

March 1, 2023

**Testimony of The Legal Aid Society's Employment Law Unit
to the Joint Legislative Budget Hearing on Workforce Development**

Submitted by Richard Blum

Thank you for the opportunity to present this testimony.

The Legal Aid Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems. The Society also brings law reform cases that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized citywide law reform, employment law, immigration law, health law, and homeless rights practices. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination, and unemployment insurance hearings. The Unit conducts litigation, outreach and advocacy designed to assist the most vulnerable workers in New York City, among them, low-wage workers who face inadequate wages, little or no safety net, wage theft, discrimination, and other forms of exploitation.

The pandemic laid out in stark relief that many of the workers who perform essential work necessary to the New York economy work under terrible conditions with wages that are inadequate to live a decent life in New York and with little or no safety net, including access to secure paid time off, disability pay, or unemployment insurance (UI) benefits. At the same time, the economic division between rich and poor in New York widened, as wealthy companies and individuals made record profits while the cost of living for ordinary people soared. The Legal Aid Society urges the New York State Legislature to address this deepening crisis of inequality and exploitation by enacting a set of proposals before it this session.

The specific budget bills that we are urging passage of here are:

- 1) the Raise the Wage Act, S.1978A (Ramos)/A.2204 (Joyner), which would raise and index the minimum wage based on inflation and productivity;
- 2) the Fair Pay for Home Care Act, S.3189 (May), which would raise the wages of home care workers;

3) the Unemployment Bridge Program, S.3192 (Ramos)/A.TBD (Reyes), which would create a permanent fund to provide unemployment assistance to workers excluded from the UI program; and

4) the Strengthening and Updating Paid Family and Medical Leave Act, S.2821(Ramos)/A.4053(Joyner), which would strengthen the paid family and sick leave laws and increase the temporary disability insurance benefit level.

In addition, we offer proposals on fixing the financing of the UI trust in a fair way that allows New York to increase benefit levels for workers.

I. Raise and Index the Minimum Wage, S.1978A (Ramos)/A.2204 (Joyner)

The Society urges enactment of the Raise the Wage Act, S.1978 (Ramos)/A.2204 (Joyner). In 2016, New York led the nation in passing the first \$15 minimum wage, which resulted in historic reductions in pay inequality and poverty across the state. But two key problems with the legislation – which were the result of compromises demanded by the then Republican-controlled Senate – were (1) that once the wage reached \$15, it stopped increasing, and (2) that it never really reached \$15 upstate.

As a result, the minimum wage in New York City increased to \$15 and then stalled out. That frozen minimum wage came at the worst possible time, since it coincided with the highest inflation in 40 years. The value of New York’s minimum wage has already plummeted 15% and every week is falling farther and farther behind what workers need. Fifteen dollars an hour isn’t enough anymore – either downstate or upstate – as the price of groceries, gas, and housing continues to sky-rocket.

The Raise the Wage Act is urgently needed to restore the state’s minimum wage by raising it to the level where it would have been if it had been consistently updated each year since 2019 to keep up with both rising prices and worker productivity increases. That translates to raising the wage to \$21.25 downstate and \$20 upstate by 2026.

After restoring New York’s minimum wage, it is vital that we “index” it going forward – which means providing for automatic annual increases as 19 other states already do – so that it doesn’t erode gain.

We are delighted that Governor Kathy Hochul has called for indexing the state’s minimum wage. But that is only half of the solution that New York’s working families need. While the Governor’s proposal would prevent New York’s minimum wage from being further eroded by inflation, it unfortunately does nothing to address the fact that \$15 an hour is no longer close to enough for workers anywhere in the state and fails to reverse the huge loss in value that the

minimum wage has undergone in recent years. Simply indexing the \$15 minimum wage from where it is would lock in poverty wages for the future.

The Governor's proposal would result in very small raises of 40 to 60 cents an hour each year – translating to about \$670 more each year by 2026 for an average worker. That's just \$13 more a week and doesn't begin to make a dent in the spiraling costs families are facing.

By contrast the Raise the Wage Act would deliver raises of about \$3,300 a year by 2026. That's five times larger than the Governor's proposal. It translates to \$63 a week more – enough to begin to cover the increase in the cost of groceries for a family.

Moreover, the Governor's proposal would raise pay for just 1 in 8 New Yorkers or 1.1 million workers. The Raise the Wage Act would raise pay for 1 in 3 or 2.9 million New Yorkers, and so would reach far more of the families who really need help.

In its size and impact, the Raise the Wage Act is similar to New York's historic \$15 minimum wage – which made a tremendous difference for the state's families. It is the type of response working New Yorkers need right now if they're going to weather the current cost-of-living crisis.

Study after study showed that the \$15 minimum wage didn't hurt job growth in the state or cause jobs to leave for neighboring states. That's what New York Federal Reserve Bank, the New School, and University of California researchers all found when they studied the impact of New York's last minimum wage increase. Instead, the higher wage helped neighborhood businesses by giving consumers more money to spend.

Women and workers of color would benefit the most. Seventy percent of workers who would receive raises are Black, Latinx or Asian. Fifty-five percent are women. One in four are parents supporting young children.

New polling shows that raising the minimum wage is one of the most popular issues in the state that voters want the Legislature to act on. Polling by Data for Progress also shows that the Raise the Wage Act's proposal to raise the wage to at least \$21.25 by 2027 is even more popular than the \$15 minimum wage was. Eighty percent of New Yorkers back it – including 65% of Republicans and large majorities in every region of the state.

The Society also supports the Fair Pay for Home Care Act, S.3189 (May), calling for raises in the wages of home care workers. In her budget, Governor Hochul proposes returning home care workers' pay to the minimum wage, after legislators won a \$3 increase above the minimum wage for home care workers. At a time when New York's population is aging and the demand for home care is greater than ever, the Governor is ensuring the shortage only deepens in the coming years. The

Governor is also giving private insurance companies up to 80% of the funding meant for the home care sector totaling hundreds of millions of dollars a year. In addition, the Governor is proposing to make workers in the Consumer Directed Personal Assistance Program second-class home care workers by cutting their wages up to \$4 per hour.

Home care is skilled health care work: it includes bathing and toileting, meal prep and tube feeding, wound care and medication management. A significant pay increase — 150% of minimum wage — is the only solution to end the home care shortage.

Consistent with its past testimony before the Department of Labor, the Society also supports legislation to eliminate the use of a tip credit in determining the minimum wage owed to workers, though any such legislation would need to reflect the increases in the minimum wage in the Raise the Wage Act.

II. Enact the Unemployment Bridge Program, S.3192 (Ramos)/A.TBD (Reyes) and Fix the Structural Flaws in the Unemployment Insurance System

A. Enact the Unemployment Bridge Program.

The Society urges enactment of the Unemployment Bridge Program, S.3192 (Ramos)/A.TBD (Reyes). All New Yorkers deserve a safety net. The Unemployment Bridge Program would be a permanent solution to the exclusion from unemployment insurance benefits of categories of workers whose work forms a critical part of the New York State economy.

The fight for the 2021 Excluded Workers Fund revealed long-standing gaps in our safety net that shut out many of our state's most vulnerable workers, especially Black, brown, and immigrant workers in precarious low-wage industries. Excluded workers include freelance and self-employed workers, cash economy workers, people in re-entry, and many immigrants. This program will run parallel to New York State's current unemployment insurance and will deliver unemployment compensation to these excluded New York workers to ensure that our community can survive and recover economically during a crisis or temporary job loss.

This program would not compete with the Unemployment Insurance system, but would, instead, supplement it, addressing systemic exclusion from that system. The bill includes provisions to enhance enforcement of the law against employers who are not paying into the regular UI system, specifically in the construction industry, where the problem of evasion is especially concentrated.

Moreover, the program would provide support to workers in the affected categories who face retaliation when they seek to organize a union or otherwise protest unlawful working conditions. The Society represents low-wage workers who face retaliation, including firing, when they spoke up about violations of their labor rights. Without a safety net to fall back on, workers are much less

likely to oppose unlawful practices, leaving all workers in a weaker position to organize to oppose exploitative conditions. The lack of safety net even affects unionized workers whose employers compete with unscrupulous employers who engage in unlawful practices and fire workers who organize or complain.

The program recognizes the reality of New York's labor market. New Yorkers who lack work authorization represent a heavy percentage of workers in areas we have deemed essential, for example, food service and delivery. In recent years, industries such as publishing have restructured their relationship with their workforce to convert jobs into freelance work. Even under the rigorous test for misclassification that this bill uses, there are workers who are genuinely freelancing, though not necessarily by choice. New York still hosts a cash economy of day laborers, domestic workers, and others who perform work for homeowners. Those workers face impassible boundaries to access to UI.

Unemployment disproportionately impacts people recently released from incarceration or detention. These New Yorkers face daunting burdens finding work at the precise moment when they are setting out to reintegrate into their communities and our larger society. Forty percent of people returning to NYC from state prisons go straight to a shelter bed, according to the Department of Corrections and Community Supervision, and these New Yorkers must navigate the additional hurdles of finding a job with a conviction record. Yet, the labor they performed under highly exploitative conditions, paid pennies per hour, often for the State of New York in our prison system, does not count as earnings for eligibility for UI. So the State enriches itself off their virtually uncompensated labor and then leaves them with no unemployment assistance to live on as they seek work under very challenging circumstances.

New York has more than enough money to build out this program for essential workers - and this program will have a dedicated revenue stream. To ensure that the program is revenue neutral, the reintroduced bill adds a digital ad tax that is expected to raise \$1.2 billion for New York State. Big tech companies currently do not pay taxes on the highly lucrative business of tracking and selling consumer data to advertisers and have seen record profits in recent years. This tax would collect a small portion of annual revenues of digital advertising services from companies whose gross annual revenue from these services is \$100 million or more.

We never know when the next crisis will strike. And when it does, we know that leaving some workers behind makes it harder for entire communities to recover. We strongly urge you to support this legislation and include it in the SFY 2023-24 budget.

B. Overhaul New York's Flawed UI Financing System

New York's Unemployment Insurance (UI) trust fund is \$8 billion in debt due to a flawed financing scheme that failed to put sufficient money into the trust fund to prepare for a downturn.

This underfunding has continued for decades, including during the state's historic employment expansion from 2010-20. The taxable wage base is the amount of an employee's annual earnings on which the UI payroll tax is levied. In New York, that amount is currently \$12,300, compared to \$41,100 in New Jersey. New York's disproportionately low taxable wage base lags 35 states, despite having the highest average wage level among all states. As a result, New York State borrowed more from the United States Treasury to pay benefits during the pandemic than any other state besides California.

New York's Unemployment Insurance benefit structure is mediocre and trails all our neighbor states. Because of the trust fund debt, the maximum weekly benefit has been frozen instead of increasing toward 50% in 2026 under the terms of the legislation passed in 2014. The average benefit is now \$200 per week less than it should be. The maximum in New York is \$504 per week, compared to \$713 in New Jersey and \$598 in Connecticut.

The solution to this structural problem is to raise the taxable wage base in New York sufficiently to reduce the debt. If it were raised to \$50,000 – closer to states with the highest taxable wage levels – the tax rate could be reduced and long-overdue improvements could be made to New York's meager UI benefits. The trust fund debt could be paid off sooner, saving New York employers higher federal taxes and interest payments.

Meanwhile, giant companies that distribute work to their workforce through "apps" continue to refuse to report their workers' wages or pay into the UI trust fund. Despite repeated rulings from New York courts, including the Court of Appeals in *Matter of Vega (Postmates)*, 35 NY2d 131 (2020), companies such as Uber and Lyft fail to obey the law, likely robbing the trust fund of hundreds of millions of dollars. Uber recently agreed to pay \$100 million to the New Jersey trust fund following an audit. *See* https://www.nj.gov/labor/lwdhome/press/2022/20220913_misclassification.shtml. New York has been conducting a seemingly never-ending audit of Uber for years. But the State need not wait for the audit results on past years or the arrival of Godot to legislate mandates that these companies both report wages and pay into the system on an ongoing basis.

Fraud is not the reason for the structural problem of chronic insolvency and the consequent inability of the state trust fund to meet the demands of emergencies. The irresponsibly low taxable wage base and the failure of major employers to pay into the system are the systemic reasons for the UI trust fund's chronic insolvency. In short, employers have not been required to pay adequately into the system for a long period of time. Employees are paying the price with lower benefits. Unfortunately, a recent press release by the New York State Comptroller reported a high level of fraud that was not supported by the Comptroller's own audit. The bulk of the fraud it reported finding arose in federal programs that do not affect the state trust fund and that came at a time when these emergency federal programs were being rolled out quickly and with little guidance or infrastructure with the goal of meeting the immediate needs of New Yorkers during an

unprecedented crisis. The Department of Labor's priority was correctly to get the money out to people in need. Whatever fraud arose as a result should not be seen as the cause of the structural financing problems of the system.

New York can and should fix the structural underfinancing of the UI trust fund by raising the taxable wage base and requiring all employers to pay into the system.

III. Fix the Gaps in the State's laws on paid leave and temporary disability insurance (TDI): S.2821 (Ramos)/A.4053 (Joyner).

The Legal Aid Society urges enactment of S.2821 (Ramos)/A.4053 (Joyner). New York was one of the first states in the nation to provide workers with temporary disability insurance (TDI) in 1949, and in 2016 New York once again led the way with a pioneering paid family leave program.

The TDI benefit level has remained stagnant since 1989, capped at an unlivable \$170 per week. The TDI program also does not include job protection, meaning that workers with serious health needs are forced to choose between taking the time off work that they need and maintaining their economic security.

Seven years after the passage of New York's game-changing paid family leave law, New York's program is now lagging behind other states, with workers suffering the consequences in the midst of a protracted pandemic, ongoing maternal health crisis, and rising inflation.

New York's Paid Family and Medical Leave Program can better serve New Yorkers by:

- (1) Raising the benefit levels for workers' own health needs and paid family leave.
- (2) Protecting workers' jobs during medical leave.
- (3) Meeting the needs of today's workforce by creating portable paid family leave benefits.
- (4) Adopting an inclusive family definition that includes chosen family.
- (5) Adding protections against interference.

By making these changes, this bill will benefit all New Yorkers, especially those most affected by the law's current gaps, including pregnant workers, especially Black pregnant workers, workers with disabilities, and LGBTQ+ workers.

IV. Strengthen Enforcement of Labor Laws

Raising wages and securing financing for the UI trust fund only succeed if the laws are enforced. The Society calls on the Legislature to pass post-budget legislation that will address major gaps in enforcement of the Labor Law.

A. Strengthen the Laws Against Misclassification of Employees as Independent Contractors.

Across New York State, roughly 875,000 low-paid workers lack basic rights and protections on the job. From bike messengers to janitors, from app drivers to nail salon workers, companies intentionally mislabel their workers as “independent contractors” to skirt the law and evade accountability. Exploitative companies have locked workers out of basic rights like a guaranteed minimum wage and overtime pay, unemployment insurance, paid sick or family leave, and disability leave. This practice hurts New York’s workers, social insurance programs, and lawful businesses.

Low-paid “independent contractors” without labor rights in New York are among the most vulnerable workers in our state. They are paid only half to two-thirds what payroll workers receive in the same industries. Due to that wage theft, half of this workforce either have no health insurance coverage or rely on Medicaid or Medicare. And when these workers get sick, they don’t have the flexibility to take a day off or visit a doctor. Now, more than ever, the New York State Legislature needs to end this injustice.

Post-budget, the Rights for All Workers Coalition, of which the Society is a member, will propose legislation, the Employer Accountability Act, that would establish a clear and common-sense rule to ensure that workers are covered by baseline workers’ rights. It would properly hold most employers in the state to a fair set of standards and would make it harder for unscrupulous employers to evade their obligations to their workers. By presuming that most workers have employment rights, the bill will allow many more workers to access critical workplace protections. The bill also will ensure that businesses pay their fair share to New York’s unemployment insurance fund and other safety net programs.

The Employer Accountability Act also includes other important protections, including preventing employers from evading wage laws by subcontracting their workforce while still controlling the work. It also clarifies that the state rights provided under New York labor law are available to all individuals regardless of their immigration status.

The Legal Aid Society also supports enactment of the Nail Salon Minimum Standards Council Act, S.1800 (Ramos)/A.378 (Bronson). This bill would ensure that representatives of workers and the nail salon industry will collaborate to develop fair labor standards and pricing for the nail salon industry.

B. Enact the EmPIRE Worker Protection Act, S.541 (Hoylman)/A.1893(Joyner)

The Legal Aid Society supports enactment of the EmPIRE Worker Protection Act, S.541 (Hoylman)/A.1893 (Joyner), which expands the capacity of the state in order to remedy wage theft, equal pay violations and other employee exploitation undermining recent New York labor policy accomplishments.

Constraints on enforcement have blocked many working families from experiencing the real benefits of policies that New York has enacted in recent years and that we seek to improve with the above legislation. Through our work, we see that employers bet on the state having inadequate enforcement capacity; they steal wages from their workers and allow toxic workplaces to fester with the expectation that it is unlikely they will be caught.

The EmPIRE Worker Protection Act creates a public enforcement action – similar to the long established *qui tam* action – allowing affected workers and labor unions to step into the shoes of the state, and following a notification process to the state, sue to enforce state labor law. The action, when victorious, allows for recovery of penalties that the Commissioner of Labor could recover, most of which returns to the state coffers to enable further public worker protection enforcement, and a portion of which is awarded to the workers who brought the action. The EmPIRE Act is common-sense legislation which will expand resources available for public enforcement and meet the needs of workers suffering from New York’s labor law enforcement crisis.

C. Pass the SWEAT (Securing Wages Earned Against Theft) bill, S.1997 (Ramos)/A.46 (Rosenthal)

As discussed above, wage theft is rampant in New York, and exploitative employers too often hide or transfer their assets to avoid paying wages they have stolen from their employees. Even when workers win a court-awarded judgment, they are unlikely to collect the money owed to them. Securing Wages Earned Against Theft (“SWEAT”) will update New York law joining other states which provide workers with legal tools to ensure their employers will pay them once they are awarded a judgment.

The legislation will:

- (1) Expand New York’s existing mechanic's lien law to include all workers, joining other states allowing workers to put a temporary lien on the property of an employer who fails to pay wages.
- (2) Amend New York’s existing attachment provisions to make it easier for workers to attach an employer’s assets at the start of litigation before the property can be sold or transferred, using the standard currently enforced in Connecticut law; and

- (3) Improve the procedures for holding the largest shareholders of privately held corporations and limited liability companies personally liable for wage theft.

We urge the Legislature to pass SWEAT again this session and to work with this Governor to have it signed into law.

V. End Coercion and State Exploitation of Prison Labor. Enact The No Slavery in New York Act, S.225 (Myrie)/A.3142 (Epstein) and The Fairness and Opportunity for Incarcerated New Yorkers Act, S.TBD (Myrie)/A.TBD (Epstein)

The Legal Aid Society strongly supports *The No Slavery in New York Act* and *The Fairness and Opportunity for Incarcerated Workers Act*. These bills would overhaul New York’s exploitative prison labor system, which operates on forced labor, provides penny wages, and does not lead to meaningful employment opportunities upon reentry.

By enacting this legislation, New York will join a growing number of red and blue states that have eliminated the “abolition exception” from their constitutions—the exception to slavery abolition that allows states to exact forced labor from those who are convicted of a crime. Americans have overwhelmingly supported this endeavor. This November, a majority of voters in [Alabama](#), [Tennessee](#), [Vermont](#), and [Oregon](#) cast their ballots to end prison slavery, joining [Colorado](#), [Utah](#), and [Nebraska](#), where referendums passed in 2018 and 2020.

One hundred and sixty years after the Emancipation Proclamation, the New York Constitution allows for the continued enslavement of people who are convicted of a crime. People forced to work by the Department of Corrections and Community Supervision (DOCCS) are generally paid cents per hour and can be punished for refusing a work assignment.¹ The minimum wage for incarcerated workers is ten cents an hour, with the last increase occurring in 1993. Currently, the wage scale for most incarcerated workers is from 10 to 33 cents an hour.² Earnings are capped at two dollars per day.

DOCCS has a manufacturing arm, Corcraft, that produces items ranging from school desks to hand sanitizer and license plates. Corcraft also sells services including asbestos and lead remediation. Corcraft goods and services are purchased by almost all New York municipalities and government agencies. Incarcerated Corcraft workers also staff the DMV telecommunications center.

¹ 7 NYCRR § 270.2(7)(i), (26)(viii).

² This figure and other wage and commissary price data cited in this memorandum comes from DOCCS’s response to a Freedom of Information Law request. The data will be included in a forthcoming report by Leighann Starkey and Jacalyn Goldzweig Panitz, published by The Legal Aid Society on behalf of the 13th Forward Coalition.

Between 2010 and 2021, Corcraft sold over \$545 million worth of products and services. Corcraft workers are paid from 16 to 65 cents an hour for performing these often-dangerous jobs.

Incarcerated workers must labor for hours to purchase necessities at commissary or basic services: it can take four hours of labor to afford a toothbrush, seven hours to afford a fifteen-minute phone call to a loved one, and twenty-seven hours to earn enough to buy a head of lettuce. As noted above, these meager earnings do not contribute to later social safety net protections, and workers have no right to claim unemployment insurance if they are unable to find work upon release.³

Additionally, there is no requirement that incarcerated workers' assignments be designed to promote their successful rehabilitation, reentry, and reintegration post-release—such as learning a new marketable skill in the course of their work assignment. Instead, the work performed by incarcerated workers is solely to benefit the operation or production of supplies for the correctional facility or other state or local government institutions at profit to Corcraft.⁴

In sum, by compelling labor and depriving incarcerated workers of basic rights essential to human dignity,⁵ the current prison labor system is directly connected to the profit-making and slavery-perpetuating model pioneered by New York's "Auburn Plan" that began in 1817.⁶ New York has far to go to fulfill the promise of abolition.

The 13th Forward Bill Package addresses these issues in the following ways:

- (1) It amends the New York Constitution to abolish slavery or involuntary servitude for those who have been convicted of crimes. The amendment prohibits coercive measures and punishment for those who choose not to provide labor and requires that those who voluntarily provide labor be equally protected by labor laws.
- (2) It provides a minimum wage to all incarcerated individuals who perform labor, both for Corcraft industry and for internal prison maintenance work.
- (3) It requires that all federal and state health and safety protections, including workers' compensation, apply to incarcerated individuals.

³ See, e.g., *Captive Labor* 12, n. 60.

⁴ Correction L. § 171 (2).

⁵ "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed." N.Y. Const. art. I, § 17.

⁶ Cayuga Museum of History and Art, *The Auburn System*, available at <https://cayugamuseum.org/the-auburn-system/>.

- (4) It requires that all prison labor programs be for the purpose of promoting successful rehabilitation, reentry and reintegration into the community, and not for the purpose of creating profits or cost-savings that inure to the benefit of the state.
- (5) It creates a private right of action for violations of labor protections.
- (6) It prohibits wage deductions by DOCCS for attachment, garnishment, fees, and fines.
- (7) It creates a prison labor board with members from government agencies and currently and formerly incarcerated individuals. The labor board has the authority and duty to ensure that all the above requirements are met.

Conclusion

All of these proposals address the core needs of workers who have been rendered the most marginal in our workforce. Together, they help address structural inequality and discrimination, as well as severe deprivation, and help the New York economy grow in ways that are more equitable and just.

We thank the Legislature for its consideration of this testimony. For more information or to address concerns, please feel free to contact me at rblum@legal-aid.org or (332) 400-7956.

Richard Blum
Staff Attorney
Employment Law Unit
The Legal Aid Society