Statement of Natalie Ludaway
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Before the

Committee of the Whole Subcommittee on Workforce
The Honorable Elissa Silverman, Chairperson

Public Hearing

B21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

B21-711, Wage Theft Prevention Revision Amendment Act of 2016

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10:00 a.m.
Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia

Good morning Chairperson Silverman, Councilmembers, staff, and residents. I am Natalie Ludaway, the Chief Deputy Attorney General for the District of Columbia. I am pleased to appear on behalf of Attorney General Karl A. Racine to express his support for the policy goals and objectives of Bill 21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015 and Bill 21-711, the Wage Theft Prevention Revision Amendment Act of 2016. Wage theft is a serious problem that desperately needs to be addressed in a comprehensive, efficient, and, most importantly, effective manner. Since the District of Columbia's Wage Theft Prevention Amendment Act of 2014 (the 2014 Act) went into effect in early 2015, there have been numerous attempts to clarify and revise the law. The Office of the Attorney General (OAG) greatly appreciates the work of this Committee of the Whole Subcommittee on Workforce in getting us to this important point. Because of your leadership, District workers are closer to having a law that ensures that they receive full pay for all of the work they have performed.

Wage Theft Prevention Revision Amendment Act of 2016

The Attorney General strongly supports Bill 21-711, the Wage Theft Prevention Revision Amendment Act of 2016. This legislation is the result of collaboration between the OAG and the Department of Employment Services (DOES) spanning over nearly a year. DOES Director Deborah Carroll will explain the intricacies of this legislation and the overarching policy goals. My testimony is focused on one key area that is of particular interest to OAG, the provision of attorney's fees.

The Repeal of the *Salazar* Fee Provision in the 2014 Act

The 2014 Act's provision requiring that attorney's fees awarded to employees' lawyers should be calculated using the matrix established in *Salazar v. District of Columbia*, 123 F. Supp.2d 8 (D.D.C. 2000), should be removed. Bill 21-711 makes this vitally important revision. The Attorney General joins the Mayor in strongly opposing the adoption of *Salazar* fees here, or in any other in legislation. *Salazar* has been relied on by lawyers and some judges as establishing a rate for complex federal litigation. Leaving aside whether the payment scheme established in that case is appropriate even in complex federal litigation, wage and leave cases are not generally considered to be anywhere as difficult as complex federal litigation. Unlike complex litigation, wage and leave cases are generally single issue cases, require few witnesses, and unlike complex cases are generally resolved within a year. By contrast, *Salazar* is a decades-old consent decree case involving provision of Medicaid, particularly to children, dating from an era when the District's Medicaid program was not the highly regarded program it is today. The case has produced many judicial opinions at both the trial and appellate levels. And, even in *Salazar* itself, not all legal services are compensated at *LSI-Salazar* rates. There are three levels of fee compensation, with the *LSI-Salazar* rates at the top for the most complex work defined in the Consent Order. The other two categories of work, which make up most of the legal services in the case, including representing individuals seeking fair hearings before the Office of Administrative Hearings, are compensated at far below the *LSI-Salazar* rates.

The reference in the current Wage Theft Act to *Salazar* rates has been relied on by at least two federal judges in the District to justify the imposition of the much higher *Salazar* fees in other types of cases where such high fees are not warranted. To be clear, the District is facing a serious problem. Because *Salazar* rates are contained in the current wage theft law, attorneys are arguing that the District's payment of attorney's fees at the rates authorized by *Salazar* in non-complex wage theft cases are the "prevailing market rate." They are not. The wage theft attorney's fee rates should be established by looking to comparable cases, including IDEA cases. Attorneys often request payment for hundreds, and sometimes thousands, of hours of billable work in cases brought against the District. If the courts continue to adopt the reasoning that the District has recognized *LSI-Salazar* rates as prevailing market rates, the District will have to pay millions of dollars in attorney's fees that it would not otherwise be required to pay and for legal work to which *Salazar* rates were not intended to apply.

In *Salazar*, the court was looking at complex civil litigation. These wage cases are not complex. In fact, they are more comparable to cases that the District litigates with regard to the Individuals with Educational Disabilities Act (IDEA),—cases which traditionally rely on a maximum of USAO *Laffey* rates or, frequently, much less. And, even in *Salazar*, some legal work is not compensated at the "*Salazar* rate"—much of the legal work done on behalf of individual claimants, which is much more like individual wage claim actions than the original class action, is compensated at $145 per hour, regardless of the experience of the attorney involved.

For more than a decade, it has been clear that the U.S. Attorney's *Laffey* matrix reflects the maximum prevailing hourly rate for legal services in the District of Columbia, and I am advised that this matrix has recently been updated with current data and analysis. It now is referred to simply as the U.S. Attorney's Office Matrix (USAO Matrix), having been significantly revised in 2015 to reflect hourly rates some 30 years after the original *Laffey* decision. This new USAO Matrix represents the upper end of the current prevailing market hourly rates in the District of Columbia. Attached to my testimony are three charts that will demonstrate that *Salazar* rates are approximately 41% higher than the U.S. Attorney Matrix rates. For example, an attorney with twenty years of experience would receive $516 dollars per hour under the USAO Matrix. However, under the *Salazar* formulation, he or she would receive $826 per hour—a difference of $310 an hour. When multiplied by hundreds or thousands of billable hours charged to the District, the difference is significant. The reason that courts rely on the use of a matrix is to identify the prevailing hourly rates collected locally by attorneys with similar experience working on comparable cases.

Although we strongly object to the *LSI-Salazar* rates, the OAG appreciates the underlying rationale for including the *Salazar* language in the current law. Attorney General Racine and I both come to our current positions from private for-profit law firms, and we completely understand why our former colleagues in the plaintiffs' bar would advocate for

Salazar rates. We, too, want to encourage lawyers to handle as many legitimate wage theft cases as possible. Not only does wage theft negatively affect the victim, it also defrauds the District from appropriate employee and payroll tax dollars.

Use of *Salazar* fees, however, is not the answer as is evidenced by the following: (1) According to our discussions with DOES, the current *Salazar* language has not resulted in an uptick in litigation – the very reason for its inclusion; (2) the willingness of private lawyers to take cases in other areas of litigation, such as IDEA cases, where they have been paid according the USAO *Laffey* schedule or less, shows that there is no need for extremely high hourly rates to encourage attorneys to take cases; (3) codifying *Salazar* is having an unintended adverse financial impact on the District government; and (4) it seems that the challenge with encouraging these wage theft cases is not with encouraging the attorneys to take the cases, but with encouraging the victims to pursue the cases. The businesses that often engage in this abhorrent behavior target the most vulnerable employees. I am advised that it is very difficult to maintain litigation in cases where the victim (a) is in desperate need of finances and will accept a "settlement" from an employer that is much less than what they are rightfully owed; and (b) is either actively looking for employment or is working a job that does not allow for the flexibility to pursue these claims. OAG is willing to work with you, our partner agencies, and advocates to come up with better ways to encourage victims to carry forward with litigation. In our opinion, that is the right approach. Attempting to encourage plaintiffs' lawyers through *Salazar* is not helping the victims or the District. I urge this Subcommittee to support this legislative fix.

Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

I will now focus my testimony on Bill 21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015. The OAG strongly supports this legislation with one major revision that I will mention. Moreover, Attorney General Racine greatly appreciates the introducers for including provisions that will much better protect District workers.

OAG Authority

Before the current Wage Theft Act was enacted, OAG was authorized to accept an assignment of wages from an employee, maintain an action to collect those wages, and settle a case without the consent of the affected employee. The 2014 Act deleted this authorization, thus repealing the Attorney General's authority to go to court to collect wages owed to employees. Subsection 2(d) would address this by amending D.C. Official Code § 32-1308 to read as follows:

> The Attorney General, or any employee or person aggrieved by a Violation of [the wage theft law], the Minimum Wage Revision Act, the Sick and Safe Leave Act, or the Living Wage Act [collectively, "wage and leave laws"] . . . may bring a civil action in a court of competent jurisdiction against the employer or other person violating [the wage and leave laws] and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation . . . .

This provision is very helpful. The need for OAG to have authority to investigate and litigate large-scale or pattern and practice wage theft cases directly in court is vital. Not only will this

authority help reduce the burden on DOES, thus allowing them greater focus on the more traditional administrative cases, it will be a clear message to large-scale bad actors that defrauding District workers and not paying their fair share of related taxes will not be tolerated.

Discussion of Other Provisions and the Need to Repeal *Salazar* Fees

Subsection 2(a) of the bill would create an exception to the current requirement that all employees be paid at least twice a month, and would permit employers to pay administrative, executive, and professional employees at least once a month. This change was made in response to concerns raised by the business community.

Subsections 2(b) and 3(f)(2) of the bill would amend the provisions now in effect requiring subcontractors and temporary agencies (the "responsible parties") to indemnify certain other parties who pay wages that should have been paid by a responsible party. This subsection would provide that the parties may limit this indemnification obligation by contract, and was included to address the OAG's concern that the 2014 Act could be construed to impair existing contract rights.

Subsection 2(c) of the bill would reduce the criminal penalties included in the 2014 Act to amounts recommended by OAG. It addresses OAG's concern that if the higher penalties remain in place, a court might conclude that the United States Attorney, and not the Attorney General for the District of Columbia, is responsible for prosecuting offenses of the District's wage theft and living wage laws.

Subsection 2(d) would correct an inconsistency in the 2014 Act to make clear that certain time frames are measured from the date on which a notice is mailed, not delivered. In addition, in response to a concern raised earlier by OAG, this subsection would provide that appeals of administrative orders issued under the District's wage and leave laws shall be made to the D.C.

Court of Appeals. Subsection 2(d) would also address OAG's concern that the organizational standing provision in the 2014 Act was too broad, by limiting organization standing to labor and employee organizations to which the employee belonged.

Subsection 2(e) would give the Mayor rulemaking authority and corrects a gap in the Mayor's authority noted by OAG.

Subsection 3(a) would repeal the current exemption from the District's minimum wage laws for parking lot and parking garage attendants.

Subsections 3(b)(1) and 3(e) would clarify for how long an employer must maintain certain records and addresses a concern raised earlier by OAG that the time period was unclear.

Subsection 3(b)(1) would also exempt employees who are not covered by the minimum wage and overtime laws from the requirement that an employer must keep track of the precise times and dates during which an employee worked. This was done in response to concerns raised by the business community.

Subsection 3(b)(3) would provide that an employee could acknowledge receipt of a required notice by email, and would provide that the statute of limitations for bringing a civil action alleging a violation of the District's wage and leave laws would not begin until the employer had provided all required notices. We recommend that this provision be amended to specify that the employer must provide all notices required under the District's wage and leave laws.

Subsections 3(b)(2), 3(b)(4) and 3(c) would require the Mayor to provide certain notices in any foreign language required for vital documents under the District's language access law and any other language the Mayor deems appropriate.

Subsection 3(d) would be amended to permit the Mayor to provide copies of certain forms to employers by posting them on the District government's website and addresses a concern raised earlier by OAG that the law would otherwise require the government to provide individual notices to employers.

Subsection 3(g) would strike the reference to liquidated damages in the "Remedies" section of the District's minimum wage law, and provide, instead, that an employee could receive "all appropriate relief provided for under section 10a of the Wage Payment Act." Subsections 3(h) and (i) would make clear that the remedies that are available under the wage theft law are also available for violations of the minimum wage law.

Section 4 would repeal the provision in the 2014 Act making the law retroactive. This change responds to OAG's concern that making the new criminal provisions in the 2014 Act retroactive would violate the Constitution's prohibition against ex post facto laws. .

Before closing, I note that our staff has identified several minor drafting recommendations and will contact the Subcommittee with them.

As I stated previously, Attorney General Racine strongly urges a repeal of *Salazar* in the District of Columbia Code. The OAG asks that repeal be reflected in the Bill 21-120.

I greatly appreciate the opportunity to testify on these bills. I am pleased to answer any questions that members may have.