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## Do Amendments to the Fair Labor Standards Act as Applied to Puerto Rico Implicitly Encourage Employers to Benefit at the Expense of Young Workers

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## NOTE

### DO AMENDMENTS TO THE FAIR LABOR STANDARDS ACT AS APPLIED TO PUERTO RICO IMPLICITLY ENCOURAGE EMPLOYERS TO BENEFIT AT THE EXPENSE OF YOUNG WORKERS?

*With something of this scale, we're not just seeing an outage. We are seeing a complete stoppage in the rhythms of daily life.*

– Miguel Román, Scientist at NASA<sup>1</sup>

#### I. INTRODUCTION

The rhythms of the Puerto Rican daily life were stalled long before the fire at the aging Aguirre power plant in Salinas, Puerto Rico.<sup>2</sup> Since the early 2000s, Puerto Rico has been facing a recession,<sup>3</sup> which has caused many Puerto Ricans to move to the United States.<sup>4</sup> The influx of migration has caused Puerto Rico's labor force to decrease.<sup>5</sup> A report published by the Institute of Statistics of Puerto Rico shows that, in

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1. See *Puerto Rico Goes Dark*, NASA EARTH OBSERVATORY, <http://earthobservatory.nasa.gov/NaturalHazards/view.php?id=88796> (last visited Aug. 1, 2017).

2. See *infra* Part II. On September 21, 2016, a fire at a power plant in the south of Puerto Rico left almost 1.5 million customers without electricity for almost forty-eight hours. *Puerto Rico Goes Dark*, *supra* note 1.

3. Puerto Ricans are American citizens but they lack “any national political representation in both Houses of Congress” and have no right to vote for the U.S. President if they reside in Puerto Rico. See *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 355 (1st Cir. 2015) (Torruella, J., concurring), *aff'd*, 136 S. Ct. 1938 (2016); Greg DePersio, *The Origins of the Puerto Rican Debt Crisis*, INVESTOPEDIA (Mar. 23, 2017, 11:35 AM), <http://www.investopedia.com/articles/investing/090915/origins-puerto-rican-debt-crisis.asp> (explaining that the Jones-Shafroth Act of 1917 granted United States citizenship to Puerto Ricans).

4. Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RES. CTR. (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s> (finding that, as of 2013, there were 5.1 million Puerto Ricans living in the United States mainland compared to 3.5 million living in Puerto Rico, and in 2014 alone, Puerto Rico's net population decreased by 64,000); see Nick Timiraos, *Puerto Rico's Economic Crisis in Five Charts*, WALL ST. J. (June 29, 2016, 1:53 PM), <http://blogs.wsj.com/economics/2016/06/29/puerto-ricos-economic-crisis-in-five-charts>.

5. Timiraos, *supra* note 4 (noting that the labor force has decreased approximately 20%).

2012, about 84% of men and 67% of women stated that their main reason for moving to the United States was job-related.<sup>6</sup> These findings are not unexpected considering that approximately 46% of Puerto Ricans live below the poverty line.<sup>7</sup> As a result, labor participation is roughly 40%.<sup>8</sup>

Currently, Puerto Rico faces debt of nearly \$72 billion,<sup>9</sup> combined with “a 15.4 percent unemployment rate, a soaring cost of living, pervasive crime, crumbling schools and a worrisome exodus of professionals and middle-class Puerto Ricans”<sup>10</sup> who are joining the diaspora in mainland United States.<sup>11</sup> As a response to these problems, the former Governor of Puerto Rico, Alejandro García-Padilla, enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (“Recovery Act”).<sup>12</sup> The main purpose of the Recovery Act was to create an avenue for public corporations to restructure their debt.<sup>13</sup> Ultimately, the Supreme Court decided that the Recovery Act was unconstitutional.<sup>14</sup> Congress subsequently introduced a bill called the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”).<sup>15</sup>

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6. ALBERTO L. VELÁZQUEZ-ESTRADA, *PERFIL DEL MIGRANTE*: 2013, 22 (2015) (analyzing the percentage of men and women who identified “looking for work” as their reason to migrate to the United States).

7. See Robert Doar, *How to Get Puerto Rico Back to Work*, AM. ENTERPRISE INST. (Dec. 29, 2016), <https://www.aei.org/publication/how-to-get-puerto-rico-back-to-work> (quoting *Percent of People Below Poverty Level in the Past 12 Months (For Whom Poverty Status Is Determined) - United States -- States; and Puerto Rico*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_1YR\\_GCT1701.US01PR&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_GCT1701.US01PR&prodType=table) (last visited Aug. 1, 2017)).

8. See Timiraos, *supra* note 4 (comparing Puerto Rico’s labor participation rate to that of the United States where labor participation totals 63%); see, e.g., Mary Williams Walsh, *Life on the Precipice in Puerto Rico*, N.Y. TIMES, Aug. 7, 2016, at BU1 (noting that there are only “two pediatric heart surgeons in Puerto Rico[,]” only “one pediatric anesthesiologist on the whole island, serving a population of about 900,000 people under 18[,]” and 180 surgeons, “for a population of about 3.5 million”).

9. See Lizette Alvarez, *Economy and Crime Spur New Puerto Rican Exodus*, N.Y. TIMES, Feb. 9, 2014, at A1; DePersio, *supra* note 3.

10. Alvarez, *supra* note 9, at 1.

11. *Id.*

12. See *infra* notes 73, 75 and accompanying text.

13. Recent Legislation, *Puerto Rico Passes New Municipal Reorganization Act – Puerto Rico Public Corporation Debt Enforcement and Recovery Act*, 2014 P.R. Laws Act No. 71, 128 HARV. L. REV. 1320, 1320-22 (2015) (defining public corporations as those that are government owned and explaining the reasons behind the enactment of the Recovery Act).

14. See *infra* notes 81-83 and accompanying text.

15. See H.R. 4900, 114th Cong. (2016).

PROMESA, Spanish for promise, was enacted to assist Puerto Rico with its economic crisis and overwhelming debt.<sup>16</sup> Although PROMESA's main focus is related to debt restructuring and financial oversight it also contains various labor provisions.<sup>17</sup> Specifically, section 403 of PROMESA ("section 403") amends the scope of the Fair Labor Standards Act ("FLSA") and its application to Puerto Rican employers who are subject to federal minimum wage laws.<sup>18</sup> The amendment strikes paragraphs two through four of section 206(g) of the FLSA.<sup>19</sup> This Note focuses on the amended language of subsection 206(g) of the FLSA, which changes the scope of the youth subminimum wage as applied to Puerto Rico.<sup>20</sup> Under PROMESA, the Governor of Puerto Rico can allow employers to pay a subminimum wage that is not less than \$4.25 per hour to employees who are twenty-five years old or younger and initially hired after June 30, 2016.<sup>21</sup> While the enactment of PROMESA was the last resort for Puerto Rico's economic shortcomings, the proposed solutions fail to promote social and employment stability.<sup>22</sup> Nothing in PROMESA's legislative history indicates how increasing the age covered under the federal youth subminimum wage will benefit the Puerto Rican economy.<sup>23</sup> In fact, the legislative history demonstrates strong opposition to PROMESA's subminimum wage provision.<sup>24</sup>

Part II examines the historical background of the Puerto Rican economy and provides a detailed description of the events that led to the economic crisis.<sup>25</sup> The purpose of the historical background is to provide context for the events, both social and economic, that led to the

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16. See PROMESA, Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016) (codified at 48 U.S.C. § 2121) ("The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.").

17. See Pub. L. No. 114-187, §§ 101, 403-404, 130 Stat. 549, 586-587 (codified at 48 U.S.C. §§ 2121, 2192-93).

18. See Pub. L. No. 114-187, sec. 403, § 206(g), 130 Stat. 549, 586.

19. See Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. at 586.

20. See Pub. L. No. 114-187, sec. 403, § 206(g)(2), (5), 130 Stat. at 586 (noting that in the United States the federal youth subminimum wage only applies to "an employee who has not attained the age of 20 years, except in the case of the wage applicable in Puerto Rico" it applies to employees who have not attained the age of twenty years).

21. See 29 U.S.C. § 206(g)(1) (2012); Pub. L. No. 114-187, § 403, 130 Stat. at 586 (noting that the period designated by the Governor cannot exceed four years and the designation is "subject to the approval of the Financial Oversight and Management Board" established by PROMESA).

22. See *infra* Part III.

23. See 162 CONG. REC. S4653 (daily ed. June 28, 2016) (demonstrating that members of Congress wanted section 403 to be removed); H.R. REP. NO. 114-602, pt. 1, at 51 (2016); *infra* Part IV.A.

24. See *infra* Part IV.A.

25. See *infra* Part II.A.

enactment of PROMESA.<sup>26</sup> It then examines what compelled the Governor of Puerto Rico to enact the Recovery Act and the Supreme Court's determination that the Act was unconstitutional pursuant to the United States Constitution.<sup>27</sup> It also discusses the enactment and purpose of PROMESA.<sup>28</sup> Finally, it details the legislative history of the FLSA and its historical application to Puerto Rico.<sup>29</sup> Part III discusses the legal and social issues created by the amendments to the FLSA.<sup>30</sup> It also explains how the amendments will affect young adults working in Puerto Rico as well as older workers.<sup>31</sup> Further, Part III explores the benefits of a subminimum wage and how the lack of employer regulation will encourage the displacement of employees who are on probationary periods or those who are older.<sup>32</sup>

Part IV analyzes PROMESA's legislative history, which demonstrates a strong intent against the enactment of PROMESA's minimum wage provision.<sup>33</sup> Moreover, Part IV recommends amendments to section 403 and provides concrete regulations and sanctions for employers who try to take advantage of the subminimum wage.<sup>34</sup> It then proposes that individuals under the age of twenty-five who have families or who are full-time college students should be exempted from the youth subminimum wage.<sup>35</sup> This Note also proposes that further legislation be enacted to establish regulations for employers who displace employees after the youth subminimum wage period is over.<sup>36</sup> Part V briefly concludes this Note hoping that the recommended amendments to section 403 will be adopted, so that Puerto Rican people under the age of twenty-five do not have to live as a sub-class and those who are older do not have to fear displacement.<sup>37</sup>

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26. See *infra* Part II.A–C.

27. See Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71; *infra* Part II.B. For a summary of the Recovery Act, see GOV'T DEV. BANK FOR P.R., SUMMARY OF THE PUERTO RICO PUBLIC CORPORATION DEBT ENFORCEMENT AND RECOVERY ACT 6, 18, 34-36 (2014), <http://www.gdb-pur.com/documents/SummaryoftheRecoveryAct.pdf>.

28. See *infra* Part II.C.

29. See *infra* Part II.D.

30. See *infra* Part III.A.

31. See *infra* Part III.A, C.

32. See *infra* Part III.B–C.

33. See *infra* Part IV.A.

34. See *infra* Part IV.B–C.

35. See *infra* notes 260-66 and accompanying text.

36. See *infra* Part IV.C.

37. See *infra* Part V.

## II. UNDERSTANDING THE HISTORY BEHIND THE ENACTMENT OF THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT

In order to understand the enactment of PROMESA, it is important to first understand the history behind it.<sup>38</sup> Subpart A provides an overview of the economic and social history that led to the enactment of PROMESA and the amendment of the FLSA.<sup>39</sup> It focuses on the events that forced the Governor to pass legislation addressing the debt crisis.<sup>40</sup> Moreover, Subpart B explains the purpose of this legislation and the Supreme Court's ruling that the Recovery Act was unconstitutional.<sup>41</sup> Subpart C explains the enactment of PROMESA, its purpose, and its inclusion of various labor provisions.<sup>42</sup> Subpart D provides a brief background of the FLSA, its legislative history, and its historical application to jobs in Puerto Rico.<sup>43</sup> Lastly, Subpart D also explains how section 403 amends the application of the FLSA with respect to Puerto Rican employers and employees.<sup>44</sup>

### A. *Social and Economic Events that Led to the Enactment of PROMESA*

Puerto Rico has been tremendously affected by its economic crisis.<sup>45</sup> In the 1990s, the U.S. government established various tax exemptions for corporations that conducted business in Puerto Rico.<sup>46</sup> Naturally, this incentivized corporations to bring their business to Puerto Rico.<sup>47</sup> In 2006, however, these tax exemptions expired,<sup>48</sup> which led to a

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38. See *infra* Part II.A–C.

39. See *infra* Part II.A.

40. See *infra* Part II.A–B.

41. See *infra* Part II.B.

42. See *infra* Part II.C.

43. See *infra* Part II.D.

44. See *infra* Part II.D.

45. See *Greece in the Caribbean*, ECONOMIST, Oct. 26, 2013, at 14, 18; Matt Rego, *Why Is Puerto Rico in so Much Debt?*, INVESTOPEDIA (Nov. 11, 2015, 9:29 AM), <http://www.investopedia.com/articles/investing/111115/why-puerto-rico-so-much-debt.asp> (comparing the Puerto Rican economic crisis to the Greek economic crisis).

46. See *Everything You Should Know About Puerto Rico's Debt Crisis*, PBS NEWSHOUR (July 11, 2015, 6:04 PM), <http://www.pbs.org/newshour/bb/everything-know-puerto-ricos-debt-crisis>.

47. See *id.* (explaining that most of the businesses were major pharmaceutical manufacturers and that there was a time where about “13 of the top 20 prescription drugs [were] actually made in Puerto Rico”).

48. See Paul Krugman, *America's Un-Greek Tragedies*, N.Y. TIMES, Aug. 3, 2015, at A19 (attributing Puerto Rico's economic success to the manufacturers who relocated to the Island until the tax breaks expired in 2006).

decrease in tax revenue.<sup>49</sup> In turn, this forced the Puerto Rican government to increase other taxes.<sup>50</sup> To complicate matters further, Puerto Rico has been facing a loss in population that has been described as a “slide that is steeper and more financially disastrous than in any U.S. state since the end of World War II.”<sup>51</sup> As a result, the smaller population creates less tax revenue.<sup>52</sup> Interestingly, although the economy has been deteriorating, consumption per capita has been increasing.<sup>53</sup> Puerto Rico, however, has not been able to fully recover and, for more than a decade, it has not been able to balance its budget.<sup>54</sup> In about ten years, the Puerto Rican government managed to exponentially increase its debt.<sup>55</sup>

Another factor that led to the Puerto Rican debt crisis was the tax treatment of Puerto Rican municipal bonds.<sup>56</sup> The tax benefits attracted creditors and incentivized them to overlook the fiscal problems that Puerto Rico was experiencing.<sup>57</sup> Municipal bonds are defined as debt issued by local governments to finance their expenditures.<sup>58</sup> The Puerto

49. See Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt Is Grappling with a Debt Crisis*, N.Y. TIMES (July 1, 2016), [http://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html?\\_r=0](http://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html?_r=0).

50. See, e.g., Scott Beyer, *Puerto Rico, at 11.5%, Has America's Highest Sales Tax*, FORBES (Aug. 17, 2015, 2:33 AM), <http://www.forbes.com/sites/scottbeyer/2015/08/17/puerto-rico-at-11-5-has-americas-highest-sales-tax/#2eaedf445424> (noting that since the summer of 2015 Puerto Rico has had the highest sales tax in America, because the Puerto Rican government “raised its Sales and Use Tax from 7% to 11.5%”).

51. See Nick Timiraos, *Exodus Worsens Puerto Rico's Crisis*, WALL ST. J., June 30, 2016, at A1; see also DePersio, *supra* note 3 (explaining that Puerto Rico's population is not only leaving the Island, but it is also aging).

52. Walsh & Moyer, *supra* note 49 (attributing part of Puerto Rico's current debt to the Island's failure to generate enough revenue).

53. See Krugman, *supra* note 48 (comparing Puerto Rico's financial situation to that of Europe and explaining that although Puerto Rico is facing an economic crisis, the Island's consumption per capita has increased because of continued increases in federal funding).

54. See Beyer, *supra* note 50 (noting that Puerto Rico has been in a recession since 2006); Timiraos, *supra* note 4.

55. See Michelle Kaske & Tatiana Darie, *Puerto Rico's Slide*, BLOOMBERG (Dec. 23, 2016, 3:43 PM), <https://www.bloomberg.com/quicktake/puerto-ricos-slide> (noting that the Puerto Rican government nearly doubled its debt).

56. See Alvarez, *supra* note 9, at 1; DePersio, *supra* note 3 (explaining that the Jones-Shafroth Act of 1917 stipulated that Puerto Rican municipal bonds would be exempted from taxation and thus residents of the fifty states and other United States territories could invest in these bonds without having to pay interest on the income); cf. Beyer, *supra* note 50 (imputing part of the existing debt to the “famously corrupt and inefficient political system that keeps large percentages of people on the public dole, either through welfare or government employment.”).

57. Timiraos, *supra* note 4.

58. For purposes of this Note, the general definition of municipal bonds is as follows: Municipal bonds are debt securities issued by states, cities, counties and other governmental entities to finance capital projects, such as building schools, highways or sewer systems, and to fund day-to-day obligations. Investors who buy municipal bonds

Rican government could issue its municipal bonds tax-exempt, making these bonds highly attractive to creditors.<sup>59</sup> For many years, this tax exemption was indispensable to the Puerto Rican government.<sup>60</sup> Essentially, the government was paying for its expenses with borrowed money.<sup>61</sup> The Puerto Rican government continues to default on its debt of over \$72 billion,<sup>62</sup> despite allocating most of its budget to “debt service.”<sup>63</sup>

In 2014, several major credit rating agencies rated Puerto Rico’s debt as noninvestment grade.<sup>64</sup> The grading is particularly concerning because Puerto Rico cannot seek any relief under chapter nine of the Bankruptcy Code.<sup>65</sup> The rating also matters because it affects Puerto Rico’s access to capital markets.<sup>66</sup> With no access to capital markets,<sup>67</sup> it is difficult for Puerto Rico to fund its government and to avoid defaulting on its debt.<sup>68</sup> Currently, there is a possibility that Puerto Rico will receive further negative grading.<sup>69</sup> This makes it difficult for the

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are in effect lending money to the bond issuer in exchange for a promise of regular interest payments, usually semi-annually, and the return of the original investment, or “principal.” The date when the issuer repays the principal, the bond’s maturity date, may be years in the future.

*Municipal Bonds*, U.S. SEC. & EXCH. COMM’N, (Jan. 28, 2011), <https://www.sec.gov/answers/bondmun.htm>.

59. See Timiraos, *supra* note 4 (explaining that the Puerto Rican government may issue debt “exempt[ed] from federal, state and local taxes, unlike U.S. states”).

60. See DePersio, *supra* note 3; Rego, *supra* note 45 (explaining that during the mid-1970s, 20% of Puerto Rico’s gross domestic product was allocated to government spending).

61. See *Everything You Should Know About Puerto Rico’s Debt Crisis*, *supra* note 46 (explaining that, for the last nine to twelve years, Puerto Rico has remained functional by using borrowed money and that about half of the local government’s budget “goes to debt service”); Kaske & Darie, *supra* note 55 (comparing the practices adopted by the Puerto Rican government to those adopted by New York City, which caused the city to almost go bankrupt in the 1970s).

62. See *Everything You Should Know About Puerto Rico’s Debt Crisis*, *supra* note 46.

63. See *id.*

64. See DePersio, *supra* note 3 (noting that this status is also known as “junk status”).

65. See Mary Williams Walsh, *Puerto Rico Said to Face ‘Death Spiral’ over Debt*, N.Y. TIMES, Oct. 15, 2016, at B3 (explaining that Chapter 9 of the Bankruptcy Code allows “distressed cities and other local governments” to seek financial help).

66. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942 (2016) (“Puerto Rico’s access to capital markets has also been severely compromised since ratings agencies downgraded Puerto Rican bonds . . . to noninvestment [grade] . . .”).

67. See *What Are Capital Markets? Definition and Meaning*, MKT. BUS. NEWS, <http://marketbusinessnews.com/financial-glossary/capital-markets> (last visited Aug. 1, 2017) (defining capital markets as “financial markets where long-term debt[s] . . . are bought and sold”).

68. See CAPITAL WATCH, *Puerto Rico’s Fiscal Crisis and Its Impact on Capital Markets*, (July 18, 2016), <http://cbrcapitalwatch.com/?p=2326> (suggesting that no access to capital markets will hinder Puerto Rico’s ability “to raise funds and keep its government running”).

69. See MICROJURIS P.R., *Junta de Planificación Presenta Revisión de Proyecciones Económicas Para Años Fiscales 2016 y 2017* [Planning Board Presents Review of Economic Projections for Fiscal Years 2016 and 2017], (Nov. 11, 2016) (Span.), <https://aldia.microjuris.com/2016/11/11/junta-de-planificacion-presenta-revision-de-proyecciones-economicas-para-anos->



Puerto Rican government to avoid subsequent defaults.<sup>70</sup> One of Congress's aims through PROMESA was to "facilitate reinvestment in Puerto Rico" and access to capital markets.<sup>71</sup> However, before PROMESA was enacted, the Puerto Rican government unsuccessfully attempted to solve its economic crisis.<sup>72</sup>

*B. Puerto Rico Public Corporation Debt Enforcement and Recovery Act: From Its Inception to Its Decay*

The Recovery Act was enacted with the purpose of allowing the Governor of Puerto Rico to declare a state of emergency and allow certain public corporations to restructure their debt.<sup>73</sup> The combined deficit for the 2012 to 2013 fiscal year of Puerto Rico's three main public corporations was approximately \$20 billion.<sup>74</sup> This combined debt was one of the main factors that urged former Governor García-Padilla to pass the Recovery Act.<sup>75</sup>

Mainly, the Recovery Act sought "to establish a debt enforcement, recovery, and restructuring regime for the public corporations and other instrumentalities" and afford a remedy for Puerto Rico's lack of bankruptcy protection.<sup>76</sup> For years, Puerto Rican public corporations have been issuing bonds in the capital markets.<sup>77</sup> Neither Puerto Rico

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70. See CAPITAL WATCH, *supra* note 68.

71. See PROMESA, Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016) (codified at 48 U.S.C. § 2121); *Puerto Rico Hill Update—Muni Market Impacts*, WHITE HOUSE (Mar. 18, 2016), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Blog/The%20Impact%20of%20the%20Crisis%20on%20Puerto%20Rico%20Muni%20Market.pdf>.

72. The Recovery Act was enacted as an alternative to Chapter 9 relief. See Recent Legislation, *supra* note 13, at 1320-23; *infra* Part II.B.

73. See Recent Legislation, *supra* note 13, at 1320; Mary Williams Walsh, *Puerto Rico Passes Bill Allowing It to Declare a Moratorium on Its Debt*, N.Y. TIMES, Apr. 7, 2016, at B5.

74. See 2014 P.R. Laws Act No. 71; Recent Legislation, *supra* note 13, at 1321 (identifying the three main public corporations as "the [Puerto Rico] Electric Power Authority (PREPA), [Puerto Rico] Aqueduct and Sewer Authority (PRASA) and the [Puerto Rico] Highways and Transportation Authority (PRHTA)"); Mary Williams Walsh, *Puerto Rico Power Supplier Saved from Cash Squeeze*, N.Y. TIMES, Aug. 15, 2014, at B3 (explaining Puerto Rico Electric Power Authority's debt).

75. See Recent Legislation, *supra* note 13, at 1321.

76. See 2014 P.R. Laws Act No. 71 (detailing the regime created by the Recovery Act, which would be applied during an economic emergency); Andrew M. Simon, *Puerto Rico Continues the Struggle to Restructure Its Debts*, NAT'L LAW REVIEW (Oct. 10, 2016), <http://www.natlawreview.com/article/puerto-rico-continues-struggle-to-restructure-its-debts>.

77. See Recent Legislation, *supra* note 13, at 1321 (explaining that it has been the practice of Puerto Rico's public corporations to either "issue[] bonds in the capital markets or receive[] financial support from [the Government Development Bank] to cover budget deficits and fund capital improvements").

nor its public corporations can file for federal bankruptcy protection.<sup>78</sup> Therefore, enacting the Recovery Act seemed to be the only way for the Puerto Rican government to solve its financial woes.<sup>79</sup>

But the Recovery Act never met its purpose—creditors sued Puerto Rico and several government officials, seeking to enjoin the enforcement of the Recovery Act.<sup>80</sup> In a pair of consolidated cases under the name *Franklin California Tax-Free Trust v. Puerto Rico*,<sup>81</sup> Puerto Rico's District Court held that the Recovery Act was unconstitutional and that federal bankruptcy law preempted it.<sup>82</sup> Shortly thereafter, both the First Circuit and the Supreme Court affirmed the District Court's decision.<sup>83</sup> In its five to two decision, the Supreme Court focused on the specific issue of whether Puerto Rico was a state for purposes of preemption.<sup>84</sup> Justice Thomas, writing for the majority, explained:

[T]he definition of "State," . . . has included Puerto Rico since it became a Territory of the United States in 1898. The first Federal Bankruptcy Act, also enacted in 1898, defined "States" to include "the Territories, the Indian Territory, Alaska, and the District of Columbia." . . . [However], [w]hen Congress recodified the bankruptcy laws to form the Federal Bankruptcy Code in 1978, the definition of "State" dropped out of the definitional section. . . . Congress then amended the Code to reincorporate the definition of "State" in 1984. . . . The amended definition includes Puerto Rico as a State for purposes of the Code with one exception.<sup>85</sup>

Justice Thomas stated that the exclusion of Puerto Rico under the definition of "state" "does not sweep so broadly."<sup>86</sup> Ultimately, the Supreme Court clarified that Puerto Rico was not considered a state for purposes of authorizing its municipalities to seek relief under Chapter 9

78. See Michael Corkery, *Puerto Rico's Indebted Power Utility Adds to Island's Problems*, N.Y. TIMES, July 2, 2014, at B8.

79. See *id.*

80. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1943 (2016) (explaining that the group of investment funds "hold nearly \$2 billion in bonds issued by the [Puerto Rico] Electric Power Authority").

81. 85 F. Supp. 3d 577 (D.P.R. 2015).

82. *Id.* at 582, 600-01 (holding that the Recovery Act is unconstitutional "pursuant to the Supremacy Clause of the United States Constitution").

83. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. at 1949, *aff'd*, 805 F.3d 322, 332-33 (1st Cir. 2015).

84. 136 S. Ct. at 1942 ("The Federal Bankruptcy Code pre-empts state bankruptcy laws that enable insolvent municipalities to restructure their debts over the objections of creditors and instead requires municipalities to restructure such debts under Chapter 9 of the Code.").

85. *Id.* at 1945.

86. *Id.* at 1942 (explaining that because of Puerto Rico's exclusion from the definition of "State," it cannot authorize its municipalities to seek relief under Chapter 9 of the federal Bankruptcy Code).

of the Bankruptcy Code, but Puerto Rico was to be considered a state for purposes of preemption.<sup>87</sup> Thus, the Supreme Court concluded that Puerto Rico could not enact its own bankruptcy laws in order to restructure the debt of its public utilities companies and any such laws would be preempted by the Bankruptcy Code.<sup>88</sup>

### C. *A Promise*

After the Supreme Court issued its decision, Congress was the last resort for Puerto Rico.<sup>89</sup> Representative Sean P. Duffy sponsored a bill that was later called the Puerto Rico Oversight, Management, and Economic Stability Act.<sup>90</sup> On June 30, 2016, President Obama signed PROMESA into law,<sup>91</sup> following several debates in Congress on whether to approve, amend, or strike PROMESA.<sup>92</sup> The Act's main purpose is "to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets."<sup>93</sup> Essentially, PROMESA barred creditors from collecting debt until the board created by PROMESA was organized.<sup>94</sup>

In August 2016, President Obama appointed the members of PROMESA's board.<sup>95</sup> The board is composed of legislative leaders, a

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87. The Supreme Court concluded as follows:

[T]he Code prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. Without that authorization, Puerto Rico's municipalities cannot qualify as Chapter 9 debtors. . . . But Puerto Rico remains a "State" for other purposes related to Chapter 9, including that chapter's pre-emption provision. That provision bars Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies.

*Id.* at 1942.

88. *Id.*

89. See Williams Walsh & Moyer, *supra* note 49.

90. H.R. 4900, 114th Cong. (2016).

91. See Simon, *supra* note 76.

92. See Heather Long, *President Obama Signs Puerto Rico Rescue Bill*, CNN (June 30, 2016, 5:00 PM), <http://money.cnn.com/2016/06/29/investing/puerto-rico-debt-promesa>; Press Release, Norma Torres, House to Vote on Torres Amendment Removing Minimum Wage Provision in Puerto Rico Bill, (June 9, 2016), <https://torres.house.gov/media-center/press-releases/house-vote-torres-amendment-removing-minimum-wage-provision-puerto-rico>.

93. See PROMESA, Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016) (codified at 48 U.S.C. § 2121).

94. See Rob Hotakainen, *How Congressman Raul Labrador Made a Mark by Helping His Homeland*, CHARLOTTE OBSERVER (June 29, 2016, 6:42 PM), <http://www.charlotteobserver.com/news/politics-government/article86738217.html#1> ("Creditors will be barred from using the courts to collect money while the board gets organized and Puerto Rico restructures its more than \$70 billion in debt.")

95. See *President Obama Announces the Appointment of Seven Individuals to the Financial Oversight and Management Board for Puerto Rico*, WHITE HOUSE (Aug. 31, 2016), <https://www.whitehouse.gov/the-press-office/2016/08/31/president-obama-announces-appointment-seven-individuals-financial> (listing the appointed individuals to the Oversight and Management

retired bankruptcy judge as well as other members with experience in private equity and similar fields.<sup>96</sup> All members of the board share a background in finance.<sup>97</sup> The board acts as a federal check on the Puerto Rican government.<sup>98</sup> The Governor of Puerto Rico will continue to make decisions but under the supervision and subject to the approval of the board.<sup>99</sup> The former Governor drafted and presented his fiscal plan to the board in October 2016.<sup>100</sup> However, the relationship between the Governor and the board could change because the Island's current Governor has implied opposition to PROMESA.<sup>101</sup>

Although PROMESA's main focus is on Puerto Rico's management of public finances, this Note focuses on PROMESA's minimum wage provision.<sup>102</sup> Section 403 states that the Governor of Puerto Rico may designate a period of time not to exceed four years in which employers can pay a minimum wage of \$4.25 to people under the age of twenty-five.<sup>103</sup> This provision is flawed.<sup>104</sup> So far, Congress has

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Board). The board has its own website where it publishes its events and documents. FIN. OVERSIGHT & MGMT. BD. FOR P.R., <https://juntasupervision.pr.gov/index.php/en/home> (last visited Aug. 1, 2017).

96. See Susan Cornwell & Nick Brown, *Puerto Rico Oversight Board Appointed*, REUTERS (Aug. 31, 2016, 4:03 PM), <http://www.reuters.com/article/us-puertorico-debt-board-idUSKCN11628X> (noting that one of the appointees, Carlos García, was the former head of Puerto Rico's Government Development Bank).

97. See Salim Furth, *Puerto Rico Oversight Board Members Specialize in Finance, Not Economic Reform*, WALL ST. J.: WASHWIRE BLOG (Aug. 31, 2016, 3:07 PM), <http://blogs.wsj.com/washwire/2016/08/31/puerto-rico-oversight-board-members-specialize-in-finance-not-economic-reform> (emphasizing that the appointed members of the board seem to demonstrate a background geared toward finance "rather than economic reform").

98. See Cornwell & Brown, *supra* note 96 ("[T]he board will be tasked with assessing and certifying annual budgets and a fiscal recovery plan presented by the island's government, as well as facilitating debt restructuring talks on the island . . .").

99. See, e.g., Walsh, *supra* note 65 ("Congress gave Puerto Rico's [G]overnor, and not the board, the authority to draft the 10-year fiscal plan that will become the basic road map for moving Puerto Rico of its financial troubles.").

100. See Nick Brown, *Puerto Rico Oversight Board Hopes to Certify Fiscal Plan by End-Jan*, REUTERS (Nov. 18, 2016, 10:40 AM), <http://www.reuters.com/article/us-puertorico-oversight-idUSKBN13D1L8>.

101. See Luis J. Valentin, *Rosselló Assures No Changes to Puerto Rico Minimum Wage*, CARIBBEAN BUS. (Jan. 9, 2017), <http://caribbeanbusiness.com/rossello-assures-no-changes-to-puerto-rico-minimum-wage> (explaining that the new governor, Ricardo Roselló, introduced legislation related to labor reform that will not affect Puerto Rico's current minimum wage despite the PROMESA).

102. See PROMESA, Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. 549, 586 (2016); *infra* Part III.

103. See Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. at 586.

104. See *infra* Part IV.A-C.

denied recommendations to strike section 403.<sup>105</sup> Employer adoption of section 403 is forthcoming.<sup>106</sup>

*D. A Glance at the Legislative History of the Fair Labor Standards Act, Its Application to Puerto Rico, and Incorporation and Amendments under the PROMESA*

The FLSA is a federal law that establishes various requirements for qualifying employers, such as the federal minimum wage.<sup>107</sup> Historically, the statutory minimum wage established by the FLSA could be lower in U.S. territories than in the states.<sup>108</sup> In 1940, Congress amended the FLSA to establish “special industry committees” that would be in charge of determining the application of the minimum wage in Puerto Rico.<sup>109</sup> Further amendments expanded the scope of the FLSA to cover retail<sup>110</sup> and allowed retail employers to hire full-time students.<sup>111</sup> In 1996, Congress further amended the FLSA by creating a youth subminimum wage.<sup>112</sup>

The youth subminimum wage that Congress included in the 1996 amended version of the FLSA allowed employers to pay a minimum

105. See Michael Oleaga, *Puerto Rico Debt Crisis: PROMESA Bill Passes House, Allows Provision Cutting Minimum Wage to \$4.25 for Young Workers*, LATIN POST (June 10, 2016, 6:45 AM), <http://www.latinpost.com/articles/121440/20160610/puerto-rico-debt-crisis-promesa-bill-passes-house-and-cuts-minimum-wage-to-4-25-for-young-workers.htm> (noting that Congresswoman Norma Torres suggested an amendment to strike the minimum wage provision in its entirety). Torres’s recommendation was rejected by vote of 225 to 196. *Id.*

106. See Valentin, *supra* note 101.

107. See, e.g., 29 U.S.C. §§ 201, 206(a) (2012).

108. See *History of Changes to the Minimum Wage Law*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/minwage/coverage.htm> (last visited Aug. 1, 2017) (“Early in the administration of the FLSA, it became apparent that application of the statutory minimum wage was likely to produce undesirable effects upon the economies of Puerto Rico and the Virgin Islands if applied to all of their covered industries.”).

109. See *id.* (explaining that these special industry committees would “determine, and issue through wage orders, the minimum wage levels applicable” and that the determined rates “could be less than the statutory rates applicable elsewhere in the United States”). For a detailed discussion about the history of the application of the FLSA to Puerto Rican jobs, see Alan B. Krueger, *The Effect of the Minimum Wage When It Really Bites: A Reexamination of the Evidence from Puerto Rico 4-7* (Nat’l Bureau of Econ. Research, Working Paper No. 4757).

110. See *History of Changes to the Minimum Wage Law*, *supra* note 108 (explaining that the FLSA’s amendments of 1961 significantly broadened the application and scope of the statutory minimum wage to include areas such as retail and service establishments).

111. See *id.* (explaining that retail employers could employ “fulltime students at wages of no more than 15 percent below the minimum with proper certification from the Department of Labor” and further amendments extended the “fulltime student certification program to covered agricultural employers and to institutions of higher learning”).

112. *Id.* (noting that the 1996 amendments “established a youth sub minimum wage of \$4.25 an hour for newly hired employees under the age 20 during their first 90 consecutive calendar days after being hired by their employer”).

wage of \$4.25 to employees who were twenty years old or younger.<sup>113</sup> One of the rationales for this youth subminimum wage is that younger people tend to work for extra spending money.<sup>114</sup> The FLSA's subminimum wage provision applied to employers across the United States and Puerto Rico.<sup>115</sup> There has been disagreement among economists as to whether Puerto Rico should have the same minimum wage as mainland United States.<sup>116</sup> Covered jobs in Puerto Rico continued to apply the federal minimum wage.<sup>117</sup>

PROMESA amends the FLSA's youth subminimum wage provision as applied to Puerto Rican employers.<sup>118</sup> The amendment increases the age covered under the provision from twenty to twenty-five years old.<sup>119</sup> The original age stated in the FLSA, before the amendment, was twenty years old—and it applied to all employers covered by the FLSA irrespective of whether the employer was located in mainland U.S. or Puerto Rico.<sup>120</sup> The rationales that have supported the application of a youth subminimum wage for employees under the age of twenty, however, are not likely to be strong rationales for employees under the age of twenty-five.<sup>121</sup> The amendment also provides that the \$4.25 subminimum wage can only be paid for the first ninety consecutive days after an employee who is under the age of twenty-five is initially

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113. *Id.*

114. See, e.g., Cole Stangler, *Youth Minimum Wage: Nebraska Considers Lower Minimum Pay Rate for Young Workers*, INT'L BUS. TIMES (May 4, 2015, 2:30 PM), <http://www.ibtimes.com/youth-minimum-wage-nebraska-considers-lower-minimum-pay-rate-young-workers-1907608> (suggesting that younger employees work for extra “spending money”). An annual study conducted by the University of Michigan, based on the responses of about 49,000 high school seniors from the classes of 1981 through 2011, found the following:

Most high school seniors spend most of their earnings on clothing, music, hobbies, and leisure activities. Spending on cars comes in second, especially among males. Saving for future education or contributing to help out family needs rank a good deal lower. Over the last three decades there have been only modest changes in these uses of earnings. It remains true that most high school students use the bulk of their earnings for “discretionary” spending.

JERALD G. BACHMAN ET AL., WHAT DO TEENAGERS DO WITH THEIR EARNINGS, AND DOES IT MATTER FOR THEIR ACADEMIC ACHIEVEMENT AND DEVELOPMENT? iv (2014), <http://monitoringthefuture.org/pubs/occpapers/mtf-occ78.pdf>; see also *How Teen Workers Spend Their Money: U-M Study Shows Trends*, INST. FOR SOC. RES. U. MICH. (Feb. 4, 2014), <http://home.isr.umich.edu/releases/how-teen-workers-spend-their-money-um-study-shows-trends>.

115. See *History of Changes to the Minimum Wage Law*, *supra* note 108.

116. See Krugman, *supra* note 48, at A19.

117. See Oleaga, *supra* note 105 (noting that Puerto Rico currently applies a federal minimum wage of \$7.25 an hour).

118. See PROMESA, Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. 549, 586 (2016).

119. *Id.*

120. See 29 U.S.C. § 206(g)(1), (4) (2012).

121. See *infra* Part III.A.

employed.<sup>122</sup> PROMESA's amendment of the FLSA arguably broadens the application of the subminimum wage and makes it applicable to any job, except those listed in the exemptions section of the FLSA.<sup>123</sup>

### III. LEGAL AND SOCIAL CONSEQUENCES OF A YOUTH SUBMINIMUM WAGE

This Part describes the legal problems that PROMESA's youth subminimum wage could potentially create in the future.<sup>124</sup> Allowing employers to pay a subminimum wage to employees under the age of twenty-five may trigger displacements of older employees.<sup>125</sup> PROMESA amends the FLSA; currently the FLSA regulations and sanctions for employers that violate the prohibition on displacement are likely to be inadequate.<sup>126</sup> Subpart B recognizes the plausible benefits of a subminimum wage, but argues that the likely consequences outweigh its benefits.<sup>127</sup> Subpart C argues that the youth subminimum wage may encourage employers to displace older employees, resulting in age discrimination.<sup>128</sup> Subpart C further argues that it may be easier for employers to terminate employees after the ninety-day subminimum wage period is over by using probationary periods as a reason for termination, since these periods can last up to nine months for private sector employers in Puerto Rico.<sup>129</sup> It seems more likely that an employer will abuse the subminimum wage so that the employer will have more money to allocate to other costs.<sup>130</sup> Finally, Subpart C recognizes that the FLSA prohibits an employer from displacing employees who are subject to the youth subminimum wage, but argues that these prohibitions need to be strengthened.<sup>131</sup>

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122. Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. at 586.

123. *See id.* (describing the amendment to the FLSA as applied to Puerto Rico, which fails to provide any limitation on the types of jobs covered by the subminimum wage); *see also* 29 U.S.C. § 213.

124. *See infra* Part III.A.

125. *See* Juan C. Dávila, *PROMESA: Puerto Rico's "Restructure" at \$4.25 an Hour*, HUFFINGTON POST (June 29, 2016), [http://www.huffingtonpost.com/juan-c-davila/promesa-puerto-ricos-rest\\_b\\_10615610.html](http://www.huffingtonpost.com/juan-c-davila/promesa-puerto-ricos-rest_b_10615610.html).

126. *See infra* Part III.C.

127. *See infra* Part III.B.

128. *See infra* Part III.C.1.

129. *See infra* Part III.C.2.

130. *See infra* Part III.C.2.

131. *See infra* Part III.C.

A. *Consequences of PROMESA's Amendment to the FLSA*

Allowing employers to enforce section 403 would trigger a subminimum wage for people under the age of twenty-five.<sup>132</sup> As a result, it may promote age discrimination and displacement of older employees by employers who will want to hire at the subminimum wage rate.<sup>133</sup> A subminimum wage may encourage employers to hire a “younger pool of labor.”<sup>134</sup> Moreover, its application may continue to increase economic instability in Puerto Rico.<sup>135</sup> It may continue to hinder young adults who are part of a society where almost half of the population already lives below the poverty line.<sup>136</sup> Before the enactment of PROMESA, a report published by Puerto Rico showed that its labor participation significantly decreased.<sup>137</sup>

The youth subminimum wage established by the FLSA, to the extent it applies to jobs within the United States, only covers employees who are twenty years old or younger.<sup>138</sup> For years, it has been suggested that one of the rationales for the youth subminimum wage in the United States is that young employees work for extra spending money.<sup>139</sup>

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132. See PROMESA, Pub. L. No. 114-187, sec. 403, § 206(g), 130 Stat. 549, 586 (2016); Dávila, *supra* note 125.

133. See Dávila, *supra* note 125.

134. See Justin Vélez-Hagan, *The Evidence for Lowering the Minimum Wage in Puerto Rico*, HILL (Apr. 19, 2016, 3:01 PM), <http://thehill.com/blogs/congress-blog/economy-budget/276704-the-evidence-for-lowering-the-minimum-wage-in-puerto-rico> (expressing concern about implementing a subminimum wage in Puerto Rico that could “shift [employment] from the currently employed to a younger pool of labor, instead of improving aggregate employment. Given the retracting economy, it may be perfectly reasonable for an employer to say, ‘hey, I can fire this guy and hire an 18 year old for way less’”).

135. See *id.* (comparing Puerto Rico to states in the United States by noting that a subminimum wage in Puerto Rico can have a “counter-effect in Puerto Rico’s labor mobility” because “a U.S.-wide policy leaves employees nowhere else to go to find higher paying work,” while Puerto Ricans can leave the Island altogether).

136. See Brian Chappatta, *Puerto Rico Economy Worsens with Crisis, Most Anywhere You Look*, BLOOMBERG: POL. (Apr. 25, 2016, 9:22 AM), <http://www.bloomberg.com/politics/articles/2016-04-25/puerto-rico-economy-worsens-with-crisis-most-anywhere-you-look> (stating that about 46.2% of the Puerto Rican population is currently living below the poverty line).

137. See ANNE O. KRUEGER ET AL., PUERTO RICO – A WAY FORWARD 6-7 (2015) (attributing low labor participation to the fact that employees are “disinclined to take up jobs because the welfare system provides generous benefits that often exceed what minimum wage employment yields”). The total salary in the report was based on a minimum wage of \$8.50 or less. *Id.* at 6; see also Nick Timiraos, *How the Puerto Rico Bill Attacks the Minimum Wage*, WALL ST. J.: ECON. BLOG (May 25, 2016, 8:15 AM), <http://blogs.wsj.com/economics/2016/05/25/how-the-puerto-rico-bill-attacks-the-minimum-wage> (stating that in 2010, “[r]oughly one-third of workers earned the minimum wage”).

138. 29 U.S.C. § 206(g)(4) (2012); see U.S. DEP’T LABOR, *Questions and Answers About the Minimum Wage*, <https://www.dol.gov/whd/minwage/q-a.htm> (last visited Aug. 1, 2017) (explaining which enterprises are subject to the federal minimum wage).

139. See BACHMAN ET AL., *supra* note 114, at 11-12. *But see* Stangler, *supra* note 114.



However, this rationale may not be as applicable as applied to individuals who are older than twenty years old.<sup>140</sup> For example, many individuals who are more than twenty years old are students, recent graduates, or have families of their own with no external support.<sup>141</sup> This Note therefore argues that legislation needs to be enacted to add exemptions to PROMESA for young adults who fall within these categories.<sup>142</sup> Raising the age of coverage under the youth minimum wage may be a concession that Puerto Rican citizens must take; however, it appears those risks may outweigh the benefits.<sup>143</sup>

Moreover, there has been tremendous opposition to PROMESA by residents of the Island.<sup>144</sup> Public resistance has been rapidly increasing,<sup>145</sup> and there is tension between government offices and Puerto Rican citizens.<sup>146</sup> It has also been predicted that opposition to PROMESA might increase since Ricardo Rosselló, who is not a supporter of PROMESA, was elected Governor.<sup>147</sup> In fact, Roselló has created a committee that will be tasked with drafting recommendations on legislation to increase the minimum wage for private employers.<sup>148</sup>

140. See Stangler, *supra* note 114 (“[Y]oung people aren’t always just working for extra spending money . . .”).

141. See Nelson Denis, *Orwell in Puerto Rico: Congress ‘Promises’ a New Dictatorship*, NATION (Apr. 15, 2016), <https://www.thenation.com/article/orwell-in-puerto-rico-congress-promises-a-new-dictatorship> (stating that many of the over 200,000 young adults in Puerto Rico are currently paying student loans).

142. See *infra* Part IV.B.

143. See *infra* Part III.B.

144. See Jhoni Jackson, *Young Boricuas Have Been Camped Out for a Month Protesting PROMESA: Meet the Faces Behind the Movement*, REMEZCLA (July 27, 2016, 5:43 PM), <http://remezcla.com/features/culture/campamento-contra-la-junta-puerto-rico> (describing “Campamento Contra La Junta,” a group composed of individuals who oppose the board established by PROMESA, and its members who protested while living in tents outside the United States District Court of Puerto Rico in San Juan for over a month).

145. See *Fiscal Board Protestors, Riot Police Clash on San Juan Bridge*, CARIBBEAN BUS. (Aug. 31, 2016), <http://caribbeanbusiness.com/protestors-demonstrate-against-federal-fiscal-board> (describing the first protest against the board in Puerto Rico, which resulted in a clash between officers from the Tactical Operations force and 300 activists); Yara Simón, *As Soon as Obama Signed PROMESA Budget Bill, Puerto Ricans Hit the Streets to Protest*, REMEZCLA (June 30, 2016, 7:22 PM), <http://remezcla.com/lists/culture/obama-signed-promesa-into-law>.

146. See *Fiscal Board Protestors, Riot Police Clash on San Juan Bridge*, *supra* note 145 (noting that the Puerto Rico Chamber of Commerce filed a temporary restraining order against the PROMESA protestors).

147. See Tom Howell Jr., *Island Debt Package Faces Bipartisan Criticism*, WASH. TIMES (June 8, 2016), <http://www.washingtontimes.com/news/2016/jun/8/puerto-rico-debt-restructuring-package-faces-bipar>. Ricardo Rosselló has been elected as the new Governor of Puerto Rico. See *id.* (noting that Puerto Ricans might be “send[ing a] . . . message” when Ricardo Rosselló was elected during the Island’s primary election); see also *Puerto Rico: Pro-Statehood Candidate Ricardo Rosselló Wins Governor Race*, NBC NEWS (Nov. 8, 2016, 8:11 PM), <http://www.nbcnews.com/news/latino/puerto-rico-pro-statehood-candidate-ricardo-rossell-wins-governor-race-n680576>.

148. *Gobernador Firma Orden Ejecutiva Para Aumentar Salario Mínimo de Empleados del*

Even members of the federal judiciary and local Puerto Rican politicians have questioned PROMESA.<sup>149</sup> Judge Juan R. Torruella encouraged “peaceful ‘civil resistance’” to oppose the board.<sup>150</sup> Despite not always being peaceful, there has indeed been resistance as protestors continue to express their opposition to PROMESA and its board.<sup>151</sup> These protestors claim that their resistance against PROMESA is projected to continue indefinitely.<sup>152</sup>

In addition to the social resistance it has spurred, PROMESA may also impact enterprises that are not covered by the FLSA.<sup>153</sup> Title 29, section 250(a) of the Laws of Puerto Rico Annotated (“section 250(a)”) addresses Puerto Rico’s minimum wage.<sup>154</sup> Section 250(a) provides the legal protection of local enterprises not covered by federal law.<sup>155</sup> Employers not covered by the FLSA are allowed to pay their employees a minimum wage of approximately \$5.08, which is 70% of the federal minimum wage.<sup>156</sup> If employers covered by the FLSA are allowed to pay

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*Gobierno [Governor Signs Order to Increase Minimum Wage of Government Employees]*, MICROJURIS P.R. (Mar. 2, 2017), <https://aldia.microjuris.com/2017/03/02/gobernador-firma-orden-ejecutiva-para-aumentar-salario-minimo-de-empleados-del-gobierno> (stating that the committee will have ninety days, from the day that the Governor signed the executive order, to create a plan on how to implement legislation geared at increasing the minimum wage for the private sector). *But see* PROMESA, Pub. L. No. 114-187, § 4, 130 Stat. 549, 551 (2016) (to be codified at 48 U.S.C. § 2103) (“The provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act.”).

149. *See* Judge R. Torruella’s *Controversial Keynote Speech at the Puerto Rico Bar Association Convention 2016*, MICROJURIS P.R. (Sept. 27, 2016), <https://aldia.microjuris.com/2016/09/27/video-judge-juan-r-torruellas-controversial-keynote-speech-at-the-puerto-rico-bar-association-convention-2016-english-subtitles>. When discussing his personal views on PROMESA, he asked the rhetorical question “Promise of what, to whom? . . . a seven-person ‘Junta’ politically chosen by Congress and President Obama with omnipotent powers over the government democratically elected by the People of Puerto Rico . . .” *Id.*; Ed Morales, *The Technocratic Takeover: Will the Evisceration of Democracy in Puerto Rico Be Allowed to Proceed Unnoticed?*, JACOBIN MAG. (Sept. 13, 2016), <https://www.jacobinmag.com/2016/09/puerto-rico-promesa-board-obama-trump> (noting that local Puerto Rican politicians “have threatened to formally protest the inclusion of the three most objectionable GOP appointees”).

150. *See* Cindy Burgos Alvarado, *Judge Torruella Calls for ‘Economic Boycott’ and ‘Civil Resistance’ Against Fiscal Board*, CARIBBEAN BUS. (Sept. 11, 2016), <http://caribbeanbusiness.com/judge-torruella-requests-economic-boycott-and-civil-resistance-against-fiscal-board> (quoting Judge Torruella when he suggested an economic boycott as a form of peaceful protest).

151. *See, e.g.*, Cornwell & Brown, *supra* note 96.

152. *See* Jackson, *supra* note 144 (quoting protestors who claimed that “[t]heir stay, like the federally imposed fiscal board they’re protesting, is indefinite”).

153. *See* P.R. LAWS ANN. tit. 29, § 250(a) (2017).

154. *Id.*

155. *Id.* (“Those enterprises or activities that do not meet the criteria of the Federal Fair Labor Standards Act, and are therefore exempted from the federal minimum wage, shall pay a minimum wage equivalent to seventy percent . . . of the prevailing minimum wage.”).

156. *Id.* This number is the total of the federal minimum wage, which is \$7.25, multiplied by 70%. *See id.*; *see also* *Minimum Wage Laws in the States*, U.S. DEP’T OF LABOR (Jan. 1, 2017), <https://www.dol.gov/whd/minwage/america.htm#Puerto>.

the youth subminimum wage of \$4.25, then local enterprises not covered by the FLSA could potentially pay a minimum wage equivalent to 70% of this prevailing subminimum wage to people under the age of twenty-five.<sup>157</sup> This subminimum wage would be significantly less than what employers not covered by the FLSA are currently allowed to pay to employees who are twenty years or older.<sup>158</sup> Potentially, employers not covered by the FLSA will now be able to pay a minimum wage of roughly \$2.97.<sup>159</sup>

In practice, this may become problematic since there is no explicit language in either the FLSA or PROMESA's amendments addressing sanctions against employers not covered by the FLSA, who might displace employees in order to hire an individual at the calculated subminimum wage.<sup>160</sup> Although Puerto Rican law includes a penalties section, the FLSA should also include a penalty provision for employers who violate the Puerto Rican law.<sup>161</sup> Therefore, section 206(g)(2) of the FLSA may also affect jobs that are not covered by federal minimum wage laws.<sup>162</sup> Despite congressional attempts to address the issue of employee displacement by explicitly prohibiting it, the prohibition seems too narrow.<sup>163</sup> It appears as though Congress and Puerto Rico's legislature failed to account for how amendments to the FLSA could affect enterprises not covered by the FLSA.<sup>164</sup> Legislation should be enacted to include regulations and prohibitions against enterprises not covered by the FLSA, but which must pay a minimum wage "equivalent to seventy percent of the prevailing minimum wage."<sup>165</sup> If these regulations and prohibitions are included within the amendments to the

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157. See *Minimum Wage Laws in the States*, *supra* note 156.

158. See *supra* notes 153-57; *infra* 159-60 and accompanying text.

159. This number is the total of the federal youth subminimum wage, as it applies to Puerto Rico (\$4.25), multiplied by 70%. See *supra* note 156 and accompanying text. It would be the lowest state minimum wage followed by Georgia and Wyoming, both having a state minimum wage of \$5.15. See *State Minimum Wages: 2017 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (Jan. 5, 2017), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#1>.

160. See 29 U.S.C. §§ 215, 216 (2012); *supra* notes 132-37 and accompanying text. See generally PROMESA, Pub. L. No. 114-187, §§ 101, 402-04, 602, 130 Stat. 549, 553, 586-87, 609 (2016).

161. See P.R. LAWS ANN. tit. 29, § 250(g) (2010) (providing that any person who violates any provision of chapter 29 will be considered to have violated section g); *infra* Part IV.C. This can be done by simply adding one subsection to the FLSA's penalties section. See *infra* note 271 and accompanying text.

162. See *State Minimum Wages: 2017 Minimum Wage by State*, *supra* note 159 ("Employers not covered by the FLSA will be subject to a minimum wage that is at least 70 percent of the Federal minimum wage or the applicable mandatory decree rate of \$5.08, whichever is higher.").

163. See *infra* Part IV.C.

164. See *supra* notes 153-60 and accompanying text.

165. See *supra* notes 153-60; *infra* Part IV.C.

FLSA, then arguably a cause of action would arise out of PROMESA, which would be covered by its jurisdictional section.<sup>166</sup>

### B. *Benefits of a Subminimum Wage*

The benefits of a lower minimum wage cannot be overlooked.<sup>167</sup> Before the enactment of PROMESA, the Puerto Rican government drafted reports expressing concerns about the negative consequences that would result when applying the United States minimum wage to Puerto Rico.<sup>168</sup> The main argument against imposing a higher minimum wage is that it would cause a decrease in hiring, which would lead to a decrease in labor participation.<sup>169</sup> However, this argument is not compelling because the consequences of a lower subminimum wage outweigh its benefits.<sup>170</sup>

Currently, in Puerto Rico, a minimum wage earner earns about the same as the median wage earner.<sup>171</sup> Moreover, several reports showed that a minimum wage earner could potentially earn less than an unemployed individual receiving federal assistance.<sup>172</sup> Essentially, this results in a disparity among minimum wage earners and unemployed individuals.<sup>173</sup> This disparity may continue to increase if younger workers are subject to a subminimum wage.<sup>174</sup> Even without these considerations, Puerto Rico currently lacks strong labor participation.<sup>175</sup>

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166. PROMESA, Pub. L. No. 114-187, § 106, 130 Stat. 549, 562 (2016) (to be codified at 48 U.S.C. § 2126) (“[A]ny action . . . otherwise arising out of this Act, in whole or in part, shall be brought in a United States district court for the covered territory . . .”).

167. See Krugman, *supra* note 48, at A19.

168. See *id.* (arguing that sharing the same minimum wage as in mainland United States would increase costs and that a higher minimum wage would decrease productivity, which could be attributed to the high amount of funding that Puerto Rico receives for federal programs and outmigration).

169. See KRUEGER ET AL., *supra* note 137, at 6-7 (explaining that another factor that could cause a decrease in hiring and labor participation would be that employees would be less motivated to seek jobs because of the accessibility to welfare in Puerto Rico).

170. See *id.* at 7 (comparing an estimate of incomes between a household of three people receiving welfare, which could receive up to \$1743 per month while a minimum wage earner could receive up to \$1159 per month).

171. See Oren Cass, *Help Wanted in Puerto Rico, A Proposal from Senator Marco Rubio Could Revive the Island’s Beleaguered Labor Market*, CITY J. (Dec. 5, 2016), <http://www.city-journal.org/html/help-wanted-puerto-rico-14885.html> (noting that a Puerto Rican minimum wage earner can potentially earn significantly less than an individual receiving federal benefits and that currently a minimum wage earner earns \$7.25 per hour, while a median-wage earner earns \$9.61 per hour).

172. *Id.*

173. *Id.*

174. See *infra* Part III.C.

175. See Cass, *supra* note 171.

Thus, the plausible benefits of a subminimum wage are outweighed by its consequences.<sup>176</sup>

*C. Lack of Regulation of Employers Who Might Displace Current Employees*

PROMESA amends the FLSA's subsection regarding employers who displace employees in order to hire others under the youth subminimum wage.<sup>177</sup> The FLSA's section 206(g)(4) incorporates section 215(a)(3) of PROMESA.<sup>178</sup> However, these sections do not provide for any sanctions or penalties against employers who violate them.<sup>179</sup> In contrast, section 216 of the FLSA establishes various penalties against employers who violate section 215 generally.<sup>180</sup> Although section 216 establishes several penalties that must be enforced against an employer who violates section 215(a)(3), these penalties are inadequate.<sup>181</sup> They are flawed because section 215(a)(3) usually only

176. See *infra* Part III.C.

177. See 29 U.S.C. § 215(a)(3) (2012); PROMESA, Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. 549, 586 (2016).

178. PROMESA, Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. at 586 (“Any employer who violates this subsection shall be considered to have violated section 15(a)(3) . . .”). The specific language of section 215(a)(3) is the following:

[T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

179. See *id.* §§ 206, 215(a)(3).

180. The FLSA reads as follows:

(a) Fines and imprisonment. Any person who willfully violates any of the provisions of section 215 . . . shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 15(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

*Id.* § 216(a)–(b).

181. See *supra* note 178 and accompanying text.

applies to retaliation claims.<sup>182</sup> Moreover, section 216(a) creates criminal penalties for employers, which imposes a heavy burden on an employee seeking relief under such section.<sup>183</sup> Providing a remedy for retaliation claims is inadequate within the context of PROMESA's youth subminimum wage.<sup>184</sup> It is unlikely that every case will be retaliatory, making it difficult for an employee in this situation to prove the elements of a retaliation claim and obtain relief.<sup>185</sup>

Moreover, employers are likely to be encouraged to displace employees, particularly older employees, in order to avoid having to provide good cause for termination.<sup>186</sup> Even though employers cannot technically displace employees for purposes of hiring individuals at the wage authorized,<sup>187</sup> there are many employees who are unprotected by section 403, especially those who are not unionized.<sup>188</sup> At this point, the tangible implications of PROMESA's amendment to the FLSA are unknown, but the various gaps in the law must be addressed.<sup>189</sup>

Subpart 1 discusses how the new youth subminimum wage may encourage employers to displace or terminate older employees.<sup>190</sup> It also examines current prohibitions against these displacements and argues that they are insufficient.<sup>191</sup> Subpart 2 considers the overlap between probationary periods and the amount of time that employers may be allowed to pay the subminimum wage to employees who are initially employed.<sup>192</sup> Subpart 2 also considers how employers might take advantage of probationary periods to avoid providing good cause for termination.<sup>193</sup>

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182. Most of the cases involving section 215(a)(3) of the FLSA are cases involving retaliation claims. *See, e.g.,* *Conner v. Schnuck Mkts.*, 121 F.3d 1390, 1393-94, 1398-99 (10th Cir. 1997) (holding that in the context of a claim for retaliation under 29 U.S.C. § 215(a)(3), plaintiff failed to produce sufficient evidence to survive a motion for summary judgment); *Cordero v. Turabo Med. Ctr. P'ship*, 175 F. Supp. 2d 124, 127-28 (D.P.R. 2001) (holding that a claim for retaliation under 29 U.S.C. § 215(a)(3) must show that the employee engaged in a protected activity).

183. *See* 29 U.S.C. § 216(a) (requiring an individual who violates the subsection to act willfully and imposing a fine, imprisonment, or both).

184. *See infra* Part IV.C.

185. *See infra* Part IV.C. This is particularly true when considering that employers may fire employees while on probationary periods. *See infra* note 210 and accompanying text.

186. *See* Dávila, *supra* note 125.

187. *See id.*

188. *See id.*

189. *See* Walsh, *supra* note 8, at 4 ("No one knows yet how intrusive federal oversight will be.").

190. *See infra* Part III.C.1.

191. *See infra* Part III.C.1.

192. *See infra* Part III.C.2.

193. *See infra* Part III.C.2.

### 1. Discrimination Based on Age

Enforcement of this subminimum wage may promote age discrimination.<sup>194</sup> It seems evident that employers will benefit economically if they can pay lower wages to people under the age of twenty-five, as opposed to having to pay the regular minimum wage to older employees.<sup>195</sup> Thus, regulations and sanctions against employers need to be strengthened.<sup>196</sup> Although PROMESA's amendments to the FLSA also incorporate provisions that prohibit employers from displacing employees, employers can circumvent these prohibitions when displacing older workers.<sup>197</sup> It will not be difficult for Puerto Rican employers to displace older employees and justify their decisions to do so based on economic reasons.<sup>198</sup>

This Note recognizes that there are safeguards under Puerto Rican local laws to prevent this issue.<sup>199</sup> Section 185(c) of the Puerto Rico Laws Annotated provides, in relevant part, that when an employer discharges an employee because of reduction in profits or reorganization then the following duty attaches:

[I]t shall be the duty of the employer to retain those employees of greater seniority on the job with preference, provided there are positions vacant or filled by employees of less seniority in the job within their occupational classification which may be held by them, it being understood that preference shall be given to the employees discharged in the event that within the six (6) months following their layoff the employer needs to employ a person in like or similar work to

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194. See *Dávila*, *supra* note 125 (suggesting that the subminimum wage might impact older employees).

195. See *id.*

196. See *id.* (suggesting that it will be simple for employers to get around displacing employees).

197. Cases from various states demonstrate that employers could proffer reasons, in the context of Age Discrimination in Employment Act ("ADEA") claims, as to why older employees were terminated. See, e.g., *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986) (affirming the lower court's decision granting summary judgment in favor of the employer, and finding that the employer did not discriminate when it laid off an older employee for economic reasons because the employer also laid off another employee who was younger and was paid more than plaintiff); *Duncan v. El Paso Prod. Co.*, 1985 U.S. Dist. LEXIS 13423, at \*3-4 (Tex. Nov. 27, 1985) (holding that economic necessity was a reasonable factor other than age to lay off an ADEA plaintiff). Employers may also displace or terminate younger employees simply by stating that they have not been successful during their probationary periods. See *infra* notes 210, 276 and accompanying text. This argument is strengthened by the fact that probationary periods in Puerto Rico can last up to nine months. See *infra* notes 210, 276 and accompanying text.

198. See *Dávila*, *supra* note 125; *infra* notes 201-03 and accompanying text.

199. See P.R. LAWS ANN. tit. 29, § 185c (1985).

that which said employees were doing at the time of their discharge, within their occupational classification . . . .<sup>200</sup>

In 1996, the First Circuit clarified this provision in *Pages-Cahue v. Iberia Lineas Aereas de España*.<sup>201</sup> Even with the safeguards provided by Puerto Rican laws, the Court in *Pages-Cahue* agreed with other circuits that when an employer is reducing its labor force, it is not obligated to offer any transfers or relocations.<sup>202</sup> Thus, if employers find an economic reason or argue that they are reducing their labor force, then they may displace older employees and unfairly benefit from the youth subminimum wage.<sup>203</sup> Therefore, this Note proposes enacting legislation that strengthens regulation of employers, and creates exemptions to PROMESA's amendment to the FLSA.<sup>204</sup>

## 2. First Ninety Consecutive Days: A Reasonable Time or an Escape Hatch for Employers?

Employers might avoid terminating employees since it is often undesirable to have a high turnover rate.<sup>205</sup> One of the primary reasons employers are likely to avoid turnover is the high cost associated with finding a replacement.<sup>206</sup> However, this argument is inapplicable when dealing with employers covered by PROMESA.<sup>207</sup> The argument particularly fails when the recent extension of probationary periods in Puerto Rico is considered.<sup>208</sup> The application of the youth subminimum wage during the first ninety consecutive days of an employee's employment is likely to clash with probationary periods.<sup>209</sup> It is

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200. *Id.*

201. 82 F.3d 533, 540 (1st Cir. 1996) (noting that the provision was subject to two other provisions that stated the following: "seniority need not be followed where 'there is a clear and conclusive difference in favor of the efficiency or capacity of the workers compared'" and the other provision related specifically to an employer who had multiple offices operating independently).

202. *See id.* at 539 (stating that employers who are "conducting a reduction in force face no obligation to offer 'lower echelon, poorer paying jobs in the restructured enterprise' to all older employees").

203. *See id.* at 539-40; Dávila, *supra* note 125.

204. *See infra* Part IV.

205. *See, e.g., How to Reduce Employee Turnover*, WALL ST. J., <http://guides.wsj.com/management/recruiting-hiring-and-firing/how-to-reduce-employee-turnover> (last visited Aug. 1, 2017) (explaining that generally it costs employers double the amount of an employee's salary to replace her position).

206. *See id.*

207. *See infra* notes 211-13 and accompanying text.

208. *See infra* notes 211-13, 277-79 and accompanying text.

209. *See* P.R. LAWS ANN. tit. 29, § 185h (1998); *see also* Mariela Rexach et al., *Puerto Rico Approves Major Reform of Its Employment Laws*, LITTLER (Jan. 26, 2017), <https://www.littler.com/publication-press/publication/puerto-rico-approves-major-reform-its-employment-laws> (stating that probationary periods can last up to nine months for all other employees that are not executives).



imperative to implement sanctions in order to regulate employers who may try to put employees that qualify for the subminimum wage on probationary periods, since these periods have been recently changed to last up to nine months.<sup>210</sup> With longer probationary periods, employers are able to displace employees after the ninety days of the subminimum wage are over, without having to show good cause.<sup>211</sup> This provides an easy way for employers to terminate employees for an alleged unsuccessful probationary period and thus avoid having to provide good cause.<sup>212</sup> Employees in probationary periods need to be protected by regulations directed at employers who try to displace them after the probationary period is over.<sup>213</sup>

#### IV. A CALL FOR AN AMENDMENT

Congress should amend the provision prohibiting displacement of employees so that it accounts for the negative effects that the youth subminimum wage will create.<sup>214</sup> This Part analyzes PROMESA's legislative history, which demonstrates a strong intent against the enactment of section 403.<sup>215</sup> Subpart A examines post-enactment proposals that go against PROMESA's wage provision, which also demonstrate strong opposition to the provision.<sup>216</sup> Additionally, this Subpart argues that it is likely that Congress might adopt other proposed amendments to section 403.<sup>217</sup> Subpart B proposes amendments to section 206(g)(2) of the FLSA—amended by section 403—explains why amendments are necessary, and specifies which employers should be covered by the amendments.<sup>218</sup> Subpart B also suggests the inclusion of exemptions to the current law, which would exempt individuals who have dependents or who are pursuing higher education.<sup>219</sup> Alternatively, Subpart C recommends various amendments to broaden the scope of current penalties by suggesting a list of specific violations, and

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210. See Rexach et al., *supra* note 209; see also *House Approves Labor Reform Amid Controversy*, CARIBBEAN BUS. (Jan. 14, 2017), <http://caribbeanbusiness.com/house-approves-labor-reform-amid-controversy> (explaining the effects of Puerto Rico's newly enacted labor reform, which includes an increase in the length of probationary periods to up to nine months).

211. See *infra* Part IV.C.

212. See *infra* Part IV.C.

213. See Dávila, *supra* note 125 (foreseeing violations against PROMESA's limited restriction on displacement by employers and stating that soon "there will be a job opening starting immediately at \$4.25 an hour"); *infra* Part IV.C.

214. See *infra* Part IV.C.

215. See *infra* Part IV.A.

216. See *infra* Part IV.A.

217. See *infra* Part IV.A.

218. See *infra* Part IV.B.

219. See *infra* Part IV.B.

different degrees of penalties that account for the first offense and ongoing offenses.<sup>220</sup>

*A. Legislative History and Other Proposed Solutions Demonstrate Strong Sentiment Against the Enactment of Section 403*

Although PROMESA's main purpose is to aid Puerto Rico in achieving fiscal responsibility, it also contains a provision related to the federal minimum wage.<sup>221</sup> This Note's solution includes, among other recommendations, a closer look at the legislative history of PROMESA.<sup>222</sup> The legislative history demonstrates that many members of Congress opposed the bill during debates, while other members proposed amendments to strike section 403 in its entirety.<sup>223</sup> Even members of Congress who supported PROMESA did so with outspoken opposition to the youth subminimum wage provision.<sup>224</sup> PROMESA was enacted in order to aid Puerto Rican municipalities to balance their debt—not to regulate labor.<sup>225</sup>

Newly proposed legislation further demonstrates disagreement with the way that section 403 is currently drafted.<sup>226</sup> In December 2016, U.S. Senator Marco Rubio introduced legislation called the Economic Mobility for Productive Livelihoods and Expanding Opportunity Act of 2016 ("EMPLEO").<sup>227</sup> EMPLEO, Spanish for job, seeks to amend subsection 206(a) of the FLSA, which is the same section—but different subsection—that PROMESA currently amends.<sup>228</sup> Rubio proposes an

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220. See *infra* Part IV.C.

221. See *supra* Part III.

222. See *infra* notes 223-35 and accompanying text.

223. See H.R. REP. NO. 114-602, pt. 1, at 117-18 (2016); Press Release, Norma Torres, *supra* note 92; Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS (June 30, 2016, 1:39 PM), <http://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741>.

224. See, e.g., Guadalupe, *supra* note 223 (quoting Representative Nydia Velázquez's opposition to PROMESA's labor provisions "Am I angry that the bill contains labor provisions that are not only obnoxious, but counterintuitive? Yes"). Representative Raul Labrador, who took part in drafting PROMESA, stated the following: "I don't like it but it was something that was necessary . . ." *Id.*; see Linda Sánchez Statement on Puerto Rico, (June 9, 2016), <https://lindasanchez.house.gov/media-center/press-releases/linda-s-nchez-statement-puerto-rico> (noting that Congresswoman Linda Sánchez supported PROMESA as a way of providing Puerto Rico relief from its financial crisis although she disagreed "with the bill's language on minimum wage, overtime protection, and earned retirement pension benefits").

225. PROMESA, Pub. L. No. 114-187, § 101, 130 Stat. 549, 553 (2016) (to be codified at 48 U.S.C. § 2121).

226. See Economic Mobility for Productive Livelihoods and Expanding Opportunity Act, S. 3503, 114th Cong. (2016).

227. See *id.*

228. See *id.*

“opt-in” program in which employers who join will be able to pay a minimum wage of five dollars.<sup>229</sup> In theory, Rubio’s prediction is that employers will be motivated to “opt-in” because paying a five-dollar minimum wage will allow them to allocate funds to other costs.<sup>230</sup> The proposed legislation aims to create a win-win situation for both employer and employee.<sup>231</sup> Employees working for employers that participate in the “opt-in” program will qualify to receive a wage subsidy.<sup>232</sup> However, only employees who earn less than ten dollars per hour are eligible for this wage subsidy.<sup>233</sup> Although Rubio’s proposal also advocates for a subminimum wage—although not for young workers—it acknowledges that PROMESA’s subminimum wage is below the threshold of sustainability.<sup>234</sup> This Note supports portions of Rubio’s legislation by adopting, to a certain extent, some of its proposals.<sup>235</sup>

### B. Amendments to Section 403

Members of Congress and Puerto Ricans alike have opposed section 403.<sup>236</sup> Currently, Puerto Rico’s labor participation rate is worrisome.<sup>237</sup> Allowing a subminimum wage for younger employees will likely result in legal and social consequences for Puerto Rico.<sup>238</sup> If the youth subminimum wage is enforced, the labor force participation will continue to decrease because employees have little incentive to work, since living off of welfare pays more than the current wages.<sup>239</sup> By 2050, the Puerto Rican population is expected to drop by thousands of citizens.<sup>240</sup> Employers who are subject to the federal minimum wage will

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229. See Kevin Derby, *Marco Rubio Brings Back EMPLEO Act to Help Puerto Rico’s Economy*, SUNSHINE ST. NEWS (Jan. 6, 2017, 1:15 PM), <http://www.sunshinestatenews.com/story/marco-rubio-brings-back-empleo-act-help-puerto-ricos-economy> (explaining the bill introduced by Senator Marco Rubio).

230. See *id.*

231. This win-win scenario is implied in the goals of the bill, which states, “[a] bill [t]o decrease the cost of hiring, and increase the take-home pay of, Puerto Rican workers.” See S. 3503.

232. See Derby, *supra* note 229 (defining a wage subsidy as a raise of up to \$2.50 for employees who earn less than ten dollars per hour only if her employer opted-in).

233. See *id.*

234. See S. 3503.

235. See *infra* Part IV.C (using some of Rubio’s proposal as a model to draft a solution).

236. See *supra* Part IV.A.

237. See *Labor Participation Rate Rises 1.1% for July, Estimated at 40.5%*, CARIBBEAN BUS. (Aug. 19, 2016), <http://caribbeanbusiness.com/labor-participation-rate-rises-1-1-for-july-estimated-at-40-5>; *supra* notes 137, 169 and accompanying text.

238. See Walsh, *supra* note 65, at B3 (noting that the ex-Governor of Puerto Rico referred to the current situation in the Island as an “economic and humanitarian crisis”); *supra* Part III.A.

239. See *supra* note 137 and accompanying text.

240. See *International Data Base*, U.S. CENSUS BUREAU, <http://www.census.gov/population/>

likely benefit from the youth subminimum wage.<sup>241</sup> Enforcing the youth subminimum wage may continue to promote emigration of young adults.<sup>242</sup>

The current minimum wage is approximately “77 percent of the median wage.”<sup>243</sup> Enforcing a youth subminimum wage is likely to decrease their participation in the labor market.<sup>244</sup> As it is currently drafted, employers who are subject to the FLSA will be able to adopt the subminimum wage, subject to the Governor’s approval.<sup>245</sup> Employers may now be implicitly allowed to hire younger employees at the youth subminimum wage while at the same time leaving these younger employees with little to no safeguards.<sup>246</sup> The amendments do not offer an explicit list of jobs that will be affected by the new subminimum wage.<sup>247</sup> Section 403’s amendment to section 206(g)(2) refers to “employers” as opposed to “any employers.”<sup>248</sup> The amendment does

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international/data/idb/region.php?N=%20Results%20&T=13&A=separate&RT=0&Y=2026,2027,2028,2029,2030,2031,2032,2033,2034,2035,2036,2037,2038,2039,2040,2041,2042,2043,2044,2045,2046,2047,2048,2049,2050&R=-1&C=RQ (last visited Aug. 1, 2017).

241. See Dávila, *supra* note 125 (suggesting that PROMESA will deregulate labor by encouraging employers to “hire less full-time workers and young workers need to conform with only working 15 to 35 hours a week with no benefits”).

242. See Alvarez, *supra* note 9, at 22.

243. See Scott Beyer, *Puerto Rico’s Business Climate Problem*, FORBES (May 10, 2016, 5:31 PM), <http://www.forbes.com/sites/scottbeyer/2016/05/10/puerto-ricos-business-climate-problem/#34707f8f2045> (noting that the current minimum wage is \$7.25 and that the minimum wage in most states “is between 40 percent and 50 percent of the median”); Doar, *supra* note 7.

244. However, it can be argued that decreasing the minimum wage applicable in Puerto Rico will be beneficial, as it has been previously shown that having the same minimum wage as the United States has decreased Puerto Rico’s labor participation. Doar, *supra* note 7 (citing a 1990s study that showed that Puerto Rican labor participation decreased about 10% when the same minimum wage as that imposed in the United States was applied to Puerto Rican jobs). *But see* Oleaga, *supra* note 105 (“Lowering wages will only compel more young people to leave and will have a detrimental impact on Puerto Rico’s current and future workforce, its tax base, and ultimately its ability to repay its debt.”).

245. See Juan Felipe Santos & Jeffrey W. Brecher, *Puerto Rico Does Not Have to Comply with DOL’s Final Rule Amending ‘White Collar’ Overtime Regulations, for Now*, JACKSON LEWIS (June 30, 2016), <http://www.jacksonlewis.com/publication/puerto-rico-does-not-have-comply-dol-s-final-rule-amending-white-collar-overtime-regulations-now> (explaining how PROMESA changes the applicability of the FLSA to jobs in Puerto Rico). After the 2016 election, the new Governor of Puerto Rico has released legislation regarding labor reform and has stated that he will not change the federal minimum wage despite PROMESA’s changes. See Valentín, *supra* note 101. *But see* PROMESA, Pub. L. No. 114-187, § 4, 130 Stat. 549, 551 (2016) (to be codified at 48 U.S.C. § 2103) (“The provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act.”).

246. See Dávila, *supra* note 125 (suggesting this type of behavior from employers).

247. See Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. at 586 (listing PROMESA’s amendments to the FLSA without specifying the jobs affected by the amendment).

248. The amended language introduced by PROMESA is the following:

In lieu of the rate prescribed by subsection (a)(1), the Governor of Puerto Rico, subject to the approval of the Financial Oversight and Management Board

not provide a specific reference to particular employers to whom the provision will apply.<sup>249</sup> However, section 206(g)(2) is to work in lieu of section 206(a)(1) when applied to Puerto Rico, but only with regard to the rate prescribed.<sup>250</sup> Since the language of section 206(g)(2) incorporates the language of section 206(g)(1) and how it is to be applied to Puerto Rico, it can be inferred that section 206(g)(2) applies to any employer beyond those listed in the first subsection of section 206.<sup>251</sup> It seems as though the addition of the words “any employer”<sup>252</sup> broadens the law by making it applicable to jobs other than those involving commerce and goods.<sup>253</sup>

Legislation should be enacted to narrow the scope of application of section 206(g)(2) and to establish definite regulations and sanctions for employers who violate this section.<sup>254</sup> In general, section 206(g)(2) of the FLSA is amended by section 403.<sup>255</sup> Because section 206(g)(2) can arguably apply to any employer, the subsection should be amended so as

established pursuant to section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act, may designate a time period not to exceed four years during which employers in Puerto Rico may pay employees who are initially employed after the date of enactment of such Act a wage which is not less than the wage described in paragraph (1). Notwithstanding the time period designated, such wage shall not continue in effect after such Board terminates in accordance with section 209 of such Act.

Pub. L. No. 114-187, sec. 403, § 206(g)(2), 130 Stat. at 586.

249. *Id.*

250. *See id.*

251. Section 206(a) provides a list of the employers to whom this minimum wage applies and states the following:

Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees. Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . .

29 U.S.C. § 206(a) (2012).

252. Section 206(g)(2) of the FLSA, amended by PROMESA, incorporates section 206(g)(1). *See infra* note 254 and accompanying text. The language of section 206(g)(1) is the following:

In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.

*Id.* § 206(g)(1).

253. *See supra* notes 251-52 and accompanying text; *infra* notes 254-56 and accompanying text. The word “any” is limited in scope by the listed exemptions. *See* 29 U.S.C. § 213.

254. *See* Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. 549, 586 (2016); *supra* Part III.C. Legislation may be useful to narrow the language of the provision by specifying how an employer violates the provision as well as establishing monetary penalties against employers who unfairly benefit from the youth subminimum wage. *See infra* Part IV.C. These sanctions may prove more efficient than requiring an employee to show that her employer acted “willfully.” *See infra* notes 276-79 and accompanying text.

255. *See* Pub. L. No. 114-187, sec. 403, § 206(g)(2)-(4), 130 Stat. at 586.

to narrow its application to jobs involving commerce or production of goods for commerce.<sup>256</sup> The following is the proposed subsection for an amendment of the FLSA's section 206(g)(2):

*(g) Newly hired employees who are less than 20 years old.*

*(2) In lieu of the rate prescribed by subsection (a)(1), only employers engaged in commerce or in the production of goods for commerce may pay any employee of such employer, during the first 30 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than \$4.25 an hour.<sup>257</sup>*

The amendment would narrow the language of the subsection so that only certain employers—those involved in commerce or in the production of goods for commerce—may adopt the \$4.25 subminimum wage.<sup>258</sup> It would also shorten the time for this minimum wage from ninety days to thirty days.<sup>259</sup> Alternatively, the provision should remain as it is currently drafted, but it should include exemptions.<sup>260</sup> The exemptions should apply to individuals who are under the age of twenty-five, and are pursuing higher education, paying student loans, or who have dependents.<sup>261</sup> This solution can be adopted by simply including the following subsection:

*(2)(a) Employees within the following categories must be exempted from the subminimum wage:*

*(i) individuals who are twenty-five years old or younger with dependents;*

*(ii) individuals who are twenty-five years old or younger and who are pursuing higher education on a full-time or part-time basis and who are at least fifty percent dependent on their own income; or*

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256. See *infra* note 257 and accompanying text. Each subsection of section 206 addresses a specific employer, which seems as if the employers listed in subsection (a) are not applicable to all the subsections within section 206. Thus, arguably subsection 206(g)(2) may apply to any employee. See Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. at 586.

257. See 29 U.S.C. § 206(a)(1) (2012); Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. at 586; *supra* Part III.C.

258. See *supra* note 257 and accompanying text.

259. See *supra* note 257 and accompanying text.

260. See *infra* note 262 and accompanying text.

261. See Dávila, *supra* note 125 (acknowledging that PROMESA's youth subminimum wage does not take into account individuals under the age of twenty-five who financially support their families and those who are college students); Renée Loth, *Close the 'Subminimum' Wage Loophole*, BOSTON GLOBE (Mar. 3, 2017), <https://www.bostonglobe.com/2017/03/03/close-subminimum-wage-loophole-close-subminimum-wage-loophole/peorwmYduzUKyGVxiq5ZFN/story.html>; Stangler, *supra* note 114 (drawing from Nebraska legislation that “would exempt people who are under 18 and do not have high school diplomas or child dependents from the new wage law”).

(iii) individuals who are twenty-five years old or younger and who are paying student loans.<sup>262</sup>

This alternative takes into account the theory that young workers tend to work for spending money, which is not the case for those in the categories listed above.<sup>263</sup> Moreover, the exemption will also provide a less stringent application of the youth subminimum wage.<sup>264</sup> It is also less likely to negatively affect labor participation.<sup>265</sup> Although there are no guarantees that these exemptions will be successful, they will likely reduce any legal claims arising from the application of the youth subminimum wage.<sup>266</sup>

*C. Legislation Should Be Enacted to Strengthen Sanctions for Employers Who Displace or Act Less Favorably Against Employees After the Subminimum Wage Period Is Over*

In order to avoid displacement of employees after the probationary period or after the subminimum wage period is over, regulations and penalties should be strengthened.<sup>267</sup> As it is currently drafted, PROMESA states that employers may not take any action to displace employees, and if an employer does displace an employee, then the employer will be deemed to have violated section 215(a)(3) of the FLSA.<sup>268</sup> However, PROMESA seems to incorporate penalties that are only triggered in the context of retaliation claims.<sup>269</sup> Thus, this Note proposes a broader approach to the penalties that are to be applied against an employer who violates section 403 or the FLSA's section 206(g)(2)–(4), as amended.<sup>270</sup>

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262. See Dávila, *supra* note 125. For the purposes of this Note, the general definition of dependent is as follows:

A qualifying child or a qualifying relative. Five tests must be met for a child to be [a] qualifying child. The five tests are: [relationship, age, residency, support, and joint return]. Four tests must be met for a person to be [a] qualifying relative. The four tests are: [not a qualifying child test, member of household or relationship test, gross income test, and support test].

*Personal Exemptions and Dependents*, IRS, [https://www.irs.gov/publications/p17/ch03.html#en\\_US\\_2016\\_publink1000170933](https://www.irs.gov/publications/p17/ch03.html#en_US_2016_publink1000170933) (last visited Aug. 1, 2017). For a more in depth definition of who qualifies as a dependent see *id.*

263. See Dávila, *supra* note 125; Stangler, *supra* note 114.

264. See *supra* note 262 and accompanying text.

265. See *supra* note 262 and accompanying text.

266. See *supra* note 262 and accompanying text.

267. See *supra* Part III.C.

268. See 29 U.S.C. § 215(a)(3) (2012); Pub. L. No. 114-187, sec. 403, § 206(g)(2)–(4), 130 Stat. 549, 586 (2016).

269. See *supra* note 182 and accompanying text.

270. See *infra* note 271 and accompanying text. Legislation may be useful to identify when an

To ensure that employers who displace employees to unfairly take advantage of the youth subminimum wage, discriminate, or retaliate are punished, the provision should also include the following subsection:

*4. Any employer who violates section 403 of the Puerto Rico Oversight, Management, and Economic Stability Act or section 206(g)(2) of the Fair Labor Standards Act, as amended by PROMESA, shall be liable for such legal or equitable relief as may be appropriate including, but not limited to, employment, reinstatement, promotion, and the payment of wages lost.*

*(a) An employer violates the sections above if*

*(1) the employer displaces, terminates, demotes, or otherwise adversely affects the terms of employment of any employee in order to unfairly benefit from the youth subminimum wage;*

*(2) shapes its hiring policies in a way that it unfairly benefits from the youth subminimum wage; or*

*(3) terminates an employee after the ninety days period without providing good cause, in writing, for the termination.*

*(b) If an employer is found to have violated these provisions the following additional penalties apply:*

*(1) if it is the first violation, a fee in the amount of \$500 shall be paid to the Secretary of State; or*

*(2) if it is not the first violation, a fee in the amount of \$1000 shall be paid to the Secretary of State.*

*(c) This section also applies to enterprises not covered by the Fair Labor Standards Act, as referenced in section 250(a) of the Title 29 of the Laws of Puerto Rico Annotated.<sup>271</sup>*

This provision incorporates similar language from the current penalties provision of the FLSA, but includes several protections that would be appropriate and would only apply in the context discussed in this Note.<sup>272</sup> Moreover, even if the only other applicable penalties provided in section 216(a) were to be applied, these penalties are still ineffective because of their high burden requiring an employee to show “willfulness.”<sup>273</sup> It may be difficult for an employee to prove that the actions of her employer were willful.<sup>274</sup> Thus, this standard should be relaxed so that employees can readily show that employers displaced

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employer is violating the law, to provide specific penalties to be afforded to an employee challenging her employer’s practices, and to draw a clear distinction between first and second time offenders. *See infra* note 271 and accompanying text.

271. *See* 29 U.S.C. §§ 215(a)(3), (b), 216(b); Pub. L. No. 114-187, 130 Stat. at 586; Empleo Act, S. 3503, 114th Cong. §§ (d)(2), (o) (2016); *infra* note 280 and accompanying text.

272. *See* 29 U.S.C. § 216(b); *supra* note 271 and accompanying text; *infra* note 280 and accompanying text.

273. *See* 29 U.S.C. § 216(a).

274. This section imposes criminal sanctions. *Id.*



them for reasons related to the unfair application of the youth subminimum wage by simply striking the word “willfully.”<sup>275</sup> This will broaden the scope of application of the penalties under section 216 of the FLSA.<sup>276</sup>

It is imperative to introduce sanctions that account for employers who try to put employees that qualify for the subminimum wage on probationary periods, since these periods have been recently changed to last up to nine months—in the private sector.<sup>277</sup> Now, probationary periods exceed the period that employers are allowed to adopt the youth subminimum wage.<sup>278</sup> Thus, there is a greater incentive for employers to displace employees soon after the ninety days of the subminimum wage are over without having to provide good cause.<sup>279</sup> That is why this Note aims to decrease the number of employers who may attempt to unfairly benefit from the subminimum wage by suggesting stronger penalties for employers who displace employees subject to the subminimum wage and by requiring employers to offer good cause in writing.<sup>280</sup> Thus, another regulation should require employers to provide written notice to employees giving a detailed account of the employee’s conduct and actions that led to the termination of her probationary period, particularly if the employer experiences high turnover rates.<sup>281</sup> At the very least, employers should be required to evaluate individuals within the first thirty days of employment as opposed to waiting the full ninety days, when probationary periods are not nearly over.<sup>282</sup>

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275. *Id.*

276. *See supra* notes 274-75 and accompanying text.

277. In 2017, the newly elected Governor of Puerto Rico introduced a labor reform that changed the length of probationary periods, which could last up to three months, and now can last up to twelve months. *See* P.R. LAWS ANN. tit. 29, § 185(h) (1998); *see also* CARIBBEAN BUS., *supra* note 210 (explaining the effects of Puerto Rico’s newly enacted labor reform, which include an increase in the length of probationary periods).

278. *See supra* note 210 and accompanying text.

279. *See supra* Part III.C.2.

280. *See supra* Part IV.

281. *See, e.g.*, MASS. GEN. LAWS ch. 31, § 34 (2012) (outlining a Massachusetts law that recommends that when employer’s end an employee’s probationary period the employer may “give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory”). Legislation may be useful to create an effective regulatory system for employer’s who try to displace employees in order to unfairly benefit from the subminimum wage. *See* Dávila, *supra* note 125; *supra* note 271 and accompanying text.

282. *See* Nancy Yaffe, *Given California’s Version of the ACA, Should Probation Be 60 or 90 Days?*, FOX ROTHSCHILD LLP (Dec. 17, 2014), <https://californiaemploymentlaw.foxrothschild.com/tags/probationary-period> (suggesting a similar solution to apply to employers in California in the context of providing new hires with healthcare benefits by evaluating them “within the first 30 days, rather than waiting a full 60 or 90 days”).

## V. CONCLUSION

The economic crisis in Puerto Rico has reached a peak that will take many years to stabilize.<sup>283</sup> As a consequence, the labor force has faced a staggering decline.<sup>284</sup> The enactment of PROMESA was aimed at aiding the Puerto Rican government in managing its debt.<sup>285</sup> But the minimum wage provision included in PROMESA creating a lower youth subminimum wage goes beyond this aid.<sup>286</sup> Many citizens of Puerto Rico and members of Congress strongly disagree with the application of the youth subminimum wage.<sup>287</sup> It has been predicted that the Island's population will continue to decrease, which in turn will continue to negatively affect the labor force and prospects for economic recovery.<sup>288</sup> PROMESA amends the FLSA youth subminimum wage as it applies to Puerto Rico.<sup>289</sup> Moreover, the penalties afforded in case of an employer violation are too narrow.<sup>290</sup> Without regulations that apply in this particular context, it will be fairly easy for employers to displace employees in order to hire younger employees at the subminimum wage.<sup>291</sup> If all that an employer needs to do to take advantage of the subminimum wage is find legal avenues to displace current employees, then the prohibition against displacement fails.<sup>292</sup> Therefore, Congress should enact legislation that amends this provision by narrowing its language and scope of application.<sup>293</sup> Understanding the benefits of section 403, this Note provides an alternative approach and suggests that exemptions be added to the law, as it is currently drafted.<sup>294</sup> These exemptions would exclude individuals who are twenty-five years old or younger with dependents and those pursuing higher education.<sup>295</sup> Congress should also enact legislation, as that proposed herein, that establishes penalties that are specifically for employees who attempt to

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283. See *supra* Part II.

284. See *supra* notes 135-37 and accompanying text.

285. See *supra* Part II.C.

286. See *supra* Part III.

287. See *supra* Parts III.A, IV.A.

288. See *supra* notes 137, 241 and accompanying text.

289. See *supra* Part II.D.

290. See *supra* Part III.C.

291. See Dávila, *supra* note 125 (suggesting that notwithstanding PROMESA's restriction on employer's displacement of employees in order to hire younger individuals at the subminimum wage "it is easy for an employer to do exactly that, they just need to find ways around the legality of their intentions").

292. See *id.*; *supra* notes 197-99 and accompanying text.

293. See *supra* note 257 and accompanying text.

294. See *supra* Part IV.B-C.

295. See *supra* Part IV.B.

or take advantage of the youth subminimum wage.<sup>296</sup> This legislation would broaden the scope of application of these penalties to more than solely retaliation claims.<sup>297</sup> Alternatively, the language in the current penalties should be struck, which would broaden its scope.<sup>298</sup> Lastly, this Note suggests imposing the requirement of written notice with a detailed account of an employee's conduct and actions that led to the termination of her probationary period.<sup>299</sup> These solutions have been proposed in the hopes that amendments to PROMESA will be adopted so that Puerto Rican people who are under the age of twenty-five do not have to live as a sub-class and the older generations do not have to fear displacement.<sup>300</sup>

*Jeruska Lugo-Sánchez\**

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296. *See supra* Part IV.C.

297. *See supra* Part IV.C.

298. *See supra* Part IV.C.

299. *See supra* Part IV.C.

300. *See supra* Part IV.B–C.

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