



4900 Rt. 33W • Suite 100
Wall Twp., NJ 07753
Phone: 732-256-9646
Fax: 732-256-9666
Web: www.njgca.org

December 19, 2016

To: New Jersey General Assembly
From: Sal Risalvato, Executive Director

Re: OPPOSE A-862

On behalf of the nearly one thousand independent small business represented by the New Jersey Gasoline, Convenience Store, Automotive Association, I ask that you oppose A-862 in its current form.

Our central concern is that the dramatically higher penalties being created by this bill will fall equally on employers without regard to whether they willfully violated the law, or are merely in error on debatable points of law. The additional penalties added by this legislation (specifically the 200% in damages) **should apply only to those employers found to have knowingly and willfully violated wage and hour laws.**

Wage and hour laws, particularly overtime laws, are complex and only growing in their complexity. The independent contractor/employee distinction continues to be hotly contested in federal court. It is understandable to see how a small business owner, without any dedicated HR department, can find themselves unintentionally violating the letter of the various wage and hour laws.

Here is a real-world example of a violation that did not harm the employee. An employer and an employee agree that the employee will work 50 hours in one week and be paid \$750. Both are satisfied. The Department of Labor would look at that arrangement and declare it an illegal violation of wage and hour laws. They would claim that \$750 divided by 50 is \$15 per hour. The employee should have been paid \$600 for hours 1-40 and time-and-a-half (\$22.50) for hours 41-50 (\$225) for a total of \$825. This would mean the employee is "owed" \$75 for that week. However, the DOL will also work with the employer to ensure their books going forward comply with the letter of the overtime law. If the employee were to be paid an hourly rate of \$13, then they would be owed \$520 for hours 1-40 and \$19.50 for hours 41-50 (\$195) for a total of \$715. The legal solution is more complicated for the employer and less pay for the employee, but the wage and hour laws are now properly met.

Of course, such a failure should still be met with punishment, and is under current law. The current penalties call for the employee to be reimbursed any back wages, and they are guilty of a disorderly

persons offense (typically involving a fine of up to \$1,000), and also can be fined \$250 by DOL for a first offense.

The original purpose of this bill was to strengthen the penalties on unscrupulous employers, who make a calculated risk to cheat employees and figure that if they are caught, they will simply pay the employees their wages then and walk away with a relative slap on the wrist. If they are not caught, of course, they get away with keeping money rightfully owed to their employees. Adding a 200% penalty would significantly alter this calculation, and might help dissuade these employers from behaving in this fashion.

However, by definition a negligent employer has not made this cruel calculation to begin with. By definition the negligent employer would not even be aware that they were in violation of the letter of the law. Increasing the penalty to 200% or 2,000% will not force them into compliance because they are under the mistaken impression that they are already under compliance.

In this sense we are not only supportive of the core objective of this bill, but focusing the legislation on willful bad employers would also significantly help resolve many of our concerns with other aspects of the bill. On the other hand, if this legislation would treat willful violators and erroneous but well-intentioned employers all alike, then it should apply lower penalties across the board.

Liquidated damages should then be set at 100%, the same as the federal level. The public shaming website by DOL is inappropriate, as it would put honest but negligent employers on the same list as the malicious. Provisions to fund community and legal groups based on the size of the penalties that they bring in, creating in effect a bounty system on employers throughout the state, should then be stripped from the bill. Rather than encourage private enforcement efforts targeting those employers causing the greatest harm to vulnerable employees, it would instead encourage shake-downs of well-intentioned small businesses over incremental and inadvertent violations.

However, if these penalties are only assessed on willful violators of the law, then we can accept the treble damages and court costs; we can accept violators being publicly marked as such; and we can accept these third-party groups desperately searching out violations of the law, since the financial incentive for them will be to stick with the willfully bad employers that this bill was supposed to target in the first place.

Our other significant concern is with Section 10. Willful violators of the law should not be able to repeatedly create shell corporations in order to dodge penalties for violations, and in fact, under existing New Jersey law, they cannot.

As a result, this section is not just superfluous, it is vastly over-broad. For example, it is fairly common practice for a gas station/auto repair business owner to rent out part of his business to

someone else. The entire purpose of this arrangement is to give up the burdens of managing that aspect of that business in exchange for a flat monthly income. If the person he leases to does not pay his gas pumpers in accordance with the law, then any punishments should fall on the lessee alone. If the owner is now liable for the staffing decisions of the lessor, then the entire business arrangement has become pointless, to the benefit of no one. Conceivably if a business hires a cleaning company, and that cleaning company violates wage laws, then every one of the cleaning company's clients could be held responsible. In all these cases an employer has brought on another company to provide employees to perform a service. The section should be removed from the bill.

We believe the changes suggested here are reasonable and do not conflict with the stated goal of this legislation, to crack down on malicious employers. Indeed, cracking down on willful violators of the state's wage and hour laws is not only beneficial to the affected employees and to society as a whole, it is beneficial to every honest employer forced to compete with a business giving itself a competitive advantage by breaking the law.

I respectfully ask that you vote NO on A-862.

Sincerely,

A handwritten signature in black ink, appearing to read "Sal Risalvato". The signature is fluid and cursive, with a large initial "S" and "R".

Sal Risalvato
Executive Director
NJ Gasoline, C-Store, Automotive Association