Wisconsin Economic Development Association Inc.

TO: Members, Assembly Labor Committee

FROM: Amy L. Boyer, Legislative Director

DATE: March 18, 2009

RE: **Opposition to AB40/SB 2**

The Wisconsin Economic Development Association (WEDA) a statewide association of approximately 400 economic development professionals respectfully urges you to oppose SB 2 relating to wage liens.

Wage liens provide legal mechanisms for employees to collect unpaid wages during creditor payment disputes, bankruptcies, etc. These wage liens are calculated on a per job basis, currently capped at $3,000 per employee. Commercial lending practices require businesses to have financial instruments, generally represented by a line of credit, to cover the cost of creditor obligations. This line of credit, in turn, is secured through the company's ability to generate cash (e.g. via the values assigned to assets, accounts receivable, inventory, etc.).

SB-2 proposes to eliminate this wage lien cap and elevate these claims to a priority collateral position; thereby, creating an unknown financial risk to companies and further stressing credit access and cost considerations.

If SB-2 were to become law, these uncertainties and their unknown related costs will severely compromise Wisconsin business' employment, growth and financial stabilities. Therefore, SB-2 creates two unfavorable options for business: (1) forego job / payroll growth due to capital costs or (2) raise jobs / payroll and compromise the liquidity of its balance sheet. These are choices that nearly any type of businesses, whether producing a durable good or providing a tangible service, will face if SB-2 becomes law.

As Wisconsin prepares itself for the economic recovery and reinvestment, it should not be imposing increased and/or unknown financial burdens upon its businesses. Eliminating the current wage lien caps during these unprecedented and volatile economic times is a reverse economic stimulus.

WMC
WISCONSIN'S BUSINESS VOICE

TO: Members of the Wisconsin State Assembly Labor Committee

FROM: James Buchen, Vice President, Government Relations

DATE: March 18, 2009

RE: Senate Bill 2/Assembly Bill 40 – Unlimited Wage Lien Liability

Background

Under current law, the Department of Workforce Development (DWD) must investigate and attempt to adjust any claim by an employee that his or her employer has not paid the employee any wages that are owed to the employee (wage claim). Currently, DWD or an employee who brings a wage claim action has a lien upon all property of the employer, real and personal, located in this state for the full amount of any wages owed to the employee (wage claim lien). Currently, a wage claim lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against an employer, except for a lien of a commercial lending institution that originates before the wage claim lien takes effect (prior lien), regardless of whether those other debts, judgments, decrees, liens, or mortgages originated before or after the wage claim lien takes effect. Current law provides, however, that a wage claim lien takes precedence over a prior lien of a commercial lending institution as to the first $3,000 of unpaid wages covered under the wage claim lien that are earned within the six months preceding the filing of the wage claim with DWD or the commencement of an action by the employee to recover the wages due.

Provisions of SB 2/AB 40

These bills eliminate that $3,000 cap and six-month time limit so that under the bill a wage claim lien covering any amount of wages earned at any time takes precedence over a lien of a commercial lending institution, regardless of whether the lien of the commercial lending institution originated before or after the wage claim lien takes effect. Engrossed Senate Bill 2 replaces that cap with a $10,950 cap.

These bills also provide that a wage claim lien takes precedence over the rights of any purchaser of any property of the employer, including any bona fide purchaser that purchases the property of the employer at the time of commencement of a bankruptcy proceeding, that is, the trustee in bankruptcy. This change reverses *In Re Globe Building Materials, Inc.*, 463 F. 3d 631 (7th Cir. 2006), which held that the trustee in bankruptcy could avoid a wage claim lien because under the current wage claim lien law a wage claim does not expressly take precedence over the rights of a bona fide purchaser under the federal bankruptcy law.

Finally, these bills permit a recognized or certified collective bargaining representative of an employee to file a wage claim with DWD, or to bring a wage claim action in court, on behalf of an employee and grants a wage claim lien to a collective bargaining representative that brings a wage claim action.

WMC Position

Most states recognize the need for financially stressed business entities to be able to access capital from willing lenders. Protecting the lien right priority of lenders, in part, provides greater certainty that the loan will be repaid, at least in part.

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Removing any lien priority of a lending institution will cut off access to capital for the most financially stressed business at the time they are most in need of access to capital, resulting in a greater loss of employment in more situations, a phenomena that we continue to see in our economy today. The current statute reflects a good faith attempt to balance the interests of lenders, businesses and their employees in keeping financially distressed businesses in operation.

Conclusion

For these reasons, WMC urges the members of the Wisconsin State Senate to vote against this legislation.

Testimony of the Wisconsin Bankers Association
before the
Assembly Committee on Labor
In Opposition to AB 40

10:00 a.m., March 18, 2009

Thank you, Chairwoman Sinicki and Committee Members. My name is Kurt Bauer and I am president and chief executive officer with the Wisconsin Bankers Association (WBA). WBA was founded in 1893 and represents 300 bank and thrift institutions and their 30,000 employees. WBA represents the smallest bank in Wisconsin, the largest bank in the state, and just about every bank in between.

Appearing with me is Russ Weyers, president of Johnson Bank in Racine. Mr. Weyers is the current chairman of the Wisconsin Bankers Association.

We both appear today in opposition to AB 40.

If enacted, AB 40 would remove the current $3,000 cap on the state's wage claim lien law. AB 40 also proposes to make some other radical changes to the current statute – all of which WBA believes will greatly impair the creditworthiness of Wisconsin businesses inevitably leading to more loan denials, business failures and ultimately, job loses.

In our testimony, we will discuss the history of the wage lien law in Wisconsin; the 2003 compromise that led to the current law; how that compromise protects and balances the vital interests of workers, lenders and businesses; how a uncapped wage lien law will essentially strip a business of much of the collateral it needs to pledge against a line of credit or other loan; and what that will mean to business growth and job stability in Wisconsin during the worst economic crisis since the Great Depression.

Before I begin on the substance of AB 40, I would like to provide a brief history of the wage lien law in Wisconsin. Our statute was created in 1975 when the administering state agency (then DILHR) was given an enforceable lien right over an employer's property. Because the lien was enforceable but not automatic, no conflict with competing liens ever arose.

In 1993, the law was expanded so as to give individual employees the option of enforcing this lien right. That resulted in greater activity under the statute and suits were quickly initiated on such issues as to whether this lien legally superseded liens that had existed for decades and whether this change had retroactive effect or not. In January 1998, the District I court of Appeals, overruling the trial court's decision in part, ruled that this wage claim lien did supersede other liens and also was retroactive in effect. In fact, prior to this decision, most lawyers believed it was unconstitutional for the state to assert lien priority over preexisting security interests.

In reaction, the legislature in 1998 amended this statute to provide that wage claim liens are superior to all subsequently filed liens (except DNR pollution clean-up liens) but do not take precedence over previously filed liens. That lasted for only one year when, in the

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1999 budget act, the legislature changed the law again. This change provided that the wage claim lien is superior to all liens, whenever filed, except for financial institution liens that originate before the wage claim lien takes effect and except for DNR hazardous substance or other pollution clean-up liens.

In 2003, the Wisconsin Department of Commerce (WDOC), led by then Secretary Cory Nettles, brokered a compromise between the banks' and unions' interests. The compromise, which is current law, gave Wisconsin workers the most generous wage claim lien law in the nation. More specifically, current law provides workers with a super priority over all other creditors, including banks (wage lien is still subordinate to a DNR pollution clean-up lien), for up to $3,000 per employee for hours worked, vacation and severance pay, among other benefits set forth in the definition of "wages" in sec. 109.01 (3). Workers still have a lien for all monies owed them beyond the initial $3,000; however, that lien does not have a super priority status over previously secured and perfected creditors.

Based on what the average worker makes in a two-week payroll period, the $3,000 cap is more than sufficient to protect employees' paychecks if a business fails unexpectedly.

The 2003 compromise struck an important balance between the need to ensure that workers' final paychecks are protected when a business fails, while allowing lenders to calculate their risk exposure and secure collateral.

There are several negative outcomes that will result if AB 40 is enacted as currently proposed. First, AB 40 would remove the current $3,000 super priority cap in the state's wage claim lien law along with the limitation that the unpaid wages must be earned by an employee within the 6 months preceding the date on which the employee files the wage claim lien. The elimination of these two provisions removes any ability of a creditor to quantify their risk when deciding whether to make, extend, or renew a loan, or whether to allow continued access on an existing line of credit.

AB 40 further endangers existing lines of credit in the provision stating that this unlimited super priority exists for any lien that exists on the day before the effective date of this law as against any lien of a commercial lending institution that originated before the lien under this law took effect. Unlike the negotiations in 2003, there is no apparent recognition or concern for existing lines of credit to businesses.

The compounded effect of these above-described changes is significant and potentially catastrophic for businesses and their employees today. The reality is that prudent financial institutions have routinely considered the wage lien law as it has existed since 2003 in their underwriting of any business credit. The effects of that analysis may have been minimal in the past given better economic conditions, better cash flow by the business borrower, and other factors; however, the consideration was still there in a creditor's underwriting of the business borrower.

Given today's challenging economic times that are not only restricting cash flow by businesses, but also are resulting in greater, prudent scrutiny by state and federal banking regulators on bank's commercial loan portfolios, policies and underwriting standards, it will be mandated that this wage lien law be a factor in considering the creditworthiness of a business borrower.

The result of AB 40 is that creditors will be forced to deny business loan requests, restrict or stop altogether continued access to much needed lines of credit by businesses, or call existing loans due because the creditworthiness of the business borrower has now been greatly impaired as a result of this law. There simply is no escaping this reality. This will lead to loss of jobs and perhaps complete business failures.

Current law provides an important balance to preserve the much-needed continued access to credit by businesses against the important rights of workers to be paid. This prudent balance has always been important to preserve but is even more important to protect in today's economic environment. Unfortunately we are living through the worst economy since the Great Depression and we must do what we can to make sure businesses can continue to exist so that jobs even exist in the first place.

I'd now like to turn WBA's testimony over to Russ to explain the impact of AB 40 on practical banking operations.

Thank you very much for your careful consideration to this very critical issue. WBA respectfully urges you to oppose AB 40.

CBW
Community Bankers
of Wisconsin

Public Hearing of the
Assembly Committee on Labor

AB 40/SB 2 – Wage Claims

March 18, 2009

Testimony of Richard McGuigan, Executive Vice President
Community Bankers of Wisconsin

Thank you Chair Sinicki and Members of the Committee. My name is Rick McGuigan. I am the Executive Vice president of the Community Bankers of Wisconsin (CBW). CBW is a statewide banking trade association representing the interests of approximately 210 community banks doing business in 900 offices across Wisconsin.

I appear before you today in opposition to AB 40/SB 2.

Community banks acknowledge the well-meaning intent of the authors of this bill. **Employers** have an obligation to pay employees their full amount due. It is unfortunate that AB 40/SB 2 is being portrayed as a bank creditor vs. employees issue when in reality this problem should be resolved between an employer and its employees.

In addition to being negatively impacted by a business loan that may go bad community banks are affected when employees are not paid since these same employees may be customers of the bank who hold loans that are contingent on being repaid from the employees wages. Such a situation could find the bank in a no win situation.

Wisconsin banks operate under the premise of public trust. It has been implied that banks are in a better position vs. the employees to absorb any losses. Banks are financial intermediaries that have a responsibility to safeguard the money deposited in our institutions. When a customer deposits money in a bank, that money is reinvested back into the community in the form of loans.

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CBW respectfully believes it would be useful for this Committee to understand the requirements and limitations that the community banking regulators place on lenders when making and collecting business loans. To that end I will quote from portions of the FDIC's Examiner Handbook that provides consistent guidance to bank examiners as they periodically conduct safety and soundness examinations of banks.

The Examination Handbook states that a "bank's lending policies, credit administration, and the quality of the loan portfolio [are] the most important aspects of the examination process. To a great extent, it is the quality of a bank's loan portfolio that determines the risk to **depositors** and to the FDIC's insurance fund." When a community bank makes a decision to extend a business loan the bank **must** take into account "limitations on the amount advanced in relation to the value of the collateral" [FDIC Examiner's Handbook. Section 3.2 – Loans]; the bank **must** verify "**lien positions prior to advancing funds**. Failure to perform this simple procedure may result in the bank unknowingly assuming a junior lien position and, thereby, greater potential loss exposure" [FDIC Examiner's Handbook, Section 3.2 – Right to Possess and Dispose of Collateral]. Since the bank regulatory agencies require banks to take into account lien position and collateral value **before advancing funds**, passage of AB 40/SB 2 will lead to greater uncertainty and risk in making business loans.

Given the troubled and uncertain economy in Wisconsin the legislature needs to take actions that both encourage investment and protect workers. The current wage lien statute was based on historically accurate information and already accomplishes these objectives and does not need to be modified.

The proponents of AB 40/SB 2, have provided information that the per employee limit of $3,000 for unpaid "wages" under the current wage lien statute is inadequate, citing the closing of Wisconsin Die Casting (Milwaukee) as a primary example. According to a Wisconsin State AFL-CIO memo to Members of the Wisconsin Senate dated February 9, 2009, the "**compensation** due each employee ranges from between $9,000 and $12,000; however each worker has priority status for only $3,000." In our discussions with the Wisconsin Department of Justice and the lead lending bank, we believe the information provided in the AFL-CIO February

9, 2009 memo is misleading, and doesn't reflect the extraordinary steps the lead bank took to assist the employees of Wisconsin Die Casting and attempt to help and accommodate the business customers that were clients of WDC.

First, the employees of WDC were unpaid for **approximately two weeks.** The hourly wage for employees ranged from a low of approximately $13/hour to a high of approximately $27/hour plus weekly health care benefits of between $200 and $400 per employee. Actual claims for unpaid hours worked ranged from $900 to $2,300. Claims for unpaid **vacation pay** ranged from $800 to $2,300. In other words, **in every case** at WDC the amount of unpaid **hours worked** was less than $3,000. The unpaid vacation pay for a handful of employees raised a few employee wage claims above $3,000. The term "**compensation due each employee**" (between $9,000 and $12,000) used in the February 9, 2009 memo to justify the change in the current statute included penalties assessed against the **employer**, and were clearly not "wages" as defined by Wisconsin Statute 109.01 (3).

Second, the lead bank recognized that a number of Wisconsin companies had turned over their tools and dies to WDC to enable WDC to manufacture parts for them. The bank hired back ten (10) WDC employees at twice the employees' normal wages for more than ten weeks to identify, clean, and package the tools and dies owned by client customers of WDC in order that the WDC client companies could quickly find other manufacturers that would be able to use the tools and dies to meet contractual obligations to end users of the products. The lead bank also kept those ten people employed in order to prepare the equipment for auction to maximize the funds available to both the lenders and the employees. In total, the lead bank spent over $250,000 to benefit client customers, creditors, and employees of WDC.

AB 40/SB 2 gives employees "super-priority" over all other creditors, allowing employees to collect the full amount of unpaid wages where wages is broadly defined before secured lenders are able to exercise their rights to any collateral securing their loans. Senate Amendment 1 to Senate Amendment 1 of SB 2 provides for a "super priority" lien to $10,950, indexed annually to the CPI. According to the drafters of Amendment 1, the $10,950 was taken from a similar "priority" that is found in Chapter 7 of the Federal Bankruptcy Code provisions. However, a

review of the applicable sections of the Bankruptcy Code reveals that the $10,950 "priority" claim for wages, salaries and commissions is in actuality not a super priority lien in front of secured creditors, but rather is the fourth "priority" of eight "priority claims" available for certain **unsecured creditors**, but the priority only applies as against other unsecured creditors. They take no priority over "secured" creditors, and do not create a "super priority" wage claim. In other words, the use of a priority for unsecured creditors in the Federal Bankruptcy Code is not an appropriate measure for determining the amount of a super priority wage claim lien under Wisconsin statutes. We believe the correct balance between the rights of secured creditors and the right of workers to be paid should be based on the more objective standard of the actual average unpaid wage claims of real workers in Wisconsin. That current average is approximately $3,000 per employee.

Currently, lenders can accurately measure unpaid wage credit risk by multiplying the number of a borrower's covered employees by $3,000 to determine the bank's maximum exposure to wage claims. Without the cap, a bank cannot accurately calculate how much its collateral may be reduced to pay a "priority" wage claim, before it may be used to repay a lender for credit losses. The financial regulators require community banks to take priority claims into consideration when determining the maximum loan based on collateral and cash flow. The current $3,000 wage claim lien statute **is** taken into account by lenders when approving commercial loan requests. As proposed, AB 40/SB 2 will diminish the value of collateral held by lenders resulting in the unintended consequence of discouraging investment and commercial lending to Wisconsin businesses and thereby creating less opportunity for growth and fewer jobs.

For the reasons discussed, future loans that are made by commercial lenders will be riskier if the proposed AB 40/SB 2 is enacted. Increased risk normally results in increased interest rates and fees. **Obviously, Wisconsin community banks will not stop lending if AB 40/SB 2 is enacted as proposed. However,** Wisconsin banks have experienced higher than ordinary credit losses in this current environment. Therefore, **prudent underwriting and pressure from regulatory authorities will unquestionably force financial institutions to consider the amount of the super priority lien proposed under AB 40/SB 2 when analyzing the risk exposures from new business loan applications.** The experience of the lenders involved in the loan default of

Wisconsin Die Casting (Milwaukee) is a primary example of the need of the lenders to consider the amount of the unpaid wage claim lien when approving, modifying, or denying business credit requests.

With the economic downturn resulting in less operating revenues and cash flow available for Wisconsin businesses, this is precisely the time these businesses will need to obtain secured loans from banks – secured by a company's assets, inventory and real estate – yet AB 40/SB 2 significantly undermines the potential value to a lender of this collateral when underwriting a loan. This will result in tougher credit standards and reduced commercial credit availability in Wisconsin.

Thank you for the opportunity to appear before this committee. I would be happy to answer any questions.

Testimony Regarding Senate Bill #2
Before the
Wisconsin Assembly Committee on Labor
By Robert Granum, President UE Local 1111
March 16, 2009

I am here today on behalf of the thousands of UE members and retirees across Wisconsin to urge for the passage of Senate Bill #2, to help ensure that workers are paid the wages that they have earned.

Members of the union that I represent have been badly hurt by the current law regarding priority of financial institutions over workers in a wage lien situation. About 80 workers at Wisconsin Die Casting in Milwaukee, members of Local 1112, who were told just before quitting time on March 5, 2008 that the factory was closing down immediately, and they were all out of work. The bank that provided financing to the company had cut off the line of credit and was now refusing to honor any more checks. Wisconsin Die Cast was out of business. The workers did not receive pay for their last two week pay period, plus the week that the check should have been in the mail, also their vacation that had already been earned, in addition to the 60 days of pay due to them under the Federal and State WARN Acts.

The workers filed their wage claims with the Department of Workforce Development and began their long wait. The DWD recently completed the calculations of how much each worker is owed with the amounts typically ranging between $9,000 and $12,000. However, due to current law, each of the workers will be limited to collecting only $3,000. Workers will receive between 25 cents to 33 cents on the dollar, despite the fact that financial institutions that were involved have collected large sums of money by collecting the accounts receivable, selling off the inventory, and auctioning the machinery, with the building to be sold very soon.

These workers earned those wages and needed the money. Due to the current recession, many of them remain out of work or are earning far less than they were before. It is just plain wrong that these workers are being told that they are owed thousands that they will not receive because the financial institutions are a higher priority than they are. We can not keep this economy going if workers don't have money to buy the goods and services that our country produces. Refusing to pay workers for wages they have earned does not make economic sense.

It is also in the interest of the business community that there is a system in place to guarantee that workers receive the money they have earned. The whole country watched the situation at Republic Windows and Doors in Chicago when the workers of another UE Local occupied the plant and began a huge pressure campaign against Bank of America, because they too were told, they would not be getting the money they were owned. If the Legislature does not pass Senate Bill 2, we are likely to have similar levels of conflict here in Wisconsin as workers react to being thrown out of work without the money they have earned.

While Assembly Bill #40 would have had a greater impact on workers in Wisconsin. Senate Bill 2 will go a long way in helping to protect the long standing policy of, A days work for a days pay.

Please approve Senate Bill #2. It is the right economic policy, the right social policy, and the right thing to do for the State of Wisconsin

Thank you
Robert Granum

P G U

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March 17, 2009

Dear Members of the Assembly Labor Committee:

The following provides a summary of testimony provided by Attorney Marianne Goldstein Robbins in support of Senate Bill 2 at the Public Hearing on March 18, 2009.

Senate Bill 2 Seeks to Adequately Protect Wisconsin's Workforce

Before the Assembly Labor Committee is Engrossed Senate Bill 2 ("SB-2"), which seeks to amend certain provisions of Wisconsin's wage claim and lien law, chapter 109, *Wis. Stats.* The bill provides Wisconsin's employees protection in the event an employer fails to pay employees' wages. Often this occurs when a business closes.

First, we must be mindful that what is at issue in SB-2 is employees' *earned wages*. By virtue of chapter 109, *Wis. Stats.*, even coming into play, an employer's employees are likely already without a job. SB-2 seeks to provide those employees with protection for their already hard-earned wages.

Of particular importance is the increase of the $3,000 cap on "superpriority" claims to $10,950.00. Under current law, unpaid wages of no more than $3,000, earned in the last 6 months, are provided a superpriority over certain other liens or interests, including security interests held by commercial lending or financial institutions. As stated in prior cases, "It was the intention of the [wage lien] statute to give [ ] workmen an *absolute lien* ... as against everybody," and that "their claim is a *sacred lien*." *Paine v. Woodworth*, 15 Wis. 298, 332-33 (1862) (emphasis added). Further, "We do not discern how paying workers the wages they have earned 'imperils' the banking and commercial finance industry in any way." *Pfister v. MEDC*, 216 Wis. 2d 243, 269, 576 N.W. 2d 554 (Ct. App. Wis. 1998). While these cases may deal with prior versions of Wisconsin's wage claim and lien law, their points remain the same. The monies contemplated by the wage claim and lien law are those that have already been earned and are rightfully due an employer's employees.

An article in the Milwaukee Journal Sentinel yesterday provides a graphic illustration of why a $3,000.00 per employee cap is inadequate.

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The article describes how Central States Mortgage Company shut down abruptly on March 9th and announced that employees would not be paid for wages they were owed for up to 5 weeks of work. The wage lien filed by the Department of Workforce Development on behalf of an estimated 220 employees was $3 million. At most, employees' superpriority claim under the current law would be just 22% of that amount. Under SB-2, 80% of employees' unpaid wages would be entitled to superpriority protection.

It is not unusual for skilled tradespersons or salaried employees to earn $1,100.00 or $1,200.00 per week. By law, employers are allowed to pay wages up to 1 month after the wages are earned. Typically employers pay twice a month or on a bi-weekly basis with a week delay. Therefore, in many cases, 3 weeks pay or more are due when a business closes. That means the employee would easily be owed in excess of $3,000.00 just on the basis of wages earned in the last few weeks. Now, take into account that employees often have unpaid vacation or holiday pay accrued or deducted from their wages; this likely will add over $1,400.00 to the employee's lost wages. Thus, an employee's total unpaid wages can easily exceed the current law's cap of $3,000.00 by substantial amounts even if employees are paid more than once a month. Indeed the average DWD wage claim for the last several years is over $3,000.00 per employee.

In addition, certain other Wisconsin statutes must be considered in this discussion, particularly Wisconsin's plant closing law, section 109.07, *Wis. Stat.* Under this statute, employers with 25 or more employees must provide notice of no less than 60 days of the employer's intent to shut down. If the employer fails to do so, the employees are entitled to wages during the time period for which the employer's notice failed. For practical purposes, the employer either provides the notice required by statute, or provides no notice at all. When no notice is provided, the employees are severely affected. For example, assume an employee is earning $15 per hour and works 40 hours per week. If the employer fails to provide notice, this employee would have over $5,000 in unpaid wages. Add to this amount any earned or accrued vacation or holiday pay and the $3,000 cap is far exceeded.

The current $3,000.00 cap means that often a company and its lenders will have no incentive to comply with Wisconsin plant closing law because there will be no real remedy for violation. Employees will not recover more than $3,000.00 of the lost wages and none of the statutory remedy. By contrast, SB-2 will provide a higher cap which will allow a significant recovery where an employer fails to provide the required notice.

Other changes to the existing law include removing the six-month "look back" period found in section 109.09(2)(c)(2.). This section provides that an employee is only entitled to a superpriority for his or her unpaid wages for the six months prior to his or

her filing of a wage claim and lien. Employees often have a certain attachment to their employer and in some circumstances, the employer may make statements and assurances to calm employees and lead them to believe things will get better, even after the employer shuts down. These statements may provide the employees with a deterrent to filing claims. The result is a delay in filing a wage claim and lien which results in a limitation on the unpaid wages for which the employee is entitled to a superpriority.

In addition, employees do not necessarily know about their right to file a wage claim or lien. By the time employees learn the procedure, several months have passed, and most of the employees' opportunity to take advantage of the superpriority protection has lapsed.

SB-2 also seeks to add "collective bargaining representative" to the list of those who may file a wage claim and lien. This change is proposed to decrease the delay in employees' filing of wage claims and liens. Any such delay typically results in the employee losing out on at least a portion of the superpriority he or she is entitled to due to the six month "look back" provision discussed above. Without the proposed change, employees must either make a claim themselves or assign their claim to their union. Employees are often unaware of their statutory rights and by the time a claim is filed, substantial delay may occur. Furthermore, the need to obtain assignments from employees can not only cause delay, but may result in some employees being excluded should they fail to assign their claim or file their own. By allowing a collective bargaining representative to file the wage claim and lien, these concerns are eliminated and more workers will receive the protection intended.

Finally, SB-2 clarifies that the lien takes precedence over a "bona fide purchaser" This was necessitated by the Seventh Circuit's decision in *In re Globe Building Materials, Inc.*, 463 F.3d 631 (7th Cir. 2006). In *Globe Building*, the court held that a chapter 109 wage lien is a priming lien, which may provide superpriority over other liens. But, since "bona fide purchaser" was not included in the list of those to whom a wage lien is superior, it was not superior to a bona fide purchaser. The court then went on to hold that a bankruptcy trustee is a bona fide purchaser. In effect, due to *Globe Building*, once a bankruptcy petition is filed, employees lose their wage lien superpriority. In bankruptcy or in any circumstance in which a business or its assets are sold, an employee's right to unpaid wages is vitally important. SB-2 adds language which should adequately protect employees' wage lien in these cases.

As detailed above, SB-2 seeks to provide Wisconsin's employees significant protection to their unpaid wages.

Examples Where Current Law Inadequately Protected Workforce

- Partners Floor Covering LLC - Milwaukee, WI

After Partners Floor Covering was placed into bankruptcy, the employees were unable to perfect a wage lien because of the automatic stay in bankruptcy which serves as an injunction against any proceeding of any kind to collect a pre-bankruptcy debt unless a *generally applicable* law provides for a "priming" lien. This is an example of the effect of the *Globe Building* decision where the court held that a chapter 109 wage lien is a priming lien, but since "bona fide purchaser" is not included in the list of those whom a wage lien is superior to, it is not superior to a bona fide purchaser. As a result, the majority of the member's unpaid wage including vacation pay which was deducted from the employee's paychecks was left unpaid.

- Best Ceilings & Studs, Inc. - Pewaukee, WI

The company closed its doors during peak construction season leaving unpaid wages including vacation pay for a two week period. About a quarter of the work force had claims that exceeded the $3,000.00 cap without taking into account vacation pay. This was primarily due to unpaid overtime.

- Pro-Type Builders – Dalton, WI

This company went non-union, but during the last eight months it was signatory to a collective bargaining agreement, the company failed to pay certain employees their proper wage. By the time union could gather the necessary wage assignments, the six month "superpriority" had begun to expire. Eventually, Pro Type agreed to satisfy the wage claims, but had the company not done so the employees in question would not have been entitled to any priority claim. This example also illustrates the importance of allowing a collective bargaining representative to file wage liens on behalf of union members to perfect a claim within the six-month look back period.

- Peerless Electric, LLC – Brookfield, WI

Peerless Electric went out of business this past summer with significant bank debt whereby it is likely the employees will be unable to receive the benefit of the wage claim and lien law because of the bank's prior security interest. Even so, the majority of the outstanding wage claims exceed the $3,000 cap as in addition to unpaid base wages, the employer failed to pay the employees' vacation/holiday wage for the seven months prior to closing, and for some employees even longer. To further complicate matters, the union was unable to obtain all of the necessary wage assignments within the six month look back period leaving some members without a priority claim.

- Truc Masonry, Inc. – Cedar Grove, WI

Truc Masonry is a very recent occurrence where some of the unpaid wages to employees will likely exceed the $3,000.00 cap after taking into account overtime hours. At this point, it appears the employees will be entitled to a superpriority claim, but that claim will likely be compromised due to various caps imposed by the current statute and potential delay caused by the need to obtain assignments from a workforce that is spread across the state.

- Iron Fireman – Milwaukee, Inc. – Milwaukee, WI

The company was placed into receivership and sold to a bona fide purchaser. Prior to being purchased, the company left behind two weeks in unpaid wages, with at least one of the claims exceeding the $3,000.00 cap. Fortunately for the former employees, the company was sold at a higher price than expected and it now appears that enough proceeds were generated from the sale to satisfy the secured creditor bank as well as all of the unpaid wages. Nonetheless, this is an example where in spite of the superpriority, certain employees may not have received the full amount of their claim because of the $3,000.00 cap.

- Biehn Construction, Inc. – Kenosha, WI

Biehn Construction is an example of Wisconsin's plant closing law, whereby employers with 25 or more employees must provide notice of no less than 60 days of the employer's intent to shut down. The failure to do so entitles employees to wages during the time period for which the employer's notice failed. Here, the unpaid base wages were satisfied from the proceeds of the bank auction, but not the unpaid vacation hours which in many cases exceeded the $3,000 cap as the employer failed to pay vacation monies deducted from the employees paychecks for periods of time ranging between six months and two years.

- Stainless Steel Specialties, Inc. – Oostburg, WI

This is an example of a situation where employees were unable to receive the benefit of the wage claim and lien law because of a bank's prior security interest. Had those employees been able to advance their claims, those claims would have easily been capped at $3,000, as the employer failed to pay the employees' vacation/holiday pay for 2 years, all while deducting same from the employees' paychecks.

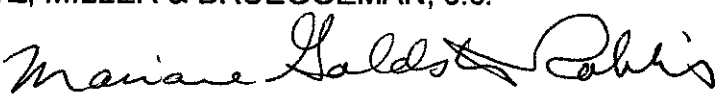
- U.S. Drywall, Inc. – Brillion, WI

The company closed its doors leaving unpaid wages including vacation pay for a two week period. Although it appears the claims in question do not exceed the $3,000.00 cap, delays caused by obtaining assignments from a workforce spread across the state nearly resulted in certain employees missing out on perfecting a superpriority claim.

The foregoing discussion sets forth why Senate Bill 2 is so important to our state's workforce and the examples above provide proof that the current statute is insufficient to meet our workers' needs. We hope you give Senate Bill 2 your strong consideration.

Very truly yours,

PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, s.c.

BY 

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Wisconsin State Senate
John Lehman
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Testimony of State Senator John Lehman
Assembly Labor Committee
March 18, 2008
Senate Bill 2

For most of Wisconsin's history the courts and state law strongly supported workers. In 1998 this changed. A special-interest provision was inserted as part of a budget adjustment bill to remove protections for workers and put bank liens -- regardless of when they were filed -- ahead of any other liens including those for earned, but unpaid compensation for workers.

The Wage Protection Act restores the historic priority of wage lien claims in Wisconsin to help workers collect the full amount of compensation they have earned.

This bill -- Senate Bill 2 -- is based on the simple idea that a day's work should result in a day's pay. Unfortunately our current state law does not have adequate provisions ensuring this principle is observed, and that is why this legislation is necessary.

The loss of a job means workers and their families must deal with the challenge of finding new jobs. They should not have to deal with the hardships of going unpaid for work they have already done or not receiving benefits they have already earned.

Banks and other financial institutions carefully assess loan applicants and charge interest on loans to manage their risk and protect their financial well being. Working families do not have that option.

In recent years some progress has been made is restoring protections for working families. A limited wage lien priority - with a $3,000 cap – now exists. At the time, that was the best that could be done. However as a practical matter Wisconsin workers and their families need, and deserve, more.

When one considers that the median full time wage of a working male in Wisconsin is over $44,000 you begin to realize how quickly a $3,000 cap is reached. In addition, employees can lose out on other compensation due them like medical insurance premiums, employer contributions to pensions and other retirement accounts held by employers in addition to salaries.

For example, just days ago employees of Central States Mortgage Company were informed they would not receive the pay they were due and that they and their families would lose their health insurance immediately. The state is in the process of filing a wage claim of $3 million on behalf of the 200 plus employees. In the newspaper story a former employee says he is personally due between $5,000 and $8,000.

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In the Senate testimony on this bill we heard from some of the people on the front lines of efforts to recover wages on behalf of workers. Their testimony provided examples how of the current law has prevented workers from receiving the wages and benefits they had earned.

Furthermore, information based on figures from the Department of Workforce Development distributed by opponents of lifting the cap on recoverable wages shows that average collected and unpaid compensation due to employees in wage lien claims exceeds the current cap.

I have heard criticism of this bill that it will seriously and adversely affect credit availability. We all know that these difficult economic times have created concern over the sufficient access to credit in Wisconsin. However, credit availability in Wisconsin is much more the result of global and national macroeconomic forces. I am further reassured by public comments from the Bankers Association that indicate prudent lending decisions have protected our Wisconsin banks from the worst of the credit crisis and they continue to make loans available. And of course, there is the significant infusion of public tax dollars to encourage continued lending by banks.

To fulfill the request of the banking lobby that a cap is necessary for them to be able to assess their risk, the amended Senate Bill provides a cap. The dollar figure -- $10,950 -- is based on the current amount of recoverable wages and befits provided by federal law. The cap amendment also mirrors federal law in that it provides for an annual adjustment based on increases in the consumer price index.

In the debate about credit, it is also important to consider that the workers protected by SB 2 are consumers and an important component of any successful economic recovery strategy. If an employee is unable to collect the full amount of the wages they have already earned they will be unable to repay consumer loans for their cars, their homes or their children's education. Certainly we must weigh the negative impacts on the consumer credit market of additional consumer bankruptcies, home foreclosures and delinquent loans.

No one wants to see any Wisconsin company fail. No one wants to see someone lose their job because their employer went out of business or declared bankruptcy, but if that happens we ought to make sure state law is on the employees side in helping them receive the wages they're entitled to. The Wage Protection Act will help to make that happen.

Some have resisted our effort here claiming we would stand out as a state with one of the strongest protections of wage earners. Let me just close by asking … if we pass this law … and Wisconsin provides some of the best protections in the nation to ensure that workers get paid the wages they are entitled to … well what's wrong with that?

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Representative Phil Garthwaite's Testimony before the Assembly Committee on Labor 3-18-09

Madam Chair, Members of the Committee,

Thank you for the opportunity to speak here today about this important issue. It's no secret that the economy is in rough shape. More and more workers are worried about losing their jobs everyday. For the average Wisconsin family losing a job is more than a simply inconvenience. It can throw a families' world into chaos. In these lean economic times more Wisconsin workers are supporting their families pay check to pay check then every before. The sudden and unexpected loss of a job is made worse when an employer fails suddenly, and as a result still owes wages to its former employees.

The driving concept behind AB-40 is simple; a days pay for a days work. For many years Wisconsin has recognized this principle, and has maintained strong protections for its workers; giving them a strong legal pathway to recover owed wages. In 1999 something changed; tucked into a budget repair bill was a provision that turned this very simple idea on its ear. In the spring of that year the legislature stripped the super-priority status of wage liens, effectively telling workers that they no longer had that strong legal pathway to recover money owed to them by their former employers. This reform created a situation in which the interests of commercial lending institutions could take priority over wages owed to former workers.

In 2003 some of those protections were restored when priority was once again given to workers, but with limitations. Current laws only gives workers truly adequate legal protection for the first 3,000 of wages owed to them. This leaves workers to fight with banks and other creditors if they are owed more that 3,000 in unpaid wages. Simply put this is an unfair situation, and it needs to be corrected.

When a Wisconsin worker looses their job, the last thing they need to deal with is fighting for money that is clearly owed to them. They need to look for a new way of supporting themselves and their families. Workers may find that they need additional training before finding a new job. In today's labor market, they may have severe difficulty finding employment, even at significantly lower pay levels. Their personal finances are often in ruins, and harsh decisions are discussed over family dinner tables all over the state. Families are too often forced to go without vital needs in order to scrape

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by. They need the money that is owed to them, they deserve it, and it's time for this body to restore those protections formerly granted to Wisconsin workers.

The current economic downturn makes this issue all the more timely. I realize that the process by which workers seek payment of owed wages doesn't happen in a vacuum. Changing the super priority stasis of wage lien claims will have other effects beyond granting workers the protections they need and deserve. I believe that other stakeholders in this process have legitimate concerns about how adjusting the super-priority cap will affect their respective businesses. We must make good decisions that recognize the rights and needs of workers while not adversely affecting already constrained credit markets.

I'm currently in the process of examining multiple perspective amendments to the current proposals. These possible amendments are aimed at striking a balance that will protect worker's rights, and the still protect the businesses that employ them. After all, businesses need workers just as employees need employers.

I appreciate the opportunity afforded by this hearing to discuss AB-40 and SB-2 as they are currently drafted. I believe that when this Committee holds an executive to vote on this legislation we will have some additional alternatives to consider. I appreciate the committee's work, and would like to thank the members again for their time and attention to this very important issue. I look forward to hearing the many viewpoints gathered in this room, and so I would also like to thank everyone who has traveled here to give us their opinions and perspectives on this issue.

Thank you,

State Representative
Phil Garthwaite
49th Assembly District

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Wisconsin State AFL-CIO ...the voice for working families.

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

To: Members of the Assembly Labor Committee

From: Joanne Ricca, Legislative & Policy Research Staff
Wisconsin State AFL-CIO

Date: March 18, 2009

Re: **Support for Engrossed Senate Bill 2: Wage Protection Act**

Senate Bill 2 addresses a fundamental injustice that was done to Wisconsin workers a decade ago. In the final weeks of the 1997-98 session, through a late-night "miscellaneous motion" on a budget adjustment bill in the Joint Finance Committee, long-standing wage protection for workers was gutted, without legislative debate. Though there have been some small changes made since then, the inadequacy of current wage claim lien law is especially felt by workers left unpaid when a business closes and they are unable to collect all they are owed for their labor.

Currently, there is a cap of $3,000 on the unpaid wages that workers can attempt to recover with priority status ahead of banks or other commercial lenders. In reality, that is the most they will recover because it is rare for any assets to remain after the banks take what they are owed. Senate Bill 2, as passed by the Senate, increases that cap to $10,950. This is a compromise because the original bill allowed workers to try to recover all they have earned and are owed. SB 2 also clarifies that Wisconsin's wage claim lien law does apply in bankruptcy cases. There is sufficient evidence that current wage claim law denies many workers their earned compensation and Attorney Marianne Robbins who is here with me today will explain some of those cases.

You will also hear testimony about the closing of Wisconsin Die Casting. This particular case demonstrates how current law undermines the effectiveness of the notice requirement for business closings. This is a serious concern because the purpose of the plant closing law is to give state and local governments the time to provide some form of economic assistance that could possibly avert the actual closing—or to assist in finding a buyer to continue business operations. If those efforts fail, it gives employees at least some time to prepare for the major family financial crisis caused by the loss of a job. The law requires employers of 25 or more to give a 60-day advance notice of closing, or workers can recover pay for each day that notice was not given. The low wage lien priority cap of $3,000 provides a disincentive for an employer (or, indirectly, a bank or commercial lender) to care about abiding by the advance notice of plant closing law.

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When a business closes, there are no winners. Given the fact that priorities must be set for the distribution of remaining business assets in bankruptcy, who can best afford to take a financial loss: banks with billions in assets that are structured to handle risk, or workers who rely on every single paycheck and yet have lost their jobs? The answer is obvious. It was reaffirmed by the 1st Circuit Court of Appeals in a decision rendered just before the banks came to the Legislature to gut the wage claim lien law in 1998: *(Pfister v. MEDC 216 Wis.2d 243, 269, 576 N.W. 2d 554, 1st Circuit Court of Appeals, 1998)*

> "The absolute or sacred nature of the wage claim lien flows from the simple proposition: if workers are not paid their wages, they and their families will suffer....Nothing in the statute suggests that the Legislature intended workers to lose their wages merely because a bank or some other creditor arrived at the courthouse first."
>
> "After all, a lien for wages is a lien for money that should have been paid in the first instance—money that, in the ordinary course of business, would not have been available to pay any claims of a secured party."

Banks expect that some loans will go bad and that is why they handle risk exposure through adequate loan-loss reserves. Workers do not have millions in loan-loss reserves.

As taxpayers, workers are contributing billions to a massive federal bailout for the financial sector, with some of those funds going to Wisconsin banks. Wisconsin workers should not have to contribute their wages as well.

This is an issue of fundamental fairness. Workers are simply asking the Legislature to give them a better chance to recover what they have earned while working in good faith for an employer.

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