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**IN THE COURT OF APPEALS OF MARYLAND**

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**No. 86**  
**September Term, 2013**

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**MURIEL PETERS,**  
*Appellant,*

v.

**EARLY HEALTHCARE GIVER, INC.,**  
*Appellee.*

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On Appeal from the Circuit Court for Montgomery County  
(Nelson W. Rupp, Jr., Judge)  
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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**BRIEF OF AMICI CURIAE MARYLAND LEGAL AID BUREAU, CASA DE  
MARYLAND, EMPLOYMENT JUSTICE CENTER, MARYLAND  
EMPLOYMENT LAWYERS ASSOCIATION, METROPOLITAN  
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND  
THE NATIONAL EMPLOYMENT LAW PROJECT**

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## Table of Contents

TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE.....	1
QUESTION PRESENTED .....	1
STATEMENT OF FACTS .....	1
SUMMARY OF ARGUMENT .....	2
INTERESTS OF AMICI.....	4
ARGUMENT .....	9
<b>I. THE CIRCUIT COURT’S FAILURE TO AWARD TREBLE DAMAGES UNDER THE MARYLAND WAGE PAYMENT AND COLLECTIONS LAW (WPCL) EVISCERATES THE LAW’S INTENDED ABILITY TO PROTECT WORKERS FROM WAGE THEFT.</b> .....	9
A. Vigorous Enforcement of the WPCL is Necessary to Combat the Pervasive Problem of Wage Theft in Maryland, Especially in Low-Wage Industries.....	9
B. Low-Wage Workers are More Likely to Become Victims of Wage Theft, and to Suffer Collateral Economic Consequences of Wage Theft.....	16
C. Awarding Treble Damages for Violations of the WPCL Is Critical to Deterring Wage Theft by Employers.....	18
D. Treble Damages are Necessary Given Persistent Budgetary Constraints Faced By Public Enforcement Agencies.....	20
<b>II. ACCESS TO TREBLE DAMAGES UNDER THE WPCL IS CRITICAL FOR HOME CARE WORKERS BECAUSE OF RAMPANT WAGE THEFT IN THE INDUSTRY AND A LACK OF FEDERAL PROTECTIONS FOR THE WORKFORCE.</b> .....	22
A. Home Care Workers Are Particularly Vulnerable to Wage Theft.....	22
B. Home Care Employers Like Appellee Use Independent Contractor Schemes to Evade Responsibility For Wages, Employer-Side Taxes and Other Worker Protections.....	23
C. Wage Theft and Poor Working Conditions Threaten to Destabilize Maryland’s Home Care Industry.....	25
D. Upholding Standards In The Rapidly Expanding Home Care Industry Is Crucial to the State’s Economic Health.....	27
CONCLUSION.....	28

**TABLE OF AUTHORITIES**

**CASES**

*Baltimore Harbor Charters, Ltd. v. Ayd*, 365 MD 366, 382 (2001).” .....23

*Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 658 A.2d 680,683 (1995).....20

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*Friolo v. Frankel*, 373 Md. 501, 515 (2003).....22

*Klausner v. Brockman*, 58 S.W.3d 671, 2001 Mo. App. LEXIS 1925, (Mo. Ct. App. 2001).....27

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**STATUTES**

2010 Md. Laws ch. 100 (H.B. No. 214) .....15

2010 Md. Laws ch. 99 (S.B. No. 694) .....15

29 U.S.C. § 213(a)(15).....26

Md. Code Ann. Lab. & Empl. § 3-507.2(b).....2

Md. Code Ann., Lab & Empl. § 3-401. ....12, 26

Md. Code Ann., Lab. & Empl. § 3-415 .....14

Md. Code Ann., Lab. & Empl. § 3-427 .....14

Md. Code Ann., Lab. & Empl. § 3-505 .....14

Md. Code Ann., Lab. & Empl. § 3-507.1 .....23

Md. Code Ann., Lab. & Empl. § 3-507(b).....15

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Brandon Roberts, Deborah Povich and Mark Mather, The Working Poor Families Project, <i>Low-Income Working Families: The Growing Economic Gap</i> 8 (Winter 2012-2013) .....	16
Brian J. Markovitz, <i>Testimony in Support of S.B. 694</i> (Sen. Fin. Comm. Feb. 25, 2010).....	14, 21
CASA de Maryland, <i>Testimony in Support of House Bill 214</i> (House Econ. Matters Comm. Feb. 18, 2010).....	13, 21
CASA of Maryland, <i>Wage Theft: How Maryland Fails to Protect Low-Wage Workers</i> 4 (2007).....	11, 12, 17-18
Catherine Ruckelshaus, <i>Testimony before U.S. Senate Health, Education, Labor and Pensions Committee</i> (November 12, 2013) .....	10
Daniel Massey, <i>Home care service sued over pay practices</i> , CRAIN’S N.Y. BUSINESS (April 14, 2010).....	22
Department of Legislative Services, Fiscal & Policy Note, H.B.1302 (Md. 2012) ...	21
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Eunice Hyunhye Cho et al., <i>Hollow Victories, The Crisis in Collecting Unpaid Wages</i> 6 (2013).....	17
Houston Interfaith Worker Justice Center, <i>Houston, We Have a Wage Theft Problem</i> 14 (2012) .....	18
J. Ronald DeJuliis, Commissioner of Labor and Industry, <i>Letter to Chairman Middleton Re: Senate Bill 694</i> (Sen. Fin. Comm. Feb. 24, 2010) .....	19
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Kim Bobo, <i>Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid And What We Can Do About It</i> 7 (New Press 2009).....	9
L. Morris, <i>Quits and Job Changes Among Home Care Workers in Maine</i> , The Gerontologist, 49(5): 635-50.....	26
Linda Burnham and Nik Theodore, <i>Home Economics: The Invisible and Unregulated World of Domestic Work</i> , National Domestic Workers Alliance, Center for Urban Economic Development, University of Illinois at Chicago DataCenter (2012) .....	9, 22

Maryland Dep’t of Labor, Licensing and Regulation, Annual Report (2008) .....	11
Michael Cooper, <i>States Face Tough Choices Even as Downturn Ends</i> , N.Y. TIMES, July 10, 2012, at A15.....	25
PHI State Data Ctr., Maryland: Occupational Growth Projections, 2010-2020...25, 27	
National Employment Law Project, <i>Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States</i> 6 (2011).....	10, 13, 16, 21
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Ruth Milkman et al., Institute for Research on Labor and Employment – UCLA, <i>Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low Wage Workers</i> (2010). .....	14
Sarah Leberstein, Nat’l Employment Law Project, <i>Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries</i> (August 2012) .....	10
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Yvonne Wenger, <i>Wage Theft Prevails in Post-Recession Economy</i> , Baltimore Sun, Feb. 2, 2011 .....	11

## **STATEMENT OF THE CASE**

Amici adopt the Appellant's Statement of the Case.

## **QUESTION PRESENTED**

Whether the lower Court erred in failing to award additional damages under the MWPCCL where there was no *bona fide* dispute that the wages were owed to Appellant by Appellee.

## **STATEMENT OF FACTS**

Amici adopt the Appellant's Statement of Facts.

## SUMMARY OF ARGUMENT

The Circuit Court erred in its application of the Maryland Wage Payment and Collections Law (WPCL) when it declined to award Appellant Muriel Peters treble damages after Appellee Early Healthcare Giver, Inc.'s (EHCG) illegally withheld her earned overtime wages. Md. Code Ann. Lab. & Empl. § 3-507.2(b). Treble damages are available to plaintiffs under the WPCL in order to deter employers from violating minimum wage and hour standards; to reduce the costs associated with public enforcement and private litigation; as well as to fully compensate workers for the collateral economic consequences they may experience when their wages are illegally withheld.

If Maryland courts continue to ignore the statutory language of the WPCL and decline to award treble damages awards in wage theft cases, as the lower court did here, such actions will eviscerate the power of the WPCL and send a strong message to unscrupulous employers, including home care agencies, that they may violate this law at little or no cost, thus completely undermining the intent of the Maryland General Assembly. This appeal presents the Court with an opportunity to affirm the critical role that treble damages play in wage theft cases, and to uphold the state's promise of protection to Maryland workers by enforcing the WPCL vigorously, equitably, and accurately.

Robust enforcement and its deterrent and compensatory effects are especially important in low-wage industries like home care, in which Appellant is employed.

Tens of thousands of Maryland residents depend on home care workers to help get them out of bed in the morning, prepare their meals, and transport them safely to the doctor. But these workers often cannot rely on getting paid for their important work. As a result, morale is low, turnover is high, and all those who depend on or expect to depend on their services suffer. Awarding Ms. Peters the full amount of treble damages allowed under the WPCL is a crucial step towards ensuring greater employer accountability and baseline standards. Such an award would also serve to stabilize the home care industry so it can deliver a decent livelihood to workers and quality home care services to the people of Maryland, and would uphold the Maryland General Assembly's intent when it passed and amended the WPCL.



## INTERESTS OF AMICI

**Maryland Legal Aid Bureau (“MDLAB”)** is a private, non-profit law firm that provides free civil legal services to low-income people throughout Maryland. Maryland Legal Aid frequently represents and litigates on behalf of low wage workers in the home healthcare, agricultural, domestic service, and other industries where non-payment and late payment of overtime wages due under state law is common. A decision of the Court to not award treble damages would adversely impact MDLAB’s clients seeking to recover the full amount of unpaid wages and would undermine the remedial intent of the WPCL.

**CASA de Maryland (“CASA”)** is a worker-centered community organization that was founded in 1985 in response to the needs of its local migrant population. CASA’s mission is to create a more just society by empowering and improving the quality of life in low-income immigrant communities. CASA’s ultimate goal is to achieve a future in which diverse and thriving communities live free from discrimination and fear, and work together with mutual respect to achieve full human rights for all.

CASA serves low-income immigrants from over 60 countries, the majority being Latin American (87.7%) immigrants. Low-wage immigrants are particularly vulnerable to discriminatory treatment and face greater risks of wage theft and resulting poverty due to their lack of familiarity with U.S. legal and financial systems, their immigration status and language barriers. Today, CASA represents

over forty thousand (40,000) members, a majority of whom are low-wage workers. CASA's legal program serves thousands of clients each year suffering hundreds of thousands of dollars of wage theft, workplace discrimination and other workplace abuse.

CASA has a specific committee dedicated solely to domestic workers, as abuse against home care and domestic workers is rampant. The vast majority of home care workers among its membership are low-income, minority women with children – a particularly vulnerable group because they are often the sole care providers for their dependents and have incredible burdens on their time between work and household and childcare responsibilities. Further, low-wage jobs, including in home care, are often paperless jobs where very little, if any, documents are exchanged between employers and employees. In conjunction these factors make it incredibly difficult for aggrieved home care workers to secure counsel to file lawsuits on their behalf for unpaid wages. Not only do these workers risk losing their employment in taking time off to search for legal representation, but there is often little incentive for the private bar to take on these cases due to the lack of documentary evidence.

The provision for and award of treble damages under the WPCL is crucial to workers being able to secure legal reprieve --both to increase the ability of workers to secure legal representation and to properly compensate workers for their true

economic losses and the costs of being forced to litigate for what they have rightfully earned.

An award of treble damages absent a bona fide dispute provides a necessary deterrent against wage theft for vulnerable home care workers. Failing this, there is no rational incentive for employers to comply with the law since the ability of a low-wage worker to take legal action against them is low and even the few instances when a worker is able to secure legal counsel the greatest liability an employer faces is an order to pay wages that a worker was lawfully due in the first place. A decision of the Court to not enforce the statutory language of the WPCL severely curtails the ability of CASA's members to thrive in economically stable households free from wage theft.

**Employment Justice Center (“EJC”)** is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers’ rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels well over 1000 workers from D.C., Maryland and Virginia each year on their rights in the workplace. Approximately 25% of EJC’s clinic cases are from Maryland. The most common category of complaints among EJC’s clients are wage and hour complaints, especially unpaid wages for work performed; indeed, in 2010, 32.6% of the claims handled in EJC’s Workers’ Rights Clinic were wage and hour

claims. A significant portion of those who have such complaints are undocumented workers, who are hired by unscrupulous employers for the specific purpose of evading their wage payment responsibilities.

The **Maryland Employment Lawyers Association (“MELA”)** and the **Metropolitan Washington Employment Lawyers Association (“MWELA”)** are sister local affiliates of the National Employment Lawyers Association, a national organization of attorneys, primary plaintiffs’ counsel, who specialize in employment law. The joint membership of MELA/MWELA comprises over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MELA/MWELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA and/or MWELA have frequently participated as amicus curiae in cases of interest to their members, including the following recent cases: *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, *rehearing en banc den.*, 467 F.3d 378 (4th Cir. 2006), *cert. den.*, 127 S. Ct. 2036 (Apr. 16, 2007); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007); *Manor Country Club v. Flaa*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003); and *Friolo v. Frankel*, 373 Md. 501 (2003).

Members of MELA and MWELA have represented numerous clients seeking to enforce federal, state and local laws prohibiting discrimination and retaliation in employment. As longtime advocates in employment and labor law, MELA/MWELA

can offer the court their wide-ranging expertise and their unique perspective on the issues presented in this appeal. MELA and MWELA have a significant interest in this case to ensure that Maryland courts construe wage and hour protections for Maryland employees consistent with the remedial purpose that was intended by the state legislature.

The **National Employment Law Project (“NELP”)** is a non-profit legal organization with nearly 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP’s area of expertise includes the workplace rights of home care workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional testimony addressing the persistent workplace violations in the home care industry, and importance of vigorous enforcement of state and federal wage and hour standards. In NELP’s experience, the availability of treble damages awards for violations of the WPCL is critical to deterring unscrupulous employers from illegally withholding earned overtime wages from their employees.

## ARGUMENT

### I. **THE CIRCUIT COURT’S FAILURE TO AWARD TREBLE DAMAGES UNDER THE MARYLAND WAGE PAYMENT AND COLLECTIONS LAW (WPCL) EVISCERATES THE LAW’S INTENDED ABILITY TO PROTECT WORKERS FROM WAGE THEFT.**

#### A. *Vigorous Enforcement of the WPCL is Necessary to Combat the Pervasive Problem of Wage Theft in Maryland, Especially in Low-Wage Industries.*

Maryland wage theft occurs when an employer violates the federal Fair Labor Standards Act (FLSA), the Maryland Wage and Hour Law (WHL) or the WPCL by refusing to pay a worker any (or in some cases, all) legally mandated wages for any amount of hours worked. *See* Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid And What We Can Do About It* 7 (New Press 2009). In some cases, employers pay less than the required minimum wages, do not pay overtime wages, or pay workers with bad checks. *Id.* *See, also*, Annette Bernhardt, et al., Ctr. For Urban & Econ. Dev., Nat’l Employment Law Project, & UCLA Inst. for Research on Labor and Employment, *Broken Laws, Unprotected Workers: Violation of Employment and Labor Laws in American Cities* (2009) [hereinafter *Broken Laws*]<sup>1</sup>. In other cases, employers misclassify their employees as independent contractors in an attempt to evade responsibility for workplace laws

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<sup>1</sup> Available at <http://www.nelp.org/page//brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>. *See also* Linda Burnham and Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, National Domestic Workers Alliance, Center for Urban Economic Development, University of Illinois at Chicago DataCenter (2012), available at <http://www.domesticworkers.org/pdfs/HomeEconomicsEnglish.pdf>.

and to shift their share of payroll taxes to the worker. *See* Catherine Ruckelshaus, *Testimony before U.S. Senate Health, Education, Labor and Pensions Committee* (November 12, 2013)(“Companies [misclassify employees] to avoid having to report and pay FICA and FUTA taxes, evade labor organizing, skirt baseline labor standards like minimum wage and overtime, discrimination protections, health and safety and workers compensation, and unemployment insurance.) In this case, Appellant Muriel Peters’s employer, EHCG, illegally withheld overtime wages she had earned pursuant to the WHL and the WPCL and also misclassified her as an “independent contractor” in an attempt to evade liability for those violations and avoid responsibility for paying employer taxes.

Wage theft is not incidental, aberrant or rare, committed by a few rogue employers at the periphery of the labor market. Nat’l Employment Law Project, *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States* 6 (2011)[hereinafter “Winning Wage Justice”]<sup>2</sup> (national, state and industry-specific studies reveal a worsening U.S. wage theft crisis); *see also* Sarah Leberstein, Nat’l Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (August 2012) (nationally, 10 to 30% of employers, or even more, misclassify their employees as “independent contractors,” meaning that several million workers

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<sup>2</sup> Available at <http://www.nelp.org/page/-/Justice/2012/WinningWageJusticeSummaryofResearchonWageTheft.pdf?nocdn=1?nocdn=1>

nationally may be misclassified, costing state and federal governments billions of dollars in revenues annually).<sup>3</sup>

Several recent surveys of low-wage workers illustrate the frequency with which Maryland employers in particular illegally withhold their employees' earned overtime wages. At least 75% of the low-wage Maryland workers surveyed in two separate 2006 studies were not paid their earned overtime wages. See Ruben Chanrasekar and Surinder Pal Singh, *The Low-Wage South Asian Immigrant Rights Project: A Preliminary Report*, American Friends Service Committee (March 2006) (76% were denied overtime, resulting in an average annual loss of \$3,822 per worker) and CASA of Maryland, *Wage Theft: How Maryland Fails to Protect Low-Wage Workers* 4 (2007) (75% of domestic workers surveyed were not paid earned overtime wages, and over half earned less than the minimum wage).<sup>4</sup> Over the course of only one recent year, the Maryland Department of Labor, Licensing and Regulation (DLLR) collected \$764,000 in unpaid wages; while this figure represents only those cases that were successfully prosecuted by the DLLR, it underscores the high incidence of wage theft in this state. See Maryland Dep't of Labor, Licensing and Regulation, Annual Report (2008) at 13; see also Yvonne Wenger, *Wage Theft Prevails in Post-Recession Economy*, Baltimore Sun, Feb. 2, 2011 (reporting that

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<sup>3</sup> Available at [http://nelp.3cdn.net/0693974b8e20a9213e\\_g8m6bhyfx.pdf](http://nelp.3cdn.net/0693974b8e20a9213e_g8m6bhyfx.pdf)

<sup>4</sup> Similarly, a 2004 survey of day laborers in the metropolitan Washington, D.C. area, focusing on Maryland suburbs, reported that 58% of the workers had been denied wages at least once and that 55% were paid less than had been agreed. CASA of Maryland, *Wage Theft* at 5.



Maryland employers in the current flagging economy have increasingly, and illegally, withheld their employee's earned overtime pay).

CASA of Maryland has described the phenomenon of wage theft in Maryland as “epidemic,” a condition consistent with national findings. CASA of Maryland, *Wage Theft* at 5. For example, a 2009 national survey of low-wage workers found that 76% of those who had worked more than 40 hours a week were not paid overtime, and 70% of workers who were required to come in early or stay after their shift were not paid for this “off the clock” work. *See Broken Laws* at 20. Home care workers are particularly susceptible to wage theft. *See, infra*, Part II.A. Employers illegally denied overtime pay to nearly 83% of home care workers who had earned it, and failed to properly compensate 90% of those who worked before or after their official shift. *Broken Laws* at 39-40.

In Maryland, when an employer illegally withholds a worker's overtime wages, the worker is entitled to recover under both the WHL (Md. Code Ann., Lab. & Empl. § 3-415) and the WPCL (Md. Code Ann., Lab. & Empl. § 3-505).<sup>5</sup> Under

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<sup>5</sup> The Maryland Wage and Hour Law (WHL) requires employers to pay minimum wage and an overtime wage of at least 1.5 times the usual hourly wage for each hour over 40 that an employee works in a given workweek. Md. Code Ann., Lab. & Empl. § 3-401. The WHL shares the benevolent and remedial purposes of its Federal counterpart, the Fair Labor Standards Act (FLSA), and by setting minimum wage and hour standards intends: “(1) to provide a maintenance level consistent with the general health and well-being of the population, (2) to safeguard employers and employees against unfair competition, (3) to increase the stability of industry, (4) to increase the buying power of employees, and (5) to decrease the need to spend public money for the relief of employees.” *Friolo* 373 Md. at 363, Md. Code Ann., Lab. & Empl. § 3-402. The two laws work together, and a plaintiff whose overtime wages

the WHL, damages are limited to the amount of the worker's actual unpaid wages and reasonable counsel fees and costs; no other statutory or liquidated damages are available. Md. Code Ann., Lab. & Empl. § 3-427. However, under the WPCL, a worker whose overtime wages were illegally withheld in the absence of a *bona fide* dispute may recover an additional amount of treble damages, a common state law remedy for wage theft. Md. Code Ann., Lab. & Empl. § 3-507(b) and *Winning Wage Justice* at 11 (“In cases of wage theft...many state laws provide for double or “treble” (triple) damages...”).

In response to several federal decisions that interpreted the WPCL to not include unpaid “overtime wages” as a basis for a claim, the Maryland General Assembly in 2010 amended the statute to clarify that “overtime wages” were covered to the same extent as regular wages, bonuses, or other compensation. *See* 2010 Md. Laws ch. 99 (S.B. No. 694); 2010 Md. Laws ch. 100 (H.B. No. 214). As the legislative history makes clear, the General Assembly sought to ensure that federal and state courts applied the WPCL in a way that fulfilled its remedial purposes of protecting workers from the abuses of wage theft and protecting law-abiding employers from the effects of unfair competition by unscrupulous employers. *See* CASA de Maryland, *Testimony in Support of House Bill 214* (House Econ. Matters Comm. Feb. 18, 2010) [hereinafter *Testimony of CASA de Maryland*] (“A

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have been illegally withheld is “entitled to sue under both [the WHL and the WPCL] to recover any overtime pay that remained due after termination of her employment.” *Friolo*, 373 Md. at 515.

substantial portion of Maryland’s labor force lacks the financial resources to bring a claim [with the result that] unscrupulous employers are effectively shielded from any legal consequences whatsoever for their unlawful behavior.”)

The FLSA, which shares the remedial purposes of the WHL, provides for liquidated damages equal to two times of the amount of wages illegally withheld. Because the FLSA is a “floor” below which states are not permitted to legislate, any award of unpaid wages under the WHL, in the absence of a corresponding treble damages award under the WPCL, would fall under the FLSA “floor,” a result clearly not intended by the Maryland Assembly. *See, e.g.,* Brian J. Markovitz, *Testimony in Support of S.B. 694* (Sen. Fin. Comm. Feb. 25, 2010) [hereinafter “Testimony of Brian Markovitz”] (an employee who merely receives his unpaid overtime wages under the WHL, and nothing more in the way of treble damages under the WPCL, would receive less under the Maryland law than its federal counterpart, the FLSA).

This pervasive problem of wage theft in Maryland deals a double blow to the state’s economy. Low-income families are likely to spend their earnings on basic necessities like food, clothing and housing, and circulate these expenditures through the local economy. Thus, any loss of earned wages adversely affects local jobs and businesses. *Cf.* Ruth Milkman et al., Institute for Research on Labor and Employment – UCLA, *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low Wage Workers* (2010). Moreover, when these workers’ meager wages are stolen by their employers, they and their

families are often forced to rely upon already strained public safety nets, such as food stamps, food banks, temporary assistance with utility bill payments, subsidized housing and shelters. *See* PHI, *Who Are Direct Care Workers?* (2011).<sup>6</sup>

Vigorous enforcement of the WPCL, therefore, is necessary to protect not only Maryland’s low-wage workers, but also its local and state economies and its taxpayers. To this end, applying treble damages to unpaid overtime benefits multiple sectors of society, including businesses that follow the law. Indeed, when the General Assembly amended the WPCL in 2010, it did so after receiving testimony from a local business owner who stated that coverage for overtime violations was necessary in order to “make[] unscrupulous employers less likely to violate the law.” *See* Jason Rubin, *Testimony in Support of S.B. 694* (Sen. Fin. Comm. Feb. 25, 2010)[hereinafter “*Testimony of Jason Rubin*”](“For unscrupulous competitors, failing to pay overtime “gives them a competitive edge. They are able to hold on to monies owed their employees and use that money to compete with us. ... We should not be penalized because we follow the law.”) These consequences of wage theft are the types of issues that the Maryland legislature had in mind when it enacted the treble damages provision in the MWPLC.

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<sup>6</sup> Available at <http://www.directcareclearinghouse.org/download/NCDCW%20Fact%20Sheet-1.pdf>.

*B. Low-Wage Workers are More Likely to Become Victims of Wage Theft, and to Suffer Collateral Economic Consequences of Wage Theft.*

A minimum-wage worker in Maryland employed full-time for a year earns \$15,080, an amount equal to roughly 65% of the poverty level for a family of four. See U.S. Census Bureau, Poverty Thresholds By Size of Family And Number Of Children [hereinafter *Poverty Thresholds*].<sup>7</sup> These minimum wage workers, together with those who earn up to 200% of the federal poverty level (wages that are still very much subsistence in nature), constitute over 120,000 working families in Maryland. Brandon Roberts, Deborah Povich and Mark Mather, The Working Poor Families Project, *Low-Income Working Families: The Growing Economic Gap* 8 (Winter 2012-2013).<sup>8</sup>

Compounding their economic vulnerability, these low-wage workers are more likely to work in industries in which wage theft is rampant, such as restaurant, hospitality, construction and home care. *Winning Wage Justice* at 6. When employers illegally withhold their wages, full-time, low-wage workers lose an average of \$2,634 annually – a devastating amount to low-income families. *Id.*; see also *Broken Laws* at 20-21. Collectively, the amount of money stolen from workers' paychecks is staggering. For example, workers in low-wage industries in Chicago,

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<sup>7</sup> Available at <http://www.census.gov/hhes/www/poverty/data/threshld/>.

<sup>8</sup> Available at [http://www.workingpoorfamilies.org/wp-content/uploads/2013/01/Winter-2012\\_2013-WPFP-Data-Brief.pdf](http://www.workingpoorfamilies.org/wp-content/uploads/2013/01/Winter-2012_2013-WPFP-Data-Brief.pdf)

Los Angeles and New York City lose more than \$56.4 million per week as a result of employment and labor law violations. *Broken Laws* at 50.

Since they are already struggling to meet their families' basic needs of food, shelter and clothing, low-wage workers are also more likely to suffer collateral economic consequences when their employers illegally withhold their earned wages.<sup>9</sup> These consequences can include eviction, repossession of an automobile (often necessary for workers to commute to or obtain work), food insecurity, and the incurrence of high interest payments for credit cards and payday loans. These are real threats to familial stability for many of these over 120,000 Maryland families, including Ms. Peters'.

The effects of wage theft reverberate through families and communities, as workers report having to borrow money to avoid eviction or feed their families. *See Eunice Hyunhye Cho et al., Hollow Victories, The Crisis in Collecting Unpaid Wages* 6 (2013)(the lengthy duration of the wage claim and collections process causes severe economic distress and harm for low-wage workers, including having to go without food or medicine and difficulty in paying bills and rent as a result of unpaid and uncollected wages.) As one worker explained, "I fell behind on rent. I borrowed money. I was unable to give my kids everything they needed. Had to

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<sup>9</sup> *See* Burnham and Theodore, *Home Economics*, at 24. In a national survey of low-wage domestic workers, 37 percent reported that in the past 12 months they were forced to pay their rent or mortgage late; 60 percent spent more than half of their income on rent or mortgage payments; 40 percent paid essential bills late in the previous month; and one in five (20%) workers reported that in the past month there were times when there was no food to eat of any kind in their own home because they had no resources to obtain it.

leave my place and rent a smaller unit. I had to get another job. I felt upset and powerless not to collect the wages I was owed.” *Id* at 4. *See also* CASA of Maryland, *Wage Theft, supra*, at 5; Houston Interfaith Worker Justice Center, *Houston, We Have a Wage Theft Problem* 14 (2012) (low-wage workers often incur burdensome costs of eviction, relocation and litigation).

The ability of low-wage workers in Maryland to support themselves and their families, and to do so without straining limited public resources, is undermined when employers can violate the WHL and WPCL and face no real economic or legal consequences. Given the myriad of collateral consequences experienced by low-wage workers when their wages are illegally withheld, the failure of a court to award treble damages for a violation of the WPCL, in the absence of a *bona fide* dispute, is a failure to fully compensate the wage theft victim for her economic injury.

*C. Awarding Treble Damages for Violations of the WPCL Is Critical to Deterring Wage Theft by Employers.*

Awarding a plaintiff treble damages under the WPCL when her employer fails to pay her on time and in full serves several important public purposes. Treble damages are designed to more effectively deter employers from violating minimum workplace standards than common law causes of action. *See Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 658 A.2d 680,683 (1995)(noting that the availability of treble damages, costs and fees under the WPCL provides a greater incentive for employers to pay employees in-full for services rendered than the common law causes of action in *quantum meruit* or breach of contract). In the

absence of treble damages, there is no incentive for an employer to pay a worker on time or in full. Indeed, there is a strong *incentive* to violate these laws, since an employer would only be obligated to pay wages when (and unless) the employee successfully brings a claim. Without a credible threat of enforcement, either from public agencies or private litigation, rational employers may choose to take advantage of what is essentially a zero interest loan from their employees. This was expressly recognized in the legislative history leading to the amendment of the WPCCL in 2010. See J. Ronald DeJuliis, Commissioner of Labor and Industry, *Letter to Chairman Middleton Re: Senate Bill 694* (Sen. Fin. Comm. Feb. 24, 2010) (“Unscrupulous employers are more likely to deny their employees overtime wages if the only consequence of this denial is that they may have to pay the wages at a later date.....The deterrent effect is enhanced, however, if the sanction for getting caught is payment of up to three times the overtime wage.”). For this reason, treble damages provide a crucial economic incentive for employers to comply with the WPLC.

Sending a strong message to employers that compliance is a priority is especially important for low-wage workers who often work in industries with pervasive and systemic violations of wage laws. Moreover, awards of treble damages on overtime pay provide an important benefit to employers in those industries who already comply with Maryland’s wage and hour laws, because they are otherwise forced to compete with employers who are able to illegally lower their



prices or business costs by shortchanging their workers. *Cf. Testimony of Jason Rubin, supra* (explaining that as a law-abiding employer, he is harmed when unscrupulous competitors are able to illegally underbid for contracts by refusing to pay overtime); *Friolo v. Frankel*, 373 Md. 501, 515 (2003) (noting that a purpose of the Wage and Hour Law is “to safeguard employers...against unfair competition”). Therefore, reversing the Circuit Court’s ruling and applying treble damages to Ms. Peters’ earned overtime will set a precedent that benefits society by deterring wrongdoers and rewarding businesses that follow the law, consistent with the intent of the General Assembly. *Id.*

*D. Treble Damages are Necessary Given Persistent Budgetary Constraints Faced By Public Enforcement Agencies.*

Maintaining a credible threat of treble damages awards is even more important when public enforcement agencies lack the capacity to independently investigate, deter and prosecute employers who engage in wage theft. In Maryland, the DLLR’s Employment Standards Service (ESS) is responsible for enforcing the WHL and WPCL. ESS’s resources depend upon shifting political and budgetary realities, a dependence that has previously rendered its capacity a “virtual nullity.” *Baltimore Harbor Charters, Ltd. v. Ayd*, 365 MD 366, 382 (2001).” Even under the current more robust funding levels, the capacity of the ESS is insufficient, standing alone, to enforce and ensure the laws’ legislative objectives of minimum standards

and fair competition. *See* Department of Legislative Services, Fiscal & Policy Note, H.B. 1317 (Md. 2013).<sup>10</sup>

Rather than relying on public enforcement alone to enhance compliance by employers, the Maryland legislature created a private right of action for victims of wage theft, with the expectation that the private bar could enforce the WPCL through lawsuits that may result in treble damages. Any limitation or restriction on the availability of treble damages in wage theft cases, including for overtime, undermines one half of this effective approach, one intended by the General Assembly. *Compare* Md. Code Ann., Lab. & Empl. § 3-507.1 (providing a private right of action) (detailing the Commissioner of Labor and Industries enforcement powers) *with* Testimony of CASA of Maryland (treble damages awards necessary for low-wage workers to enlist the private bar for assistance in litigating wage and hour violations in state court); *see also* Testimony of Brian J. Markovitz (without the availability of treble damages awards in state court, lower-wage workers face considerable difficulty in engaging private counsel to vindicate their rights). Given the small amount of money at stake when low-wage workers are underpaid, the treble damages provide an important incentive for employers in low-wage industries to pay their employees on time and in full, and an incentive for the private bar to litigate state claims when they do not. *See Winning Wage Justice* at 19 (treble damages are vital to deter wage theft in low wage industries).

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<sup>10</sup> Available at [http://mgaleg.maryland.gov/2013RS/fnotes/bil\\_0007/hb1317.pdf](http://mgaleg.maryland.gov/2013RS/fnotes/bil_0007/hb1317.pdf).

**II. ACCESS TO TREBLE DAMAGES UNDER THE WPCL IS CRITICAL FOR HOME CARE WORKERS BECAUSE OF RAMPANT WAGE THEFT IN THE INDUSTRY AND A LACK OF FEDERAL PROTECTIONS FOR THE WORKFORCE.**

*A. Home Care Workers Are Particularly Vulnerable to Wage Theft.*

The lack of a central job-site and workers' physical isolation in clients' homes, sometimes for days on end, contribute to home care workers' vulnerability, making it difficult for them to collaborate with coworkers to confront abuses, or even to share information about their rights. *See*, for example, Linda Burnham and Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, National Domestic Workers Alliance, Center for Urban Economic Development, University of Illinois at Chicago DataCenter (2012).<sup>11</sup>

Overtime violations, in particular, are prevalent against workers like Muriel Peters who are assigned to "high hours" cases of 60-80 hours per week or more, caring for those with significant needs, and thus are even more vulnerable to overtime and other wage violations. This lack of enforcement has contributed to a workplace culture of non-compliance, illustrated by the cavalier reaction of one home care agency CEO to an overtime class action filed by her employees, "We just haven't paid overtime....It's no mystery in this industry." *See* Daniel Massey, *Home care service sued over pay practices*, CRAIN'S N.Y. BUS., Apr. 14, 2010.<sup>12</sup>

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<sup>11</sup> Available at <http://www.domesticworkers.org/pdfs/HomeEconomicsEnglish.pdf>.

<sup>12</sup> Available at <http://www.craigslist.com/article/20100313/FREE/100419938>.

The historical exclusion of home care workers from the federal Fair Labor Standards Act exacerbates their vulnerability and makes a vigorous enforcement of the WHL and the WPCL critically important.<sup>13</sup> Maryland is among the states that have chosen to provide broader coverage than the federal law and extends wage and hour protections to home care workers.<sup>14</sup> Because home care workers cannot seek justice under the FLSA, it is critical that Maryland trial courts award workers like Ms. Peters treble damages for overtime wage theft under the WPCL. Without the awarding of these damages, workers like Appellant have no other recourse for compensation, and this sends a strong message to Maryland home care employers that they may underpay their employees with impunity.

*B. Home Care Employers Like Appellee Use Independent Contractor Schemes to Evade Responsibility For Wages, Employer-Side Taxes and Other Worker Protections.*

By misclassifying Ms. Peters as an independent contractor and then underpaying her, EHCG illegally siphoned off tax revenues due to the state of Maryland, related counties and municipalities, and the federal government. These

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<sup>13</sup> The U.S. Department of Labor recently announced rules reforms that will extend federal minimum wage and overtime protections to most home care workers. The new rules do not go into effect until January 1, 2015. Application of the Fair Labor Standards Act to Domestic Service; Final Rule, 78 Federal Register 60454 (Oct. 1, 2013)(amending 29 C.F.R. part 552), available at <https://www.federalregister.gov/articles/2013/10/01/2013-22799/application-of-the-fair-labor-standards-act-to-domestic-service>.

<sup>14</sup> Maryland does not have a corollary of the Fair Labor Standards Act's exemption for workers performing "companionship services," 29 U.S.C. § 213(a)(15); 29 C.F.R. 552.6 *et seq*; Md. Code Ann., Lab & Empl. § 3-401 *et seq*. Maryland law has only a limited exemption from overtime provisions for employees of not for profit entities that provide companionship services. Md. Code Ann., Lab & Empl. § 3-415(b)(6).

kinds of misclassification schemes translate into millions of dollars in lost revenues for local economies nationwide, and are a real problem here in Maryland.<sup>15</sup> *See, for example, Cooney v. O'Connor*, No. 1788, (Md. Ct. Spec. App. November 26, 2002) (Maryland home care agency required its employees to sign an “Independent Contractor agreement” as a condition of getting a job placement and unsuccessfully attempted to prevent former employees from collecting unemployment insurance benefits); *Lee’s Indus.*, 355 N.L.R.B. 1267 (2010) (after workers filed lawsuit seeking unpaid overtime wages, the defendant home care agency told them that they had to sign an agreement calling them “independent contractors” if they wanted to keep their jobs); *Klausner v. Brockman*, 58 S.W.3d 671, 2001 Mo. App. LEXIS 1925, (Mo. Ct. App. 2001) (two home care aides later found to be employees were directed to register a shell home care business, required to sign contracts deeming them to be independent contractors, and issued IRS 1099 Forms for Independent Contractors).

Workers who are misclassified risk losing the protection of minimum wage and overtime laws, as well as safety-net benefits like unemployment insurance, workers compensation, and Social Security and Medicare. Employers who misclassify their employees shift their FICA and FUTA tax obligations onto their

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<sup>15</sup> An audit of Maryland employers in the landscaping and construction industry found that 20% were misclassifying employees as independent contractors. Maryland Department of Labor, Licensing and Regulation, *Annual Report of the Joint Enforcement Task Force on Workplace Fraud* (December 2012), available at <https://www.dllr.state.md.us/workplacefraudtaskforce/wpftfannrep2012.pdf>.

employees, shirk workers compensation payments, and exclude workers from employer benefit plans. They can thereby significantly reduce their payroll costs, allowing them to unfairly underbid competitors, which hurts law-abiding businesses.

A vigorous enforcement of the WPCL can help deter independent contractor abuses in industries not covered by Maryland's Workplace Fraud Protection Act, such as the growing home health care industry.<sup>16</sup> Deterring misclassification will return much-needed revenues to the state and localities (at a time when revenue is falling short and causing an increase in taxes on Marylanders),<sup>17</sup> restore workplace protections for misclassified workers, and help level the playing field for law-abiding businesses.

*C. Wage Theft and Poor Working Conditions Threaten to Destabilize Maryland's Home Care Industry.*

Ensuring the full protection of the WPCL to home care workers like Ms. Peters is crucial to stabilizing this increasingly vital workforce and ensuring that the

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<sup>16</sup> In response to rampant misclassification in the construction and landscaping industries, in 2010 the Maryland legislature passed the Workplace Fraud Protection Act, designed to protect Maryland workers from the impacts of misclassification abuse, level the playing field for law abiding businesses, and ensure that the state is not deprived of the taxes it is owed by unscrupulous employers willing to break the law to get ahead. See Thomas E. Perez, former Secretary of the Department of Labor, Licensing and Regulation, *Testimony in support of HB 1590*, House Economic Matters Committee (March 20, 2008).

<sup>17</sup> See Dep't. of Legislative Services, Fiscal & Policy Note, H.B. 1302 (Md. 2012), available at [http://mgaleg.maryland.gov/2012s1/fnotes/bil\\_0002/sb1302.pdf](http://mgaleg.maryland.gov/2012s1/fnotes/bil_0002/sb1302.pdf) (one recent attempt to fill the gap in state tax revenues by raising income tax rates). See, also, Michael Cooper, *States Face Tough Choices Even as Downturn Ends*, N.Y. TIMES, July 10, 2012, at A15 (state governments, including Maryland, have been forced to "grapple[] with the steepest and longest drop in tax collections on record.")

industry can continue to meet the rising demand for home care services in Maryland. Average wages for Maryland home care workers are less than \$11 per hour, less in real wages than what home care workers earned a decade ago, and far below what they need to provide for themselves and their families.<sup>18</sup> These poverty level wages have fueled turnover rates estimated at between 44% and 65% per year and impede the industry's ability to meet a projected 35% increase in demand for direct-care workers over the next decade.<sup>19</sup>

These high turnover rates may also impede the industry's ability to meet a projected 35% increase in demand for direct-care workers over the next decade. During the same period, the population of women aged 25-54 years old – the main labor pool from which these workers are drawn – is projected to grow by less than 2%, down from over 14% just two decades ago.<sup>20</sup> And, as the worker population ages and begins to have physical and other disabilities, recruiting a younger workforce is difficult with the poor working conditions these jobs offer. The

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<sup>18</sup> Maryland: Occupational Growth Projections, 2010-2020, PHI State Data Center, available at <http://phinational.org/policy/states/maryland/>; *Poverty Thresholds*.

<sup>19</sup> A survey of home care agency staff in Pennsylvania found a turnover rate of 44% (University of Pittsburgh, *The State of the Homecare Industry in Pennsylvania (2007)*); a review of 13 state and 2 national studies of in-home care for persons with intellectual and developmental disabilities found an average turnover rate of 65% (Hewitt and Larson (2007); a study of agency-employed home care workers in Maine found a turnover rate of 46% (L. Morris, *Quits and Job Changes Among Home Care Workers in Maine*, *The Gerontologist*, 49(5): 635-50).

decrease in worker supply, high turnover rates, and exploding demand increase the risk of worker shortages.

Attracting and retaining enough workers to meet this demand will require, at minimum, an assurance that workers can expect their full wages on payday. Allowing home care agencies like Appellee to cheat workers out of their wages with only minimal consequences provides a perverse economic incentive for employers to withhold their workers' wages, while projecting to potential workers that taking a job in the field is a gamble that may not result in a paycheck. This scheme not only hurts workers; it also puts law-abiding employers at a disadvantage, as they struggle to compete for clients and government funding with employers that illegally lower labor costs.

*D. Upholding Standards In Maryland's Rapidly Expanding Home Care Industry Is Crucial to the State's Economic Health.*

Maryland's ability to ensure wage compliance in its home care industry is especially critical now because this workforce is expanding rapidly. Between 2010 and 2020, the two occupations that make up the home care workforce—Home Health Aides and Personal Care Assistants—are projected to grow by 59% and 54% respectively in Maryland, as compared with overall job growth for the state at 12%.<sup>21</sup> As this workforce expands to constitute a larger share of the state's overall workforce, enforcing employer compliance with standards directly impacts the future of work in Maryland and the future of those families dependent on the earnings of

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<sup>21</sup> Maryland: Occupational Growth Projections, 2010-2020, PHI State Data Center, available at <http://phinational.org/policy/states/maryland/>.




those workers. Allowing rampant wage theft in this sector harms an ever-growing slice of the Maryland's workforce and undermines the state's economic growth.

### CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Brief of Appellant Peters, Amici respectfully suggest that this Court remand this case to the Circuit Court with instructions that Ms. Peters be awarded treble damages in the amount of \$18,603, in addition to the unpaid wages that the Circuit Court has already awarded her.

Respectfully submitted,



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## RELEVANT STATUTES

### **Maryland Wage Payment and Collection Law Md. Code Ann., Lab. & Empl. §§ 3-501 to 3-509**

#### **§ 3-501. Definitions**

- (a) In this subtitle the following words have the meanings indicated.
- (b) “Employer” includes any person who employs an individual in the State or a successor of the person.
- (c)(1) “Wage” means all compensation that is due to an employee for employment.
- (2) “Wage” includes:
  - (i) a bonus;
  - (ii) a commission;
  - (iii) a fringe benefit;
  - (iv) overtime wages; or
  - (v) any other remuneration promised for service.

#### **§ 3-502. Payment of wage by employer**

- (a)(1) Each employer:
  - (i) shall set regular pay periods; and
  - (ii) except as provided in paragraph (2) of this subsection, shall pay each employee at least once in every 2 weeks or twice in each month.
- (2) An employer may pay an administrative, executive, or professional employee less frequently than required under paragraph (1)(ii) of this subsection.
- (b) If the regular payday of an employee is a nonworkday, an employer shall pay the employee on the preceding workday.
- (c) Each employer shall pay a wage:

(1) in United States currency; or

(2) by a check that, on demand, is convertible at face value into United States currency.

(d)(1) In this subsection, “employer” includes a governmental unit.

(2) An employer may not print or cause to be printed an employee’s Social Security number on the employee’s wage payment check, an attachment to an employee’s wage payment check, a notice of direct deposit of an employee’s wage, or a notice of credit of an employee’s wage to a debit card or card account.

(e) This section does not prohibit the:

(1) direct deposit of the wage of an employee into a personal bank account of the employee in accordance with an authorization of the employee; or

(2) credit of the wage of an employee to a debit card or card account from which the employee is able to access the funds through withdrawal, purchase, or transfer if:

(i) authorized by the employee; and

(ii) any fees applicable to the debit card or card account are disclosed to the employee in writing in at least 12 point font.

(f) An agreement to work for less than the wage required under this subtitle is void.

### **§ 3-503. Deductions by employer**

An employer may not make a deduction from the wage of an employee unless the deduction is:

(1) ordered by a court of competent jurisdiction;

(2) authorized expressly in writing by the employee;

(3) allowed by the Commissioner because the employee has received full consideration for the deduction; or

(4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.

**§ 3-504. Notice regarding wages and paydays**

(a) An employer shall give to each employee:

(1) at the time of hiring, notice of:

(i) the rate of pay of the employee;

(ii) the regular paydays that the employer sets; and

(iii) leave benefits;

(2) for each pay period, a statement of the gross earnings of the employee and deductions from those gross earnings; and

(3) at least 1 pay period in advance, notice of any change in a payday or wage.

(b) This section does not prohibit an employer from increasing a wage without advance notice.

**§ 3-505. Payment on cessation of employment**

(a) Except as provided in subsection (b) of this section, each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

(b) An employer is not required to pay accrued leave to an employee if:

(1) the employer has a written policy that limits the compensation of accrued leave to employees;

(2) the employer notified the employee of the employer's leave benefits in accordance with § 3-504(a)(1) of this subtitle; and

(3) the employee is not entitled to payment for accrued leave at termination under the terms of the employer's written policy.

### **§ 3-506. Reciprocal agreements by Commissioner**

To collect wages that employers unlawfully withhold, the Commissioner may enter into a reciprocal agreement with a labor department or other similar unit that has jurisdiction in another state over wage collection.

### **§ 3-507. Enforcement by Commissioner**

(a) Whenever the Commissioner determines that this subtitle has been violated, the Commissioner:

- (1) may try to resolve any issue involved in the violation informally by mediation;
- (2) with the written consent of the employee, may ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and
- (3) may bring an action on behalf of an employee in the county where the violation allegedly occurred.

(b)(1) If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

(2) If wages of an employee are recovered under this section, they shall be paid to the employee without cost to the employee.

#### **§ 3-507.1. Order to pay wages**

(a) On receipt of a complaint for failure to pay wages that do not exceed \$3,000, the Commissioner shall:

- (1) send a copy of the complaint to the employer alleged to have failed to pay wages; and
- (2) require a written response to the complaint within 15 days.

(b)(1) The Commissioner:

- (i) shall review the complaint and any response to it; and
- (ii) may investigate the claim.

(2) On the basis of the review and any investigation, the Commissioner may:

(i) issue an order to pay wages under subsection (c) of this section if the Commissioner determines that this subtitle has been violated; or

(ii) dismiss the claim.

(c)(1) The Commissioner may issue an order to pay wages that:

(i) describes the alleged violation;

(ii) directs payment of wages to the complainant; and

(iii) if appropriate, orders the payment of interest at the rate of 5% per year accruing from the date the wages are owed.

(2) The Commissioner shall send the order to pay wages to the complainant and to the employer at the employer's last known business address by both regular mail and certified mail, return receipt requested.

(3) Within 30 days after receipt of the order to pay wages, the employer may request a de novo administrative hearing, which shall be conducted in accordance with Title 10, Subtitle 2 of the State Government Article.

(4) On receipt of a request for a hearing, the Commissioner shall schedule a hearing.

(5) If a hearing is not requested, the order to pay wages shall become a final order of the Commissioner.

(6)(i) If a petition for review is not filed within 30 days of the issuance of the final order, the Commissioner may proceed in District Court of the county where the employer resides or has a place of business to enforce payment.

(ii) In a proceeding under this subsection, the Commissioner is entitled to judgment in the amount of the order to pay wages and any interest due on a showing that:

1. the order to pay wages and interest, if any, was assessed against the employer;

2. no appeal is pending;

3. the ordered wages and interest, if any, are wholly or partly unpaid; and

4. the employer was duly served with a copy of the order to pay wages and interest, if any, in accordance with this section.

**§ 3-507.2. Recovery of unpaid wages**

(a) Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

(b) If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

**§ 3-508. Acts prohibited; penalties**

(a) An employer may not willfully violate this subtitle.

(b) An employee may not knowingly make to a governmental unit or official of a governmental unit a false statement with respect to any investigation or proceeding under this subtitle, with the intent that the governmental unit or official consider or otherwise act in connection with the statement.

(c)(1) An employer who violates subsection (a) of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$1,000.

(2) An employee who violates subsection (b) of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$500.

**§ 3-509. Short title**

This subtitle may be cited as the Maryland Wage Payment and Collection Law.

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**Maryland Wage and Hour Law**  
**Md. Code Ann., Lab. & Empl. § 3-401 *et seq.***  
**Selected provisions**

**§ 3-401. Definitions**

(a) In this subtitle the following words have the meanings indicated.

(b) “Employer” includes a person who acts directly or indirectly in the interest of another employer with an employee.

(c) “Federal Act” means the federal Fair Labor Standards Act of 1938.

(d) “Wage” means all compensation that is due to an employee for employment.

### **§ 3-415. Payment of overtime to employees**

(a) Except as otherwise provided in this section, each employer shall pay an overtime wage of at least 1.5 times the usual hourly wage, computed in accordance with § 3-420 of this subtitle.

(b) This section does not apply to an employer that is:

(1) subject to 49 U.S.C. § 10501;

(2) an establishment that is a hotel or motel;

(3) an establishment that is a restaurant;

(4) considered a gasoline service station because the employer is engaged primarily in selling gasoline and lubricating oil, even if the employer sells other merchandise or performs minor repair work;

(5) a bona fide private country club;

(6) a not for profit entity and is engaged primarily in providing temporary at-home care services, such as companionship or delivery of prepared meals, to aged or sick individuals, individuals with disabilities, or individuals with a mental disorder;

(7) a not for profit concert promoter, legitimate theater, music festival, music pavilion, or theatrical show; or

(8) an amusement or recreational establishment, including a swimming pool, if the establishment:

(i) operates for no more than 7 months in a calendar year; or

(ii) for any 6 months during the preceding calendar year, has average receipts in excess of one-third of the average receipts for the other 6 months.

(c) This section does not apply to an employer with respect to:



- (1) an employee for whom the United States Secretary of Transportation may set qualifications and maximum hours of service under 49 U.S.C. § 31502;
- (2) a mechanic, partsperson, or salesperson who primarily sells or services automobiles, farm equipment, trailers, or trucks, if the employer is engaged primarily in selling those vehicles to ultimate buyers and is not a manufacturer; or
- (3) a driver if the employer is engaged in the business of operating taxicabs.

**§ 3-427. Action against employer**

(a) If an employer pays an employee less than the wage required under this subtitle, the employee may bring an action against the employer to recover the difference between the wage paid to the employee and the wage required under this subtitle.

(b) On the written request of an employee who is entitled to bring an action under this section, the Commissioner may:

(1) take an assignment of the claim in trust for the employee;

(2) ask the Attorney General to bring an action in accordance with this section on behalf of the employee; and

(3) consolidate 2 or more claims against an employer.

(c) The agreement of an employee to work for less than the wage to which the employee is entitled under this subtitle is not a defense to an action under this section.

(d) If a court determines that an employee is entitled to recovery in an action under this section, the court may allow against the employer reasonable counsel fees and other costs.

**STATEMENT OF TYPE STYLE AND POINT SIZE**

This brief uses 13-point Times New Roman font.

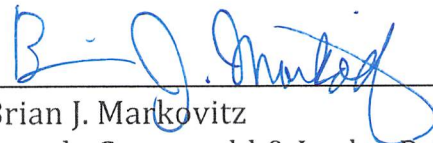
**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of December, 2013, I caused to be mailed first class, postage prepaid, two copies each of the foregoing Brief of Appellant to:

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