



MEMORANDUM

TO: Interested Parties
FROM: Alida Kass, President & Chief Counsel
SUBJECT: S1790/A2903
DATE: April 8, 2019

Willful violations of wage and hour law are not acceptable. We appreciate targeting willful bad actors who regard occasional penalties as a mere cost of doing business. And we support requiring businesses that are found to have inadvertently violated wage and hour requirements to make their employees whole.

However, A2903 would *criminalize even inadvertent wage and hour violations* and hold businesses responsible for the wage and hour violations of their contractors. It would sweep the good faith use of independent contractors – an area of law [especially prone to confusion](#) – as well as other inadvertent wage and hour violations, into a regime of massive penalties appropriate only for willful bad actors.

For several years, NJCJI, along with many others in the business community, have expressed specific concerns regarding the inordinate punitive effect that this legislation would have on good faith businesses making reasonable determinations on disputed points of law. Unfortunately, the legislation continues to expose legitimate, good faith businesses to the same liability *and jail time* as those who willfully steal from their employees.

Jail Time for Inadvertent First-time Violators:

The legislation creates a new crime of “pattern of non-payment of wages,” which is not limited to willful violations of law. The degree of willfulness required under Section 13 is limited to knowingly committing an *act* that violates the provisions of applicable law. But there is no requirement that the employer know that the *act* he is committing is not consistent with what the law requires.

So, for example, an employer who knowingly treats a worker as an independent contractor, or otherwise knowingly provides a compensation structure that he believes to be consistent with the law, would be guilty if it turned out to violate any provision of State wage, benefit or tax laws. This would even include employers compensating employees *more* than would be required under minimum wage law, for failure to structure their compensation with explicit overtime payments.

Furthermore, although the bill defines “pattern” as requiring conviction “on two or more prior occasions,”

N.S.S2C:20-2 provides for the stacking of violations, so that each “episode or transaction may be the subject of a separate prosecution and conviction,” with no requirement that a prior conviction pre-date the *action* at issue in subsequent convictions.

Class actions for six years of treble damages for good faith violations.

The original core concern regarding this legislation remains unchanged. Section 7b. of the bill as amended continues to provide for civil remedies of treble damages (actual damages plus 200 percent liquidated damages) for any employer who fails to pay the full amount of wages to an employee agreed to or required by, or in the manner required by the wage and hour laws. Section 5 of the bill as amended continues to provide for those super-penalties to be available for six years.

Providing such exorbitant damages for non-willful violations creates a profit motive to bring low-merit claims on disputable points of wage and hour law and extract shakedown settlements.

Joint and several “deep-pocket” liability for contracting services

The risk of super-penalties continues to extend to businesses operating in good faith who *are* in fact complying with the law but are in a contractual relationship with another business found to have violated some aspect of wage and hour laws. And note: this section is not merely about ensuring that employees be made whole. It would apply joint and several liability to the entire treble damage super-penalty for behavior over which they have no control. And the opportunity to go after “deep pocket” defendants intensifies the profit motive to extract settlements based on relatively low-merit claims.

The standards on worker classification are indisputably uncertain. Recognizing the widespread confusion on the point, the Board of Accountancy and Department of Labor has sent a joint [letter](#) to all accountants on the need to advise businesses on the classification of employees and independent contractors.

Losing on a point on which reasonable minds can differ should not mean massive penalties and years of jail time. And a business should be able to contract a service out to a vendor, or bring on additional workers to meet peak demand, without assuming the risk of treble-damage class actions for unknown violations of that vendor. We are requesting reasonable amendments to protect good faith businesses, while retaining all necessary tools to punish willful violators.

Necessary Amendments:

1) Add safe harbor to Sections 4 and 7 for inadvertent violations made in good faith:

The penalties and damages provided for violations of this section shall not apply to inadvertent errors made in good faith. Penalties and damages for inadvertent errors made in good faith shall be limited to two years’ actual damages, and a \$500 penalty payable pursuant to the “Penalty Enforcement Law of 1999.”

2) Amend Section 9 to limit joint and several liability to known violations:

... for any violations of the provisions of State wage and hour laws if the employer had knowledge of the violations ~~or violations of the provisions of section 10 of P.L.1999, c.90 (C.2C:40A-2) regarding compliance with State wage and hour laws, including provisions regarding retaliatory actions against employees for~~

exercising their rights under any of those laws, and both may be subject to any remedy provided for violations of those laws.

3) Amend Section 13 to limit criminal penalties to knowing violations:

- a. A person commits the crime of pattern of wage nonpayment if the person knowingly ~~commits an act that~~ violates the provisions of ... and if the person has, at the time of that act, ~~on~~ two or more prior ~~occasions, been convicted~~ convictions of a violation of the provisions ... Knowledge that the action constitutes a violation of law is a necessary element of the offense.
- b. Pattern of wage non-payment is a crime of the third degree, ~~except that the presumption of nonimprisonment set forth in 7 subsection e. of N.J.S.2C:44-1 for persons who have not previously been convicted of an offense shall not apply.~~