

Testimony before the  
House Business and Industry Committee  
May 27, 2015  
Interim Charge: The Impact of Wage Theft

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Honorable Rep. Oliveira and Members of the Business and Industry Committee,

Good afternoon. My name is Emily Timm and I am the Deputy Director of Workers Defense Project. Thank you for the opportunity to testify before the committee on the important issue of wage theft.

Workers Defense Project assists low-income workers to recover wages when they are victims of wage theft. Wage theft is the common occurrence when employers fail to pay their workers their promised wages, pay them less than the full amount they are owed or don't pay them at all. Wage theft undercuts responsible businesses and hurts working families by forcing them to face unexpected hardships. It also has a significant impact on the Texas economy by reducing the consumer spending power of families in our community.

In certain sectors, wage theft is pervasive. For example, a 2013 study by the University of Texas found that 1 out of every 5 construction workers has experienced wage theft.<sup>1</sup> Among contingent workers, the rate of wage theft is as high as 1 in 2.<sup>2</sup>

Workers Defense Project assists low-wage worker clients to recover their hard-earned wages through a number of administrative remedies (filing complaints with the Texas Workforce Commission or Department of Labor) and legal remedies (litigation under federal and state law, small claims court and property liens), and applying Texas' Theft of Service Code (Penal Code chapter 31.04) in cases where employers intentionally withhold wages. Each case of wage theft has particular details and context that may make a certain remedy more appropriate for that particular case. Factors to determine an appropriate remedy might include:

- how long ago the wage theft occurred
- the period of time over which the wage theft occurred.
- the number of workers who were not paid
- the size of the employer owing the wages, and the solvency of their business
- the type of wage theft that occurred, for example, total non-payment of wages, partial withholding of wages, or failing to pay overtime or minimum wage.

In 2011, the Texas legislature overwhelmingly voted in favor of SB1024, a bill modifying Texas Penal Code Chapter 31.04 to include wage theft in the definition of Theft of Service. SB1024 empowered local law enforcement and prosecutors to investigate and enforce Theft of Service in cases where employers intentionally denied payment to their employees. In Austin, Rep. Rodriguez initiated a stakeholder process with Workers Defense Project, the Austin Police Department, the Travis County Sheriff, the District Attorney, and the County Prosecutor that has resulted in a highly effective enforcement strategy on wage theft cases under the new law.

In attachment A, you will see flowchart explaining how the theft of service process works in Austin. To summarize briefly: an unpaid worker, with or without the help of an advocate, sends a demand letter via certified mail to their employer asking for payment (Attachment B) and including APD's memo explaining the law (see Attachment C). The worker will wait 10 days for a response from their employer. If their employer fails to negotiate with them, they can then file a report with the Police Department by calling 311 and the case is assigned to an investigator. The investigator will contact the employer to discuss payment. The investigator has much discretion in determining how the case moves forward. If the investigator determines criminal intent and the employer refuses to pay, they will solicit a written affidavit from the worker and then issue a warrant for the arrest of the employer. If the employer is arrested, the case is then prosecuted by the Travis County Prosecutor, who may opt to settle and seek restitution or to proceed to indictment.

Let me be clear: the vast majority of theft of service cases require minimal police action and very rarely make it to the prosecutorial stage. It's in everyone's best interest to resolve it sooner. The importance of Theft of Service begins with the sending of the demand letter. Informing employers about the existence of the law and including a memo from APD along with our demand letters has proven incredibly effective at getting cases resolved via friendly negotiation.

Theft of Service has also proven very effective in certain types of cases where legal and administrative remedies have not been successful. The threat of arrest proves far more powerful than threat of TWC or DOL investigation to certain employers who may be "judgment proof" because of their small size or lack of solvency. Theft of Service forces suspects who ordinarily would evade the law to face the justice system. People who ordinarily wouldn't pay, step forward to resolve their cases through settlement and negotiation.

SB1024 has been implemented in Austin and other Central Texas cities. El Paso, Dallas and some cities in the Rio Grande Valley are moving towards incorporating it in their training materials for investigators.

Theft of Service has been effective in Austin because we've made huge efforts to partner with the local law enforcement community. It has been challenging to replicate this success in other parts of the state where these agencies still view wage theft as a civil rather than a penal matter. This isn't due to a fault in the statute but a lack of political will. We need your help to bring law enforcement to the table.

Local law enforcement agencies should be aware that this law has not resulted in a huge influx of new cases. In 2012, WDP referred 58 cases to area law enforcement; in 2013, 60 cases. Approximately 85% of those cases were successfully resolved at the demand letter/negotiation stage, with only a call from a police investigator. In 2013, only 5 cases resulted in employer arrests and initiating the prosecutorial stage. The remaining unresolved cases were referred back to TWC or civil court. We consider this very successful rate of recovering wages.

Many cases are not appropriate for theft of service and are better handled by the Texas Workforce Commission or other administrative and legal channels. For example, WDP would probably not refer the following types of cases to law enforcement:

- failure to pay overtime
- cases involving multiple workers because under TOS there's no mechanism for a joint investigation.
- prolonged violations. When a worker has not been paid over a longer period of time, administrative and legal remedies would be more effective.
- Cases that would be likely to receive penalties or damages through a legal or administrative process- a tool that the TWC and the courts have.

However, in the case of Graciela Alvarado, a construction worker who was employed by a fly by night construction cleaning company, Theft of Service was the only remedy to which her employer was responsive. Advocates attempted to negotiate with her employer for her \$5000 in back wages but it wasn't until the employer received a demand letter and a call from APD detective that they agreed to sign a settlement plan and are currently making payments to Graciela for the full amount owed.

By passing SB1024 in 2011, the House and Senate demonstrated overwhelming support for legislation that creates meaningful penalties for employers who deny their workers their fair pay. Since being enacted, SB1024 has provided a critical tool for workers and advocates who are working to recover back wages. Wage theft not only forces working families into economic hardship, but it harms the Texas economy by curtailing local spending, and undercutting responsible businesses who pay their workers properly. A business that pays its workers and all appropriate taxes simply can't compete with an employer who cheats their workers out of wages. Theft of Service, among the other legal and administrative remedies, sends a strong message that we won't allow unfair competition.

At this time I do not recommend any changes to Texas Penal Code Chapter 31.04- we should let the law do its job. I do urge the committee to take up the issue of wage theft and look at other ways to strengthen enforcement by the Texas Workforce Commission, or to consider other innovative measures such as denying licenses or permits to companies who fail to pay their workers. I've included a list of possible policy approaches to do this in my written testimony, and I am happy to provide additional information about those recommendations. Thank you for your leadership on this issue and we look forward to working with you in the 84<sup>th</sup> Legislative session to make sure Texas is tough on wage theft.

Attachments:

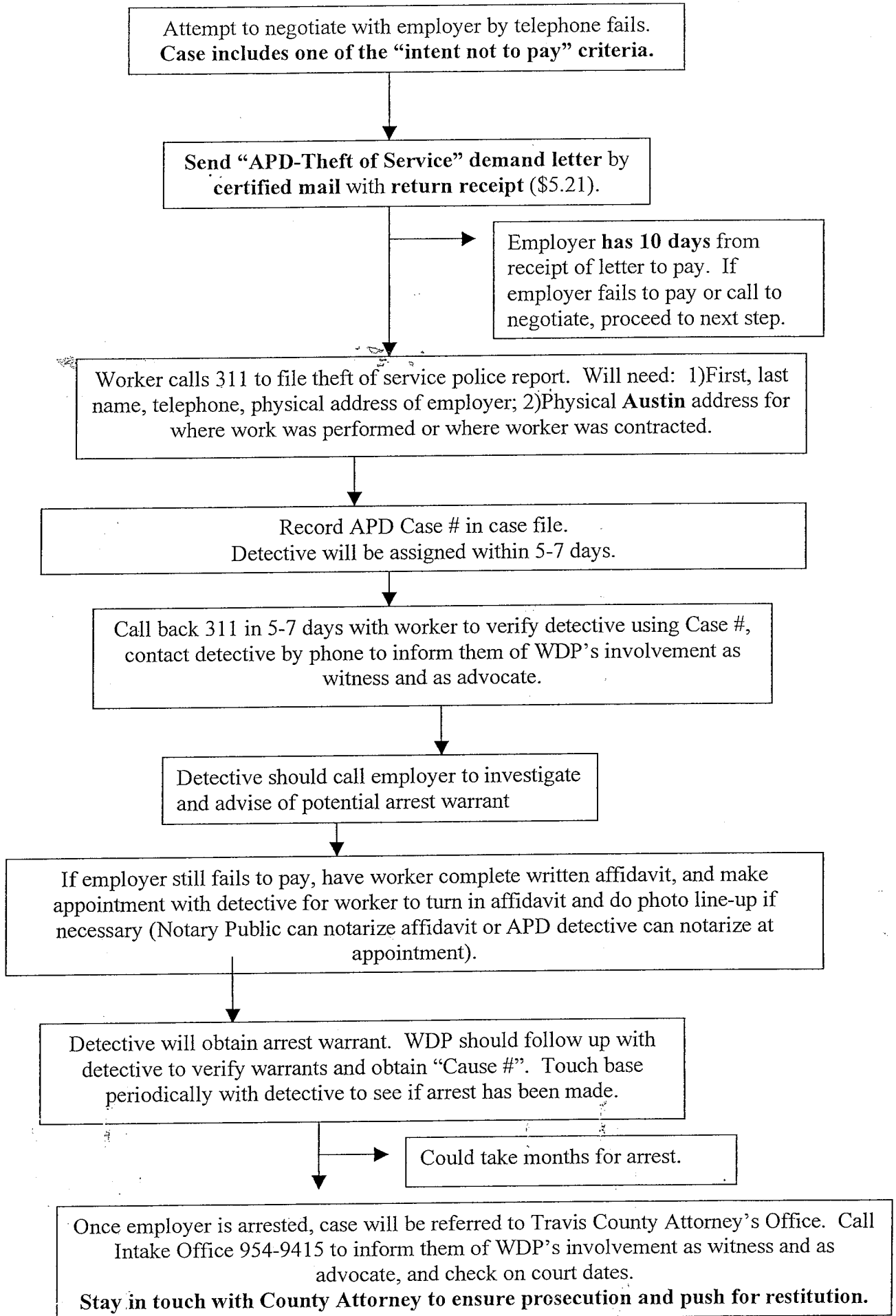
- A. Theft of Service flow chart
- B. WDP Demand Letter
- C. APD letter explaining the Theft of Service policy
- D. List of possible policy innovations to strengthen administrative and legal remedies for wage theft.

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<sup>i</sup> University of Texas at Austin, Division of Diversity and Community and Engagement. *Build a Better Texas: Construction Working Conditions in the Lone Star State*. January, 2013.

<sup>ii</sup> University of California, Los Angeles. National Day Labor Study. 2005.

## FLOW CHART FOR TYPICAL APD THEFT OF SERVICE CASE





## Workers Defense Project

*Proyecto Defensa Laboral*

Month Day, Year

Company

Attn Name of the employer

Street name and number

City, State Post Code

SENT VIA REGULAR & CERTIFIED MAIL

Re: Demand for unpaid wages/theft of service.

Dear *Name of the employer*,

Workers Defense Project is an organization that assists low-wage workers. We are writing you on behalf of *Name of worker/s*, who worked for you between *Dates worked*. *Name of worker/s* claims that *she/he/they is/are* owed *\$Amount owed* in unpaid wages for *Type of work* performed for you. *Name of worker/s has/have* presented to us a detailed calculation for the dates and hours worked from *Dates worked*, the salary promised, and the amount of outstanding wages owed.

This letter is a demand for payment of the *\$Amount owed* in unpaid wages. **Failure to pay the *\$Amount owed* within ten days of receiving this letter creates a presumption of committing an offense, and this matter will be referred to the Austin Police Department for investigation.** The Austin Police Department is investigating such cases under criminal Theft of Service charges, pursuant to Chapter 31.04 of the Texas Penal Code (**see attached Police memo**).

It is always our policy to attempt to settle this type of dispute through negotiation. We attempted to resolve this with you by telephone and were unsuccessful. Please contact me immediately if you wish to settle this matter or if you have any questions please call me at (512) 391-2305 ext 8025.

To resolve this matter immediately, send payment of *\$Amount owed* made out to "Workers Defense Project" within 10 days of receiving this letter to: Workers Defense Project; 5604 Manor Rd Austin, TX 78723. We will not distribute the funds to *Name of worker/s* until *she/he/they has/have* signed a release form.

**Please be avised that it is illegal to retaliate or take any adverse action with respect to *Name of worker/s*.**

Thank you for your attention to this matter and I hope to hear from you soon.

Respectfully,

Patricia Zavala  
Employment Services Director  
Patricia@workersdefense.org

*In unity there is strength*

5604 Manor Rd Austin, TX 78723 T: (512) 391-2305 F: (512) 391-2306  
534 West 10th St Dallas, TX 75208 T: (972) 479-5080 F: (972) 534-2800  
info@workersdefense.org www.workersdefense.org



# Austin Police Department

*City of Austin: Founded by Congress, Republic of Texas, 1839*  
*P.O. Box 689001, Austin, Texas 78768-9001 Telephone (512) 974-5000*  
*www.cityofaustin.org/police*

TO: Austin Police Department  
FROM: Art Acevedo, Chief of Police  
SUBJECT: Amendments to the Theft of Service Statute (Tex. Penal Code § 31.04)  
DATE: May 10, 2012

The Austin Police Department is committed to thoroughly investigating all instances whereby an employer does not compensate an employee for services performed. If necessary, charges will be filed against an employer who does not fully compensate an employee for services rendered.

According to the Texas Penal Code (Chapter 31.04, Theft of Service),

A person commits an offense if, with intent to avoid payment of service that he knows is provided only for compensation:

- (4) He intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make payment after receiving notice demanding payment.

Failure to make payment within ten days after receiving notice (via certified mail) gives rise to a presumption of intent to avoid payment. TEX. PENAL CODE § 31.04(b)(2). The 82<sup>nd</sup> Legislature's amendments to section 31.04 (found in H.B. 2196/S.B. 1024) enhance the ability to prosecute employers who commit theft of service against longer-term employees.

Effective September 1, 2011, amendments to Section 31.04 of the Penal Code strengthen the theft of service provisions that target "wage theft" by employers. Under prior law, intent to avoid payment could be negated with proof of partial payment by the employer. As a practical matter, this meant employers could avoid prosecution after depriving employees of several weeks' pay simply by showing they had paid wages in earlier pay periods thus leaving longer-term employees vulnerable.

The newly-added subsection (d) makes clear that partial payments to an employee will no longer provide "cover" to an employer who engages in wage theft:

For purposes of Subsection (a)(4):

- (1) if the compensation is or was to be paid on a periodic basis, the intent to avoid payment for a service may be formed at any time during or before a pay period; and
- (2) the partial payment of wages alone is not sufficient evidence to negate the actor's intent to avoid payment for a service. TEX. PENAL CODE § 31.04(d).



*Keeping you, your family and our community safe.*

The monetary amounts involved can easily elevate the offense to a state jail felony. See Tex. Penal Code §31.04(e)(4). Even a misdemeanor criminal conviction of wage theft will be taken seriously, as it may make an employer ineligible to receive public contracts.

An offense under this section is:

- (1) a Class C misdemeanor if the value of the service stolen is less than \$20;
- (2) a Class B misdemeanor if the value of the service stolen is \$20 or more but less than \$500;
- (3) a Class A misdemeanor if the value of the service stolen is \$500 or more but less than \$1,500;
- (4) a state jail felony if the value of the service stolen is \$1,500 or more but less than \$20,000;
- (5) a felony of the third degree if the value of the service stolen is \$20,000 or more but less than \$100,000;
- (6) a felony of the second degree if the value of the service stolen is \$100,000 or more but less than \$200,000;
- (7) a felony of the first degree if the value of the service stolen is \$200,000 or more

If you have any questions regarding laws pertaining to theft of service, you may contact me at 974-5381.

Sincerely,

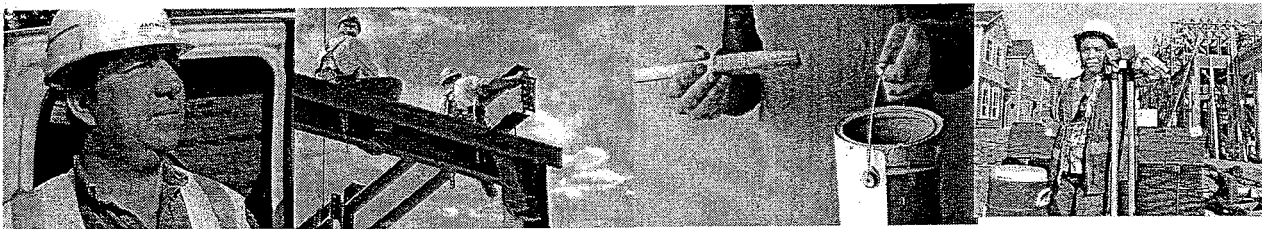


Art Acevedo  
Chief of Police  
Austin Police Department



*Keeping you, your family and our community safe.*





## HONEST PAY FOR HONEST WORK: STOP WAGE THEFT LEGISLATIVE PROPOSALS

### HIGH RATES OF WAGE THEFT IN LOW WAGE SECTORS

- 1/5 construction workers in Texas has suffered wage theft.
- Wage theft occurs when an employer pays less than the promised wage, less than the minimum wage or fails to properly pay overtime wages.<sup>1</sup>
- For temporary workers 50% of contingent laborers have experienced wage theft.<sup>2</sup>

### SOCIAL COSTS: TAXPAYERS AND RESPONSIBLE BUSINESSES PAY THE PRICE

- When workers aren't paid their hard earned wages, their families face unexpected hardships and are forced to fall back on public safety nets.
- **Seventy-one percent of construction workers who experienced wage theft report that they are unable to meet the basic needs of their families.**<sup>3</sup>
- Responsible businesses who properly pay their workers wages get underbid by companies who lower costs by cheating workers out of wages.

### PROPOSALS TO STOP WAGE THEFT

- **Strengthen existing penalties for employers who don't pay their workers.** Clarifying and strengthening the existing bad faith penalty under Texas Labor Code Chapter 61.053 will help to deter employers from future violations.
- **Improve transparency of wage theft perpetrators.** Create a database of employers who have criminal wage theft convictions under the Penal Code (34.01) or Pay Day Law (61.019) and makes it available to the public on the TWC webpage.
- **Extend TWC Filing Deadline to two years.** The current statute of limitations to file a complaint with the TWC is 180 days, which doesn't allow workers who have been underpaid for more than 6 months to recover the full amount that they are owed. Two years would bring the Texas statute in line with the federal.
- **Empower the TWC to address retaliation.** Of workers who took action to recover their unpaid wages, **1/3 report suffering retaliation** from their employers, including threats, dismissal, pay cuts, reduced hours, or being assigned more difficult work tasks.<sup>4</sup> Under current Texas law, there are no consequences for employers who retaliate against their employees.
- **Streamline and clarify current lien laws** so that construction workers who are not paid can more effectively utilize liens to secure payment of hard earned wages. Chapter 53 of the Texas Property Code is extremely complex with a varying deadlines and requirements for utilizing liens.
- **Establish other deterrents for employers** who have cheated their workers out of wages, such as denying licenses and permits, limiting renewal of business registration, etc.

<sup>1</sup> Price, Amy, et al. *Build a Better Texas: Construction Working Conditions in the Lone Star State*. University of Texas. January 2013.

<sup>2</sup> Valenzuela, Abel et al. *On the Corner: Day Labor in the United States*. UCLA Center for the Study of Urban Poverty 2006.

<sup>3</sup> Price, Amy, et al. *Build a Better Texas: Construction Working Conditions in the Lone Star State*. University of Texas. January 2013.

<sup>4</sup> Price, Amy, et al. *Build a Better Texas: Construction Working Conditions in the Lone Star State*. University of Texas. January 2013..

#### Workers Defense Project

Contact: Emily Timm 512-391-2305 ext 8030  
Emily@workersdefense.org