

Unpretty Nails: Addressing Workers Rights Violation within the Vietnamese Nail Salon Industry

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INTRODUCTION

In May 2015, Saran Maslin Nir's two-part exposé for the *New York Times* brought to the national public's attention the poor health, safety, and labor conditions for low-wage nail salon workers in the industry, which has long been dominated by a largely first generation immigrant workforce. Following a 13-month investigation involving more than 150 interviews with nail salon workers and owners across ethnicities in four languages, Maslin Nir's articles detail a laundry list of offenses that include wage theft, physical abuse, and health consequences from toxic product exposure.¹ The exposé found that a vast majority of nail salon workers experienced workers rights violations, including being paid below the legal minimum wage, docked tips as punishments for minor transgressions, monitored by video, and sometimes even physically abused.² A previous survey by the National Employment Law Project found that more than one-third of workers in beauty salons were paid less than minimum wage.³ More importantly, the exposé highlighted the fact that employers were rarely punished for labor and other violations due to underfunding of government resources for enforcement.

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1. Sarah Maslin Nir, *The Price of Nice Nails*, N.Y. TIMES (May 7, 2015), http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html?_r=2&mtref=undefined&gwh=EC39A34869A588473166BCFD4A036932&gwt=pay&assetType=nyt_now; Sarah Maslin Nir, *Perfect Nails, Poisoned Workers*, N.Y. TIMES (May 8, 2015), <http://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html>.

2. Maslin Nir, *The Price of Nice Nails*, *supra* note 2.

3. Anette Bernhardt, Diana Polson & James DeFilippis, NATIONAL EMPLOYMENT LAW PROJECT, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 27 (Mar. 2015), <http://nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf>.

Although the exposé shocked many readers into boycotting nail salons,⁴ even moving New York Mayor Bill de Blasio to declare a Nail Salon Day of Action,⁵ community advocates have cautioned against taking drastic and potentially harmful steps that may harm the industry and its vulnerable workers.⁶ In particular, advocates found that persuading low-wage nail salon workers to step out of the shadow requires a collaborative community effort that can foster long-term relationships and engender trust between workers and owners. One innovative model, the California Healthy Nail Salon Collaborative (“CHNSC” or “the Collaborative”)⁷ is a conglomerate of manicurists, nonprofits, and justice and environmental organizations. The Collaborative has shown tremendous promise in advancing the goals of building trust and collaboration in the industry by rewarding salon owners for prioritizing workers’ health and safety.

Consider the story of Lucky Nguyen, a 46-year old Vietnamese nail salon worker who lives and works in southern California. Nguyen has worked in the nail salon industry for over ten years without ever complaining about the long hours or low wages. She told a *Los Angeles Times* reporter that in her decade of experience working for various salons, nail salon owners cared much more about their clients than about their workers. She said, “even when [a] customer . . . kicked my face, no one defended me. I kept quiet so I could keep working.”⁸ Nguyen explained that workers “are paid in cash, [so] there are no records, [and] everything can be erased.”⁹ At a recent community forum in Little Saigon, a nickname given to a group of cities in Orange County with the largest Vietnamese community in the United States, Nguyen, fellow manicurists, and salon owners listened intently as members of the Collaborative discussed topics such as safe working conditions, overtime, and paid sick leave. In the nearly three-hour presentation, state and federal labor specialists discussed how to file a wage claim, what a minor work permit requires, and the difference between independent contractors and employees. While Nguyen was appreciative of the training, she expressed doubt that her work conditions would improve significantly because nail salon owners continue to prioritize the needs of their clients over the needs of their workers.¹⁰ Although Nguyen

4. Kara Bloomgarden-Smoke, *Times Manicure Story Horrifies Mani-Pedi Addicted New Yorkers*, OBSERVER (May 11, 2015, 5:22 PM), <http://observer.com/2015/05/times-manicure-story-horrifies-mani-pedi-addicted-new-yorkers/>.

5. Sarah Maslin Nir, *Hundreds of Volunteers, Armed With Fliers, Tell Nail Salon Workers of Their Rights*, N.Y. TIMES (May 21, 2015), <http://www.nytimes.com/2015/05/22/nyregion/hundreds-volunteer-to-educate-nail-salon-workers-on-their-rights.html>.

6. Eleanor Goldberg, *How California’s Ethical Nail Salons Can Teach New York To Clean Up Its Act*, HUFFINGTON POST (May 22, 2015), http://www.huffingtonpost.com/2015/05/22/help-new-york-city-nail-salons_n_7355360.html

7. CALIFORNIA HEALTHY NAIL SALON COLLABORATIVE, <http://www.cahealthynailsalons.org/>.

8. Anh Do, *Little Saigon Forum Sheds Light on Nail Salon Issues*, L.A. TIMES (Aug. 7, 2015, 3:00 AM), <http://www.latimes.com/local/california/la-me-nail-salon-rights-20150807-story.html>.

9. *Id.*

10. *Id.*

benefitted from the training and is better positioned now to address potential future violations, many low-wage Vietnamese workers like Nguyen are not so fortunate.

According to the latest census data, there are now more nail salons than Starbucks in the United States, at 17,000 nail salon locations around the country.¹¹ In California alone, there are more than 8,000 nail salons with nearly 100,000 nail technicians.¹² California's State Board of Barbering and Cosmetology reports that 80% of the 352,184 licensed manicurists and cosmetologists are Vietnamese.¹³ In 2014, the Bureau of Labor Statistics determined that the average manicurist earned \$22,500 per year.¹⁴ They work with chemicals, which are known or suspected to cause cancer, skin problems, respiratory illnesses, and reproductive harm.¹⁵ A 2012 California Department of Toxic Substance Control study found toxic chemicals in several nail products, which claimed to be toxic free, and linked exposure to these chemicals to cancer and birth defects.¹⁶ In a September 2014 Report¹⁷ published by the Office of New York City Public Advocate, Letitia James estimated that there were about 2,000 licensed nail salons in the city. James concluded that increased demand and price competition for affordable nail services have had various negative health effects on nail salon workers in the city.¹⁸ The Report further stated:

“[A] survey of one hundred nail salon employees in New York City concluded that 57 percent developed an allergic reaction, 37 percent experienced pain from eye irritation, and 37 percent developed skin problems.” The environmental hazards range from glaring UV lamps to fetid foot baths to the “toxic trio” of nail polish: dibutyl phthalates, toluene, and formaldehyde. Manicurists work long hours without proper protective gear, with studies showing over seven in ten “never or rarely wear face masks” and nearly half “never or rarely wear gloves.” Chemical studies draw links between common products for treating hair and nails with cancer, reproductive problems, and respiratory illness.¹⁹

But, negative health effects are not the only issue affecting low-wage nail salon workers. Nail salon workers, like workers in many other low-wage industries in the United States, are victims of a labor violation known as “wage theft”, which occurs when owners either “pay workers less than the minimum wage or

11. Campbell, *How Some Nail Salons in California Are Finding A Less Toxic Way to Work*.

12. Katie Orr, *Lawmaker Wants State To Take Closer Look At Nail Salons*, CAPITAL PUBLIC RADIO (Aug. 20, 2015), <http://www.caprдио.org/articles/2015/08/20/lawmaker-wants-state-to-take-closer-look-at-nail-salons/>.

13. Do, *supra* note 9.

14. *Id.*; Occupational Employment Statistics, Bureau of Labor Statistics, 2014.

15. Do, *supra* note 9.

16. Shelby Grad, *Are California nail salons safe for workers?*, L.A. TIMES (May 8, 2015, 2:21 PM), <http://www.latimes.com/local/lanow/la-me-ln-how-safe-are-california-nail-salons-20150508-story.html>.

17. Letitia James, POLICY REPORT: HOW SAFE IS YOUR NAIL SALON?, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK (Sept. 2014), http://www.thenation.com/wp-content/uploads/2015/05/publicadvocate-annualreport-nail_salon-1.pdf.

18. *Id.* at 3.

19. *Id.*

agreed-upon wage, requiring employees to work ‘off the clock’ without pay, failing to pay overtime, stealing tips, illegally deducting fees from wages owed, or simply not paying a worker at all.”²⁰ Pay violations are shockingly high in low-wage industries, including retail, restaurant and grocery stores, domestic work, homecare, manufacturing, construction, janitorial services, and car washes.²¹

Although the nail salon industry implicates a multitude of labor, health, and safety violations, this Article specifically focuses on the issue of workers’ rights for low-wage Vietnamese nail salon workers in California. However, the Article recognizes that an effective comprehensive solution will need to address health and safety concerns as well, though that issue is beyond its scope. Because Vietnamese women heavily dominate California’s nail salon industry, the proposed dual strategy of (1) state regulation and (2) local community enforcement is tailored to be particularly sensitive to the experiences of this vulnerable immigrant population.

First, the California State Legislature should adopt a tiered wage bond requirement for the entire nail salon industry as a condition of licensing and operation. By developing a reasonably tiered bond requirement that corresponds to the number of nail salon employees employed by a business, workers will have a legal mechanism to pursue and successfully secure unpaid wage claims against their employer.

Second, city and county governments should formally partner with the California Healthy Nail Salon Collaborative (“CHNSP”) to build trust and ongoing relationships among workers, salon owners, and the community. This means significantly growing the organization’s membership of environmental and reproductive justice groups, the salon workforce, non-profit organizations, researchers, government agencies, and other key stakeholders. In particular, the strategy needs to reconcile the competing interests of workers and owners, while recognizing that many Vietnamese workers aspire to one day become nail salon owners themselves.

Part I will discuss the problems in the nail salon industry nationwide and illustrate how a largely Vietnamese refugee population came to dominate California’s nail salon industry. Part II will discuss California’s low-wage carwash industry and draw parallels between the experiences of Latino carwash workers and those of Vietnamese nail salon workers. Part III will discuss the various workers’ rights issues experienced by Vietnamese nail salon workers and the proposed strategies to resolve issues, such as unionization, wage and hour claims, misclassification litigation, a state wage bond, and community enforcement. Part IV will recommend adopting a dual strategy for pairing a state wage bond with collaborative community enforcement to engage workers, owners, and the public. The Conclusion will

20. Eunice Hynhye Cho, Tia Koonse, & Anthony Mischel, NATIONAL EMPLOYMENT LAW PROJECT, *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA’S WORKERS* 4.

21. NATIONAL EMPLOYMENT LAW PROJECT, *WINNING WAGE JUSTICE: A SUMMARY OF RESEARCH ON WAGE AND HOUR VIOLATIONS IN THE UNITED STATES* (2013) (compiling dozens of studies from across the country and across industries), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice-SummaryofResearchonWageTheft.pdf>.

offer some closing thoughts on the future for organizing nail salon workers and identify several key areas for additional research.

I. THE PROBLEMS IN THE NAIL SALON INDUSTRY

A. THE DOMINANT PRESENCE OF VIETNAMESE WORKERS IN THE NAIL SALON INDUSTRY

In order to understand why Vietnamese women came to represent such a large percentage of nail salon workers in California, one must understand the unique social, economic, and political climate that brought Vietnamese refugees to the United States and specifically to California. Since The Fall of Saigon in 1975, hundreds of thousands of Vietnamese have fled the country to all parts of the world to escape war and persecution. Historians have generally classified the Vietnamese refugee migration to the United States into three distinct waves: (1) 1975-era refugees; (2) “boat people”; and (3) minority groups including Amerasians and ethnic Chinese-Vietnamese. Professor Steven Gold, a specialist in the treatment of and training in psychological trauma and trauma-related disorders, conducted an extensive study in conjunction with the Center for Disease Control, on Vietnamese migration patterns to provide the following classifications of the three waves of Vietnamese migration:

First Wave – The first wave of Vietnamese refugees, numbering about 175,000, entered the United States during 1975–1977. This group was mostly comprised of U.S. military and government employees, members of the South Vietnamese military and government, and educated, urban professionals with their families. Many spoke English, were familiar with American culture, and adjusted rapidly to the United States.²²

Second Wave – Vietnamese refugees who arrived in 1978 were known as “boat people,” because they fled by boat to refugee camps in Thailand, Malaysia, Indochina, the Philippines, and Hong Kong. These refugees typically were less educated and from rural areas. They were often farmers, fishermen, and soldiers. Roughly half died from attacks by pirates and military forces. Survivors eventually entered the United States, but were disadvantaged because of their lack of education and inability to speak English. As a result, this wave had more difficulty adapting to the West.²³

Third Wave – A third wave of Vietnamese, primarily immigrants but also refugees, continues to arrive in the United States. They include

22. *Chapter 1. Vietnamese History and Immigration to the United States*, CTR. FOR DISEASE CONTROL 12, <http://www.cdc.gov/tb/publications/guidestoolkits/ethnographicguides/vietnam/chapters/chapter1.pdf> (citations omitted).

23. *Id.* (citations omitted).

Amerasians (often offspring of Vietnamese women and U.S. soldiers), political prisoners (former South Vietnamese government workers, military personnel, and intellectuals sent to “reeducation camps”), and ethnic Chinese-Vietnamese (an entrepreneurial class of Chinese living in Vietnam). The Chinese-Vietnamese, in particular, are similar to the boat people in that their adjustment to the United States has also been slower. In 2001, according to the Southeast Asian Resource Action Center, 25,180 Vietnamese immigrants settled in the United States. The same year, 3,108 Vietnamese refugees and Amerasians were resettled in the United States.²⁴

According to the Migration Policy Institute’s analysis of data from the United States Census Bureau, the Vietnamese population in the United States has grown significantly since 1975, increasing from about 231,000 in 1980 to nearly 1.3 million in 2012, making it the sixth largest foreign-born population in the United States.²⁵ Whereas Vietnamese refugees comprised the first two waves of Vietnamese immigration to the United States, subsequent migration has mainly consisted of immigrants reuniting with relatives already in the United States.²⁶ Most Vietnamese immigrants settled in California (40%) and Texas (12%), followed by Washington State (4%), Florida (4%), and Virginia (3%).²⁷ Three California counties (Orange, Los Angeles, and Santa Clara) account for about 26% of the Vietnamese population in the United States.²⁸ In particular, the second wave of Vietnamese refugees had a difficult time adjusting to their new home because they often had rudimentary education and minimal English-language skills. Despite the lack of language skills or technical training, the Vietnamese people exhibited a strong sense of entrepreneurial spirit by finding niche occupations that would allow them to quickly earn money to support their families in the United States and send remittance back to their families still in Vietnam.²⁹ It was this second wave of Vietnamese refugees,

24. *Id.* (citations omitted).

25. Hataipreuk Rkasnuam & Jeanne Batalova, *Vietnamese Immigrants in the United States*, MIGRATION POL’Y INST. (Aug. 25, 2014), <http://www.migrationpolicy.org/article/vietnamese-immigrants-united-states>.

26. *Id.*

27. *Id.* The Migration Policy Institute (MPI) tabulated data from the U.S. Census Bureau pooled from its 2008-12 American Community Survey (ACS).

28. *Id.*

29. Alicia Campi, *From Refugees To Americans: Thirty Years Of Vietnamese Immigration To The United States*, IMMIGR. POL’Y CTR., http://www.ilw.com/articles/2006,0313-campi.shtm#_17; see also Celeste Hoang, *The Fascinating Story Behind Why So Many Nail Technicians Are Vietnamese*, TAKEPART (May 5, 2015), <http://www.takepart.com/article/2015/05/05/tippi-hedren-vietnamese-refugees-nail-industry> (“Tam Nguyen—the founder and president of Advance Beauty College in Garden Grove and Laguna Hills, California, and whose mother is a close friend of Le’s—says that based on what he’s seen, he estimates that nearly every Vietnamese American in the industry these days still sends a portion of earnings home to support relatives. Eight percent of Vietnam’s economy—perhaps \$14 billion this year, up from \$12 billion in 2014—is attributable to overseas remittances, reports Reuters. Half the money comes from the U.S.”).

many of whom settled in California, which had a pronounced impact on the nail salon industry in the United States.

In an article published earlier this year by BBC News, Hollywood Actress Tippi Hedren, the “Godmother of the nail industry,” is credited with helping Vietnamese women get their start in the nail salon industry.³⁰ Forty years ago, Hedren visited a Vietnamese refugee camp near Sacramento, California and met with a group of women who had recently fled South Vietnam.³¹ Hedren wanted to help the women learn a skill or trade that they could use to support themselves in their adopted country.³² When she met with the refugees, she was surprised to find they were enamored with her manicure.³³ Inspired by this interaction, Hedren later flew in her personal manicurists to teach the art of manicures to the group of twenty women.³⁴

The Vietnamese community gave the nail salon business a radical makeover. In the 1970s, manicures and pedicures cost around \$50 – affordable for Hollywood starlets but out of reach for most American women.³⁵ Today, a basic “mani-pedi” can be as cheap as \$20. According to *Nails Magazine*, this is largely due to Vietnamese American salons charging 30%-50% less than other salons.³⁶ A 2003 study estimated that the nail salon industry was already worth more than \$6 billion.³⁷ The number of salons rose from 32,674 in 1993 to 53,615 in 2003, with an increase in revenue of 67% over the decade.³⁸ Today, the nail salon industry has grown to be worth over \$8 billion dollars.³⁹ Now, 51% of nail technicians in the United States and approximately 80% in California are of Vietnamese descent, following in the footsteps of that first group of women inspired by Hedren,⁴⁰ *Nails Magazine* credits the Vietnamese with “changing and redefining the industry more than any other group, and making nail care a service that anyone from teens to working women can afford.”⁴¹

B. LABOR VIOLATIONS IN THE NAIL SALON INDUSTRY

According to the latest census data, there are currently more than 17,000 nail salons in the United States; this rise in nail salons parallels the rising demands for “mani-pedis.”⁴² In California alone, there are more than 8,000 nail salons with

30. Regan Morris, *How Tippi Hedren made Vietnamese refugees into nail salon magnates*, BBC NEWS (May 3, 2015), <http://www.bbc.com/news/magazine-32544343>.

31. Hoang, *supra* note 30.

32. *Id.*

33. *Id.*

34. Morris, *supra* note 31.

35. *Id.*

36. *Id.*

37. Campi, *supra* note 30.

38. *Id.*

39. Morris, *supra* note 31.

40. *Id.*

41. Campi, *supra* note 30.

42. Campbell, *supra* note 12.

nearly 100,000 nail technicians.⁴³ In New York City, the number of nail salons has tripled over the last decade and a half to nearly 2,000 in 2012.⁴⁴ In a two-part exposé for the *New York Times*, Saran Maslin Nir interviewed more than 150 nail salon workers and owners, in four languages, and found that “a vast majority of workers are paid below minimum wage; sometimes they are not even paid. Workers endure all manner[s] of humiliation, including having their tips docked as punishment for minor transgressions, constant video monitoring by owners, [and] even physical abuse.”⁴⁵ Moreover, employers are rarely punished for labor and other violations due to lack of enforcement by proper authorities.

Part of the reason why the New York State Labor Department had trouble detecting these problems is that “a vast majority of these cases are in response to worker complaints, as opposed to initiating its own investigations.”⁴⁶ An investigation by *The Times* of the department’s enforcement database dating from 2008 found that the department typically opens two to three dozen nail salon cases per year across the entire state. According to the Office of the New York City Public Advocate’s official report on the nail salon industry in September 2014, the state only has 27 total inspectors that are responsible for ensuring the health and safety of nearly 5,000 salons statewide. After the State Labor Department conducted its first sweep of 29 nail salons last year, authorities found 116 wage violations.⁴⁷ Prompted by national news articles and complaints from nail salon employees, the Connecticut Department of Labor investigated more than two dozen nail salons across its state on August 3, 2015 resulting in issuance of stop-work orders and the temporary shutdown of twenty-three salons for wage violations.⁴⁸ The Connecticut State Labor Commissioner, Sharon M. Palmer, announced that the division had collected \$47,350 in overdue pay for employees, \$79,000 in civil penalties for underreporting payroll and paying employees in cash, and \$21,300 for wage and hour violations.

A related problem is that the limited enforcement of licensing for nail salon technicians means that licenses are “frequently fabricated, bought, and sold.”⁴⁹ Although there are reportedly 30,000 licensed nail technicians in the state of New York, lax enforcement has created an environment where numerous manicurists are able to work without a proper license.⁵⁰ One manicurist recalls that when state inspectors visited the salon she was working at, her boss ordered her and the other

43. Orr, *supra* note 13.

44. Nir, *supra* note 2.

45. *Id.*

46. Nir, *supra* note 2.

47. *Id.*

48. Ken Dixon, *State Department of Labor Cracks Down on Nail Salons*, CT Post (Aug. 18, 2015), <http://www.ctpost.com/news/article/CT-Dpt-of-Labor-cracks-down-on-nail-salons-6448677.php>.

49. Nir, *supra* note 2.

50. Nir, *supra* note 44.

nine unlicensed workers to hustle out of the back door and circle the neighborhood for twenty or thirty minutes while the investigation was being completed.⁵¹

Nail salon owners also have contrasting views on the increasing investigations and level of enforcement that have followed the national attention of the issue. For example, “Larry Nguyen, who works in Irvine, [California] and has run salons for 30 years, said, ‘I don’t find this as educational as it’s creating difficulties for the small-business owner. The law is so demanding that to satisfy them, who would dare to be an owner?’”⁵² Nguyen’s experience highlights a common complaint among small business owners that are concerned that the new regulations would impose additional costs and discourage entrepreneurship. Alternatively, “Thu Le, who supervises 30 technicians at Red Persimmon Salon & Spa in Riverside, California said: ‘I learned that I can change to make it even better for my staff. Sometimes they want to work more hours. Now I need to teach them’ the reasoning behind regulations.”⁵³ Le’s perspective reflects an understanding that the new regulations ultimately seek to improve the quality of life for her workers. However, one common issue that these owners can agree on is that price competition from budget nail salons is fierce and is one of the main contributing reasons for the prevalence of wage theft in the industry.

The first wave of Vietnamese salons that opened were not necessarily low-end or discount salons,⁵⁴ *Nail Magazine* explains that:

It wasn’t until the profession began to draw huge numbers of new immigrants that the price wars now associated with Vietnamese salon competition began. But the most intense competition to Vietnamese salons is from other Vietnamese salons. The nail industry has changed fundamentally under the influence of the business and cultural practices of Vietnamese nail professionals. The Vietnamese salon community is largely responsible for the drop in service prices and the erosion of the middle-class nail salon, but it also opened up nail care to a whole new market and brought in clients who had never taken an emery board to their nails, let alone sat down for a professional manicure.⁵⁵

Although the growth of discount salons provided “greater accessibility to a service that was long considered a luxury,” oversaturation drove down the prices of nail services around the country.⁵⁶ As more Vietnamese salons entered the market, “pricing became the dominant marketing strategy employed to win market share.”⁵⁷ Rather than focusing on client amenities or unique services, Vietnamese nail salons sought to offer nail services at the lowest price. In California, prices have been

51. Nir, *supra* note 2.

52. Do, *supra* note 9.

53. *Id.*

54. Suzette Hill, *The Asian Influence*, NAILS MAGAZINE (Mar. 1, 1997), <http://www.nailsmag.com/article/40699/the-asian-influence>.

55. *Id.*

56. *Id.*

57. *Id.*

driven so low that few salons can survive or make a respectable profit.⁵⁸ While some Vietnamese immigrants have actually left California because of stiff competition to pursue the venture in other markets, those that remained have had to look elsewhere to find ways to cut costs. For many owners, cost savings comes through exploiting their vulnerable workers to reduce labor cost.

As a direct result of the price competition among nail salon owners, workers regularly experience a labor violation called “wage theft.” The phenomenon includes getting paid less than the minimum wage, being required to work off the clock without pay, being denied overtime, having tips stolen, being victim to illegal deductions, or simply not being paid at all.⁵⁹ Despite the strong protections provided by the California Labor Code⁶⁰ to workers, wage theft remains a rampant problem. In a survey of low-wage workers in Los Angeles, “almost 30 percent of workers surveyed were paid less than the minimum wage in the previous week, and almost 80 percent of workers who worked more than 40 hours a week were not paid the legally required overtime rate of pay.”⁶¹ The estimated 654,914 workers in Los Angeles are projected to face one pay-related violation in any given week, which amounts to a loss of \$26.2 million per week.⁶²

Unfortunately, nail salon workers share the challenge faced by low-wage workers in other industries in recovering their hard-earned wages. Even after state authorities have ruled in the workers’ favor and have issued a legally binding judgment ordering employers to pay, workers find it difficult to recover on the judgment.⁶³ A recent study shows that only 17% of California workers who prevailed in their wage claims before the Department of Labor Standards Enforcement (“DLSE”) and received a judgment were able to recover any payment at all between

58. *Id.*

59. Cho et al., *supra* note 21 at 4; RUTH MILKMAN, ANA LUZ GONZALEZ & VICTOR NARRO, WAGE THEFT AND WORKPLACE VIOLATIONS IN LOS ANGELES: THE FAILURE OF EMPLOYMENT AND LABOR LAW FOR LOW-WAGE WORKERS 1 (2010), <http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2/>.

60. The Wage Theft Prevention Act (AB 469) went into effect on January 1, 2012. The new legislation amends existing laws (Labor Code sections 98, 226, 240, 243, 1174, and 1197.1), and adds new requirements (Labor Code sections 200.5, 1194.3, 1197.2, 1206, and 2810.5) which criminalizes willful violations for non-payment of wages after a court judgment or final administrative order; requires restitution to the employee in addition to a civil penalty for failure to pay minimum wages; requires that specified information be provided to employees at the time of hire and in wage claim proceedings and that employers update changes within specified periods; extends the time period for obtaining judgments on final orders for collection of penalties by the Division of Labor Standards Enforcement (DLSE); enhances bond requirements for employers with convictions or court judgments for non-payment of wages including requiring an accounting of assets upon request by DLSE or court order; establishes that penalties under the Labor Code for failure to comply with wage-related statutes are minimum penalties; and allows employees to recover attorney’s fees and costs incurred to enforce a judgment for unpaid wages. Labor Commissioner’s Office, *Wage Theft Protection Act of 2011 – Notice to Employees*, CA.GOV (Mar. 11, 2016), <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>.

61. Cho et al., *supra* note 21, at 4

62. *Id.*

63. *Id.*

2008 and 2011.⁶⁴ During this same period, workers were only able to collect \$42 million, or roughly 15%, of the \$282 million unpaid wages award issued by the DLSE.⁶⁵ The large disparity between wage awards and workers' collection of damages can be explained by the fact that workers who try to enforce DLSE judgments for unpaid wages often find that their employers have disappeared, hide assets, or shut down operations and reorganized as a new entity. The problem of wage theft and the efforts for workers to pursue them, as publicly detailed by the *New York Times*, also creates tension in the relationship between workers and owners.

C. TENSION BETWEEN WORKERS AND EMPLOYERS

The tension that exists in the working relationships between nail salon workers and owners is reflective of their contrasting identities and power dynamics. Nail salon workers are predominantly low-income immigrants with limited English language skills who may even be in the country illegally.⁶⁶ While some workers are unaware of the legal channels that exist to pursue unpaid wage claims against their employer, others fear that pursuing such actions may prove futile or may even evoke retaliation from their employers.⁶⁷ One of the industry's dominant narratives, which makes workers particularly vulnerable to exploitation, is the idea that if they work hard and do not complain, they may one day become owners themselves. Many nail salon owners tell workers of their own immigrant success stories, rising from the ranks of manicurists to eventually become owners themselves. Owners "expressed a vision of themselves as heroic, shouldering the burden of training workers and the risk of employing people who are not legally permitted to work in the United States."⁶⁸ Several owners even said that they "felt betrayed when workers quit or sued" and many defended their business methods "as the only way to stay afloat."⁶⁹ When investigators try to interview them, manicurists are frequently reluctant to cooperate, more so than in any other industry, according to a Labor Department official who spoke anonymously. "It's really the only industry we see that in," the person said, explaining that it most likely indicated just how widespread exploitation is in nail salons. "They are totally running scared in this industry."⁷⁰ This phenomenon is widespread throughout the predominantly Vietnamese nail salon industry in California.

According to John Trang, a workers' rights advocate with significant experience working with nail salon workers in California, many Vietnamese women, workers and owners alike, see the nail salon industry as an avenue for them to achieve economic mobility and achieve their own American Dream in the United States.⁷¹ Although Vietnamese women face various economic obstacles due to

64. *Id.*

65. *Id.*

66. Nir, *supra* note 2.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. John Trang is one of the staff attorneys working at Asian Americans Advancing Justice – Los

language barriers, and gender or racial stereotypes, it is relatively easy for new immigrants to open a nail salon. In comparison, other industries do not permit such quick access to jobs. For Vietnamese owners, the initial investment needed to open a salon can be relatively minor: a few thousand dollars for pedicure chairs with whirlpool baths, rent, and some new bottles of nail polish each month.⁷² There are also relatively few licensing hoops to jump through, and many Vietnamese nail salon owners skip them altogether. According to Elaine Ho-Wan, a salon consultant who specializes in Vietnamese salons:

The [Vietnamese people] have a negative history with government which was often in place to hurt them, not help them. I think these new business owners are not willing to take time, to be patient, and to go through the necessary steps to get the right licenses and the right equipment before they get started. They want to start working right away. They don't want to deal with what they see as government interference.⁷³

Ho-Wan explains that it isn't a casualness about legalities or a disregard for the American system behind it; it's simply a need to quickly start working, earning money, and supporting one's family. Additionally, Vietnamese workers are reluctant to pursue any actions against their Vietnamese employers for wage theft and other workplace problems. Trang explained, "because many workers aspire to become owners someday, there is an incentive for workers to not pursue any actions against the employer, or support stricter regulations because [they] believe, reasonably, that it is against their future self-interest."⁷⁴ As a result, these social and economic barriers discourage Vietnamese nail salon workers from reporting labor or workplace violations to the proper authorities.

II. ANALYZING THE CARWASH INDUSTRY AS A PARALLEL MODEL

A. CONNECTING THE EXPERIENCES OF CARWASH AND NAIL SALON WORKERS

Although *The Times* exposé focused on the nail salon industry, it could easily have been written about the low-wage carwash industry. The workplace and labor violations experienced by vulnerable Latino immigrants in the carwash industry in the United States parallel many of those experiences by workers in the predominantly immigrant nail salon industry. For example, carwash workers in New York recently rallied, filed a lawsuit, and eventually unionized to protest the stealing of tips and lack of minimum wage or overtime pay.⁷⁵ Other cities, such as Chicago and

Angeles. Trang coordinates the organization's advocacy on behalf of low-wage workers, with a focus on combating wage theft and labor trafficking. He engages in direct legal services, community legal education, policy advocacy, and litigation. I interviewed him as research for this article.

72. *Id.*

73. Hill, *supra* note 55.

74. Conversation with John Trang.

75. Errol Louis, *Is Your Nail Salon Abusing Workers?*, CNN (May 12, 2015, 12:46 PM), <http://www.cnn.com/2015/05/12/opinions/louis-nail-salon-workers/>.

Los Angeles, have also seen similar violations of wage laws by carwash owners.⁷⁶ In thinking about developing effective legal, policy, or organizing strategies to address the labor and workplace violations in the nail salon industry, the experiences of workers in the carwash industry provides an important model for comparison.

According to an older report on the carwash industry from 2006, the industry has over 14,000 establishments and brings in revenues of over \$5 billion, but remains incredibly fragmented; almost 95% of the firms operating in the United States consist of single establishments, and only thirty-two firms have ten or more car washes.⁷⁷ Although the industry has undoubtedly grown since, the report notes that California alone has over 1,500 establishments with 22,000 employees that bring in \$872 million in revenue.⁷⁸ The most recent estimates indicate that Los Angeles County has over 500 carwashes and employs approximately 10,000 carwash workers, many of which fail to abide by basic labor, health, and safety laws.⁷⁹ Like the nail salon industry, common illegal industry practices include: failure to pay minimum wage, failure to pay overtime, failure to provide rest and meal breaks, failure to provide drinking water, and failure to provide proper equipment to workers, who are exposed to highly toxic chemicals.⁸⁰ The carwash workforce is composed of predominantly male, Latino immigrants, many of whom are undocumented workers,⁸¹ a community that federal labor law and the Supreme Court has consistently afforded less protection compared to United States citizens.

As a starting point for comparison, both the nail salon and carwash industries are low-wage industries that have become commonplace across the United States, but particularly in large metropolitan areas such as Los Angeles, Chicago, or New York. For both industries, owners are often mom and pop shops, rather than large chains that employ several dozen employees. Whereas the nail salon industry in California employs mostly monolingual Vietnamese immigrant women and the carwash industry mostly monolingual Latino immigrant males, both industries have a significant undocumented population that may not be authorized to work in the United States. For both industries, the language barrier, immigration status, and the small business size stand as some of the important barriers to effective organizing.

III. ALTERNATIVE STRATEGIES FOR ADDRESSING WORKERS' RIGHTS

A. MISCLASSIFICATION AND UNIONIZATION

One of the strategies that legal advocates often suggest for building worker power and improving wages and working conditions in the nail salon industry

76. *Id.*

77. Matt Parker, *Wage, Labor and Safety Conditions in the California Car Wash Industry 1* (Apr. 2006) (unpublished M.A. thesis, UCLA).

78. *Id.*

79. Our Work, CLEAN CARWASH CAMPAIGN, available at <http://www.cleancarwashcampaign.org/our-work/>.

80. *Id.*; see also Victor Narro, *Finding the Synergy between Law and Organizing: Experiences*, 35 *FORDHAM URB. L.J.* 339, 360–61 (2008).

81. *Id.*

is through unionization. The rationale behind this strategy is that when workers “collectively negotiate wages, hours, and other work conditions—and keep a permanent watch for violations—abuses get caught earlier and are resolved through a process that is faster and less costly than launching a regulatory crackdown or filing lawsuits.”⁸² For example, the Community Labor Environment Action Network (“CLEAN”) carwash campaign in 2011 successfully organized carwash workers from Bonus Carwash in the city of Santa Monica and ratified the first union contract in the country for their workers.⁸³ That number has now grown to over thirty unionized carwashes across Los Angeles.⁸⁴

However, the main problem for the nail salon industry, unlike the car wash industry, is that workers are categorized as independent contractors rather than as employees, which is a prerequisite to union organizing. When Congress passed the National Labor Relations Act (“NLRA”) with the primary goal under Section 7 of the Act to give employees the right to be “free from discrimination and coercion in employment on the basis of their concert and union activity,”⁸⁵ those rights were limited to “employees” within the meaning of the Act.⁸⁶ The agency charged with carrying out the NLRA, the National Labor Relations Board (“NLRB”), specifically states on its website that independent contractors are not covered by the Act.⁸⁷ This contested classification is important because if nail salon workers were able to secure a legal classification as an employee, then that would avail them to various benefits and protections under California law. Unlike independent contractors, employees are entitled to minimum wage and overtime pay, meal and rest breaks, reimbursements for work-related expenses, workers’ compensation, and employer’s contributions to unemployment insurance.⁸⁸ As employees, they would be entitled to unionize and collectively bargain with their employer companies, which would bring immense potential for building worker solidarity and improving wages and working conditions in the industry.

Even if nail salon workers are able to successfully secure legal classification as employees, a task that would likely take at least several years to work itself through the appeals process, unionization may still not be a cost effective strategy for organizing low-wage workers in the industry. Classification decisions are often made on a site-by-site basis, and nail salons employers can adjust their policies or

82. Louis, *supra* note 76.

83. Our Work, *supra* note 80.

84. *Id.*

85. Jamison F. Grella, *From Corporate Express to FedEx Home Delivery*, 18 Am. U. J. GENDER SOC. POL’Y & L. 877, 878; 29 U.S.C. § 157 (2006) (stating that employers who interfere with section 7 rights commit unfair labor practices).

86. *Id.*; § 152.

87. See Frequently Asked Questions – NLRB, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr#38n3182> (“Most employees in the private sector are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).”).

88. Cal. Lab. Code § 1194; Cal. Lab. Code § 226.7; Cal. Lab. Code § 2802; Cal. Lab. Code § 3700; Cal. Unemp. Ins. Code § 976.

work rules to make it more difficult for workers to reclassify themselves. For example, one of the obstacles in the misclassification litigation that drivers are pursuing against Uber and Lyft is that as a condition of employment, the companies require that their drivers sign a Transportation Provider Service Agreement and Terms of Service Agreement respectively; both companies require that its drivers stipulate that they are entering into an independent contractor relationship.⁸⁹ For legal immigrants, this tactic makes it difficult to assert their “employee” status because their legal written consent suggests that they are aware that they are entering into an independent contractor relationship. For undocumented workers, the lack of legal status becomes an additional deterrent for workers to assert their rights through the legal system.

With less than 7% of the private sector workforce belonging to a union,⁹⁰ employers have been able to regularly violate various workplace laws because the NLRA has been ineffective in facilitating the already dwindling power of union organizing.⁹¹ Some of the challenges that organizers can expect to face in their efforts to unionize Vietnamese nail salon workers are both institutional and cultural. Because the overwhelming majority of nail salons are small businesses, the typical “mom and pop shop”, it would take a tremendous amount of resources to organize them across the different parts of the United States since each salon offer regionally low-priced services. Furthermore, when nail salons sense the threat of unionization or litigation, they often sell their salons and disappear.⁹² The language barrier is also an important deterrent against unionization because Vietnamese nail salon workers are often first generation immigrants, monolingual, or undocumented. For many Vietnamese refugees who fled Vietnam in response to Communism, the unique aspect of workers’ rights can be perceived as socialism and be received negatively in the community.⁹³ Even though the CLEAN carwash campaign has achieved some success in the gradual process of unionizing low-wage car washes, it has strategically adopted a unique hybrid model for organizing carwash workers by pairing unionization strategies with a complementary effort to maintain a robust workers’ center⁹⁴ for its members. In contrast, the various obstacles of misclassification and

89. *Legal*, UBER (Jan. 2, 2016), <https://www.uber.com/legal/usa/terms>; *Terms*, LYFT (Feb. 8, 2016), <https://www.lyft.com/terms>.

90. Economic News Release, *Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 28, 2016), <http://www.bls.gov/news.release/union2.nr0.htm>.

91. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 19 U.S.C. §§ 151-69 (2006)); see Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Worker Centers*, 48 HARV. C.R.-C.L. L. REV. 325 (2013).

92. See Trang Interview, *supra*, at 75.

93. Don Terry, *Passions of Vietnam War Are Revived in Little Saigon*, NEW YORK TIMES (Feb. 11, 1999), <http://www.nytimes.com/1999/02/11/us/passions-of-vietnam-war-are-revived-in-little-saigon.html>.

94. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, ECONOMIC POLICY INSTITUTE (Dec. 13, 2005), <http://www.epi.org/publication/bp159/> (“Worker centers are defined as community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers. The vast majority of them have grown up to serve predominantly or exclusively immigrant population.”).

unionization make this an unviable strategy for organizing nail salon workers, a matter that will be discussed in further detail below.

B. WAGE & HOUR CLAIMS

One of the main labor violations that nail salon workers face in the workplace is a phenomenon commonly known as “wage theft”. Wage theft includes “paying workers less than the minimum wage or agreed-upon wage, requiring employees to work ‘off the clock’ without pay, failing to pay overtime, stealing tips, illegally deducting fees from wages owed, or simply not paying a worker at all.”⁹⁵ For many advocates, the logical step for workers is to pursue those claims with California’s Department of Labor Standards Enforcement (“DSLE”) to recover any unpaid wages that they are owed. However, many nail salons pay their workers in cash and fail to keep proper records.⁹⁶ Furthermore, undocumented nail salon workers are especially reluctant to pursue these unpaid wages publicly for fear of immigration consequences that may emanate from likely employer retaliation.⁹⁷ While all workers may be subject to discipline or termination, workers that lack proper immigration status could also be reported to immigration authorities and thereby subjected to immigration detention and deportation. Even when advocates are able to help workers win wage and hour claims, the workers still face the difficult problem of collecting on the judgment because employers simply go out of business or reestablish themselves under a different ownership and name.

Sarah Ahn, a community organizer for the Flushing Workers Center in New York City, has found in her experience organizing nail salon workers that it has “become commonplace for nail salon owners to claim to have no means to pay judgments against them in wage-theft cases, often after taking steps to hide their assets.”⁹⁸ For example, Ahn helped six manicurists win a court award of more than \$474,000 in 2012 for underpayment,⁹⁹ but only managed to collect around \$110,000 from the nail salon chain.¹⁰⁰ Although the chain’s owner claimed to lack the funds to pay the judgment, records showed that just before trial, he sold property worth several million dollars, a clear effort to hide his assets to avoid paying the judgment.¹⁰¹ As Ahn says, sometimes it is a fruitless “chasing game.”¹⁰²

95. Cho et al, *supra* note 21 at 4.

96. See Dixon, *supra* note 50 (“labor agents and investigators found that workers were being paid in cash with no payroll records, wages were below the minimum \$9.15 per hour, and no overtime payment was provided”); see also Do, *supra* note 9 (“‘We are paid in cash, there are no records, everything can be erased,’ Nguyen said. ‘Even who we are.’”).

97. Tara Culp-Ressler, *If You’re In A Nail Salon In New York, You’ll Now See A Workers’ Bill Of Rights On The Wall*, THINK PROGRESS (May 30, 2015), <http://thinkprogress.org/economy/2015/05/30/3664338/nail-salon-bill-rights/>.

98. Ileana Najarro, *New York, Combating Worker Abuse, Requires Salon Owners to Secure Wage Bonds*, N.Y. TIMES (Aug. 9, 2015), <http://www.nytimes.com/2015/08/10/nyregion/new-york-combat-ing-worker-abuse-will-require-salon-owners-to-secure-wage-bonds.html>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

In a comprehensive study of data from the DLSE between 2008 and 2011, researchers found that of California workers who prevailed on their wage claims, only 17% were able to collect any payment from their employer. Of the \$282 million in judgments that were issued by the DLSE, workers were only able to collect \$42 million, or roughly 15%, of the \$282 million total issued.¹⁰³ This is despite California's system of labor law affording significantly greater protection for workers than most other states in the country. In the words of one low-wage construction worker who had been fired by his employer for pursuing a wage claim:

I had high hopes after I found out that a judgment was issued in my favor, but with the news of the [employer's] bankruptcy filing, I have to wait and see what is going to happen. I plan to continue to fight for my wages, but I am realizing that the law seems to protect the companies and individuals who have financial stability and steal wages.¹⁰⁴

Advancing Justice Los Angeles Staff Attorney John Trang provides examples of how salon employees are unable to collect on their favorable judgment. Some workers find that after suing, salon owners often sell their salons and disappear. Other times, workers find that employers hide their assets or shut down their operations and reorganize as a new entity. Trang explained that the current laws around successor liability or alter ego doctrine, though improved with Senate Bill 588,¹⁰⁵ create high barriers for workers to successfully litigate a matter to fruition. Furthermore, the context in which the litigation decision is made is also important because it involves a low-wage immigrant industry that employs vulnerable communities that are already burdened with other financial responsibilities and time commitments. As a result, even in the carwash industry, the CLEAN carwash campaign has sought to use wage and hour claims as a secondary strategy to supplement larger organizing goals.

Given the significant amount of resources that would have to be provided to offer high demand legal services to its carwash workers, the CLEAN campaign instead uses wage and hour claims as a secondary tool to recruit and retain organizational membership. Rather than operating a free legal clinic that is already being provided by various other legal service organizations in the area, the service intends to serve the needs of workers who are currently engaged in a unionization campaign and support existing members. In a broader effort to build worker power while balancing the immediate needs of workers, the CLEAN campaign positions its wage and hour litigation service as a perk for current members to stay involved with its organizing campaigns. Thus, successful unionization effort continues to be a predicate in which the CLEAN campaign offers its wage and hour service to its membership. Advocates are keenly aware that helping low-wage workers secure

103. Cho et al, *supra* note 21 at 4.

104. *Id.* at 1.

105. SB-588 Employment: nonpayment of wages: Labor Commissioner: judgment enforcement, CALIFORNIA LEGISLATIVE INFORMATION (Oct. 11, 2015), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB588.

wage and hour victories and collecting on the unpaid wage claims does not address the systemic issue of exploitation in the carwash industry. In analogizing the lessons of the carwash industry to the nail salon industry, advocates must recognize that devoting limited resources to wage and hour litigation, with low prospects of successful unionization, is less likely to transform the industry in a way that broader strategies of organizing, advocacy, and enforcement can.

C. STATE WAGE BOND

Shortly after the publication of the *New York Times* exposé, New York Governor Andrew Cuomo announced the formation of a Nail Salon Task Force to lead a multi-pronged effort to reform the nail salon industry in New York State.¹⁰⁶ On August 10, 2015, Governor Cuomo announced that nail salon owners will be required to secure a wage bond within the next sixty days or face newly enacted fines and penalties, which could include the closure of their business for non-compliance.¹⁰⁷ Paired with the wage bond requirement was a new specialty trainee program¹⁰⁸ that allowed unlicensed nail salon workers to register free of charge.¹⁰⁹ The purpose of the new wage bond requirements is quite simple: to provide for assets that workers can tap into for work reimbursements if salon owners are not paying their workers fairly. In an emphatic message, the administration proclaimed the importance of protecting the dignity and rights of nail salon workers and that New York would not tolerate any abuse in the industry.¹¹⁰

The experience of nail salon worker Silvia Gonzales is emblematic of the problem that nail salon workers face in seeking to collect unpaid wages from their employer. Gonzales worked twelve hours per day, six days a week for four years performing manicures and pedicures with no lunch break, making \$55 per day, or about \$4.50 per hour.¹¹¹ After four years, her pay increased to \$80 per day, but she was still below the minimum wage.¹¹² She often recalled hearing her employer proclaim to workers, many of whom were working illegally in the country, that no one could win against him in court.¹¹³ Gonzales pursued her claim in federal court and

106. *Governor Cuomo Announces Multi-Agency Enforcement Task Force to Tackle Abuse in the Nail Salon Industry*, OFFICE OF GOVERNOR ANDREW M. CUOMO (May 11, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-multi-agency-enforcement-task-force-tackle-abuse-nail-salon-industry>.

107. *Governor Cuomo Announces Wage Bond Requirements For Nail Salon Owners and Availability of New Nail Specialty Trainee Registration For Workers*, OFFICE OF GOVERNOR ANDREW M. CUOMO (Aug. 10, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-wage-bond-requirements-nail-salon-owners-and-availability-new-nail>.

108. *Id.* (“The new trainee registration program, which is overseen by the New York Department of State, allows individuals to work and receive practical training in nail specialty services while studying to take the nail specialist exams. A nail trainee provides nail services in a salon under the supervision of a licensed nail specialist. The business owner is responsible for paying the nail trainee at least the minimum wage and ensuring he or she is adequately supervised during the duration of the traineeship.”).

109. *Id.*

110. *Id.*

111. Najarro, *supra* note 99.

112. *Id.*

113. *Id.*

was awarded more than \$200,000 in wages owed and other damages.¹¹⁴ But even her lawyer, after the win, told her that it would probably be very difficult for her to collect her monetary award.¹¹⁵ This precise issue can be effectively resolved by the Governor's new wage bond system.

The new wage bond requires employers to provide for assets that workers can tap into for work reimbursements if salon owners are not paying their workers fairly. The size of the wage bond that nail salon owners are required to obtain depends on the number of hours of nail services provided by nail practitioners in the salon. The announcement identified four tiers:¹¹⁶

- At least \$25,000, if a business employs the equivalent of 2 to 5 full time individuals who provide nail specialty services
- At least \$40,000, if a business employs the equivalent of 6 to 10 full time individuals who provide nail specialty services
- At least \$75,000, if a business employs the equivalent of 11 to 25 full time individuals who provide nail specialty services
- At least \$125,000, if a business employs the equivalent of 26 or more full time individuals who provide nail specialty services.

The administration also provided for a wage bond calculator that allows owners to easily determine what their bond requirement is based on the number of employees working in their establishment.¹¹⁷ Furthermore, the administration emphasized that "evidence of sufficient liability coverage and of the wage bond must be maintained by nail salon owners and made accessible to all workers at all times that the business is open."¹¹⁸

The value of a wage bond importantly has a direct benefit on nail salon workers because it freezes employer assets in case there is a need to pay unpaid wage claims. The employer's significant investment in the bond also can incentivize good behavior from nail salon owners who would otherwise exploit the predominantly immigrant population of workers. This would force employers, who commit labor violations, to compete fairly with other nail salon owners by incorporating the true cost of doing business into operating decisions. This may also have a positive effect on price competition by making it difficult for employers to survive off of wage theft and other ways of exploiting workers. Kara Miller, a lawyer representing ten former employees of the Envy Nails chain who are suing their employer for wages owed, said the requirement would be "a huge leap forward in protecting workers."¹¹⁹ While the Governor's action was widely heralded by workers, advocates,

114. *Id.*

115. *Id.*

116. See Cuomo, *supra* note 108.

117. *Nail Salon Wage Calculator*, DEPARTMENT OF NEW YORK STATE DIVISION OF LICENSING SERVICES, http://www.dos.ny.gov/licensing/nails_wage_calc/wagebondcalc.html.

118. See Cuomo, *supra* note 108.

119. Najarro, *supra* note 99.

and the general public, the nail salon industry cried foul and immediately began organizing around the issue.¹²⁰

Many local business owners complained that it was a complicated process and was expensive to comply with. Assembly Member Ron Kim, who originally sponsored the bill, says that many mom and pop shops found that the wage bonds themselves were “not readily available,” because owners had trouble finding a broker that offered wage bonds to nail salons.¹²¹ In September 2015, the Korean American Nail Salon Association of New York and the Chinese Nail Salon Association of East America, two groups representing nail salon owners, filed a lawsuit¹²² in New York State district court arguing that the wage bonds were “not readily available” because “too few surety companies offer the wage bond, and that those that do have such strict requirements — such as high personal credit scores — that the bond is out of reach for many owners,” and therefore has set up thousands of good nail salon owners up for failure.¹²³ The petition also argued that the Governor’s emergency order “discriminates against Asian immigrant business owners, particularly women, and that it would force salons out of business before they could prove they’re committed to meeting the goals of the state’s nail salon legislation.”¹²⁴ Although the New York State judge dismissed the lawsuit in December 2015, the fight over the regulations is far from over and the cost-based claims made by the industry deserves consideration during the continued implementation of the new wage bond requirement.¹²⁵

D. LICENSING AND COMMUNITY ENFORCEMENT

One strategy that has been pioneered in California is a community enforcement model by the California Healthy Nail Salon Collaborative (“CHNSC” or “the Collaborative”) that seeks to build trust and a working relationship among workers, owners, government agencies, and the community.¹²⁶ Through its work with local

120. See Adrienne Pasquarelli, *Nail Salons Push Back Against Cuomo’s Wage-Bond Mandate*, CRAIN’S NEW YORK BUSINESS (Aug. 19, 2015), <http://www.crainsnewyork.com/article/20150819/POLITICS/150819483/nail-salons-push-back-against-cuomos-wage-bond-mandate> (“Nearly 500 local owners and workers plan to submit a petition Friday urging the state Department of Financial Services to reverse its Aug. 10 decision”).

121. *Id.*

122. Complaint, Korean Am. Nail Salon Ass’n of N.Y., Inc. v. Cuomo, 26 N.Y.S.3d 826 (2015).

123. Elizabeth A. Harris, *Nail Salon Owners Sue Cuomo and New York State Over Wage Bond Requirement*, NEW YORK TIMES (Sep. 18, 2015), http://www.nytimes.com/2015/09/19/nyregion/nail-salon-owners-sue-cuomo-and-new-york-state-over-wage-bond-requirement.html?_r=0.

124. Chris Fuchs, *Lawsuit Filed by Nail Salon Trade Groups Against New York State Dismissed*, NBC NEWS (Dec. 9, 2015, 2:48 PM) <http://www.nbcnews.com/news/asian-america/lawsuit-filed-nail-salon-trade-groups-against-new-york-state-n477156>.

125. Elizabeth A. Harris, *New York Court Dismisses Challenge to Nail Salon Wage Protections*, NEW YORK TIMES (Dec. 8, 2015), http://www.nytimes.com/2015/12/09/nyregion/new-york-court-dismisses-challenge-to-nail-salon-wage-protections.html?_r=0 (“Justice Melkonian wrote that the state had ‘sufficiently demonstrated that nail salon workers are being deprived of legally due wages and that immediate adoption’ of the regulation ‘was necessary for the preservation of the public health, safety or general welfare of nail salon workers.’”).

126. *About Healthy Nail Salons*, CALIFORNIA HEALTH NAIL SALON COLLABORATIVE, <http://www.healthy-nail-salons.org>.

health advocates and city and county officials out of a concern for workers' rights in the nail salon industry, Oakland's Asian Health Services founded the CHNSC project in 2005. The group's primary mission is to improve the health and safety of salon employees and their owners, who often work as manicurists as well.¹²⁷ The Collaborative has over forty active organizational members and allies that include: environmental and reproductive justice groups, the salon workforce, non-profit organizations, researchers, government agencies and other key stakeholders.¹²⁸ The Collaborative subdivides its community organizing strategy into four core areas: (1) outreaching and leadership development; (2) policy advocacy; (3) research; and (4) movement building.¹²⁹ Despite only having four full-time staff members, the Collaborative has developed an innovative three-part healthy nail salon certification program that has earned praises from worker advocates.¹³⁰ The organization has emphasized that its message is not about boycotting nail salons, but rather about working together to help the industry become healthier and safer.

The story of Lean-Anh Truong provides an illustration that the nail salon industry can truly be transformed through programs like the Collaborative. Truong, originally from Vietnam, has worked as a manicurist in California for more than twenty years and eventually worked her way up to own her own salon with about five employees.¹³¹ One of her proudest business accomplishments is owning a black ventilation machine that vacuums up the harmful dust that can enter the staff's lungs when they work with acrylics.¹³² She got the ventilator a few years ago when she became one of the first salons to be certified by the Healthy Nail Salon Collaborative program.¹³³

cahealthynailsalons.org/what-is-hns/about-healthy-nail-salons/.

127. Campbell, *supra* note 12.

128. *Mission Statement*, CALIFORNIA HEALTHY NAIL SALON COLLABORATIVE, <http://www.cahealthynailsalons.org/about/mission-history/>.

129. According to the California Healthy Nail Salon Collaborative, the organization explains its four core areas as follows: (1) Outreaching and Leadership Development – Building the leadership, decision-making, and power of California salon workers and owners invested in improving their working conditions and workplace health and safety through outreach, education and organizing; (2) Policy Advocacy – Advancing improvements to public policy impacting the health, safety and rights of nail salon workers and owners through regulatory and legislative advocacy, and partnerships with government agencies; (3) Research – Advancing research and data collection efforts and effectively utilizes the expertise of a national Research Advisory Committee to support the Collaborative and National Healthy Nail and Beauty Salon Alliance's work; and (4) Movement Building – Supporting movement building opportunities at the local, state and national level to raise the profile of salon workplace health, safety and rights, to connect and leverage the resources of diverse groups, to advocate for safer products, and to secure policy changes and greater regulatory protection of salon workers in California and nationally. *see generally* California Healthy Nail Salon Collaborative, *supra* note 8.

130. Campbell, *supra* note 12 (“Certification takes work — recruiting and training salons one by one, answering questions about chemicals and safety in workers’ own languages. The project also lobbies to get cities and counties on board as partners—to help offer salons rebates for ventilators, and reward them with a certificate and a “healthy salon” decal to display on their front window.”).

131. *Id.*

132. *Id.*

133. *Id.*

Community enforcement in California has also inspired similar models elsewhere in the country. For example, a new campaign led by community and labor groups, in collaboration with New York City Public Advocate Letitia James, created the New York Healthy Salons Coalition in the city.¹³⁴ The Healthy Salons Incentive program is modeled off the California Healthy Nail Salon Collaborative and seeks to combine a certification program for businesses that adhere to best practices for workplace health and safety with greater nationwide worker training and community education efforts.¹³⁵

Part of the challenge of this strategy is that the recognition program does not address wage issues outright. Anthony Pham, owner of Spa Elysee in Burlingame, California where workers' wages start at \$11 per hour, believes that the government needs to increase enforcement and make their licensing process much stricter than it currently is. Pham expressed optimism that the certification program will make salon owners more eager to protect their workers' health, and therefore less likely to undercut their employees' wages.¹³⁶ Besides the direct health and safety improvements that come from adopting the certification program, the program's rigorous licensing and inspection process will impose significant financial penalties or even license revocation on owners that fail to meet the new industry standard. The average wage for a nail technician in California is currently \$9.88, according to the Bureau of Labor Statistics.¹³⁷ The hope is that workers' wages will begin to rise over time by strengthening the licensing process, educating workers, owners, and consumers about the dangers of price competition in the market for low-priced nail services, and punishing salon owners that violate labor laws.

IV. DUAL STRATEGY: CALIFORNIA WAGE BOND AND HEALTHY NAIL SALON COLLABORATIVE

As the above discussion of alternative strategies demonstrates, there is no single, proven, quick-fix strategy that can address all of the health, safety, and labor violations that continue to occur in the nail salon industry nationwide. However, taking important lessons from some of the effective strategies that have been pursued in New York and California so far, I propose a dual strategy of pairing a California wage bond with a robust Healthy Nail Salon Collaborative. In analyzing the potential benefits and costs of these proposed policies, I specifically focus on: (1) affected stakeholder groups; (2) purpose and potential consequences; and (3) political and economic feasibility of adoption and implementation.

134. *NY Healthy Nail Salons Coalition*, FACEBOOK, <https://www.facebook.com/healthysalonsny?fref=nf>; Michelle Chen, *How Can You Get an Ethical Manicure? Support Worker Organizing*, THE NATION (May 11, 2015), <http://www.thenation.com/article/how-can-you-get-ethical-manicure-support-worker-organizing/>.

135. *Id.*

136. Goldberg, *supra* note 7.

137. *Occupational Employment Statistics*, BUREAU OF LABOR STATISTICS (2014), <http://www.bls.gov/oes/>.

A. DEVELOPING A TIERED WAGE BOND IN CALIFORNIA

The California State Legislature should look to pass a California wage bond in the upcoming 2016 legislative session modeled off of the wage bond that was developed in New York. By requiring nail salon owners to buy a wage bond as a condition of licensing and operation in the state, workers who are being unfairly denied wages will know that owners now have assets that can be tapped for reimbursements. In developing such a policy, it is important to consider the different stakeholders that would be affected by the change. Workers clearly benefit from the new wage bond because litigating wage and hour claims becomes a more viable avenue to pursue unpaid wages; the new wage bond would assuage the concern that employers might just disappear, hide their assets, or shut down operations and reorganize as a new entity. While some consumers may find that the prices of nail services could increase in competitive markets such as California or New York City, they can now ethically choose nail salons knowing that workers are not having their wages or tips stolen by owners. Naturally, such a policy will need to incorporate the interests of nail salon owners, who have demonstrated in New York that they are more than willing to come in full force through protest and litigation if their interests are not considered or met.¹³⁸ As far as the projected impact of the policy, I expect that the rollout of a wage bond will need to prioritize the needs of nail salon workers while balancing the powerful and potentially disruptive interests of owners.

Although a New York State judge dismissed the lawsuit challenging Governor Cuomo's emergency regulations in early December 2015, the lawsuit's complaint and the articles evaluating its merits provides important insight in developing California's wage bond. First, the new policy should provide sufficient resources to the Department of Labor Standards Enforcement (DLSE) for staffing and translations services to serve the predominantly monolingual Vietnamese nail salon worker community. The DLSE must work to ensure that the surety companies are both able and willing to offer wage bonds at reasonable rates to allow owners to purchase them, especially for low-income or first generation Vietnamese immigrants that may lack high personal credit scores. Second, in developing the different tiers for wage bonds based on the number of hours of nail services provided by nail practitioners in the salon, the DLSE should partner with research centers like the UCLA Labor Center and the Institute for Research on Labor and Employment to ensure that the tier rates are reflective of the characteristics of California's nail salon industry. Third, the state legislature needs to allow the roll out period for salon businesses to comply with the new regulations to be longer than sixty days before imposing financing penalties or license suspension or revocation. Alternately, the

138. Helen Holmes, *Here's Why Hundreds of Nail Salon Owners Are Protesting the New York Times*, JEZEBEL (Oct. 7, 2015), <http://jezebel.com/heres-why-hundreds-of-nail-salon-owners-are-protesting-1734981531>; Katie Reilly, *New York Nail Salon Groups Sue Governor Over New Regulations*, REUTERS (Sep. 17, 2015), <http://www.reuters.com/article/usa-new-york-nails-idUSL1N11N3D620150917>.

legislature can stagger the rollout period to provide smaller businesses with fewer employees with an extended deadline for compliance.

The economic and political feasibility of pursuing a wage bond in this upcoming 2016 legislative cycle is strategic because the *New York Times* exposé that came out in May 2015 is still largely fresh in the public's mind. This will provide additional political capital to support what will certainly be an increasingly organized nail salon industry in California that is preparing to resist the change. Although the Fall of Saigon in 1975 is now over forty years ago, civic engagement for many older generation Vietnamese living in the United States is still lackluster because of anti-Communist sentiments that created distrust in the government. Thus, it will fall on the shoulders of labor and community advocates and students to bring forth worker testimony, conduct research, and push the state legislature to move forward with a wage bond while public awareness and political momentum for the issue is still strong. On the economic feasibility side, advocates will also need to work quickly to develop both quantitative and qualitative research for a cost-effective policy to address the various workplace and labor violations in the industry. This wage bond requires significant government involvement, but has the potential to significantly build nail salon worker power and primarily address the problem of wage theft by nail salon owners.

B. EXPANDING THE CALIFORNIA HEALTHY NAIL SALON COLLABORATIVE

In addition to adopting a California wage bond as a regulatory tool, the state needs to also devote sufficient resources into developing a vibrant model of community enforcement. Rather than inventing a new model, California should instead look to support and expand upon the existing efforts of the California Healthy Nail Salon Collaborative to build trust and a working relationship among workers, owners, government agencies, and the community. The Collaborative, currently based out of Oakland nonprofit Asian Health Services with four full-time staff members, is centered on a rigorous licensing and inspection process that seeks to ensure that certified nail salons meet reasonable requirements for worker health and safety.¹³⁹ The purpose of a strong certification program, backed by financial penalties and license suspension, is to reward owners that take the initiative to improve upon

139. Some of the key projects that the California Healthy Nail Salon Collaborative works on are: (1) California Healthy Nail Salon Campaign: We work to pass policies to protect the health and safety of the salon workforce in cities and counties throughout California; (2) Healthy/Green Salons Project: We provide technical assistance, best practices and guidance to assist nail salons in greening and making their business practices and work environments less toxic; and to also build support among consumers for healthy/green salons.; (3) Board of Barbering and Cosmetology (BBC) Project: Increase the Collaborative presence and advocacy with the BBC on issues such as improving language access to information on health and safety, the BBC's regulatory requirements and other concerns of the salon workforce; and (4) National Healthy Nail and Beauty Salon Alliance: Work with diverse stakeholders and partners to increase the health, safety, and rights of salon workers by reducing their toxic chemical exposure through strategic movement building, policy and regulatory advocacy and media efforts nationally. *Key Projects*, CALIFORNIA HEALTHY NAIL SALON COLLABORATIVE, <http://www.cahealthynailsalons.org/what-we-do/key-project/>.

workplace conditions with a certificate and a “healthy salon” decal to display on their front windows to help attract conscious consumers.¹⁴⁰

On the implementation-side, the Collaborative program could potentially be incorporated as a sub-division of the DLSE, which will provide additional government staffing while simultaneously benefiting from the local knowledge that comes with partnering with Asian Pacific Islander health nonprofits that exist in most metropolitan cities in the state. For example, Asian American for Community Involvement (AACI)¹⁴¹ and Asian Pacific Health Care Venture (APHCV)¹⁴² are nonprofits based out of San Jose and Los Angeles, respectively, and are similar to Asian Health Services in Oakland, which offer services targeting Asian communities. Both AACI and APHCV can play an important role as local partners for the Collaborative to work with Vietnamese nail salon workers. This can provide an avenue for additional support for language and translation services because the Department of Consumer Affairs’ California Board of Barbering and Cosmetology (“BBC”) has very few Vietnamese-speaking government staff members, a perennial problem that both workers and employers complain about. In addition to helping to provide community enforcement for the certification program, partnering with local nonprofits provides an avenue for greater statewide worker training, public outreach, and community education efforts.

As far as the political and economic feasibility of pursuing this action, advocates can expect tremendous pushback from the nail salon industry, which currently benefits from limited enforcement by the BBC. Nail salon owners will ask for either an extended timeline for compliance or identify cost concerns to obstruct implementation of such a policy. Thus, advocates should be prepared to defend the track record of Asian Health Services in managing the Collaborative with its limited staff since 2005, and demonstrate further that prospective local nonprofit partners will benefit from the institutional knowledge to help with local implementation and to serve the Vietnamese community. The Collaborative should also prepare to increase its partnership with local and city governments to help support its education and public outreach efforts. The expansion of the Collaborative is a matter of magnitude, not of necessity, because the success of the program will have a large impact on public awareness, workers’ rights, and improve owners’ compliance.

V. CONCLUSION

In order to adequately address the health, safety, and labor violations in California’s nail salon industry, a comprehensive approach that is sensitive to the unique needs of the largely Vietnamese nail salon worker community needs to be developed. The solution must engage diverse groups, including the workers and owners, as well as the local government, health nonprofits, and the larger community through collective organization. Still, there are many questions left unanswered

140. Campbell, *supra* note 12.

141. ASIAN AMERICANS FOR COMMUNITY INVOLVEMENT, <http://aaci.org/>.

142. ASIAN PACIFIC HEALTH CARE VENTURE, <http://www.aphcv.org/>.

that advocates will need to conduct additional research on including: (1) what are the expected changes to consumer prices for nail services in California with the adoption of a wage bond requirement; (2) how should the appropriate wage bond tiers be formulated to appropriately calibrate with the regional market while still allowing owners to earn a living; and (3) how should the Collaborative be staffed and organized as to maximize the effectiveness of community enforcement given financial constraints? The answers to these questions are key for the development of a comprehensive strategy for organizing Vietnamese workers in California's nail salon industry.

Back in August 2015, California State Assemblyman David Chiu announced that he would create a task force to look at the health, safety, and working conditions of the approximate 8,000 nail salons in California with the goal of developing new state legislation for the following year.¹⁴³ The hope is that when the state legislature reexamines this issue in 2016, community and labor advocates will have answered many of these important questions and will be able to push through these practical workers' rights policies despite anticipated opposition from the nail salon industry.

143. Orr, *supra* note 13.