

November 2022

Comment: Ensuring Wages for California Restaurant Workers: Utilizing The Self-Help Prejudgment Wage Lien Tool

Rebekah Didlake

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Rebekah Didlake, *Comment: Ensuring Wages for California Restaurant Workers: Utilizing The Self-Help Prejudgment Wage Lien Tool*, 52 Golden Gate U. L. Rev. (2022).
<https://digitalcommons.law.ggu.edu/ggulrev/vol52/iss2/6>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized editor of GGU Law Digital Commons.

Comment

Ensuring Wages for California Restaurant Workers: Utilizing The Self-Help Prejudgment Wage Lien Tool

REBEKAH DIDLAKE*

INTRODUCTION

In the fall of 2016, Rebekah worked as a server at Mission Beach Café,¹ a busy brunch restaurant in the Mission District of San Francisco.² Most weekends, people packed onto the sidewalk corner outside the neighborhood restaurant, waiting hours to taste the locally famous hot brunch and oversized mimosas.³ In business since 2007, Mission Beach Café became so popular that the owner planned to open a new restaurant just a few blocks away.⁴ However, despite its popularity, Mission Beach

* J.D. Candidate, Golden Gate University School of Law, May 2022; B.A. International Relations, San Francisco State University, May 2015; Associate Editor, 2021-2022, *Golden Gate University Law Review*. The author would like to thank Professor Anna Kirsch for her invaluable guidance. The author is also grateful for the entire *Golden Gate University Law Review* staff for their thoughtful feedback and support.

¹ Third Amended Complaint at 6, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. Mar. 2, 2018). The author of this Comment, Rebekah Didlake, worked at Mission Beach Café as a server from August 2016 to February 2017. Rebekah was one of ten plaintiffs involved in the lawsuit against Mission Beach Café.

² See generally Caleb Pershan, *Mission Beach Café Permanently Closed by Health Department*, SF EATER (June 10, 2019), <https://sf.eater.com/2019/6/10/18659952/mission-beach-cafe-closed-health-department-eviction> (noting Mission Beach Café' drew crowds for its popular dishes such as brioche French toast and duck confit hash).

³ *How to Do Brunch Right at Mission Beach Café in San Francisco?*, SF INSIDER, <https://sfinsider.sfgate.com/how-to-do-brunch-right-at-mission-beach-cafe-in-san-francisco/> (last visited Jan. 7, 2021); see generally Caleb Pershan, *supra* note 2.

⁴ Jay Barmann, *Mission Beach Shutters After 12 Years*, SFIST (June 8, 2019), <https://sfist.com/2019/06/08/mission-beach-cafe-shutters-after-12-years/>; see also Joe Eskenazi, *The Decline and Fall of Mission Beach Café was Even Messier Than You Thought*, MISSION LOC. (June 17, 2019), <https://missionlocal.org/2019/06/the-decline-and-fall-of-mission-beach-cafe-was-even->

Café had been violating state and local labor laws for years, at the expense of its workers.⁵

Within the first couple months of Rebekah's employment, the owner avoided paying Rebekah and other workers' paychecks and tip checks⁶ on a regular basis.⁷ When the owner disbursed the workers their often-late paychecks and tip checks, the owner would then instruct the workers to wait three to four days to cash their checks.⁸ Additionally, the bank often turned these workers away because of insufficient funds in the account, which occurred on multiple occasions.⁹ As a result, workers went weeks and sometimes months without receiving their wages.¹⁰ Moreover, the owner used personal checks unaccompanied by required paystubs,¹¹ leaving workers unable to determine critical information such as their hours worked, rate of pay, or tax deductions.¹² Consequently, workers could not determine if they were being accurately paid for the time worked.¹³

As the wage issue worsened, the workers looked for help.¹⁴ Despite the difficult obstacles low-wage workers face in obtaining legal counsel,¹⁵ the Mission Beach Café workers obtained joint legal representation from two local workers' rights clinics—Legal Aid at Work and the Women's Employment Rights Clinic (WERC) at Golden Gate University, School of Law.¹⁶ With the help of counsel, the workers filed a complaint

messier-than-you-thought/ (explaining that while operating Mission Beach Café, the owner poured thousands of dollars into another Mission District property, the former Luna Park).

⁵ See Third Amended Complaint, *supra* note 1, at 1-10 (stating plaintiffs' allegations date back to the allowable period of four years.); Eskenazi, *supra* note 4 (explaining that between 2014 and 2017, the owner did not make over \$100,000 in city-mandated healthcare payments for employees, and instead, applied the money elsewhere).

⁶ Like many restaurants, the workers of Mission Beach Café split cash gratuities at the end of each shift. Gratuities paid by credit card must be paid to the worker the payday after the date the employer authorized the credit card payment. CAL. LAB. CODE § 351.

⁷ Declaration of Rebekah Didlake in Support of Plaintiff's Motion for Writ of Attachment at 2, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. Oct. 26, 2017); Third Amended Complaint *supra* note 1, at 6-7.

⁸ Declaration of Rebekah Didlake in Support of Plaintiff's Motion for Writ of Attachment, *supra* note 7, at 2; Third Amended Complaint, *supra* note 1, at 7.

⁹ Third Amended Complaint, *supra* note 1, at 7.

¹⁰ *Id.* at 9.

¹¹ CAL. LAB. CODE § 226.

¹² Third Amended Complaint, *supra* note 1, at 7.

¹³ *Id.*

¹⁴ Dominic Fracassa, *SF Restaurant Employees Hungry for Valid Paychecks*, SF CHRONICLE (Apr. 16, 2017), <https://www.sfchronicle.com/business/article/SF-restaurant-employees-hungry-for-valid-paychecks-11077148.php>.

¹⁵ Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 102-03 (2016).

¹⁶ Third Amended Complaint, *supra* note 1; Fracassa, *supra* note 14.

in civil court¹⁷ and filed a motion for a preliminary injunction¹⁸ requesting the owner immediately comply with wage and hour laws.¹⁹ The court granted the workers an injunction, forcing the owner to hire a payroll company to issue regular paychecks with sufficient funds.²⁰ However, the owner was behind on mortgage payments and owed thousands in back taxes.²¹ During litigation, he declared personal bankruptcy²² and legal counsel pursued the owner in bankruptcy court.²³ Yet, with few exceptions,²⁴ the workers of Mission Beach Café were last in line to receive any funds after the bank, IRS, and California Franchise Tax Board received their share of the owner's assets.²⁵ Ultimately, through bankruptcy court, the workers obtained only a small fraction of their owed wages²⁶—still, a better fate than most.²⁷

Because only a fraction of their owed wages were available through bankruptcy, the workers' attorneys litigated the case against the business.²⁸ Since California rescinded the restaurant's business license in

¹⁷ Complaint, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. Mar. 27, 2017).

¹⁸ An injunction is a court order requiring a person to do or cease doing a specific action." *Injunction*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/injunction> (last visited Sept. 7, 2021).

¹⁹ Motion for a Preliminary Injunction, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. Mar. 30, 2017).

²⁰ Order Granting Plaintiffs' Motion for Preliminary Injunction, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. June 1, 2017).

²¹ Joe Eskenazi, *supra* note 4 ("[The owner] fell behind on mortgage payments, owe[d] \$53,000 in back taxes for Northern California properties, and \$49,000 to the California Franchise Tax Board.").

²² *Id.*

²³ E-mail from Anna Kirsch, Attorney, WERC, to Plaintiffs (Feb. 15, 2020, 9:10 PST) (on file with author).

²⁴ Wages incurred by workers six months prior to filing for bankruptcy are a prioritized debt. *See* 11 U.S.C. § 507(a)(4). A small portion of some workers unpaid wages were collected using this provision. E-mail from Anna Kirsch, Attorney, WERC, to Plaintiffs (Aug. 31, 2020, 12:02 PST) (on file with author).

²⁵ Julian Mark, *Rodents. Bankruptcy. Wage Theft. Eviction: Behind the Implosion of Mission Beach Café*, MISSION LOC. (June 11, 2019), <https://missionlocal.org/2019/06/more-than-rodents-the-real-story-behind-mission-beach-cafes-implosion/>. Under California law, owner, directors, and managing agents can be held personally liable for unpaid wages. CAL. LAB. CODE § 588.1.

²⁶ As of December 2020, the workers of Mission Beach Café have outstanding judgments against the owner for approximately \$175,000 and against the restaurant itself, Mission Beach Café, LLC, for approximately \$1.2 million dollars. E-mail from Anna Kirsch, Attorney, WERC, to Plaintiffs (Dec. 1, 2020, 07:20 PST) (on file with author).

²⁷ *See* Eunice Hyunhye Choet al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers 2* (2013), <https://s27147.pcdn.co/wp-content/uploads/2015/02/Hollow-Victories.pdf>. ("Only 17 percent of California workers who prevailed in their wage claims before the DLSE and received a judgment were able to recover any payment at all between 2008 and 2011.").

²⁸ E-mail from Anna Kirsch, Feb. 15, 2020, *supra* note 23.

2014,²⁹ Mission Beach Café could not defend itself in court.³⁰ As a result, the workers obtained a \$1.3 million-dollar default judgment against Mission Beach Café for labor violations including unpaid wages, overtime violations, and penalties.³¹ Yet, judgments against restaurants are notoriously hard to collect because of the nature of the restaurant industry.³² Consequently, the workers were unable to collect their \$1.3 million dollar judgment against Mission Beach Café.³³

The Mission Beach workers' story is not unique³⁴ Wage theft is a pervasive problem that crosses many industries with a disproportionate impact on the low-wage workforce.³⁵ An employer commits wage theft when they fail to pay a worker according to the law such as failing to pay a worker for all hours worked, taking unlawful deductions, and paying less than the minimum wage.³⁶ Unlike the Mission Beach Café workers who were able to attain legal representation, access to legal representation is often a difficult task for low-wage workers.³⁷

For many low-wage workers in California, winning a judgment is “often at best a hollow victory” because low-wage workers and state authorities are often unable to enforce judgements for nonpayment of wages.³⁸ The National Employment Law Project and UCLA's Labor Center conducted a study that found between 2008 and 2011, only 17% of California workers who won wage judgments before the Labor Commissioner³⁹ were able to receive *any* payment.⁴⁰ The study found that many businesses with outstanding unpaid judgments were “non-active”

²⁹ Joe Eskenazi, *supra* note 4 (Mission Beach Café's business license was suspended in 2014 for failing to meet tax obligations).

³⁰ *My Business is Suspended*, STATE OF CAL. FRANCHISE TAX BD. (last updated Sept. 22, 2021), <https://www.ftb.ca.gov/help/business/my-business-is-suspended.html>.

³¹ Order for Separate Default Judgment Against Defendant Mission Beach Café, LLC, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748 (S.F. Cnty. Super. Ct. Sept. 18, 2018).

³² Karen Foshay, *Wage Theft: Millions Stolen, Little Recovered Within the Restaurant Industry*, KCRW (July 31, 2016), <https://www.kcrw.com/news/shows/kcrw-investigates/wage-theft-millions-stolen-little-recovered-within-the-restaurant-industry>; see HYUNHYE CHO, KOONSE & MISCHEL, *supra* note 27, at 2.

³³ E-mail from Anna Kirsch, Dec. 1, 2020, *supra* note 26; see generally HYUNHYE CHO ET AL., *supra* note 27 (discussing the low rate of workers who obtain their wages after a judgement is issued in their favor).

³⁴ See Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 765 (2019).

³⁵ Rey Fuentes, *Making Workers Whole: A Retrospective Analysis of SB588 and Enhanced Post-Judgment Collection in California*, 40 BERKELEY J. OF EMP. & LAB. L. 369, 372 (2019).

³⁶ Lee & Smith, *supra* note 34, at 765.

³⁷ Fritz-Mauer, *supra* note 15, at 102-03.

³⁸ HYUNHYE CHO ET AL., *supra* note 27, at 1.

³⁹ The Labor Commissioner's office is California's administrative agency that adjudicates wage theft and retaliation claims. *About Us*, DEP'T OF INDUS. REL., <https://www.dir.ca.gov/dlse/AboutUs.htm> (last visited Feb. 7, 2021).

⁴⁰ HYUNHYE CHO ET AL., *supra* note 27, at 2.

businesses, meaning they did not have an operating business license, often due to dissolution, forfeiture, or failure to file taxes.⁴¹ Moreover, during the long adjudication process, some employers go so far as to dissolve, hide, or transfer assets.⁴² These situations can create “nearly insurmountable barriers” for workers to collect their wage judgments because of the unavailability of assets.⁴³

Wage theft runs especially rampant in California’s restaurant industry⁴⁴ and these workers are highly susceptible to worthless wage judgments.⁴⁵ Some estimates found restaurant workers account for up to 10% of wage claims filed with the Labor Commissioner each year.⁴⁶ Even more grim, the Labor Commissioner⁴⁷ collected only \$684,000 out of over \$16 million dollars of wages owed to restaurant workers in 2017-2018.⁴⁸ Although wage theft is a nationwide epidemic crossing various

⁴¹ *Id.* at 10-11.

⁴² *Id.* at 11; *see, e.g., Success Stories*, WAGE JUST. CTR., <http://wagejustice.org/success-stories/> (last visited Jan. 6, 2021) (describing a case where garment owners were sued for transferring one million in assets to their son just three months after wage theft judgments for five workers were entered in court. The owners subsequently settled the fraudulent transfer lawsuit.); *Labor Commissioner Reaches Settlement to Secure \$190,000 in Back Pay for Rosemead Restaurant Workers*, CAL. DEP’T OF IND. REL. (May 31, 2016), <https://www.pnewswire.com/news-releases/labor-commissioner-reaches-settlement-to-secure-190000-in-back-pay-for-rosemead-restaurant-workers-300277297.html> (explaining a case where three restaurant owners, who were siblings, began transferring ownership of their restaurant between them just four months after workers filed wage theft claims with the Labor Commissioner. After the Labor Commissioner sued the owners for fraudulent transfer, the owners settled the wage theft claims.).

⁴³ HYUNHYE CHO ET AL., *supra* note 27, at 11.

⁴⁴ *See, e.g., Bay Area Immigrant Workers Win \$2.6 Million Settlement from Shuttered Kome Seafood Buffet*, ASIAN LAW CAUCUS (Aug. 12, 2020), <https://www.advancingjustice-alc.org/news-resources/news/bay-area-immigrant-workers-win-2-6-million-settlement-from-shuttered-kome-seafood-buffet> (describing a \$2.6 million dollar settlement for 133 restaurant workers for unpaid minimum wage, overtime, required split shift premiums, related penalties, and closing the restaurant without proper notice); Jay Barmann, *Current and Former Burma Superstar Employees Win \$1.3M in Class Action*, SFIST, (June 4, 2020) <https://sfist.com/2020/06/04/current-and-former-burma-superstar-employees-win-1-3m-class-action-suit/> (explaining a class action lawsuit with 353 current and former workers at Burma Superstar settled for \$1.3 million for violations of state laws governing hourly employees, overtime, sharing of tips with back-of-house workers, amongst other violations); Caleb Pershan, *Rangoon Ruby Chain Settles \$4 Million Wage Theft Lawsuit With Restaurant Workers*, SF EATER (Jan. 18, 2019), <https://sf.eater.com/2019/1/18/18187968/rangoon-ruby-wage-theft-lawsuit-settlement-bay-area-restaurant-workers> (reporting restaurant chain Royal Rangoon settled a wage theft lawsuit involving about 300 workers. For those workers housed in the dormitories by the restaurant, the situation was more precarious. The \$4 million settlement included unpaid wages and penalties.).

⁴⁵ Foshay, *supra* note 32.

⁴⁶ *Id.*

⁴⁷ The Labor Commissioner is also known as the Division of Labor Standards Enforcement (DLSE). *Labor Commissioner’s Office*, DEP’T OF INDUS. REL., <https://www.dir.ca.gov/dlse/> (last visited Jan. 10, 2022).

⁴⁸ CAL. DEP’T OF INDUS. REL., 2017-2018 FISCAL YEAR REPORT ON THE EFFECTIVENESS OF THE BUREAU OF FIELD ENFORCEMENT 5 (2018) https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf. [hereinafter 2017-2018 FISCAL YEAR REPORT].

industries,⁴⁹ this Comment explores the wage theft crisis in the context of low-wage restaurant workers and the obstacles they face when recovering unpaid wages. This Comment argues that a self-help prejudgment wage lien tool is an ideal solution to ensure restaurant workers can collect unpaid wages.

Part I of this Comment provides an overview of the California wage theft crisis including its causes and remedies. Part II explains the insufficiency of current prejudgment and post-judgment tools available to restaurant workers. Part III examines viable options for a prejudgment wage lien law by surveying the robust prejudgment tools available in the car wash and construction industries in California. Part IV reviews Wisconsin's and Maryland's wage lien laws as exemplary models for a wage lien tool for restaurant workers. Part IV also analyzes the most important aspects of a successful wage lien law for restaurant workers: a self-help tool with super priority provisions and private bonding enforcement. Together, these key features of the suggested self-help tool will serve to incentivize employers to comply with wage and hour laws while ensuring restaurant workers their due wage payments when employers fail to comply. Finally, this Comment recognizes the foundation laid by California legislators through previous attempts to pass a broad wage lien law in California.

I. WAGE THEFT

Every year workers in the United States lose billions of dollars to wage theft.⁵⁰ In fact, wage theft is one of the most frequently committed crimes in the Nation.⁵¹ Unfortunately, it is a crisis occurring largely outside the public's view.⁵² To put the severity of wage theft in perspective, each year, workers lose more money in wages than money stolen in “bank robberies, convenience store robberies, street and highway robberies, and gas station robberies combined.”⁵³ Despite California's “employee-friendly” reputation, California is no exception to the wage theft

⁴⁹ Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 101 (2018).

⁵⁰ *Id.*

⁵¹ *Id.* at 97; Wage theft is also prevalent among large Fortune 500 corporations. For instance, from 2000-2018, Walmart had paid \$1.4 billion in total wage theft settlements and fines, FedEx \$592 million, and Bank of America \$381 million. PHILIP MATTERA, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS' WAGES 8 (2018), https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft_report_revised.pdf.

⁵² Hallett, *supra* note 49, at 101.

⁵³ *Id.* at 97 (quoting Ross Eisenbrey, *Wage Theft Is a Bigger Problem than Other Theft—But Not Enough Is Done to Protect Workers*, ECON. POL'Y INST. (Apr. 2, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-theft-protect/>).

crisis.⁵⁴ California is perceived to have a harsh regulatory environment, causing many to accuse California as being overly protective of employees and “hostile to business.”⁵⁵ But, in some ways, wage theft is actually worse in California than in states without an “employee friendly” reputation.⁵⁶

Wage theft occurs in many different forms, including when employers pay workers below minimum wage, fail to pay overtime, and require workers to work off the clock.⁵⁷ Employers may also commit wage theft by intentionally misclassifying workers as independent contractors, refusing to pay a worker’s final paycheck, or taking illegal deductions out of a worker’s paycheck, such as deducting missing money from a cash register.⁵⁸ Further, tipped workers are vulnerable to employers unlawfully keeping tips.⁵⁹ Research shows that wage theft impacts numerous industries and socioeconomic backgrounds, but it has the most severe impact on low-wage workers.⁶⁰

A. THE WAGE THEFT CRISIS IN CALIFORNIA

Wage theft is pervasive in California’s low-wage industries.⁶¹ A landmark 2010 study conducted by the Institute for Research on Labor and Employment at UCLA focused on wage theft in low-wage industries in Los Angeles County surveying close to 2,000 workers.⁶² The study focused on both large and small employers.⁶³ The study found that more than 30% of workers reported being paid less than minimum wage and almost 80% of workers eligible for overtime from the previous week had

⁵⁴ Fritz-Mauer, *supra* note 15, at 73.

⁵⁵ *Id.*

⁵⁶ *Id.* at 74-75; *see also* RUTH MILKMAN ET AL., WAGE THEFT AND WORKPLACE VIOLATION IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 1 (2010), <https://irle.ucla.edu/old/publications/documents/LAwagetheft-Milkman-Narro-110.pdf> (“[I]n nearly every case, [workplace] violation rates are higher in Los Angeles than in New York and Chicago.”); HYUNHYE CHO ET AL., *supra* note 27, at 16-18 (explaining how Wisconsin workers are sometimes better able to collect wages than California workers).

⁵⁷ Hallett, *supra* note 49, at 98-99.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Lee & Smith, *supra* note 34, at 765.

⁶¹ Fritz-Mauer, *supra* note 15, at 96; Over 30% of the California’s low-wage work force work in the following industries: restaurants and other food services, retail, educational services, administrative and business services, manufacturing, and construction. *Low Wage Work in California*, U.C. BERKELEY LAB. CTR. (2017), <https://laborcenter.berkeley.edu/low-wage-work-in-california/#industries-and-occupations> (last visited Feb. 7, 2022).

⁶² MILKMAN ET AL., *supra* note 56, at 1.

⁶³ *Id.* at 8. The study surveyed employees in a wide range of industries. To name a few, the study included bank tellers, childcare workers, gardeners and landscapers, retail workers, restaurant, cafeteria, and fast-food workers. *Id.* at 12.

yet to receive it.⁶⁴ Further, over 80% of workers surveyed experienced meal break violations, rest break violations, or both.⁶⁵ This culminated in over 88% of low-wage workers in Los Angeles County experiencing at least one form of wage theft in the week before the workers were surveyed,⁶⁶ compared to 60% nationally.⁶⁷ Low-wage workers in Los Angeles lose an average of \$2,070.00 each year out of a total yearly earnings of \$16,536.00.⁶⁸ The study found “front line workers in low-wage industries lose more than \$26 million *per week* as a result of employment and labor law violations” in Los Angeles County alone.⁶⁹

Wage theft has huge social costs as well.⁷⁰ Wage theft increases poverty rates and negatively affects local economies, forcing low-wage workers to live without basic necessities.⁷¹ It also affects workers emotionally and psychologically.⁷² In addition to the impact on individual workers, wage theft costs the government millions of dollars in lost tax revenue annually.⁷³ For instance, in 2011, the State of California lost \$14 million in tax revenue due to wage theft.⁷⁴

B. CAUSES AND REMEDIES OF WAGE THEFT

Many factors contribute to the widespread prevalence of wage theft including the decline of organized labor⁷⁵ and workers’ lack of knowledge regarding their rights.⁷⁶ One issue is an overall lack of enforcement, which consequently can both incentivize employers to engage in wage theft and disincentivize workers from seeking remedies for their unpaid wages.⁷⁷

The restaurant industry is particularly prone to wage theft.⁷⁸ First, breaking into the restaurant industry requires low capital costs and little

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 30.

⁶⁷ ANNETTE BERNHARDT ET. AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 21 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁶⁸ MILKMAN ET AL., *supra* note 56, at 53.

⁶⁹ *Id.*

⁷⁰ Lee & Smith, *supra* note 34, at 765-66.

⁷¹ *Id.*

⁷² *Id.* at 766.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 770-71.

⁷⁶ *Id.* at 771.

⁷⁷ See Hallett, *supra* note 49, at 107-08 (explaining the current system encourages workers to accept their unpaid wages and does little to incentivize employers to comply with the law).

⁷⁸ See Foshay, *supra* note 32; 2017-2018 FISCAL YEAR REPORT, *supra* note 48, at 5.

regulatory hurdles so “almost anyone c[an] set up their own restaurant.”⁷⁹ Some owners are small businesses with little access to bank financing and large capital.⁸⁰ These restaurants may rely on leasing space and equipment,⁸¹ meaning these restaurants do not have valuable assets. Second, when the restaurant is up and running, an average of 67% of costs for a full-service restaurant go directly towards wages and purchase expenses, such as food.⁸² In addition, steep competition keeps restaurants from raising prices too high in an effort to offset costs.⁸³ These factors can lead to undercapitalization, which significantly decreases workers’ chances of receiving their unpaid wages.⁸⁴ Therefore, the risk of insolvency and low profit margins leave restaurant workers vulnerable to wage theft and prone to nonpayment, even when workers receive a judgment in their favor.⁸⁵

Limited enforcement and minimal accountability permit employers to ignore legal requirements.⁸⁶ Many employers are not held accountable because, often, workers either do not know or do not understand their wage and overtime rights.⁸⁷ One nationwide study surveying over 4,000 low-wage workers in Los Angeles, Chicago, and New York found that 59% of workers misunderstood their minimum wage or overtime rights.⁸⁸

Additionally, workers are less likely to report their unpaid wages in fear of retaliation such as decreased hours and pay, change in work duties, and even termination.⁸⁹ Workers fear being replaced if they com-

⁷⁹ TUNA N. AMOBI & XIONG JUN GOON, *INDUSTRY SURVEYS: RESTAURANTS* 17 (June 2020).

⁸⁰ *How to Start a Restaurant with Little to No Money*, AUGUSTE ESCOFFIER SCH. OF CULINARY ARTS (June 18, 2021), <https://www.escoffier.edu/blog/food-entrepreneurship/how-to-start-a-restaurant-with-little-to-no-money/>.

⁸¹ *Id.*

⁸² Rory Crawford, *Restaurant Profitability and Failure Rates: What You Need to Know*, FULL-SERVICE REST. MAGAZINE (April 2018), <https://www.fsrmagazine.com/expert-takes/restaurant-profitability-and-failure-rates-what-you-need-know>.

⁸³ AMOBI & JUN GOON, *supra* note 79, at 17.

⁸⁴ Lee & Smith, *supra* note 34, at 770.

⁸⁵ See Foshay, *supra* note 32 (discussing the difficulties in collecting wage theft judgments from restaurants).

⁸⁶ See Hallett, *supra* note 49, at 108.

⁸⁷ *Id.* at 105.

⁸⁸ *Id.* In another survey of restaurant workers in Philadelphia, just over 60% of respondents did not know the correct legal minimum wage. RESTAURANT OPPORTUNITIES CENTER OF PHILADELPHIA ET AL., *BEHIND THE KITCHEN DOOR: THE HIDDEN REALITY OF PHILADELPHIA’S THRIVING RESTAURANT INDUSTRY* 24 (2012) https://docshare.tips/behind-the-kitchen-door-the-hidden-reality-of-philadelphias-quos-thriving-restaurant-industry_57476d6bb6d87f4a718b47cc.html.

⁸⁹ See Hallett, *supra* note 49, at 107 (discussing a 2009 study finding 20% of surveyed workers experienced serious problems at work and of these workers 51% worried complaining would lead to them being fired, 10% believed their hours would be cut, and 36% did not complain because the worker felt that complaining would not make a difference).

plain about wage theft,⁹⁰ especially in industries such as restaurants where the turnover rate of workers is high.⁹¹ Furthermore, approximately 10% of workers in restaurants are undocumented⁹² and these workers can be especially vulnerable to retaliation.⁹³ Recent allegations regarding the presence of Federal Immigration and Customs Enforcement (ICE) agents at wage claim hearings illustrate the credible threats workers face when trying to collect their unpaid wages.⁹⁴ Even though these types of retaliations are prohibited by law, the process of litigating a retaliation claim can be just as complicated and slow as wage claims.⁹⁵

The long and convoluted process for workers to file a wage-related complaint against their employers further discourages workers from coming forward.⁹⁶ Workers who decide to pursue a wage-related claim in California have two options.⁹⁷ The first option is to file a civil suit directly with the court, which is difficult for low wage workers to attain.⁹⁸ Hiring an attorney is expensive and an unrealistic option for many low-wage restaurant workers.⁹⁹ Most restaurant workers are disputing relatively low-wage claims so the recovery may not justify the attorney's time.¹⁰⁰ The alternative—filing their own complaint—may be confusing and time consuming for someone without any formal legal training.¹⁰¹ While the workers of Mission Beach Café were able to obtain legal services, bringing a lawsuit is often not possible for many low-wage restaurant workers.¹⁰²

The second option is to file an administrative complaint with the Labor Commissioner.¹⁰³ Filing a complaint with the Labor Commissioner is a fairly straightforward process that many workers can do on

⁹⁰ Lee & Smith, *supra* note 34, at 770.

⁹¹ See *How High Employee Turnover is Affecting the Restaurant Industry*, MICHELIN GUIDE (Oct. 4, 2018), <https://guide.michelin.com/us/en/california/article/features/restaurant-employee-turnover> (stating in 2016, the U.S. Bureau of Labor reported the restaurant turnover rate nationwide surpassed 70%).

⁹² Soleil Ho & Tatiana Sanchez, *Bay Area's Undocumented Restaurant Workers May Need Most Help. Get the Least*, SF CHRONICLE (July 5, 2020), <https://www.sfchronicle.com/restaurants/article/Bay-Area-s-undocumented-restaurant-workers-may-15380764.php>.

⁹³ See Hallett, *supra* note 49, at 131-32.

⁹⁴ Natalie Kitroeff, *Officials Say Immigration Agents Showed Up at Labor Dispute Proceedings. California Wants Them Out*, L.A. TIMES (Aug 3, 2017), <https://www.latimes.com/business/la-fi-ice-california-labor-20170802-story.html>.

⁹⁵ Hallett, *supra* note 49, at 107.

⁹⁶ *Id.*

⁹⁷ Fritz-Mauer, *supra* note 15, at 102.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 102-03.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 103.

their own.¹⁰⁴ The worker participates in an administrative process which first involves an informal conference with a Labor Commissioner deputy, the worker, and the employer to determine if the wage dispute can be resolved without a formal hearing.¹⁰⁵ If the employer does not attend the conference or the claim cannot be resolved, the claim will be scheduled for a hearing.¹⁰⁶ Although no formal rules of evidence apply at the hearing, the decision at the hearing is binding like a court judgment, though it can be appealed.¹⁰⁷ The Labor Commissioner handles more than 30,000 new wage claims each year but this represents only a small fraction of wage violations around the state because not all wage theft claims are reported.¹⁰⁸ Although filing a complaint through the Labor Commissioner is an administrative process, both filing a wage theft claim with the Labor Commissioner or filing a wage theft claim in civil court can take over two years.¹⁰⁹ Further, the workers' chances of collecting from a judgment by the Labor Commissioner is still relatively low.¹¹⁰

Employers are also disincentivized to comply with wage and hour laws because even when a worker is aware of their rights and adjudicates the claim, an employer likely will only pay a fraction of the amount due.¹¹¹ Even the risk of paying hefty penalties and liquidated damages¹¹² does little to deter wage theft¹¹³ because many wage claim disputes settle

¹⁰⁴ See THE LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, DO-IT-YOURSELF RECOVERY OF UNPAID WAGES 8 (2004), http://legalaidatwork.org/wp-content/uploads/2017/01/Recovering_Unpaid_Wages.pdf.

¹⁰⁵ *Policies and Procedures for Wage Claim Processing*, CAL. DEP'T OF INDUS. REL. (July 2018), <https://www.dir.ca.gov/dlse/Policies.htm>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Fritz-Mauer, *supra* note 15, at 74 n.10.

¹⁰⁹ ASSEMB. COMM., REGULAR SESS. BILL ANALYSIS LIENS: AB 1164: EMPLOYEES AND WORKERS, at 3 (Cal. 2013); Foshay, *supra* note 32 (explaining when workers file a claim through the Labor Commissioner, "LA County workers have to wait an average of 495 days for a hearing. In Oakland, the wait is 1,050 days . . .").

¹¹⁰ Fritz-Mauer, *supra* note 15, at 103-04. For example, between 2008-2011 only 17% of workers were able to receive any payment from their respective employer. HYUNHYE CHO ET AL., *supra* note 27, at 2.

¹¹¹ See Hallett, *supra* note 49, at 103 ("Economists have long sought to explain non-compliance with wage and hour laws as a rational profit-maximizing decision employers make in response to low enforcement rates and weak penalties. In their seminal 1979 article, *Compliance with the Minimum Wage Law*, Orley Ashenfelter and Robert Smith theorized that an employer's decision to pay less than the minimum wage involves a cost-benefit analysis that takes into account the probability of detection, the expected penalties that would occur if detected, and the profit the employer expects to make by violating the law.") (citing Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 335-36 (1979)).

¹¹² For instance, an employer must pay twice what the employer owed. See CAL. LAB. CODE § 1194.2.

¹¹³ See Fritz-Mauer, *supra* note 15, at 196 ("[I]n spite of California's long history of progressivism, and despite its seemingly strict labor and employment statutes, wage theft runs rampant through the state's low-wage industries."); see, e.g., Hallett, *supra* note 49, at 112 (explaining one

for far less than what is actually owed.¹¹⁴ In California, most wage claims have a statute of limitations of three or four years,¹¹⁵ leaving many workers with unrecoverable unpaid wages.¹¹⁶

Not only do workers suffer without their wages while waiting on adjudication of their claims, but employers can take advantage of the long process to hide and transfer their assets.¹¹⁷ Many employers found liable by the Labor Commissioner become non-active businesses, meaning they abandon, transfer, or sell the business—some even before a judgment is rendered.¹¹⁸ Not every business shuts its doors or transfers assets purposefully to avoid liability but some employers take fraudulent steps to avoid paying workers' unpaid wages.¹¹⁹

For instance, in May 2012, three restaurant workers employed at a Los Angeles restaurant filed wage claims with the Labor Commissioner.¹²⁰ Within four months, the three restaurant owners, who were also siblings, began to transfer ownership between each other in an attempt to avoid paying the workers' unpaid wages.¹²¹ After the Labor Commissioner sued the owners for fraudulent transfer, the owners settled the three workers' claims in 2016 for \$190,000.¹²² Many workers with judgments against non-active businesses are not so lucky and face almost

example where a restaurant in Connecticut agreed to pay workers' back wages in 2009 and 2010 but was sued again by the Department of Labor in 2015 for the same conduct. Each time, the same owner reorganized under a different corporation owned by the same couple. The owner admitted "he would continue to pay less than minimum wage because 'he could get away with it' and he believed 'that's the way business works in America.'").

¹¹⁴ Hallett, *supra* note 49, at 109.

¹¹⁵ See CAL. CODE CIV. PROC. § 338 (stating that statutory violations have a three-year statute of limitations of three years); CAL. BUS. & PROF. CODE § 17208 (allowing a four-year statute of limitations under the Unfair Competition law for cases filed in civil court).

¹¹⁶ Hallett, *supra* note 49, at 109.

¹¹⁷ HYUNHYE CHO ET AL., *supra* note 27, at 2.

¹¹⁸ *Id.* at 14.

¹¹⁹ *Id.*; see Foshay, *supra* note 32 (explaining when the Labor Commissioner tries to collect judgments "'[E]mployers will play shell games,' said Labor Commissioner Su. 'They will close down and open up under a new name. They will transfer their assets, often to family members or friends, in an effort to abscond with wages that should have been properly given to workers.'"); see, e.g., *Labor Commissioner Victory for 15 Workers Seeking Unpaid Wages*, CAL. STATEWIDE LAW ENF'T AGENCY, (Sept. 18, 2018) (stating that a residential care facility settled 15 workers claims for \$450,000 after the Labor Commissioner sued the employer from transferring their real estate ownership to escape payment).

¹²⁰ *Labor Commissioner Reaches Settlement to Secure \$190,000 in Back Pay for Rosemead Restaurant Workers*, *supra* note 42.

¹²¹ *Id.*

¹²² *Id.* ("The three employees, who worked as kitchen staff, regularly worked 12-hour shifts, six days per week with no overtime, meal periods, or rest breaks. They were paid \$875 to \$900 twice per month, with no pay stubs detailing their hours or lawful deductions. Each of the workers filed wage claims in May 2012 and January 2013, and won judgments in September 2013 ordering the owners to pay wages owed as well as liquidated damages and penalties.").

insurmountable barriers to collect their wages.¹²³ Yet, the current tools available to restaurant workers to prevent a worthless judgement are insufficient.

THE INSUFFICIENCY OF AVAILABLE PREJUDGMENT AND POST-JUDGMENT TOOLS FOR RESTAURANT WORKERS

A. PREJUDGMENT ATTACHMENTS POSE UNIQUE CHALLENGES FOR RESTAURANT WORKERS

Prejudgment writs of attachments secure assets before a judgment is rendered by creating a judicial lien on a respondent's property.¹²⁴ Thus, prejudgment attachments also serve to encourage settlement in a case.¹²⁵ However, due to the complicated nature of not only attaining but also enforcing a prejudgment attachment,¹²⁶ they are not a realistic tool for many restaurant workers.

Prejudgment attachments are one of the only prejudgment tools available to restaurant workers to prevent a worthless judgment.¹²⁷ Yet, just obtaining a prejudgment attachment is a long and cumbersome process.¹²⁸ Prejudgment attachments are only available in civil suits, and are unavailable to workers who filed a complaint through the Labor Commissioner.¹²⁹ If there is a civil claim, the attorney must find assets to attach, fill out and file dozens of forms, and the worker must file a \$10,000 dollar bond.¹³⁰ Consequently, even when a restaurant worker manages to retain legal services, the process of attaining a prejudgment

¹²³ See HYUNHYE CHO ET AL., *supra* note 27, at 17; see also Foshay, *supra* note 32 (stating corporate shell games can make collecting back wages too time consuming and expensive. For instance, a case with approximately ten hours of work can balloon to one hundred, two hundred, or even more in order to try to collect a workers' wages).

¹²⁴ Diane Roldán, *Making the Most of Prejudgment Writs of Attachment*, 40 L.A. LAW. 15, 16 (2017).

¹²⁵ *Id.*

¹²⁶ *Id.* at 15.

¹²⁷ HYUNHYE CHO ET AL., *supra* note 27, at 8-10 (discussing tools available to workers including pre-judgment tools like prejudgment attachments and mechanic's liens. However, mechanic's liens are only available to workers in the construction business [as further discussed below]. Other post-judgment tools are also discussed including post-judgment liens, collections agencies, and relying on the Labor Commissioner to collect judgments.).

¹²⁸ *Id.* at 8; see also Roldán, *supra* note 124, at 15 ("There are few areas of the law more byzantine and susceptible to error than the minutiae of prejudgment writs of attachment.").

¹²⁹ HYUNHYE CHO ET AL. *supra* note 27, at 8.

¹³⁰ Roldán, *supra* note 124, at 15.

attachment is still complicated and absorbs significant time and resources.¹³¹

The complicated process to enforce a prejudgment attachment is compounded for restaurant workers because restaurants have low profit margins¹³² and thus, little assets. Assuming a restaurant worker attains a prejudgment attachment as the workers did at Mission Beach Café¹³³—the complicated process of enforcing the attachment throws workers into a sort of catch-22. Navigating the bureaucracy of the sheriff’s office to enforce the attachment can be burdensome.¹³⁴ For example, one tool the Mission Beach Café workers attempted to use was a till tap levy, a type of prejudgment attachment execution where the sheriff collects cash at the business’s premises.¹³⁵ However, the sheriff could only arrive on weekdays, missing the best opportunity to collect on the restaurant’s most lucrative days—weekends.¹³⁶ Moreover, a till tap is only effective when customers pay in cash, which enables the sheriff to intercept payment.¹³⁷ But, till taps can deter customers since they have to pay in cash and affect the workers’ tips and payments going forward. If the owner filed for bankruptcy within ninety days of obtaining the attachment, then the court would set aside the lien.¹³⁸ Once the sheriff starts collecting cash, the owner could be pushed into bankruptcy, thus, negating the lien.¹³⁹ Although some of these factors may be location-specific, depending on each cities’ sheriff’s department, this process is nonetheless long and complicated, making it a useless tool for most restaurant workers.¹⁴⁰ Another option is for workers to use post-judgment collection tools after receiving a judgment from the Labor Commissioner or civil court.

¹³¹ See *id.* (“A single attachment application typically involves half a dozen arcane court forms, more than one memorandum of points and authorities, a certified bond, evidentiary declarations, and attorney declarations. Moreover, convincing the judge to sign the right-to-attach order is only half the battle. Navigating the bureaucracy of the court clerk and sheriff’s offices to enforce the writ can prove as formidable as litigating the merits.”).

¹³² Crawford, *supra* note 82.

¹³³ Right to Attach, *Germick v. Mission Beach Café, LLC*, No. CGC-17-557748, (S.F. Cnty. Super. Ct. Dec. 8, 2017).

¹³⁴ Roldán, *supra* note 124, at 15.

¹³⁵ *More Ways to Collect*, CAL. CTS., <https://www.courts.ca.gov/11188.htm#acc12745> (last visited Jan. 6, 2022); see E-mail from Anna Kirsch, Attorney, WERC, to Plaintiffs (Feb 15, 2018, 09:10 PST) (on file with author) (discussing instructions given to the local sheriff’s office to collect cash from the restaurant).

¹³⁶ *Id.* (explaining the sheriffs’ office would not collect on the weekends and could not guarantee other preferences would be followed. Further, they would not give advance notice and it may take weeks or even months for the sheriffs’ office to enforce the attachment).

¹³⁷ *More Ways to Collect*, *supra* note 135.

¹³⁸ Roldán, *supra* note 124, at 18.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 15.

A. STRENGTHENING POST-JUDGMENT TOOLS DOES NOT
MEANINGFULLY IMPACT RESTAURANT WORKERS

In 2015, amidst the growing concern over wage theft and the recent legislative defeats for a prejudgment wage lien in California,¹⁴¹ advocates focused on a bill to combat the meager post-judgment collection rates.¹⁴² Enacted in 2016, SB 588 strengthens post-judgment collections through five separate tools: (1) mail levies and liens, (2) stop orders and licensing revocation, (3) enhanced successor liability (4) upstream liability for specific industries, and (5) individual liability for individual employers.¹⁴³ Although a full analysis of all these tools is outside the scope of this Comment,¹⁴⁴ individual liability and stop orders created by SB 588 are noteworthy. Unfortunately, many of these tools require action by the Labor Commissioner, an understaffed and underfunded agency.¹⁴⁵ Since the passage of SB 588, wage collection rates in the restaurant industry have only modestly improved.¹⁴⁶

First, individual liability permits any person acting on behalf of an employer “who violates or causes to be violated” certain provisions of the California Labor Code or the state’s Wage Orders to be held personally liable.¹⁴⁷ The individual liability component is a valuable tool for workers’ rights.¹⁴⁸ Advocates have been able to pressure employers to settle claims through this provision, attaining payment of wages far faster than going through the Labor Commissioner or filing in civil court.¹⁴⁹ However, some advocates have cited resistance from employers who

¹⁴¹ ASSEMB. COMM., REGULAR SESS. BILL ANALYSIS LIENS: AB 1164: EMPLOYEES AND WORKERS (Cal. 2013); S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416: LABORERS AND EMPLOYEES (Cal. 2014).

¹⁴² Fuentes, *supra* note 35, at 382-83 (explaining the failure of prejudgment wage lien bills in 2013 and 2014).

¹⁴³ *Id.* at 383.

¹⁴⁴ For a comprehensive analysis of SB 588 see Rey Fuentes, *Making Workers Whole: A Retrospective Analysis of SB 588 and Enhanced Post-Judgment Collection in California*, 40 BERKELEY J. EMP. & LAB. L. 369 (2019).

¹⁴⁵ See Lee & Smith, *supra* note 34, at 795; see also Foshay, *supra* note 32 (discussing how the Labor Commissioner’s office has fewer than one field deputy per county, prompting Los Angeles County to create its own wage theft task forces).

¹⁴⁶ See Fuentes, *supra* note 35, at 388-91, 394-95 tbls. 2 & 5 (showing for the restaurant industry a 6% success rate for mail levies and a 16% success rate for stop orders); *Id.* at 398 (explaining with the help of SB 588, collection rates increased to 28% overall but that rate is still modest).

¹⁴⁷ CAL. LAB. CODE § 558.1(a). Wage orders, which outline employment requirements categorized by different industries, were created by the Industrial Welfare Commission but are enforced by the Division of Labor Standards Enforcement. *Industrial Welfare Commission*, CAL. DEP’T OF INDUS. REL., <https://www.dir.ca.gov/Iwc/iwc.html> (last visited October 31, 2021).

¹⁴⁸ Fuentes, *supra* note 35, at 396.

¹⁴⁹ *Id.* at 396-97.

have argued individual liability does not apply outside the Labor Commissioner hearings.¹⁵⁰ Further, liability is limited to the “owner, director, officer, or managing agent of the employer.”¹⁵¹ In the restaurant industry, agents such as managers or supervisors, likely do not have many assets.

Second, the stop order provision of the bill allows the Labor Commissioner to issue a citation requiring a business to stop operating when a business fails to satisfy a judgment against them thirty days after the opportunity for appeal has passed.¹⁵² Further, the Labor Commissioner may issue civil penalties if a business continues to operate after receiving a stop order.¹⁵³ An employer can avoid these consequences by posting a bond ranging from \$50,000 to \$150,000, depending on the size of final judgment, in order to satisfy the outstanding liabilities.¹⁵⁴ Alternatively, an employer may show proof of a settlement.¹⁵⁵

The stop order provision has had some success in the restaurant industry but falls short of full payment of wages.¹⁵⁶ For instance, a study analyzing data from the enactment of SB 588 to April 2018, revealed there was an overall 16% success rate in collecting unpaid wages through stop orders in the restaurant industry.¹⁵⁷ Even more striking, the Labor Commissioner did not record one bond by any employer, one of the methods an employer can use to avoid a stop order.¹⁵⁸ Although individual liability is a tool available without the aid of the Labor Commissioner, many of the provisions of SB 588, like stop orders, require action on the part of the Labor Commissioner,¹⁵⁹ an underfunded agency.¹⁶⁰ Despite an overall improvement in the collection of unpaid wages across all industries as a result of SB 588, the overall rate is modest,¹⁶¹ especially in the restaurant industry.¹⁶² Even with strengthened post-judgment tools, collections for restaurant workers remain low.¹⁶³ The Labor

¹⁵⁰ *Id.* at 397 (“[W]hile no appellate court has yet ruled on this issue, some advocates stressed that defendants have objected to the application of individual liability outside of the Berman hearing process, arguing that there was no clear legislative intent to expand such liability outside of hearings before the Labor Commissioner.”).

¹⁵¹ CAL. LAB. CODE § 558.1(b).

¹⁵² *Id.* § 238(a).

¹⁵³ *Id.* § 238(f).

¹⁵⁴ *Id.* § 238(a).

¹⁵⁵ *Id.* § 238(b).

¹⁵⁶ See Fuentes, *supra* note 35, at 388-91, 393-95 tbls. 2 & 5.

¹⁵⁷ *Id.* at 393.

¹⁵⁸ *Id.* at 397.

¹⁵⁹ See *id.* at 383.

¹⁶⁰ Foshay, *supra* note 32.

¹⁶¹ Fuentes, *supra* note 35, at 398.

¹⁶² See *id.* at 388-91, 394-95 tbls. 2 & 5.

¹⁶³ 2017-2018 FISCAL REPORT, *supra* note 48, at 5.

Commissioner was only able to collect about \$684,000 out of approximately \$16 million in wages owed to restaurant workers in 2017-2018.¹⁶⁴

II. LESSONS FROM CALIFORNIA’S INDUSTRY-SPECIFIC PREJUDGMENT WAGE LIEN TOOLS

Industry-specific wage laws and enforcement tools are not a new phenomenon as California has a long history of recognizing and targeting industries where wage theft is ubiquitous. For instance, California has adopted more robust prejudgment tools for the construction and car wash industries.¹⁶⁵ This demonstrates that California recognizes the need for industry-specific wage laws and enforcement tools.

A. MECHANIC’S LIENS AS AN INCENTIVE FOR PROMPT PAYMENT OF WAGES

Mechanic’s liens allow a laborer to attach a lien onto a property that was improved by the worker’s labor.¹⁶⁶ This tool is not unique as almost all states have their own form of a mechanic’s lien.¹⁶⁷ However, mechanic’s liens are a prejudgment lien available to only certain workers, typically those involved in the construction industry such as subcontractors, material suppliers, direct contractors, and equipment lessors.¹⁶⁸

In California, mechanic’s liens have over a 150 year history since the legislation was passed during California’s first legislative session.¹⁶⁹ California later codified the laborer’s right to a mechanic’s lien in the state’s constitution in 1879,¹⁷⁰ in which the provision remains largely unchanged today.¹⁷¹ The California Constitution mandates the legislature provide “speedy and efficient enforcement of such liens” for the value of a laborer’s services.¹⁷² The mechanic’s lien scheme rests on the theory that construction laborers who have added value to a property should be

¹⁶⁴ *Id.*

¹⁶⁵ See *Car Wash Registration Document Requirements*, CAL. DEP’T INDUS. RELATIONS (July 2019), https://www.dir.ca.gov/dlse/required_documents.html; HYUNHYE CHO ET AL., *supra* note 27, at 9 (2013).

¹⁶⁶ HYUNHYE CHO ET AL. *supra* note 27, at 9 (2013).

¹⁶⁷ *Id.* at 16.

¹⁶⁸ CAL. CIV. CODE § 8400(a)-(f); Fuentes, *supra* note 35, at 381.

¹⁶⁹ J. David Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 BERKELEY J. EMP. & LAB. L. 254, 256 (1999).

¹⁷⁰ CAL. CONST. art. XX, § 15 (1879); see Sackman, *supra* note 168, at 256.

¹⁷¹ Sackman, *supra* note 169, at 256 n.6; CAL. CONST. art. XIV § 3 (1976).

¹⁷² CAL. CONST. art. XIV, § 3 (1879).

protected by making the property liable to them for the increased value which they have created.”¹⁷³

Most workers who can utilize mechanic’s liens are required to give a preliminary notice before recording the lien with the county recorder’s office.¹⁷⁴ The legislature distinguishes between materialmen and laborers, creating an exemption for the preliminary notice requirement for laborers.¹⁷⁵ Laborers are those who “perform actual labor for wages on the property.”¹⁷⁶

Even though the provision within the California Constitution remains predominately unchanged since its inception, the mechanic’s lien scheme codified in the California Civil Procedure statutes has been amended over the years.¹⁷⁷ Today, a worker is subject to recording and timing requirements to collect for the value of services or improvements made to the physical property.¹⁷⁸ As long as the requirements are satisfied, the lien attaches to the real property where the work was conducted.¹⁷⁹ Mechanic’s liens have priority status over liens that “attach[] after commencement of a work improvement,” which helps to secure payment of a worker’s wages once they start working.¹⁸⁰ This provision has the effect, in certain circumstances, to allow a worker to be paid first when the property attached is sold and protects a worker’s wages if their employer files for bankruptcy.¹⁸¹

Although originally intended to be a straightforward process, enforcement of mechanic’s lien may require legal assistance.¹⁸² Mechanic’s liens are generally successful in recovering unpaid wages because they encourage settlement and payment by drawing the owner’s attention to the attached property.¹⁸³

B. THE CAR WASH BOND REQUIREMENT SCHEME IS A STEP IN THE RIGHT DIRECTION

In 2004, the California state legislature passed A.B. 1688, a registration and bond requirement bill specific to the car wash industry in re-

¹⁷³ Clark v. Beyrle, 160 Cal. 306, 311 (1911).

¹⁷⁴ CAL. CIV. CODE § 8410; *see also id.* § 8416 (requiring proof of notice before enforcing a mechanic’s lien).

¹⁷⁵ *Id.* § 8200(e)(1).

¹⁷⁶ Borchers Bros. v. Buckeye Incubator Co., 59 Cal. 2d 234, 240 (1963).

¹⁷⁷ *See* Cal. Civ. Code §§ 8400-94.

¹⁷⁸ *Id.* §§ 8410-24; Fuentes, *supra* note 35, at 381.

¹⁷⁹ *See* CAL. CIV. CODE § 8440.

¹⁸⁰ *Id.* § 8450.

¹⁸¹ *See* Fuentes, *supra* note 35, at 381.

¹⁸² *See id.*

¹⁸³ *See* HYUNHYE CHO ET AL. *supra* note 27, at 9.

sponse to substandard working conditions and wage theft.¹⁸⁴ In addition to findings of nonpayment of minimum wage and overtime, the legislature found a class of car wash workers who only worked for tips without being paid an hourly rate.¹⁸⁵ Moreover, the legislature found existing tools did little to remedy the issues.¹⁸⁶

The passage of A.B. 1688 did not set up a procedure for workers but rather created a scheme between car wash operators and the Labor Commissioner, by which workers are ensured prompt payment of wages via the bill's registration and bond system.¹⁸⁷ Annually, each car wash operator must register with the Labor Commissioner's office and pay a registration fee.¹⁸⁸ Additionally, in order to continue to operate, the car wash must have a valid surety bond equal to no less than \$150,000 to ensure nonpayment of wages.¹⁸⁹ The scheme created the Car Wash Worker Restitution Fund, which consists of the registration fees and fines.¹⁹⁰ To participate in the fund, a worker submits a claim to the Labor Commissioner, who investigates and determines whether the worker is entitled to receive a payment of claimed wages.¹⁹¹

While the amount of monetary penalties collected increased with the registration requirements, there remains a lack of compliance for operators who refuse to register.¹⁹² The registration enforcement is within the Labor Commissioner's authority¹⁹³—a state agency already underfunded and understaffed.¹⁹⁴ The car wash operators who are likely to ignore the registration and bonding requirements may be the same bad actors who violate wage and hour laws. With proper enforcement, a bonding requirement can allow a worker to promptly recover their wages.¹⁹⁵

¹⁸⁴ S. COMM. ON LABOR & INDUS. RELATIONS, CAR WASHES: LABOR STANDARDS; REGISTRATION, S., 2003-2004 Reg. Sess., at 1 (Cal. 2003).

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 1.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*; *see also* Cal. Lab. Code § 2055 (explaining requirements for car wash registration).

¹⁸⁹ CAL. LAB. CODE § 2055(b). In 2003, when A.B. 1688 was passed, the surety bond requirement was only \$15,000. Assemb. B. 1688, 2003-2004 Reg. Sess. (Cal. 2004). However, noting the typical wage claim for a car wash worker was about \$35,000, A.B. 1387, passed in 2013, raised the surety bond requirement to \$150,000. ASSEMB. COMM. ON LABOR & EMP'T., CAR WASHES, 2013-2014 Reg. Sess., at 3 (Cal. 2014); Assemb. B. 1387, 2013-2014 Reg. Sess. (Cal. 2014).

¹⁹⁰ S. COMM. ON LABOR & INDUS. RELATIONS, CAR WASHES: LABOR STANDARDS; REGISTRATION, S., 2003-2004 Reg. Sess., at 2 (Cal. 2003).

¹⁹¹ CAL. CODE REGS. § 13694 (West 2005).

¹⁹² *See* DEPT. OF INDUS. REL., DIV. OF LAB. AND STAND. ENF'T., 2008 REPORT ON THE STATUS OF ENF'T. IN THE CAR WASHING AND POLISHING INDUS. LAB. CODE SECTION 2068, at 3 (Cal. 2008).

¹⁹³ CAL. LAB. CODE § 2065.

¹⁹⁴ Foshay, *supra* note 32.

¹⁹⁵ *See* S. COMM. ON LABOR & INDUS. RELATIONS, CAR WASHES at 2.

III. THE IDEAL PREJUDGMENT WAGE LIEN TOOL TO ENSURE WAGES FOR CALIFORNIA RESTAURANT WORKERS

A. WISCONSIN AND MARYLAND WAGE LIEN LAWS: EXEMPLARY MODELS FOR RESTAURANT WORKERS

1. *Wisconsin*

In 1993, the Wisconsin legislature passed a bill to ensure workers can collect their unpaid wages.¹⁹⁶ Wisconsin's wage lien law is one of the broadest in the nation because it applies to most workers and is not limited to certain industries.¹⁹⁷ Wisconsin's wage lien law is an effective tool for employees to collect unpaid wages because the tool allows for workers to file a lien on their own and, procedurally, it is a fairly straightforward process.¹⁹⁸

A worker files a wage claim and wage lien simultaneously on their own or files a complaint with the Department of Workforce Development (DWD), Wisconsin's equivalent to California's Labor Commissioner.¹⁹⁹ The DWD also files a wage lien on behalf of the worker after conducting an initial investigation.²⁰⁰ Both personal and real property may be attached as part of the wage lien.²⁰¹ Whether attaching real or personal property, the worker files a notice of the lien in the circuit court where the worker provided services to her employer.²⁰² Once the wage lien is filed, the assets are preserved to ensure the worker can collect owed wages.²⁰³ The employee has two years from filing a claim with the DWD to enforce the lien.²⁰⁴

Wisconsin's prejudgment wage lien allows for a broad "super priority status," meaning a worker's claim will take precedence over other debts if an employer files for bankruptcy or liquidates her assets.²⁰⁵ A

¹⁹⁶ HYUNHYE CHO ET AL., *supra* note 27, at 16.

¹⁹⁷ *Id.* at 19.

¹⁹⁸ *Id.* at 17.

¹⁹⁹ WIS. STAT. § 109.09 (West 2018); *Id.* at 16-17.

²⁰⁰ WIS. STAT. § 109.09; HYUNHYE CHO ET AL. *supra* note 27, at 16-17.

²⁰¹ WIS. STAT. § 109.09(2).

²⁰² *Id.* § 109.09(2).

²⁰³ HYUNHYE CHO ET AL. *supra* note 27, at 17.

²⁰⁴ WIS. STAT. § 109.09(2)(c) (citing WIS. STAT. § 893.44(2) (West 2022)).

²⁰⁵ *Id.* § 109.09(2); See Rebecca Lineberry, Comment, *Combatting Wage Theft: Establishing Employees as Secured Creditors Under the Maryland Unpaid Wage Lien Law*, 77 MD. L. REV. 1229, 1243 (2018).

worker's lien even takes precedence over preexisting liens, with few exceptions.²⁰⁶

Wisconsin workers have been significantly successful in collecting unpaid wages.²⁰⁷ Between 2007 and 2012 more than 55% of employers paid workers wage claims in full while only 5% of employers refused to settle, resulting in litigation of those claims.²⁰⁸ As a whole, even though the DWD receives approximately 3,300 wage claims per year, the DWD only filed 234 wage liens between 2005 and 2013.²⁰⁹ Although a much smaller scale than California's 30,000 wage claims filed per year,²¹⁰ the success in Wisconsin suggests employers pay up because employers are aware the DWD or a worker may file a wage lien to their real or personal property. This is an important aspect for a prejudgment wage lien because it has the effect of workers promptly being paid their unpaid wages. Further, the state was able to collect full or partial payment of wages in most cases where the employer closed, sold their business, or filed for bankruptcy.²¹¹ Wisconsin's tool is easy and effective, which makes it an exemplary tool for California restaurant workers.

2. *Maryland*

More recently, Maryland enacted a broad prejudgment wage lien law similar to the Wisconsin law.²¹² Like Wisconsin, Maryland's Lien for Unpaid Wages Law was fashioned to be a simple and effective tool that is easily accessible to workers without the need for counsel.²¹³

Similar to Wisconsin, a worker in Maryland files a lien on their own or the Labor Commissioner can pursue a wage lien on behalf of the worker.²¹⁴ In order to establish a wage lien, a worker first needs to fill out a notice of intent to file a wage lien.²¹⁵ This is a simple form found

²⁰⁶ WIS. STAT. § 109.09(2)(c); *See* Lineberry, *supra* note 205, at 1243 (explaining statutory exceptions such as for commercial lending institutions and government cleanup after environmental disasters).

²⁰⁷ *See* HYUNHYE CHO ET AL. *supra* note 27, at 17-18.

²⁰⁸ *Id.* at 17-18.

²⁰⁹ *Id.* at 18.

²¹⁰ Fritz-Mauer, *supra* note 15, at 103.

²¹¹ *See* HYUNHYE CHO ET AL., *supra* note 27, at 18 ("Of 98 workers with wage claims against employers who have closed, sold, entered bankruptcy, or defaulted, 79 have collected full or partial payment").

²¹² MD. CODE ANN., LAB. & EMP. § 3-1102 (Westlaw 2021).

²¹³ Lineberry, *supra* note 205, at 1236-37.

²¹⁴ SB 758, Reg. Sess. Md. Laws Ch. 540 at 1 (Md. 2013); MD. LAB & EMP § 3-1102.

²¹⁵ MD. LAB. & EMP. § 3-1102; Lineberry, *supra* note 205, at 1237.

on Maryland's Department of Labor website.²¹⁶ The notice includes basic information such as the amount of wages claimed and the real or personal property the worker is seeking to encumber.²¹⁷ A worker then serves the notice through mail or personal service.²¹⁸ An employer has thirty days to dispute the lien by filing a complaint in the circuit court where the property is located.²¹⁹ If an employer disputes a lien, the court must adjudicate the claim within forty-five days from the date the complaint is filed.²²⁰ If an employer does not dispute the lien within the thirty days, a lien automatically attaches to the property.²²¹

Unlike Wisconsin, where a worker records in one place whether personal or real property, Maryland uses two different forums depending on the type of property the worker wishes to attach.²²² A worker in Maryland must record a lien against real property in the circuit court governing where the real property is located, and a lien against personal property with the State Department of Tax and Assessment.²²³ A worker has twelve years to enforce the wage lien from the date of recording.²²⁴

After recording a wage lien, the lien becomes a secured claim from the date the court order established the lien or from the date the worker filed the wage lien if the employer did not file a dispute.²²⁵ However, due to imprecise language in the statute, there is still an open question regarding what priority the wage liens have in relation to other claims on the employer's property.²²⁶ The statute designates the claim as "secured" but fails to specify the wage lien's priority to other liens filed on the same property.²²⁷

Maryland's wage lien law is a strong model to ensure unpaid wages for restaurant workers. The law furnishes workers with a self-service tool they can use to pressure the payment of unpaid wages.²²⁸ Wisconsin's wage lien law allows a slightly simpler process for workers by allowing the worker to file in one forum whether the worker wants to attach real or

²¹⁶ *Maryland Lien for Unpaid Wages: Employment Standards Service (ESS)*, MD. DEP'T OF LAB., <https://www.dlr.state.md.us/labor/wages/essunpaidwageslien.shtml> (last visited Oct. 27, 2020).

²¹⁷ *Id.*; Martha M. Ertman and Doris N. Weil, *Maryland's New Remedy for Wage Theft*, MD. BAR J., 16, 18 (2018).

²¹⁸ MD. LAB. & EMP. § 3-1102 (West 2021) (citing MD. RULES, RULE 2-121(a)).

²¹⁹ MD. LAB. & EMP. § 3-1103(a)-(b); Ertman & Weil, *supra* note 217, at 18.

²²⁰ MD. LAB. & EMP. § 3-1103(c)-(d); Ertman & Weil, *supra* note 217, at 18.

²²¹ MD. LAB. & EMP. § 3-1104(2); Ertman & Weil, *supra* note 217, at 18.

²²² MD. LAB. & EMP. § 3-1105(c); Ertman & Weil, *supra* note 217, at 19.

²²³ MD. LAB. & EMP. § 3-1105(c); Lineberry, *supra* note 205, at 1238.

²²⁴ MD. LAB. & EMP. § 3-1106(b).

²²⁵ *Id.* § 3-1105(e).

²²⁶ Lineberry, *supra* note 205, at 1239.

²²⁷ Ertman & Weil, *supra* note 217, at 22.

²²⁸ *See* Lineberry, *supra* note 205, at 1238-39.

personal property.²²⁹ Additionally, Maryland's lack of clear priority status in bankruptcy is a point of concern since workers could go through the entire process only to find their employer exhausted all their remaining assets to other creditors in bankruptcy court.²³⁰ Workers should have priority status since, unlike banks, workers generally lack the ability to gauge an employer's ability to pay a debt and do not have other funds to rely on.²³¹ Thus, Wisconsin's model is likely much more effective. However, either model would be an improvement to California's current lack of protections for restaurant workers.

B. ESSENTIAL FEATURES FOR A WAGE LIEN TOOL

Advocates, scholars, and legislators have consistently advocated for prejudgment wage liens as a simple tool that can ensure payment for workers and strengthen the power of the California Labor Commissioner.²³² In the midst of meager collection rates for restaurant workers, a tailored wage lien law for the restaurant industry will help to ensure full payment of wages.²³³ A self-help tool with super priority provisions and private bonding enforcement can act as both a deterrent and a safeguard to encourage and ensure employers pay workers their wages. A combination of these suggestions will help to guarantee restaurant workers' wages.

1. *Utilizing State Self-Help Tool Models for California Restaurant Workers*

California restaurant workers need a self-help tool because acquiring legal assistance to file a lawsuit in civil court presents significant barriers for restaurant workers²³⁴ and the long administrative process often leaves workers waiting for their unpaid wages.²³⁵ The self-help process in Maryland and Wisconsin present an ideal solution for California's self-help

²²⁹ See WIS. STAT. §109.09(2).

²³⁰ Lineberry, *supra* note 205, at 1245-46.

²³¹ ASSEMB. COMM., REGULAR SESS. BILL ANALYSIS LIENS: AB 1164: EMPLOYEES AND WORKERS, at 5 (Cal. 2013) (explaining that banks and other business creditors have a duty of due diligence to ensure a debtor has the capacity to pay a debt).

²³² See Fritz-Mauer, *supra* note 15, at 113-14; NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE: An Advocate's Guide to State and City Policies to Fight Wage Theft 113 (2011), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJustice2011.pdf>; ASSEMB. COMM., BILL ANALYSIS LIENS: AB 1164; S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416: LABORERS AND EMPLOYEES (Cal. 2014); HYUNHYE CHO ET AL., *supra* note 27, at 8.

²³³ See HYUNHYE CHO ET AL., *supra* note 27, at 19.

²³⁴ See Fritz-Mauer, *supra* note 15, at 102-03.

²³⁵ Foshay, *supra* note 32.

tool. Both states utilize a simple form requiring basic information such as the nature of the wage theft violations and a description of the real or personal property the worker wishes to attach. Similar to Wisconsin, the restaurant worker could file a wage complaint with the Labor Commissioner, who may decide to file a wage lien on the worker's behalf, or the worker could file the wage lien at the county recorder's office herself.²³⁶ A self-help prejudgment tool will allow a worker to freeze an employer's assets at the time the lien is filed, which will help ensure the worker will receive her wages if a judgment is found in her favor. As a result, like with a mechanic's lien, an employer will be made promptly aware of the lien on their property.²³⁷ This will encourage an employer to engage with the employee instead hiding or dissolving their assets. Furthermore, this will also incentivize employers to follow wage and hour laws and plan accordingly before operating a restaurant, since the alternative would be a lien on their property.

Opponents may resist this self-help process model because the worker may attach a wage lien before proving the merits of their claims.²³⁸ It may be unfair to impose a wage lien on a restaurant owner that interferes with his or her property or business for a meritless wage claim.²³⁹ However, there are multiple ways this issue could be resolved. For instance, at the initial settlement conference with the Labor Commissioner, the Labor Commissioner could dismiss the lien if an employer shows that the worker filed a frivolous claim. Moreover, the Labor Commissioner could settle the claim and remove the lien. Alternatively, the lien can be delayed and attach after the initial settlement conference if the wage claim cannot be settled or the employer does not attend. Some employers take advantage of the long adjudication process so they have time to hide or transfer their assets.²⁴⁰ Allowing the Labor Commissioner

²³⁶ See WIS. STAT. §109.09(2); HYUNHYE CHO ET AL., *supra* note 27, at 17.

²³⁷ See HYUNHYE CHO ET AL., *supra* note 27, at 9.

²³⁸ S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416, at 14 (arguing in opposition of the California Wage Theft Recovery Act of 2014).

²³⁹ See Fritz-Mauer, *supra* note 15, at 115.

²⁴⁰ See, e.g., *Success Stories*, *supra* note 42 (describing a case where garment factory owners were sued for transferring one million in assets to their son three months after wage theft judgments were entered in court for five workers. The owners subsequently settled the fraudulent transfer lawsuit); *Labor Commissioner Reaches Settlement to Secure \$190,000 in Back Pay for Rosemead Restaurant Workers*, *supra* note 42 (explaining a case where three restaurant owners, who were siblings, began transferring ownership of their restaurant between them just four months after workers filed wage theft claims with the Labor Commissioner. After the Labor Commissioner sued the owners for fraudulent transfer, the owners settled the wage theft claims); *Labor Commission Victory for 15 Workers Seeking Unpaid Wages*, *supra* note 119 (stating that a residential care facility settled 15 workers claims for \$450,000 after the Labor Commissioner sued the employer from transferring their real estate ownership to escape payment); see also Foshay, *supra* note 32 (explaining when the Labor Commissioner tries to collect judgments: "'employers will play shell games,' said Labor

the ability to remove a wage lien would incentivize employers to attend settlement conferences, which are optional for employers.²⁴¹

Similarly, if a worker files a lien with the county recorder, an employer could submit evidence that the worker's claim was frivolous to remove the lien. The process does not need to be very formal and could involve the court determining whether an employee would prevail on the merits based on the employer's evidence of payment records—which employers are already required to keep under California law.²⁴² An additional option is to delay the time the lien attaches, such as thirty days, so an employer can either pay the worker or submit evidence the worker's claim is frivolous. In sum, various options exist to ensure a wage lien is not improperly attached.

Additionally, some opponents of a wage lien devalue restaurant workers' plight to receive their owed wages in the face of high restaurant failure rates. Like construction industry workers who are entitled to a mechanic's lien for the value of such labor done,²⁴³ restaurant workers are entitled to a prejudgment tool for the value of their work. Although a lien encumbers an individual's property for a temporary time, failure to pay wages can reverberate through every aspect of a low-wage workers' life—affecting whether the worker has money for food, secure housing, and whether the worker has access to transportation, including for work. Workers have long suffered the consequences of an employer's failure to timely pay wages and despite high penalties, personal liability, stop orders, and other measures, employers continue to exploit workers and engage in wage theft.²⁴⁴ A wage lien tool is essential as it can act as both a deterrent to wage theft and a tool to ensure workers will be paid their wages.

2. *Super Priority Status in Bankruptcy to Guarantee Restaurant Workers' Collection of Unpaid Wages*

Classifying wages as non-dischargeable debt and elevating wages to super-priority status are two of the most essential aspects of a wage-lien law. Not only would an attached wage lien freeze the owner's ability to

Commissioner Su "They will close down and open up under a new name. They will transfer their assets, often to family members or friends, in an effort to abscond with wages that should have been properly given to workers."").

²⁴¹ See *Policies and Procedures for Wage Claim Processing*, *supra* note 105 (explaining if the Plaintiff does not attend the conference, then the claim is dismissed. When the respondent does not show up to the initial conference then the claim is scheduled for a hearing at a later date).

²⁴² CAL. LAB. CODE § 1197.5(e).

²⁴³ CAL. CONST. art. XIV, § 3 (1879).

²⁴⁴ See 2017-2018 FISCAL REPORT, *supra* note 48, at 5.

sell or transfer the property until paying the lien,²⁴⁵ classifying wages as non-dischargeable debt would allow workers to collect their wages even when an employer declares bankruptcy.²⁴⁶ As a result, an employer would not be able to discharge a wage lien if the employer files for bankruptcy. Combined with personal liability, elevating a wage lien as a non-dischargeable debt would require an employer to pay unpaid wages in the event the employer files for bankruptcy either as a business or personally.

Further, a wage lien should also be given super priority status to hold banks accountable when providing funding to restaurants. Similar to the premise of Wisconsin's super priority provision, it is only fair that a worker is paid their wages over banks in a bankruptcy proceeding since banks have the ability to analyze a restaurant's capital and determine whether the restaurant can pay out wages.²⁴⁷ Moreover, when looking for work, many low-wage workers are in need of work immediately and cannot afford to turn down the job even if they know an employer may be unable to pay fully or on time. Even still, when an employer fails to pay a low-wage worker, the worker often relies on an employer's promise they will pay in the future. Most importantly, unlike banks, low-wage workers face severe consequences because of unpaid wages such as the being unable to buy food, being vulnerable to eviction for nonpayment of rent, and other financial hardships.²⁴⁸ Thus, elevating wage liens to non-dischargeable debt and giving wages super-priority status increase the likelihood of paid wages when a restaurant files for bankruptcy.

3. *A Privately Enforced Bond Requirement to Further Incentivize Employers to Comply with Wage and Hour Laws*

Although a bonding requirement for the restaurant industry may be a useful option coupled with a wage-lien tool, the Labor Commissioner would likely be unable to police compliance among over 75,000 food and beverage establishments in California.²⁴⁹ A surety bond requirement

²⁴⁵ NAT'L EMP. L. PROJECT, *supra* note 232, at 113.

²⁴⁶ *Non-Dischargeable Debt in Bankruptcy*, JUSTIA, <https://www.justia.com/bankruptcy/collections-credit/non-dischargeable-debt/> (last updated Oct. 2021).

²⁴⁷ See ASSEMB. COMM., REGULAR SESS. BILL ANALYSIS LIENS: AB 1164: EMPLOYEES AND WORKERS, at 5 (Cal. 2013) (“[P]riority status is necessary because, unlike other creditors, such as banks, an employee generally has no duty to perform due diligence to make sure the debtor has the capacity to pay a debt.”).

²⁴⁸ See ASSEMB. COMM., BILL ANALYSIS LIENS: AB 1164, at 5 (“[W]orkers, unlike banks and other business creditors, cannot afford delay in payment of their wages, which are needed to pay rent, buy food, and provide for other necessities.”).

²⁴⁹ NAT'L REST. ASS'N, CALIFORNIA RESTAURANT INDUSTRY AT A GLANCE (2019), https://www.senate.ca.gov/sites/senate.ca.gov/files/california_restaurant_statisticspdf.pdf.

would be more beneficial if policed through private enforcement.²⁵⁰ One option is for banks to require restaurant owners to show proof of a surety bond to receive loans and other financing. Similar to the car wash bond requirement scheme in California, banks would require restaurants to purchase surety bonds to cover wage claims. Coupled with a super priority provision, banks would be strongly incentivized to require restaurants to purchase a bond to cover potential wage theft claims since employees would be paid out before banks.²⁵¹ As a result, some of the responsibility is shifted onto banks to ensure a restaurant has sufficient safeguards to pay their workers.

Another option is to extend liability for wage theft to landlords who rent property to restaurants, thus giving landlords an incentive to police bond requirements for restaurant owners.²⁵² Similar to mechanic's liens, a wage lien could attach to the real property where services were rendered whether a restaurant owns the property or rents it. This would have the effect of leaving the landlord vulnerable to a final judgment, thus incentivizing private bond enforcement. As a result, the burden shifts away from workers who suffer the responsibility and consequences for their unpaid wages.

A. THE FOUNDATION FOR A WAGE LIEN LAW IN CALIFORNIA HAS BEEN LAID

In 2013 and 2014, the California state legislature tried to remedy the meager collection rates for unpaid wages by attempting to pass A.B. 1164 and A.B. 2416, the latter known as the California Wage Theft Recovery Act.²⁵³ These bills would have created a wage lien for all workers in California.²⁵⁴ Although these efforts ultimately failed, the legislative history details robust tools included in these bills and demonstrates the encouraging possibility that the legislature will pass more robust worker protection laws.

As these bills made their way through the legislature, the author noted that “California has one of the highest rates of wage theft in the

²⁵⁰ Telephone Interview with Anonymous Source (Nov. 6, 2020) (notes on file with the author).

²⁵¹ *See, e.g.*, WIS. STAT. § 109.09(c) (allowing priority for wage liens over all other debts, judgments, decrees, liens, or mortgages against the employer, with few exceptions).

²⁵² Telephone Interview with Anonymous Source (Nov. 6, 2020) (notes on file with the author).

²⁵³ ASSEMB. COMM., BILL ANALYSIS LIENS: AB 1164, at 1; S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416: LABORERS AND EMPLOYEES, at 1 (Cal. 2014).

²⁵⁴ ASSEMB. COMM., BILL ANALYSIS LIENS: AB 1164, at 1; S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416, at 1.

country.”²⁵⁵ Yet, workers have to wait up to two years to obtain wages when filing through the Labor Commissioner or civil court.²⁵⁶ Organizations in support of the bill emphasized that state agencies lack resources to collect wages where judgments have been made in favor of a worker.²⁵⁷ Allowing workers access to a wage lien would provide an additional and arguably more effective tool to recover unpaid wages.²⁵⁸ Proponents of the bill pointed out that a wage lien is a “proven, simple legal tool that costs the state next to nothing” since the bill does not require the establishment of a new agency to implement it.²⁵⁹

However, the California Chamber of Commerce—made up of a broad coalition of business, financial, and employer groups—assailed the bill claiming it would “cripple California businesses” by allowing super priority wage liens for “alleged, yet unproven, wage claim[s].”²⁶⁰ The opposition found no issue with current collection methods claiming “sufficient protections [are] in place for the failure to pay wages,” despite overwhelming evidence of meager collection success.²⁶¹

Despite the ultimate failure of these bills, they illustrate the important groundwork laid by advocates for a future wage lien law. Although California has a reputation of one of the most employee friendly states,²⁶² the legislature recognizes California has a serious problem with wage theft. Thus, it is essential for the legislature to enact a wage lien law for restaurant workers

CONCLUSION

The unique nature of the restaurant industry and vulnerability of the staff requires a prejudgment wage lien law in California. Restaurant workers simply do not have sufficient tools to collect unpaid wages. Advocates have worked hard to pass a wage lien law but have only been able to strengthen post-judgment collection laws, which have fallen short from ensuring full payment of wages for restaurant workers.²⁶³ Wisconsin and Maryland demonstrate the potential for an effective self-help wage lien tool for restaurant workers.

²⁵⁵ ASSEMB. COMM., BILL ANALYSIS LIENS: AB 1164, at 3.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 4.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 6.

²⁶⁰ *Id.*; S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416, at 14.

²⁶¹ S. JUDICIARY COMM., BILL ANALYSIS LIENS: AB 2416, at 15.

²⁶² Fritz-Mauer, *supra* note 15, at 76.

²⁶³ *See* Fuentes, *supra* note 35, at 393, 399.

An accessible self-help wage lien tool will serve both as an incentive for employers to comply with wage and hour laws and to ensure restaurant workers receive prompt payment of their wages if an employer fails to comply. A super priority provision will allow workers to receive their unpaid wages before banks who provide funding. Classifying unpaid wages as non-dischargeable debt will allow the worker to still receive their wages when an employer files for bankruptcy or dissolves their assets. Advocates should consider passing bonding requirements that can be privately enforced in order to ensure workers are paid promptly and also to alleviate the enforcement burden on the state. These tools will help guarantee the payment of restaurant workers' unpaid wages and allow California to live up to its employee-friendly reputation.²⁶⁴

Although it took years for the workers of Mission Beach Café to collect a fraction of their unpaid wages and penalties, these workers were fortunate to have the benefit of legal counsel and to collect any money at all.²⁶⁵ Every worker deserves prompt payment of their earned wages and inaction is not an option amid the current wage theft crisis. California has the opportunity to pass a wage lien law that will not only benefit California restaurant workers but will serve as a model for other states nationwide. As wage theft continues to rise in the restaurant industry across the United States,²⁶⁶ it is time to create robust tools to fight one of the most commonly committed crimes in the country—wage theft.²⁶⁷

²⁶⁴ See Fritz-Mauer, *supra* note 15, at 73.

²⁶⁵ See *id.* at 102-03.

²⁶⁶ See generally *No Rights, Low Wages, No Service: How Increased Violations of Workers' Rights in 2021, Coupled with High Harassment and Low Wages and Tips, Have Pushed Workers to Leave the Service Sector*, ONE FAIR WAGE & FOOD LAB. RSCH. CTR. U.C. BERKELEY (September 2021), https://onefairwage.site/wp-content/uploads/2021/09/OFW_NationalWageTheft.pdf (comparing workplace violations in 2021 versus 2020, including wage theft).

²⁶⁷ Hallet, *supra* note 49, at 97.

