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## MEMORANDUM

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**TO:** Senate Labor Committee  
**FROM:** Anthony Anastasio, President  
**SUBJECT:** S3580  
**DATE:** June 10, 2021

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The New Jersey Civil Justice Institute (“NJCJI”) is a statewide, nonpartisan coalition of New Jersey’s largest employers, small businesses, and leading trade associations. NJCJI advocates for a fair and predictable civil justice system in New Jersey, which is an essential ingredient for a functioning economy. This memorandum serves to communicate NJCJI’s concerns regarding S3580. That bill mandates that an assistant prosecutor be assigned in each New Jersey county to criminally prosecute wage and hour law violations and provides funding for said assignments. NJCJI appreciates your concern for ensuring consistent enforcement of the New Jersey’s wage and hour laws. However, against the backdrop of widespread legal uncertainty regarding those laws, increasing criminal prosecution will only cause confusion and fear among honest businesspeople and stifle capital investment in our State.

The State’s wage and hour laws are already complex and present nuanced and disputed points of law. Accordingly, both our federal and state courts routinely grapple with their interpretation. *See, e.g.*, *Walfish v. Northwestern Mut. Life Ins. Co.*, 2020 U.S. App. LEXIS 42191 \*18, 2020 WL 9433211 (3d Cir. 2020); *Walfish v. Northwestern Mut. Life Ins. Co.*, 245 N.J. 266 (2021). For example, there are complex interactions between inconsistent federal and state overtime entitlements and exemptions that can confuse even the most experienced practitioners. *See, e.g.*, *Branch v. Cream-O-Land Dairy*, 244 N.J. 567 (2021). Moreover, the classification of workers as employees or independent contractors is subject to regular disagreements between our state courts and regulatory authorities. *See, e.g.*, *E. Bay Drywall, LLC v. Dep’t of Labor & Workforce Dev.*, 2021 N.J. Super. LEXIS 47, 2021 WL 1537473 (App. Div. 2021); *Garden State Fireworks, Inc. v. N.J. Dep’t of Labor & Workforce Dev.*, 2017 N.J. Super. Unpub. LEXIS 2468, 2017 WL 4320819 (App. Div. 2017); *Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor*, 125 N.J. 567 (1991); *Trauma Nurses, Inc. v. N.J. Dep’t of Labor*, 242 N.J. Super. 135 (1990).

These issues often present an intractable compliance puzzle for honest businesspeople since several reasonable analyses may apply to a situation. Thus, a businessperson may seek legal counsel and believe he or she is properly compensating workers based on the reasonable advice given. Then, the businessperson will later discover that those same workers should have been classified as employees and that their compensation should have been calculated as minimum wage for hours worked plus overtime.

Despite this ongoing confusion, our Legislature recently created a new crime called a “pattern of wage nonpayment”. *See N.J.S.A. 34:11-58.6*. The statute underlying this new crime was enacted in 2019 as

part of comprehensive wage and hour legislation commonly known as the “wage theft law<sup>1</sup>”. Essentially, if a businessperson or business entity has two prior convictions for violations of the State’s wage and hour laws (including worker classification and overtime determinations) and they violate any of those laws for a third time, then they commit a crime. Since the statute uses the term “knowingly” when describing the required mental state in this context, it effectively imposes strict liability. *See, e.g., State v. Rowland*, 396 N.J. Super. 126 (App. Div. 2007).

This new crime is a third-degree offense, which carries a potential penalty of three (3) to five (5) years in state prison. *See N.J.S.A. 34:11-58.6(b)*. Notably, the statute gets rid of the statutory presumption of non-imprisonment for first-time offenders. *Id.* This is inherently confusing since the statute also requires two prior convictions for “violations” before it can be charged. *See N.J.S.A. 34:11-58.6(a)*. It is therefore unclear whether a prosecutor could effectively “stack” the predicate violations in a single prosecution including a charge for this third-degree crime. Also, the law prohibits merger of other related charges at sentencing, which further enhances exposure to longer periods of incarceration.

Put another way, a businessperson would likely do less jail time if they burglarized an employee’s home than if they made three separate, good faith mistakes regarding complex worker classification or overtime exemption determinations, which would suffice to establish the crime of a pattern of wage nonpayment. If this seems ridiculous, that is because it is ridiculous. Considering the vagueness of the wage and hour laws mentioned above, incentivizing criminal prosecution in this context flies in the face of fundamental fairness and due process.

Due to these confusing and almost certainly unintended consequences, NJCJI respectfully requests that S3580 be held so that changes to *N.J.S.A. 34:11-58.6* and other statutes can be considered to ensure a more fair, predictable backdrop for potential criminal liability. We appreciate your attention to this matter and look forward to working with you on possible amendments.

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<sup>1</sup> This is a misnomer since deliberate theft of wages has always been illegal. *See, e.g., N.J.S.A. 2C:40A-2; N.J.S.A. 2C:20-8.*