Make the Road New York is a deeply rooted membership organization based in high-density immigrant communities throughout New York State. Our community centers in Brooklyn, Queens, Staten Island, and Long Island combine strategic policy advocacy, legal and educational support services, leadership development, and community organizing. Make the Road New York's 9,000 dues-paying members work together in active member-led committees around issues, such as wage theft, critical to low-income, immigrant workers and their families. Until recently, however, our organizing and legal advocacy failed to alter the economic and political landscape that permitted, and even created, perverse economic incentives for employers to steal wages. Indeed, New York's labor laws were so weak that unscrupulous employers built the low risk of getting caught, and the miniscule penalties they had to pay, into the cost of doing business. Breaking, rather than following, New York's most basic worker protection laws made better business sense.

For years, Make the Road New York has been representing workers such as Luis, a supermarket bagger from the Bronx. Luis worked fourteen-hour days, six days a week, for many years and received no wages at all—he lived off customer tips, \$40 or so each day in total. In New York City wage theft is pervasive in every low-wage industry, including but not limited

to restaurant, manufacturing, garment, commercial laundry, retail, nonunion construction, security, and nonunion building superintendent work.

Make the Road New York's Workplace Justice Project was created in response to the almost total lack of employer accountability for labor law compliance throughout New York State. The core of the Workplace Justice Project is our active Brooklyn-based and Queens-based Workplace Justice Project committees. Each committee has hundreds of active members (primarily low-wage immigrant workers) who participate in weekly campaign planning meetings, frequent direct action (such as protests or boycotts), political and skills-based training sessions, solidarity activities, and policy advocacy campaigns. Our advocacy support ranges from direct negotiation to resolve cases to filing administrative complaints to litigating in federal court. Collaboration with enforcement agencies, partnerships with progressive local unions, and attention targeted to particular high-violation industries (such as supermarkets and retail outlets) or geographic areas (particular neighborhoods in Brooklyn and Queens) have broadened the impact of our work.

Integrating community-based organizing with legal advocacy is effective in creating accountability for particular employers and winning significant back wages and damages for individual workers, but this strategy does not necessarily promote long-term change. While our community organizing tactics were successful in confronting individual cases of worker exploitation, immigrant workers continued to be victimized by wage theft. Hence members of Make the Road New York's Workplace Justice Project suggested, in 2009, that we launch a policy campaign to confront wage theft. Because our members have been combating wage theft, facing retaliation, and attempting to collect on judgments when they win, wage theft became a policy priority. Our legal team's insights about the pitfalls and gaps in New York labor law fed discussions of the content, scope, and structure of a draft bill. The following is an analysis of the campaign to craft, introduce, and win passage of the Wage Theft Prevention Act—which transpired in record time between its introduction in March 2010 and Gov. David Paterson's signature in December (Wage Theft Prevention Act, S. 8380/A. 11726 (Dec. 14, 2010) (codified at N.Y. LABOR LAW §§ 195–199, 215–219, 661–663 (McKinney 2011))). We hope that advocates who are tackling the endemic problem of wage theft in their own communities across the country can glean lessons from our work.

How We Drafted the Bill

To draft the Wage Theft Prevention Act, Make the Road New York's legal director and staff carefully reviewed the labor laws of more than twenty states, as well as the Fair Labor Standards Act, for several months to determine what we could borrow

from other jurisdictions, where improvements could be made, and what gaps remained to be filled. We also analyzed the New York Labor Law to understand fully the interplay between the various articles and map out the range of provisions that would need revision. With this research in hand, we engaged wage-and-hour legal experts from New York and other jurisdictions; the experts vetted draft text, contributed insights, and helped develop the bill. When the law amending key sections of the New York Labor Law was passed, it distilled our four key policy goals (N.Y. LABOR LAW §§ 195–199, 215–219, 661–663).

First, the Wage Theft Prevention Act puts a real price tag on breaking the law. Most important, in its final form the Act quadruples the liquidated damages that employers must pay workers (in addition to the wages owed) from 25 percent to 100 percent. The law provides, for the first time, up to \$2,500 in damages to each worker when employers fail to give pay stubs or notices of wage rates at the time of hire. The law tolls New York's six-year statute of limitations during the pendency of a New York Department of Labor investigation; this permits workers to go to court to recover any remaining wages not collected through the agency process. These enhanced damage awards, coupled with the tolling of the statute of limitations, set economic incentives for employers to follow, not break, the law.

Second, the Wage Theft Prevention Act enhances protections against retaliation for workers who enforce their rights and report abuse. While retaliation was already illegal under New York law, loopholes and inadequate remedies made those protections hollow for many low-wage or undocumented workers. For example, smart employers knew that a threat to call immigration was more than enough to scare workers away from pursuing legal claims. However, threats, without actual action, were not obviously illegal under the law. Likewise, the previous version of the law prohibited only retaliation by individuals who were themselves "employers." When, for example, two Make the Road New York members called a contractor who owed them thousands of dollars and asked to be paid, the contractor's wife would answer the phone—threatening to call the police and immigration if the workers continued to demand the pay they had earned. Under the prior law, the wife was not herself liable for her threats (she was not an "employer") and proving that the contractor was directing her, and thus liable, would be all but impossible. The Wage Theft Prevention Act closes this loophole by prohibiting retaliation by any person, not simply those who meet the technical definition of an "employer."

The most critical change that the Wage Theft Prevention Act made in the New York Labor Law's retaliation provisions is the new liquidated damages provision. Now workers may be fined up to \$10,000 for each instance of retaliation. This change is essential because when low-wage workers are fired illegally, economic necessity forces them to find new work almost immediately. Back-wage awards for a few days out of work are inadequate compensation for the experience of retaliation. Likewise, undocumented workers often face difficulty obtaining back-wage awards because of immigration status problems. Now victims of retaliation will each be eligible to receive up to \$10,000 in damages (in addition to current remedies) for each instance of retaliation. This amount will truly compensate victims and deter future abuse.

A little-noted change expands employers' criminal liability for retaliation. Criminal penalties used to be triggered only by retaliation for worker complaints about nonpayment of the minimum wage or overtime. The Wage Theft Prevention Act now provides criminal penalties for retaliation against workers for complaints of any violation of any section of the entire New York Labor Law, including the unemployment insurance, health and safety, and farmworker sections. The Act gives the Department of Labor the same powers as courts to remedy retaliation—among them the power to order reinstatement. Because most workers file complaints with the Department of Labor, rather than in court, the department must have powers to prevent and remedy retaliation.

Third, the Wage Theft Prevention Act provides new tools to help workers actually recover the wages that courts or the Department of Labor order paid. For example, the Department of Labor may now administratively order employers who default after an administrative order to provide an accounting of assets (or pay a \$10,000 penalty for refusing). Likewise, wage judgments will now automatically increase by 15 percent if employers fail to pay within ninety days (to help shift the cost of collections from workers to the employers). The Department of Labor may file final orders in court in the name of the workers, not simply the name of the state, to allow workers to undertake collection efforts.

Fourth, the law has provisions to enhance transparency and give information to workers, employers, and the public. For example, existing preemployment notices to workers about wage rates must be given annually, with greater information, and in multiple languages as translated by the Department of Labor. Payroll record and pay-stub requirements were updated to include relevant information and to end inconsistencies between the statute and various regulations. The Act also authorizes the Department of Labor to order employers to post notices of violations, for view either by the public or by employees, so that egregious instances of wage theft are publicized.

Admittedly we did not get everything on our wish list. For example, the original bill had a wage lien that would have allowed workers to encumber employers' assets before a final judgment in order to preserve assets for collection. This provision had to be removed during negotiations. Similarly a provision that would have made fairly egregious cases of wage theft a felony on the first offense had to be eliminated to help advance the bill. Even without these provisions, however, the Act makes New York's Labor Law one of the strongest—if not the strongest—in the country for all workers. Notably nearly all of the Act's provisions—the increased liquidated damages, the right to improved pay stubs and wage rate notices, and protections against retaliation—will benefit farmworkers.

A Five-Year Campaign in Nine Months?

The campaign to win the Wage Theft Prevention Act moved, by all standard measures of Albany practice, at breakneck speed. Most advocates and elected officials read the original twenty-six-page draft and declared, "This is a five- or six-year bill." Yet Governor Paterson signed the bill into law less than nine months after its introduction.

On March 12, 2010, the Wage Theft Prevention Act's sponsors, New York State Sen. Diane Savino and New York State Assemblyman Carl Heastie, introduced identical versions of the Act in their respective chambers. During March, April, May, and June advocates and the sponsors met with as many allies, elected officials, and staff members for key Assembly and Senate committees as possible. No official negotiations took place between the houses, or between either house and the executive, however. Advocates worked with our sponsors to facilitate discussions with central staff members of each house in order to understand which provisions of the Act were acceptable, which provisions were favored, and which provisions needed amendment.

In June the Senate introduced S. 8380, an amended version of the bill supported by advocates because of its perceived ability to win executive support (An Act to Amend the Labor Law, in Relation to Establishing the Wage Theft Prevention Act, S. 8380 (June 29, 2010), <http://bit.ly/iCe1Rk>). The Assembly then introduced A. 11673-b, an amended version of the bill that was no longer the "same as" the Senate version because the Assembly wanted to be on record about certain priority sections of the bill. Attempts to get both houses to adopt an amended "same-as" bill in May and June failed. Advocates worried that time was running out and we had still not worked through Executive Office concerns that could potentially draw a veto from Governor Paterson.

On June 30, 2010, S. 8380 passed the Senate with a margin of 33 to 28. Through the remarkable efforts of our coalition, our energetic Senate sponsor, and the leadership of the chamber, we obtained unanimous Democratic support and a single Republican "yes" vote from Frank Padavan of Queens. A. 11673-b passed the Assembly on July 1, 2010. Each house adjourned for the summer shortly after the bills were passed, and the legislators left Albany with only tentative plans to return sometime later during the year. Most insiders seemed to agree that they would return at some point in the fall to handle a very short list of remaining policy bills. No one promised that the Wage Theft Prevention Act would be among them.

Between July and November advocates and sponsors promoted the Act, and legislative staff members continued to negotiate so that a bill could pass during the remainder of the 2010 session. Fall election results—such as the primary defeat of Democratic Sen. Pedro Espada—made uncertain our being able to muster the necessary support from lame-duck senators to pass a second version of the Act through the Senate.

On November 24 central staff members and Senate and Assembly sponsors agreed on a reconciled version of the Wage Theft Prevention Act. Make the Road New York and our coalition of advocates supported both the "reconciled" bill and the already-passed Senate bill, and we prepared to mobilize busloads of low-wage workers to go to Albany after Thanksgiving and make one final push for the Act's passage. On November 29, as our buses pulled up alongside the capitol, the governor called for a brief meeting with the two houses, but a stalemate remained.

Later that day, as members of Make the Road New York and our closest union allies (United Food and Commercial Workers

Local 1500 and the Retail, Wholesale and Department Store Union) coursed through the hallways of the capitol and the legislative office building, drumming up support, we heard that Senator Espada would not return for the session, making it extremely unlikely that the Democratic Senate would be able to muster a quorum, much less pass controversial legislation. The only possible path to passage for the Wage Theft Prevention Act seemed to be for the Assembly to pass S. 8380—the version of the Act already passed by the Senate. At the urging of both Assemblyman Heastie and Senator Savino, Governor Paterson issued a Message of Necessity to help S. 8380 move through the necessary Assembly committees in time for the final day of session. On November 30, at around 4:30 a.m., the Act passed out of the Assembly labor and rules committees. Around 5:00 p.m. it passed an Assembly floor vote by a 2-to-1 margin. On December 14 Governor Paterson signed the Wage Theft Prevention Act into law, and it took effect on April 9, 2011 (Video: New York State Department of Labor, Wage Theft Prevention Act Signed into Law (Dec. 14, 2010), <http://bit.ly/lmIRfV>).

How We Won

The sponsors and allies behind the Wage Theft Prevention Act, like most advocates working in Albany during 2010, had a healthy fear that the New York Senate was likely to change hands and that we had only one window of opportunity to pass ambitious legislation. How and why did this "five-year piece of legislation" make it through Albany's notoriously slow legislative process in nine months?

Neutralized Business Opposition. Our Wage Theft Prevention Act campaign managed to neutralize our business opposition. We accomplished this by framing the bill in law-and-order, probusiness language from the beginning. The name of the bill and all of our promotional materials used the term "wage theft," long popular among advocates, to refer to any nonpayment or underpayment of wages due under wage-and-hour law (KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID AND WHAT WE CAN DO ABOUT IT* (2009)). Senator Savino began all of her public appearances by saying, "There is a crime spree in this neighborhood," and proceeded to describe the ways that the New York Labor Law underpunished theft if it came in the form of an employer stealing wages from an employee. When concerned business groups visited Senator Savino and Assemblyman Heastie immediately after the Wage Theft Prevention Act was introduced, the sponsors both stated clearly, "If you are not violating the law, you have nothing to worry about." Throughout the year both sponsors were aggressive with their message: honest employers had nothing to fear from this legislation, but thieving bosses were being put on notice.

We were able to back up this law-and-order framing with other probusiness messaging. Make the Road New York organizes small businesses as well as low-income families, and our small business coalition drafted a memorandum in support of the Act, handled several press appearances, and placed in *El Diario* an op-ed piece extolling the need for the Wage Theft Prevention Act to help level the playing field for responsible business owners being undercut by non-law-abiding competitors

(*Competidores delincuentes ne quitan el negocia*, EL DIARIO, May 27, 2010, at 25). The Retail, Wholesale and Department Store Union and United Food and Commercial Workers Local 1500 also had business allies obeying union rules and facing unfair competition because their competitors were lowering labor costs by stealing worker wages. We led with that message in every written campaign material and in every lobbying visit, and on at least one occasion business owners made lobbying calls themselves.

Two other factors that allowed us to get ahead of business opposition were the rapid trajectory of the campaign and the highly technical nature of the bill. Business groups justifiably assumed that this campaign, led by an Albany newcomer, was not likely to achieve much in one year. The memoranda in opposition submitted by business groups such as the National Federation of Independent Business and the Business Council of New York State generally displayed a misunderstanding of the Act's substance and were easy to counter during our own lobbying visits.

Unanimous Labor Support. In a state known for interunion rivalries and disagreements, the Wage Theft Prevention Act campaign was able to project a sense of unanimous labor support and leverage the deep commitment of our two core union partners in strategic ways. The Retail, Wholesale and Department Store Union and United Food and Commercial Workers Local 1500 made the Act their top legislative priority in Albany for 2010. In ways that Make the Road New York would not have had the “juice” or relationships to accomplish on its own, they helped make the Act a top priority for our legislative sponsors. Assemblyman Heastie's relationships with both unions helped tremendously since he had not worked with Make the Road. Our partner unions also pulled in extremely helpful support from the New York State American Federation of Labor—Congress of Industrial Organizations. We worked with our partner unions to garner support from the legislature and Governor Paterson at many key moments in a way that Make the Road New York would not have likely been able to do alone.

Other labor allies lent key support at strategic moments; they deployed their strengths in ways that the coalition needed. The Working Families Party and New York Communities for Change helped us make the Act a priority with Assembly sponsors and helped us by facilitating independent conversations when necessary with legislative leaders to gauge our standing with the house at any given time. Service Employees International Union Local 1199, the Hotel and Motel Trades Council, and the Laborers International Union and Mason Tenders Political Action Committee also weighed in and helped convey unanimous labor support.

The Right Issue for the New York State Senate. Senate Democratic leaders faced much criticism in the press during 2010. But from the very beginning of the Wage Theft Prevention Act campaign, Senator Savino and Senate Democratic leaders made clear to our coalition that they believed they could pass the Act through the Senate. This type of labor issue did pull in marginal members as supporters and bypass some of the fractiousness of Senate Democrats in recent years. New York State Sen. John Sampson's staff members dug into the substance of the Act early on and made themselves available for meetings to discuss their concerns. Senate labor law ex-

perts occasionally included Make the Road New York attorneys in discussions in order to make sure that we would collectively get the technical details right. Probusiness messaging neutralized conservative and upstate Democrats' concerns.

Leveraging Make the Road New York's Organizational Strengths. Make the Road New York had very little Albany presence before this campaign. Our record of New York City legislative wins, however, helped us build a reputation and relationships that we were able to convert into pressure at the state level. We worked closely with city-elected allies to contact Governor Paterson and assemblymembers to press for the Wage Theft Prevention Act's passage. New York City Council Speaker Christine Quinn weighed in several times with the governor and with New York State Assembly Speaker Sheldon Silver. We also built on strong press relationships to create buzz and attention. Our standard organizational practices succeeded in targeting individual employers with minicampaigns that played well to the press, highlighting the need for the Act.

The workers who have been the subject of Make the Road New York's wage theft work over the years mobilized the troops that travelled to Albany in increasing numbers during the fall. Ground mobilization reached a peak on November 29, hinting at more massive efforts continuing into 2011 and beyond until the bill became law. Our technical expertise on the substance of the legislation and doggedness in negotiations not only allowed us to outpace business opposition but, more important, helped us keep pace with requests to rewrite the Act's proposed text or gather research to demonstrate the way that specific provisions would work in practice. We were simply unwilling to accommodate the general consensus that “these things take five to six years,” and we produced research, materials, documentation, and revisions within hours or overnight to keep negotiations moving.

Sponsors, Sponsors, Sponsors. We cannot overstate the extent to which the legislative sponsors of the Wage Theft Prevention Act determined the success of our campaign. Most obvious to us when we compared notes with other advocates and unions having tried—and failed—to pass other legislation during 2010 was that the legislative sponsors were the one factor differentiating our campaign from the less successful ones.

Savino was an easy choice for the Act's Senate sponsor, especially since one of Make the Road New York's neighborhood bases lies in her Staten Island district. Senator Savino was perceived by most advocates as the likely replacement of the retiring Senate labor committee chairman. She had strong ties to labor (and was simultaneously sponsoring the Domestic Workers Bill of Rights) and at the same time had influence with conservative Senate Democrats. She champions her bills forcefully and proved willing to work with Executive and Assembly players as well as folks in her own house. She was knowledgeable and confident about the substance of the bill, despite its highly technical aspects, and had a smart and responsive staff.

Despite the Assembly's reputation as the more progressive of the two houses, Assemblyman Heastie ended up with more of a fight on his hands because of the condensed timeline. As Bronx County leader, he was incredibly influential in mobilizing support, particularly among the Bronx delegation. Assemblyman Heastie had the added advantage of having sponsored

very few controversial pieces of legislation in recent memory. In the space of one day, he managed to convince the Assembly to pass the version of the Wage Theft Prevention Act that had passed the Senate, in spite of the Assembly having a competing version of the bill. Had he failed, the bill would not have become law.



On December 14, 2010, almost exactly nine months after the introduction of the Wage Theft Prevention Act in the New York State Assembly and Senate, Augusto Fernandez, janitor and Make the Road New York member for a decade, stood side by side with Governor Paterson. Flanked by Senator Savino, Assemblyman Heastie, the commissioner of labor, and legislative leaders, Governor Paterson and Fernandez each spoke before the cameras briefly. Then the governor sat down to sign the Wage Theft Prevention Act.

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Fighting for Environmental Justice Takes Long-Lasting Coalitions

"It's official!" read Theresa Mueller's long-awaited February 2011 e-mail to community activists. A veteran deputy city attorney with the San Francisco City Attorney's Office, Mueller was referring to a Federal Energy Regulatory Commission decision that finally allowed the Potrero power plant, the second of the two dirtiest fossil fuel power plants in the most polluted area of San Francisco, to close.

Power plants do not typically close. Although power plants are designed to operate for thirty to forty years, most power plants continue to operate long beyond their planned life spans. The last step in a long list of agency, corporate, and political decisions that made the closure possible, the Federal Energy Regulatory Commission's decision to accept the plant operator's request to cease supplying energy was thus unusual. The seeming simplicity of the decision also belies the historic moment it represented: it was the culmination of more than a decade of work by a loose, sometimes contentious alliance of grassroots organizers, residents of the community surrounding the power plant, politicians, lawyers (including Mueller herself and professors at the Environmental Law and Justice Clinic at Golden Gate University School of Law), and law students. This is the story of that alliance, why the alliance worked, and the

larger lessons of its success.

Background

The story begins with the historic residential segregation that pooled low-income people of color—mostly African Americans—in the Bayview-Hunters Point neighborhood, which became the most polluted and economically depressed place in famously progressive San Francisco. Until five years ago this neighborhood and nearby areas hosted a myriad of the city's pollution sources and its only two power plants: Pacific Gas and Electric's Hunters Point plant and Mirant's Potrero plant (Alan Ramo, *Hunters Point: Energy Development Meets Environmental Justice*, 5 ENVIRONMENTAL LAW NEWS 28 (Spring 1996); see also my *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 121, 134 (2009)). The Hunters Point plant closed in 2006, and residents have successfully fought off several proposed power plants slated for the same area over the last decade. Accounts of the community's struggle have been told in newspaper and law review articles (Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons from the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 14 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW AND POLICY 537, 538 (2008); Dennis Pfaff, *Conquering the Regulatory Jungle, Law School Clinic Emerges with Rare Fruit from Environmental Fight: A Win*, SAN FRANCISCO DAILY JOURNAL, May 24, 2006, at 1; Ramo). Because the residents had a "stick-with-it-ness" to the cause, educated and connected with politicians, and built a broad coalition, the community prevailed.

Connection to Political Power

Environmental justice struggles are struggles about power (see Luke Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY 573, 576 (2008)). A key ingredient of the power plant campaign was the Bayview-Hunters Point community's connection to political power. Collaboration between city politicians and community representatives would not have been possible without a member of the San Francisco board of supervisors, Sophie Maxwell, who understood the campaign at a visceral level, having first become involved in the campaign as a community activist, and without the San Francisco Office of the City Attorney becoming a partner in the community's struggle. These connections proved invaluable as the decade of struggle went through ups and downs, with the plants' closure uncertain at many times as political winds and energy needs—both perceived and real—shifted.

The Community's Politician. Maxwell, who termed out of office in 2011, represented the political district of the neighborhoods surrounding the power plants. The district ranks ninth out of eleven in per capita income, and the district is still where most of the city's African American residents live. Before her entry into politics, Maxwell served on the board of directors of a grassroots coalition group, Southeast Alliance for Environmental Justice, which worked to reduce pollution from the power plants and to clean up the city's only Superfund site, located in the same neighborhood. She understood the community's concerns; Maxwell herself developed asthma



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