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## State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement

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## STATE AND LOCAL WORKERS' RIGHTS INNOVATIONS: NEW PLAYERS, NEW LAWS, NEW METHODS OF ENFORCEMENT

TERRI GERSTEIN\*

### ABSTRACT

*This article describes and analyzes the considerable surge in state and local government activity protecting workers in recent years. It situates this growth in state and local action as a response to degradation of working conditions resulting from longstanding economic, political, and legal trends, and the resulting worker organizing to counter those trends. It also positions this burgeoning activity as a reaction to challenges at the federal level, including rollbacks and worker-hostile policies by the Trump administration, as well as gridlock in Congress.*

*The article frames the uptick in state and local worker protection activity within three specific categories: new players enforcing labor standards laws and basic workplace protections; new laws; and new methods of enforcement. New players include state attorneys general, many of whom have significantly increased their workers' rights dockets of late, and several of whom have established new dedicated units; municipalities, a number of which have passed their own local worker protection laws and several of which have established local agencies dedicated to workers' rights; and criminal prosecutors, who are increasingly bringing charges in relation to wage theft and other employer workplace crimes. New laws at the state and local level span a range of issues: minimum wage-setting, overtime coverage, collective bargaining, paid sick days, paid family leave, fair workweeks, employer retaliation, workplace safety, and more. New methods of enforcement include utilizing a strategic enforcement approach (instead of a more traditional reactive model); partnering with worker*

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*and community organizations; creating licensing consequences for violators; and publicizing violations, among others.*

*Finally, the article urges continued focus on worker protection at the state and local level even in light of the new, more worker-friendly federal administration for several reasons, including the longstanding “laboratory of experimentation” role of states (and now also localities); states’ and cities’ closeness to constituents and ability to respond to local conditions; the scale of the crisis facing workers today and need for an “all hands on deck” approach; the number of workers who cannot file lawsuits because of forced arbitration, necessitating more government enforcement at all levels; potentially more promising state courts, in light of the increasingly conservative composition of the federal judiciary; and, given political fluctuations over time, the hedging value of ensuring that multiple levels of government focus on protecting working people.*



## INTRODUCTION

Recent decades have been brutal for working people in the United States: the years have brought wage stagnation,<sup>1</sup> declining union density,<sup>2</sup> widespread retaliation for organizing unions,<sup>3</sup> under-resourced enforcement agencies,<sup>4</sup> forced arbitration preventing access to judge and jury,<sup>5</sup> a growing chasm between corporate and worker power,<sup>6</sup> and the fissuring of the workplace (subcontracting, franchising, misclassification of workers, and other company practices to avoid employer status).<sup>7</sup> The resulting degraded working conditions have exacerbated racial and gender disparities, as they disproportionately impact immigrant workers, Black workers, other workers of color, and women workers.<sup>8</sup> On top of these problems, workers have more recently faced a devastating worldwide pandemic.

1. Josh Bivens, Elise Gould & Lawrence Mishel, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/> [https://perma.cc/47MD-7LRX].

2. *Economic News Release: Union Members Summary*, U.S. BUREAU OF LABOR STATISTICS (Jan. 22, 2020), <https://www.bls.gov/news.release/union2.nr0.htm> [https://perma.cc/6HM3-F93P].

3. Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, *Unlawful*, ECON. POL'Y INST. (Dec. 11, 2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/> [https://perma.cc/4QMT-D77M].

4. Marianne Levine, *Behind the Minimum Wage Fight, A Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> [https://perma.cc/5WQQ-CH9W]; Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz & Margaret Poydock, *Unchecked Corporate Power*, ECON. POL'Y INST. (May 20, 2019), <https://www.epi.org/publication/unchecked-corporate-power/> [https://perma.cc/B8JK-3BCT].

5. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [https://perma.cc/B3CS-UCN4]; see also Hamaji et al., *supra* note 4.

6. Josh Bivens, Lawrence Mishel & John Schmitt, *It's Not Just Monopoly and Monopsony*, ECON. POL'Y INST. (Apr. 25, 2018), <https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/> [https://perma.cc/MZR5-MZQX].

7. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 9, 10 (Harvard University Press 2014); For a concise, cogent overview of these trends, see also Josh Eidelson, *How the American Worker Got Fleeced*, BLOOMBERG BUSINESSWEEK (July 2, 2020), <https://www.bloomberg.com/graphics/2020-the-fleecing-of-the-american-worker/> [https://perma.cc/FG76-PUW4].

8. David Cooper, *Workers of Color are Far More Likely to be Paid Poverty-Level Wages Than White Workers*, ECON. POL'Y INST. (June 21, 2018, 4:53 PM), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/> [https://perma.cc/48D4-Z72F]; Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT (Sept. 21, 2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [https://perma.cc/W2GE-TZMS]; Tsedeye Gebreselassie & Laura Huizar, *What a \$15 Minimum Wage Means for Women and Workers of Color*, NAT'L EMP. L. PROJECT (Dec. 13, 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf> [https://perma.cc/S9GU-KRWL].



From 2017 through 2020, workers also faced a presidency and administration determined to undermine basic labor standards and worker organizations in the name of unfettering business. The United States Department of Labor, under direction from former President Trump,<sup>9</sup> undertook a fierce deregulatory agenda, which included dismantling protective regulations, proposing weak alternatives, and abandoning ongoing rules in development on a wide range of subjects: overtime coverage,<sup>10</sup> joint employer status,<sup>11</sup> reporting of workplace injuries,<sup>12</sup> reporting of pay data (to help flag discrimination),<sup>13</sup> and protection from airborne illnesses,<sup>14</sup> among others. The Department signaled its employer-focused approach early on, initiating an amnesty program for violators of the law<sup>15</sup> that has since been discontinued and reinstating the practice of issuing opinion letters (to employers with questions) that can be used to limit recovery in future lawsuits.<sup>16</sup> Enforcement resources have been diminished.<sup>17</sup> For example, the Occupational Safety and Health Administration (OSHA), which enforces workplace safety and health law, during the Trump administration had the lowest staffing level in its nearly 50-year history; it would take 165 years for OSHA to inspect each workplace under its jurisdiction once.<sup>18</sup> The Trump administration also created obstacles for unions and worker organizations.<sup>19</sup> In addition, the administration's anti-immigrant rhetoric and

9. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

10. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (proposed Sept. 27, 2019) (to be codified at 29 C.F.R. pt. 541).

11. Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (proposed Jan. 16, 2020).

12. Tracking of Workplace Injuries and Illnesses, 84 Fed. Reg. 380 (proposed Jan. 25, 2019) (to be codified at 29 C.F.R. pt. 1904).

13. Daniel Wiessner, *Judge Says Trump Administration Improperly Blocked Sex, Race Pay Data Rule*, THOMSON REUTERS (Mar. 5, 2019, 10:57 AM), <https://www.reuters.com/article/us-usa-lawsuit-paydata/judge-says-trump-administration-improperly-blocked-sex-race-pay-data-rule-idUSKCN1QM224> [<https://perma.cc/2UZN-69SH>].

14. Brian Mann, *Trump Team Killed Rule Designed to Protect Health Workers from Pandemic Like COVID-19*, NAT'L PUB. RADIO (May 26, 2020, 1:38 PM), <https://www.npr.org/2020/05/26/862018484/trump-team-killed-rule-designed-to-protect-health-workers-from-pandemic-like-cov> [<https://perma.cc/3HDF-V3GM>].

15. *Payroll Audit Independent Determination (PAID)*, U.S. DEP'T OF LABOR, <https://www.dol.gov/newsroom/release/whd/whd2021019> (last visited March 25, 2021).

16. For a critical discussion of the reinstatement of opinion letters, see generally Sharon Block, *An Opinion on WHD Opinion Letters*, ONLABOR (June 28, 2017), <https://www.onlabor.org/an-opinion-on-whd-opinion-letters/> [<https://perma.cc/J8BH-MFC3>].

17. Levine, *supra* note 4.

18. Deborah Berkowitz, *Report: Number of Federal Workplace Safety Inspectors Falls to 45-Year Low*, NAT'L EMP. L. PROJECT (Apr. 28, 2020), <https://www.nelp.org/news-releases/number-federal-workplace-safety-inspectors-falls-45-year-low/> [<https://perma.cc/H7ZN-A252>].

19. See, e.g., Medicaid Program; Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19,718 (proposed May 6, 2019) (to be codified at 42 C.F.R. pt. 447); vacated on Nov. 17, 2020 in



exceedingly forceful immigration enforcement made immigrant workers less likely to report violations and more vulnerable to workplace exploitation. Finally, in the face of the coronavirus pandemic, in which workers deemed essential have been falling ill and dying, OSHA during the Trump administration largely fell down on the job.<sup>20</sup>

In the face of longstanding challenges to working conditions, as well as the Trump administration's neglect of and attack on workers, some states and localities started to play a much more significant role in relation to workers' rights.<sup>21</sup> This new activity falls squarely within two broader trends. First, there is a longstanding tradition of state leadership on labor protection: the original labor standards laws, including minimum wage and maximum hours laws, were passed at the state level.<sup>22</sup> The law invalidated by the Supreme Court in the infamous 1905 *Lochner* case (holding that legislating maximum work hours was unconstitutional) was a New York state law limiting bakers' work hours.<sup>23</sup> Second, pro-worker state and local action is an example of the new progressive federalism during the Trump (and previously Bush) administration, in which progressive states provide a counterpoint to a regressive federal government, both preventing harmful federal action and also filling the enforcement vacuum left by an administration soft on corporate misconduct.<sup>24</sup>

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Order Den. Def.'s Mot. To Dismiss And Mot. For Summ. J.; Granting Pl.'s Cross- Mot. For Summ. J., 950 F.3d 1067 (2020); see also Lynn Rhinehart, *The Trump NLRB Needs to be Removed*, ONLABOR (Apr. 1, 2020), <https://www.onlabor.org/the-trump-nlrb-needs-to-be-removed/> [https://perma.cc/X2CD-93PN].

20. Regarding immigration enforcement's impact on workers reporting violations, see Amanda M. Grittner & Matthew S. Johnson, *When Labor Enforcement and Immigration Enforcement Collide: Deterring Worker Complaints Worsens Workplace Safety* (Jan. 2, 2021) (unpublished working paper) (on file with author), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3756974](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756974). Regarding the pandemic performance of OSHA during the Trump administration, see Deborah Berkowitz and Shayla Thompson, "OSHA must protect COVID Whistleblowers who file retaliation complaints," National Employment Law Project (October 8, 2020).

21. See Katherine Landergan & Katy Murphy, *States become worker safety watchdogs as pandemic worsens*, POLITICO (Dec. 4, 2020, 7:33 PM) <https://www.politico.com/states/new-york/city-hall/story/2020/12/04/states-become-worker-safety-watchdogs-as-pandemic-worsens-1340921>; Terri Gerstein, *Workers' Rights Protection and Enforcement by State Attorneys General*, ECON. POL'Y INST. (Aug. 27, 2020), <https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/> [https://perma.cc/SB7T-NXGA].

22. 1912 Mass. Acts 780; see e.g., Sarah Scovill Whittelsey, *Massachusetts Labor Legislation: An Historical and Critical Study*, 17 SUPPLEMENT TO THE ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI., 1, 12, 33 (1901), <https://www.jstor.org/stable/pdf/1010335.pdf>.

23. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

24. See 2019 Program Guide: *Progressive Federalism*, AM. CONST. SOC. (2019), <https://www.acslaw.org/wp-content/uploads/2019/02/2019-Program-Guide-Progressive-Federalism.pdf> [https://perma.cc/TE8K-SYRG]; see also Gary Gerstle, *The New Federalism*, THE ATLANTIC (May 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/new-federalism/611077/> [https://perma.cc/G9SW-WXMS]; Patricia Hurtado, Chris Dolmetsch, Clare Roth & David



In taking on worker issues, states and localities have served as an essential countervailing force against the growing concentration of corporate power and concomitant quashing of basic labor rights. Developments in recent decades—forced arbitration, non-compete and no-poach agreements (which remove workers’ ability to leverage the threat of exit), misclassification of workers, anti-union court decisions, and more—have diminished workers’ ability to counter corporate power and protect themselves. States and localities, then, have not only been plugging gaps in enforcement, but have also been fighting back against the labor market imbalances that corporations have long been driving in myriad ways that hurt worker bargaining power.

This article provides a broad overview of the numerous ways in which states and localities have expanded and enforced workers’ rights. It also provides a potential roadmap of already-tested options for state and local leaders wishing to take action. While there are limits to what can be accomplished at the state and local level,<sup>25</sup> and there is no silver bullet for ending worker exploitation, there are significant opportunities for action by states and localities, and vast as-yet untapped potential in many jurisdictions. Finally, this article explains the value of a continued focus on workers’ rights at the state and local level, even in the context of a new, worker-friendly federal administration.

The growing involvement of states and localities in the worker protection arena falls generally into three major categories. First, there are new government players in the mix, namely state attorneys general, cities and localities (legislatures and enforcement agencies), and criminal prosecutors. Second, there are new laws and standards being passed at the state and local level, addressing pressing needs in the absence of Congressional action and demonstrating again the state (and local) role as laboratories of democracy. Third, states are using new enforcement strategies in their efforts to drive legal compliance and deter employer violations.

This article discusses each of these three developments in turn.<sup>26</sup>

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Voreacos, *Trump Oversees All-Time Low in White Collar Crime Enforcement*, BLOOMBERG (Aug. 10, 2020, 3:00 AM), <https://www.bloomberg.com/news/articles/2020-08-10/trump-oversees-all-time-low-in-white-collar-crime-enforcement>.

25. One significant limit is broad preemption under the National Labor Relations Act. *See generally National Labor Relations Act*, NAT’L LAB. REL. BD., <https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act> [<https://perma.cc/EA7Q-57FG>] (last visited Aug. 25, 2020); *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); *Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 437 U.S. 132 (1976).

26. This article does not cover state and local developments related to workplace human rights, civil rights, or anti-discrimination laws; those have long been addressed at the state and local level, through Fair Employment Practices Agencies and sometimes other enforcers, such as state attorneys general, as well. It should be noted that state and local anti-workplace discrimination laws often have a lower employee-threshold for coverage than federal law, and many protect employees based on a broader range of characteristics, such as sexual orientation and gender identity or marital or familial status. In addition, some specific kinds of anti-discrimination laws have seen



## I. NEW PLAYERS

As the quality of working conditions has fallen and become more precarious, and as these issues have risen to the fore of media and public consciousness, new government actors have become involved in advancing workers' rights, whether through passage of new laws or enforcement of existing ones. Foremost among these new actors are state attorneys general (AGs), localities, and criminal prosecutors (including district attorneys and others).<sup>27</sup>

One noteworthy development in all three categories is the establishment of dedicated units or institutions within an office or level of government. Within state AG and prosecutor offices, these new units generally take the form of labor or workplace rights bureaus. Meanwhile, a number of local governments have established their own offices of labor standards. In either form, these new units or offices allow for development of career staff with substantive knowledge and expertise, as well as the ability to build longstanding relationships with relevant stakeholders. The establishment of such offices and units embeds the work in a long-term manner, as part of the office's ongoing work that will presumably outlive the priorities of any particular administration.

### A. State AGs<sup>28</sup>

State AGs have varying jurisdiction in the workers' rights area: some have explicit jurisdiction to enforce state labor laws (recently granted in Illinois and

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considerable movement at the state and local level in recent years, such as laws to address sexual harassment, in the wake of the #MeToo movement, and "ban the box" or fair hiring laws, to address discriminatory hiring resulting from employer consideration of prior criminal convictions. See *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing> [https://perma.cc/D87D-UGGJ] (last visited Aug. 22, 2020).

27. Terri Gerstein & Marni von Wilpert, *State Attorneys General Can Play Key Roles in Protecting Workers' Rights*, ECON. POL'Y INST. (May 7, 2018), <https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/> [https://perma.cc/ZA25-HTNG]; Laura Huizar & Yannet Lathrop, *Fighting Wage Preemption: How Workers Have Lost Billions in Wages and How We Can Restore Local Democracy*, NAT'L EMP. L. PROJECT (July 3, 2019), <https://www.nelp.org/publication/fighting-wage-preemption/> [https://perma.cc/3VJK-9C YX]; Chris Opfer, *Prosecutors Treating 'Wage Theft' as a Crime in These States*, BLOOMBERG L. DAILY LAB. REP. (June 26, 2018, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states>.

28. For a description of the wide range of AG activities in this area, see generally Gerstein & von Wilpert, *supra* note 27; Gerstein, *supra* note 21; Jane Flanagan, *Alt-Enforcers: The Emergence of State Attorneys General as Workplace Rights Enforcers*, 95 CHI.-KENT L. REV. 103, 103 (2020). Several sources provide useful background information on state attorney general offices in general. See generally *An Educational Resource on the Office of State Attorney General*, STATEAG.ORG, <https://www.stateag.org/> [https://perma.cc/SP9K-UCVL] (last visited Aug. 22, 2020); NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org> [https://perma.cc/KF2P-TG5U] (last visited Aug. 26, 2020); CONF. OF W. ATT'YS GEN., <https://www.devex.com/organizations/conference-of-west-ern-attorneys-general-cwag-33920> [https://perma.cc/4QZE-V5ER] (last visited Aug. 22, 2020).



Minnesota),<sup>29</sup> while others rely on more general statutes<sup>30</sup> or *parens patriae* authority, in which the state may act based on a quasi-sovereign interest in the well-being of its residents.<sup>31</sup> Even without explicit jurisdiction, some AG offices have found ways to have an impact on workers' rights.<sup>32</sup> Overall, AGs have greatly expanded their involvement in enforcing and protecting workers' rights, as evidenced by the creation of dedicated units; state-specific civil and criminal enforcement (in states with and without dedicated units); multi-state collaboration on investigations and pushback against federal action; public advisories to state and municipal actors; crisis response; and exercise of leadership on workers' rights issues.

### 1. Creation of Dedicated Units

At the start of 2015, only three AG offices had dedicated units focusing on workers' rights: California, Massachusetts, and New York.<sup>33</sup> Since then, seven additional offices have created such units: the District of Columbia, Illinois, Michigan, Minnesota, New Jersey, Pennsylvania, and Virginia.<sup>34</sup> These units

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Finally, the website [attorneysgeneral.org](http://attorneysgeneral.org) has considerable information about state attorneys general, including several databases containing information about multi-state litigation, settlements, amicus briefs, and comments and letters. Michigan, Minnesota, New Jersey, and Pennsylvania; also, Virginia's attorney general in March 2021 announced the creation of a new Worker Protection Unit.

29. MINN. STAT. § 177.45 (2019); S.B. 0161, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

30. See, e.g., N.Y. EXECUTIVE LAW § 63(12) (Consol. 2020).

31. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 607, 609 (1982). Prior to being granted explicit jurisdiction in 2019 legislation, the Illinois Attorney General's Office relied on *parens patriae* and other sources of jurisdiction to take action. See generally Complaint for Declaratory Judgment, Injunctive Relief, and Other Equitable Relief at 1, *Ill. ex rel. Madigan v. Jimmy John's Enterprises, LLC*, (Ill. Cir. Ct. 2016) (No. 2016-CH-07746) 2016 WL 3211206.

32. For a discussion of AG sources of jurisdiction, see generally Terri Gerstein & Faisal Sheikh, *An Overview of State Attorney General Labor Jurisdiction*, STATEAG.ORG (May 2017), <https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5ad6a946f950b724bbd36de9/1524017479077/An+Overview+of+State+Attorney+General+Labor+Jurisdiction.pdf> [https://perma.cc/PA4T-XVG3].

33. Gerstein & von Wilpert, *supra* note 27 (noting that Massachusetts is an outlier among states in that the Attorney General's Office, and not the state labor department, is tasked with all enforcement of the commonwealth's worker protection laws).

34. Gerstein, *supra* note 21; *Defending Your Rights: Workplace Rights Bureau*, ILL. ATT'Y GEN., [https://illinoisattorneygeneral.gov/rights/labor\\_employ.html](https://illinoisattorneygeneral.gov/rights/labor_employ.html) [https://perma.cc/9R3E-3KFM] (last visited Aug. 22, 2020); *Michigan's Cracking Down on Payroll Fraud*, MICH. ATT'Y GEN., [https://www.michigan.gov/ag/0,4534,7-359-82917\\_92258--,00.html](https://www.michigan.gov/ag/0,4534,7-359-82917_92258--,00.html) [https://perma.cc/9GWX-HK4P] (last visited Aug. 22, 2020); Press Release, Keith Ellison, Minn. Att'y Gen., Attorney General Ellison Announces New Wage Theft Unit in AGO (July 15, 2019), [https://www.ag.state.mn.us/Office/Communications/2019/07/15\\_WageTheftUnit.asp](https://www.ag.state.mn.us/Office/Communications/2019/07/15_WageTheftUnit.asp) [https://perma.cc/3CS7-7BKN]; *Affirmative Civil Rights and Labor Enforcement*, N.J. DEP'T OF LAW & PUB. SAFETY OFFICE OF THE ATT'Y GEN., <https://www.nj.gov/oag/law/civrlt.htm> [https://perma.cc/5GVF-WPB2] (last



vary in size, as some started with only one attorney, while others are more robustly staffed. They have a variety of names (“workplace rights bureau,” “payroll fraud enforcement unit,” “fair labor section”), but they all represent a commitment by these AGs to devote resources and institutionalize a section within their offices to focus on worker protection.

## 2. State-Specific Civil and Criminal Enforcement

State AGs have brought dozens of civil and criminal cases against predatory and exploitative employers in a range of industries with high rates of violations and workers who are low-wage, immigrants, and/or people of color, including in restaurants (fast food and other), construction, agriculture, retail, temp agencies, home health agencies, airport contractors, and car washes, among others.<sup>35</sup> They have also taken on specific employer practices, like inappropriate use of non-compete and no poach agreements<sup>36</sup> and payment of wages by payroll cards.<sup>37</sup> Several AGs have brought cases related to misclassification of workers as independent contractors—both former California Attorney General Xavier Becerra and Massachusetts Attorney General Maura Healey separately sued

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visited Aug. 22, 2020); *Fair Labor Section*, PA. OFFICE OF THE ATT’Y GEN., <https://www.attorneygeneral.gov/labor/> [<https://perma.cc/BU2T-UP49>] (last visited Aug. 22, 2020). Press Release, VA. ATT’Y GEN., Herring Creates First Virginia Attorney General’s Worker Protection unit (March 3, 2021), <https://www.oag.state.va.us/media-center/news-releases/1969-march-3-2021-herring-creates-virginia-s-first-attorney-general-s-worker-protection-unit>.

35. For a description of many of these cases, see Gerstein & von Wilpert, *supra* note 27, Gerstein, *supra* note 21, and Jane Flanagan, *Alt-Enforcers: The Emergence of State Attorneys General as Workplace Rights Enforcers*, 95 CHI.-KENT L. REV. 103, 113–21 (2020).

36. Yuki Noguchi, *Under Pressure, WeWork Backs Down On Employee Noncompete Requirements*, NPR (Sept. 18, 2018, 12:02 PM), <https://www.npr.org/2018/09/18/648881004/we-work-backs-down-on-employee-noncompete-requirements> [<https://perma.cc/XA89-FLZK>]; Press Release, Ill. Att’y Gen., Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), [https://illinoisattorneygeneral.gov/pressroom/2019\\_01/20190107b.html#:~:text=Chicago%20%E2%80%94%20Attorney%20General%20Lisa%20Madigan,service%20employees%20at%20its%2033](https://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html#:~:text=Chicago%20%E2%80%94%20Attorney%20General%20Lisa%20Madigan,service%20employees%20at%20its%2033) [<https://perma.cc/UD49-JV9J>]; Press Release, Wash. State Att’y Gen., AG Ferguson’s Initiative to End No-Poach Clauses Nationwide Reaches 100 Corporate Chains (Oct. 7, 2019), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-reaches-100-corporate#:~:text=SEATTLE> [<https://perma.cc/55U6-ND4K>]; Press Release, Maura Healey, Mass. Att’y Gen., Three Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 2, 2020), <https://www.mass.gov/news/three-fast-food-chains-agree-to-end-use-of-no-poach-agreements> [<https://perma.cc/LPZ7-TQ82>].

37. N.Y. State Att’y Gen., *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers* (2014), <https://ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf> [<https://perma.cc/FBP6-F3LF>]; Press Release, N.Y. Att’y Gen., A.G. Schneiderman Introduces Payroll Card Act to Create Clear Rules and Protect Workers from Unfair Fees and Coercion (Feb. 13, 2015), <https://ag.ny.gov/press-release/2015/ag-schneiderman-introduces-payroll-card-act-create-clear-rules-and-protect> [<https://perma.cc/5D7R-7CCM>].



Uber and Lyft in 2020;<sup>38</sup> D.C. Attorney General Karl Racine sued, and in 2019 reached a \$2.75 million settlement with Power Design, a national electric contractor;<sup>39</sup> and Massachusetts Attorney General Maura Healey in 2019, and 2020 reached settlements with two platform-based companies (one placing dental workers and the other placing teachers and education workers in temporary positions), requiring them to change their business practices to classify workers as employees.<sup>40</sup> AG offices in Massachusetts and New York have brought child labor cases.<sup>41</sup> Some offices have pursued joint employer

38. Kate Conger, *California Sues Uber and Lyft, Claiming Workers Are Misclassified*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/technology/california-uber-lyft-law-suit.html>; Kate Conger & Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/technology/massachusetts-sues-uber-lyft.html>.

39. Press Release, Karl Racine, D.C. Att’y Gen., AG Racine Announces National Electrical Contractor Will Pay \$2.75 Million to Workers and the District to Resolve Wage Theft Lawsuit (Jan. 15, 2020), <https://oag.dc.gov/release/ag-racine-announces-national-electrical-contractor> [<https://perma.cc/LF6B-CNAL>].

40. Katie Johnston, *As gig economy expands into temporary staffing, worker protections retreat*, BOSTON GLOBE (Nov. 14, 2019, 8:38 PM), <https://www.bostonglobe.com/business/2019/11/14/gig-economy-expands-into-temporary-staffing-worker-protections-retreat/5MkkWebi9NMYu51yJ2XR5M/story.html>; Press Release, Maura Healey, Mass. Att’y Gen., Staffing Agency Agrees to Treat Workers as Employees in Agreement with AG’s Office (Feb. 24, 2020), <https://www.mass.gov/news/staffing-agency-agrees-to-treat-workers-as-employees-in-agreement-with-ags-office>.

41. Press Release, Maura Healey, Mass. Att’y Gen., Burger King Franchisee to Pay \$250,000 Penalty (Dec. 19, 2017), <https://www.mass.gov/news/burger-king-franchisee-to-pay-250000-penalty> [<https://perma.cc/LNL6-K97F>]; David Yaffe-Bellany & Mihir Zaveri, *Chipotle Is Fined \$1.4 Million in Vast Child Labor Case*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/business/chipotle-child-labor-law-massachusetts.html>; Press Release, N.Y. Att’y Gen., A.G. Underwood Announces Guilty Plea of Cortland County Farmer for Child Labor Violations Following Death of 14-Year-Old Employee (Sept. 20, 2018), <https://ag.ny.gov/press-release/2018/ag-underwood-announces-guilty-plea-cortland-county-farmer-child-labor-violations>; Press Release, N.Y. Att’y Gen., A.G. Schneiderman Secures Criminal Conviction Of Employers In Child Labor Case (Dec. 11, 2014), <https://ag.ny.gov/press-release/2014/ag-schneiderman-secures-criminal-conviction-employers-child-labor-case>.



liability.<sup>42</sup> Certain state AGs have also used their criminal jurisdiction to pursue wage theft,<sup>43</sup> payroll fraud, and other violations.<sup>44</sup>

42. Press Release, Mass. Att'y Gen., Factory in Dudley to Pay Nearly \$1 Million for Wage Violations, Hindering AG's Investigation (Nov. 22, 2017), <https://www.mass.gov/news/factory-in-dudley-to-pay-nearly-1-million-for-wage-violations-hindering-ag-s-investigation> [<https://perma.cc/HG7B-EHEN>]; Press Release, Mass. Att'y Gen., AG Recovers \$95,000 in Wages and Penalties from Worcester Staffing Agency over Failure to Pay Dudley Factory Workers (Feb. 23, 2018), <https://www.mass.gov/news/ag-recovers-95000-in-wages-and-penalties-from-worcester-staffing-agency-over-failure-to-pay> [<https://perma.cc/4SAB-F9Z5>]; Press Release, N.Y. Att'y Gen., A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino's and Its Franchisees Liable for Systemic Wage Theft (May 24, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-lawsuit-seeking-to-hold-dominos-and-its-franchisees-liable> [<https://perma.cc/P7UQ-BZAR>].

43. Wage theft is a term often used to describe a range of practices in which employers fail to pay workers the full wages to which they are legally entitled. The UCLA Labor Center defines it as "the illegal practice of not paying workers for all of their work including; violating minimum wage laws, not paying overtime, forcing workers to work off the clock, and much more." *What is Wage Theft?*, UCLA LABOR CENTER (May 6, 2015), <https://www.labor.ucla.edu/wage-theft/>. Another definition: the term "refers broadly to a failure to pay the minimum wage, failure to comply with overtime pay requirements, worker misclassification, requiring employees to work off-the-clock, failing to provide required meal or rest breaks, stealing tips, and the many other ways employers violate basic fair pay standards." Laura Huizar, *Testimony on Wage Theft Before U.S. House Subcommittee on Labor, Health and Human Services*, NAT'L EMP. L. PROJECT (Apr. 9, 2019), <https://www.nelp.org/publication/testimony-wage-theft-u-s-house-subcommittee-labor-health-human-services/> [<https://perma.cc/3UK8-Z9E4>]. The term grew more commonly used in the years following the publication of a book popularizing the term. *See generally* KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT* (2011).

44. Press Release, N.Y. Att'y Gen., A.G. Schneiderman Announces Jail Time for Peekskill Home Health Care Agency Owner Convicted of Wage Theft (Sept. 27, 2017), <https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-jail-time-peekskill-home-health-care-agency-owner> [<https://perma.cc/H4VU-8WYG>]; Press Release, N.Y. Att'y Gen., A.G. Schneiderman Announces Guilty Pleas and Convictions of Three Queens Construction Companies for Failing to Pay 150 Workers over \$370,000 in Wages (Feb. 7, 2018), <https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-guilty-pleas-and-convictions-three-queens-construction> [<https://perma.cc/4TUZ-KZ5Y>]; Press Release, Wash. State Att'y Gen., Attorney General Ferguson Files Criminal Wage Theft and Fraud Charges against Athletic Club Executives Sam Adams and Dana Sargent (Feb. 5, 2015), <https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-files-criminal-wage-theft-and-fraud-charges-against> [<https://perma.cc/JV5Y-L5JT>]; Press Release, N.Y. Att'y Gen., A.G. Schneiderman Announces Convictions of NYC School Construction and Housing Authority Contractor and Labor Brokers Who Stole Thousands from Workers (Jan. 14, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-convictions-nyc-school-construction-and-housing> [<https://perma.cc/GU4V-5RN8>]; Press Release, N.Y. Att'y Gen., A.G. Schneiderman and U.S. Department of Labor Announce Criminal Charges against, and Civil Settlement with, Papa John's Franchisee for Wage Theft (July 15, 2015), <https://ag.ny.gov/press-release/2015/ag-schneiderman-and-us-department-labor-announce-criminal-charges-against-and> [<https://perma.cc/6ATL-QCTH>]; Press Release, R.I. Att'y Gen., Lincoln Man Arrested On Wage Theft Charges after Joint Investigation by RIAG, RISP, and DLT (Sept. 23, 2019), <https://www.ri.gov/press/view/36771> [<https://perma.cc/5V49-LME6>]; Press Release, Penn. Att'y Gen., Central



*Multi-state collaboration on investigations and on pushback against federal action:* State AGs have a long history of collaborating on large multi-state actions, from the tobacco cases in the 1990s, to investigation of the mortgage crisis in the early 2000s, to the opioid crisis today.<sup>45</sup> In recent years, some AG offices have begun to collaborate on workers' rights issues as well. These include investigations and inquiries of employers, as well as comments and lawsuits opposing federal government actions.

Multi-state actions focused on employers or particular practices have included an inquiry into use of on-call shifts by national retailers, resulting in the termination of the practices by six companies, impacting an estimated 50,000 workers;<sup>46</sup> an investigation of fast food franchisors use of "no-poach" agreements;<sup>47</sup> and an inquiry into arbitration processes used in employment-related cases by the two largest arbitration administrators.<sup>48</sup> More recently, during the coronavirus pandemic, state AGs jointly sought information from Amazon and Whole Foods about their paid sick leave policies, workplace safety

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Pennsylvania Contractor Charged for Theft of Workers' Wages and Benefits (Sept. 27, 2019), <https://www.attorneygeneral.gov/taking-action/press-releases/central-pennsylvania-contractor-charged-for-theft-of-workers-wages-and-benefits/#:~:text=HARRISBU> [https://perma.cc/7U5G-MUSH].

45. See NAAG CTR. FOR TOBACCO & PUB. HEALTH, [https://www.naag.org/naag/about\\_naag/naag-center-for-tobacco-and-public-health.php](https://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health.php) [https://perma.cc/J6ND-QD8R] (last visited Aug. 25, 2020); see *State Attorneys General, Feds Reach \$25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/naag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php> [https://perma.cc/EC2Z-3T48]; Daniel Aaron, *The Role of Attorneys General in the Opioid Litigation*, BILL OF HEALTH BLOG (Sept. 26, 2019), <https://blog.petrieflom.law.harvard.edu/2019/09/26/the-role-of-attorneys-general-in-the-opioid-litigation/> [https://perma.cc/F6U9-U9PU]; Press Release, N.Y. Att'y Gen., Attorney General James Urges Regulators To Protect Workers From Harmful, Anticompetitive Labor Practices (July 16, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-urges-regulators-protect-workers-harmful-anticompetitive> [https://perma.cc/ZB8N-V273].

46. Press Release, N.Y. Att'y Gen., AG Schneiderman Announces Agreements with Six Major Retailers to Stop On-Call Shift Scheduling (Dec. 20, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-agreements-six-major-retailers-stop-call-shift> [https://perma.cc/Z5SM-6459]. This coalition effort followed an earlier inquiry by the New York State Attorney General's Office into such practices at thirteen national retailers. See Bourree Lam, *The End of On-Call Scheduling?*, THE ATLANTIC (Oct. 23, 2015), <https://www.theatlantic.com/business/archive/2015/10/on-call-scheduling-labor/412132/> [https://perma.cc/K6NZ-H4BX].

47. Press Release, Maura Healey, Mass. Att'y Gen., Three Fast Food Chains Agree to End Use of No-Poach Agreements (March 2, 2020), <https://www.mass.gov/news/three-fast-food-chains-agree-to-end-use-of-no-poach-agreements> [https://perma.cc/Z4F4-DER8].

48. Press Release, D.C. Att'y Gen, AG Racine Leads 12-State Coalition To Ensure Workers Can Resolve Employment Disputes Fairly and Quickly in Arbitration (Nov. 12, 2019), <https://oag.dc.gov/release/ag-racine-leads-12-state-coalition-ensure-workers> [https://perma.cc/W2Y8-GVF7].



plans, and number of infections and deaths among the workforce.<sup>49</sup> They also sought similar information from Walmart.<sup>50</sup>

In addition, coalitions of AGs have submitted comments in response to a number of federal proposed rules,<sup>51</sup> and have also sued the U.S. Department of Labor multiple times. For example, they challenged a rule rolling back OSHA recordkeeping and reporting obligations,<sup>52</sup> and a rule making it easier for up-chain companies to evade joint employer status, which was ultimately invalidated by the federal district court.<sup>53</sup>

*Public advisories:* State AGs have issued advisories about various aspects of labor law, providing guidance on matters such as the rights of immigrant workers, for example.<sup>54</sup> In 2018, after the Supreme Court's decision in *Mark Janus v. AFSCME Council 31*<sup>55</sup> (rejecting as unconstitutional fair-share agency fees paid by non-union member public employees who receive union services), at least a dozen AG offices issued advisories to state and local public employers to provide guidance on the legal significance of the decision, and especially the limitation of its holding to agency fee-payers, and the lack of relevance for union members.<sup>56</sup>

49. Press Release, Maura Healey, Mass. Att'y Gen., AG Healey Leads Multistate Group Urging Amazon and Whole Foods to Strengthen Worker Protections During COVID-19 Pandemic (May 12, 2020), <https://www.mass.gov/news/ag-healey-leads-multistate-group-urging-amazon-and-whole-foods-to-strengthen-worker> [<https://perma.cc/W2Y8-GVF7>].

50. Press Release, Kwame Raoul, Ill. Att'y Gen., Attorney General Raoul Urges Walmart to Strengthen Worker Protections During Covid-19 Pandemic (June 2, 2020), [https://illinoisattorneygeneral.gov/pressroom/2020\\_06/20200602b.html](https://illinoisattorneygeneral.gov/pressroom/2020_06/20200602b.html) [<https://perma.cc/DE85-RUDB>].

51. A list of such comments may be found by searching for labor-related comments in the following database: STATE LITIG. & AG ACTIVITY DATABASE, *Multistate Letters and Comments*, <https://attorneysgeneral.org/letters-and-formal-comments/searchable-list-of-multistate-letters-and-formal-comments-2017-present/> [<https://perma.cc/F9TU-D4MC>] (last visited Aug. 25, 2020).

52. Press Release, N.J. Att'y Gen., AG Grewal Leads Lawsuit Challenging Trump Administration Rollback of Public Reporting on Workplace Injury, Illness (Mar. 6, 2019), <https://www.nj.gov/oag/newsreleases19/pr20190306c.html> [<https://perma.cc/T5Y2-YDJU>].

53. Press Release, Josh Shapiro, Penn. Att'y Gen., AG Shapiro Leads Suit to Stop Trump Administration from Stripping Workers of Key Labor Protections (Feb. 26, 2020), <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-leads-suit-to-stop-trump-administration-from-stripping-workers-of-key-labor-protections/> [<https://perma.cc/3HRS-PB4B>]; see New York et al. v. Scalia, No. 1:20-cv-01689-GHW, 2020 U.S. Dist. N.Y. Att'y Gen. Doc. 135 (S.D.N.Y. Sept. 8, 2020), [https://ag.ny.gov/sites/default/files/doc\\_135\\_opinion.pdf](https://ag.ny.gov/sites/default/files/doc_135_opinion.pdf) [<https://perma.cc/JZ7G-Z4JF>].

54. See Advisory, Maura Healey, Mass. Att'y Gen., All Workers Are Entitled to Employment Protection Irrespective of Immigration Status (May 1, 2017), <https://www.mass.gov/files/documents/2017/11/14/ag-advisory-immigrant-workers-rights.pdf> [<https://perma.cc/QVW5-4WUH>].

55. 138 S. Ct. 2448 (2018).

56. Advisories were issued in California, Connecticut, District of Columbia, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. Advisory, Xavier Becerra, Cal. Att'y Gen., Affirming Labor Rights and Obligations in Public Workplaces, [https://oag.ca.gov/system/files/attachments/press\\_releases/AG%20Becerra%20Labor%20Rights%20Advisory%20FINAL.pdf](https://oag.ca.gov/system/files/attachments/press_releases/AG%20Becerra%20Labor%20Rights%20Advisory%20FINAL.pdf) [<https://perma.cc/EE2J-CLUS>];



*Crisis Response:* During the Covid-19 pandemic, AGs have been heavily involved in enforcing stay-home orders and advocating for safer workplaces in key industries in a variety of ways.<sup>57</sup>

see Advisory, George Jepsen, Conn. Att’y Gen., General Guidance Regarding the Rights and Duties of Public-Sector Employers and Employees in the State of Connecticut after *Janus v. AFSCME Council 31*, [https://portal.ct.gov/AG/General/Guidance\\_on\\_Janus](https://portal.ct.gov/AG/General/Guidance_on_Janus) [https://perma.cc/W88G-HBDA]; Advisory, Karl Racine, D.C. Att’y Gen., Affirming Public Sector Labor Rights and Responsibilities After *Janus*, [http://oag.dc.gov/sites/default/files/2018-07/Post\\_Janus\\_Advisory\\_FINAL.pdf](http://oag.dc.gov/sites/default/files/2018-07/Post_Janus_Advisory_FINAL.pdf) [https://perma.cc/PQV3-V7HF]; Advisory, Kwame Raoul, Ill. Att’y Gen., Guidance Regarding Rights and Duties of Public Employees, Public Employers, and Public Employee Unions after *Janus v. AFSCME Council 31* (July 19, 2018), [https://illinoisattorneygeneral.gov/rights/Janus\\_Advisory\\_72018.pdf](https://illinoisattorneygeneral.gov/rights/Janus_Advisory_72018.pdf) [https://perma.cc/UE64-G2PW]; Advisory, Brian Frosh, Md. Att’y Gen., Attorney General Frosh Issues Advisory Affirming Public Sector Workers’ Rights in the Wake of U.S. Supreme Court Ruling in *Janus v. AFSCME* (July 23, 2018), <https://www.marylandattorneygeneral.gov/press/2018/072318a.pdf> [https://perma.cc/86TP-SMGK]; Advisory, Maura Healey, Mass. Att’y Gen., Affirming Labor Rights and Obligations in Public Workplaces, <https://www.mass.gov/files/documents/2018/07/03/Attorney%20General%20Advisory%20-%20Rights%20of%20Public%20Sector%20Employees%20%287-3%29.pdf> [https://perma.cc/3TJ2-QBSX]; Advisory, N.J. Att’y Gen., Joint Guidance on the Rights of Public Sector Workers and Employers After *Janus* (Aug. 22, 2018), [https://nj.gov/labor/lwdhome/press/2018/20180822\\_janus.html](https://nj.gov/labor/lwdhome/press/2018/20180822_janus.html) [https://perma.cc/JY9S-XELN]; Advisory, Hector H. Balderas, N.M. Att’y Gen., Attorney General Advisory Guidance for Public Sector Employers and Employees after *Janus v. AFSCME Council 31*, <https://www.nmag.gov/attorney-general-advisory-on-janus-decision.pdf> [https://perma.cc/HY92-HH96]; Advisory, Ellen F. Rosenblum, Or. Att’y Gen., Affirming Labor Rights and Obligations in Public Workplaces, [https://www.doj.state.or.us/wp-content/uploads/2018/07/AG\\_Advisory\\_on\\_Janus\\_Decision.pdf](https://www.doj.state.or.us/wp-content/uploads/2018/07/AG_Advisory_on_Janus_Decision.pdf) [https://perma.cc/JT4L-PZMN]; Advisory, Josh Shapiro, Penn. Att’y Gen., Guidance on the Rights and Responsibilities of Public Sector Employees and Employers Following the U.S. Supreme Court’s *Janus* Decision, <https://www.attorneygeneral.gov/wp-content/uploads/2018/08/2018-03-AG-Shapiro-Janus-Advisory-FAQ.pdf> [https://perma.cc/9QXZ-YQMW]; Press Release, R.I. Att’y Gen., Attorney General Kilmartin Provides Clarity on *Janus* Decision and Rights of Public Sector Employees (Aug. 30, 2018), <https://www.ri.gov/press/view/34109>; Advisory, Thomas Donovan, Jr., Vt. Att’y Gen., Public Sector Labor Rights and Obligations Following *Janus*, <https://ago.vermont.gov/wp-content/uploads/2018/08/Janus-Advisory-8.9.2018.pdf> [https://perma.cc/ZQU6-4PPG]; Advisory, Bob Ferguson, Wash. State Att’y Gen., Affirming Labor Rights and Obligations in Public Workplaces (July 17, 2018), <https://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-issues-advisory-affirming-labor-rights-and-obligations> [https://perma.cc/K8VD-WS46]. A few AGs, including in Texas, have issued opinions contrary to the vast majority of their peers. See Tex. Att’y Gen., Op. No. KP-0310, May 31, 2020, <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf>

57. Terri Gerstein, *How State Attorneys General Are Protecting Workers During the Coronavirus Pandemic*, ECON. POL’Y INST. WORKING ECON. BLOG (Apr. 3, 2020, 11:35 AM), <https://www.epi.org/blog/how-state-attorneys-general-are-protecting-workers-during-the-coronavirus-pandemic/> [https://perma.cc/AYY2-428K]; Terri Gerstein, *State Attorneys General are Helping Workers in Hard Times*, THE AMERICAN PROSPECT (Sept. 7, 2020), <https://prospect.org/labor/state-attorneys-general-are-helping-workers-in-hard-times/>; Press Release, Brian Frosh, Md. Att’y Gen., Attorney General Frosh Leads Coalition Urging the Trump Administration to Protect the Health and Safety of Tens of Thousands of U.S. Meat and Poultry Workers (May 12, 2020), <https://www.marylandattorneygeneral.gov/press/2020/051220.pdf> [https://perma.cc/HZU2-



*Public leadership:* State AGs are highly visible leaders in their jurisdictions, and they often exert influence and impact policy and practices within their states in a variety of ways. With the increased focus on workers' rights, state AGs have had a growing public profile on labor issues, including: proposing or supporting legislation;<sup>58</sup> authoring numerous amicus briefs, including briefs on critical issues in the U.S. Supreme Court;<sup>59</sup> conducting outreach and educating workers, employers, and the public about workers' rights; issuing reports;<sup>60</sup> and testifying in Congress.<sup>61</sup>

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JHQD]; Press Release, Maura Healey, Mass. Att'y Gen., AG Healey Leads Multistate Group Urging Amazon and Whole Foods to Strengthen Worker Protections During COVID-19 Pandemic (May 12, 2020), <https://www.mass.gov/news/ag-healey-leads-multistate-group-urging-amazon-and-whole-foods-to-strengthen-worker> [<https://perma.cc/58TS-BZWS>].

58. See descriptions of legislative efforts included in Gerstein & von Wilpert, *supra* note 35. Some recent proposals have included a proposal by New York Attorney General Letitia James to prohibit retaliation against immigrant workers, a proposal by Rhode Island Peter Neronha to increase wage theft penalties, and support by Michigan Attorney General Dana Nessel and Minnesota Attorney General Keith Ellison for new legislation in their states. See Press Release, N.Y. Att'y Gen., AG James: Bill Protecting Immigrant Workers, from Workplace Harassment Signed into Law (July 29, 2019), <https://ag.ny.gov/press-release/2019/ag-james-bill-protecting-immigrant-workers-workplace-harassment-signed-law> [<https://perma.cc/5QLV-8CWN>]; Stephen Montemayor, *Minnesota Lawmakers, Officials Hail New Wage-Theft Law as Nation's Strongest*, STAR TRIBUNE (July 15, 2019, 8:34 PM), <https://www.startribune.com/minnesota-lawmakers-officials-hail-new-wage-theft-law-as-nation-s-strongest/512743152/> [<https://perma.cc/SGC9-KFYA>]; Mikenzie Frost, *Attorney General Nessel Supports New Legislative Push to Prevent Payroll Fraud in Michigan*, NBC 25 NEWS (Aug. 29, 2019), <https://nbc25news.com/news/state/attorney-general-nessel-supports-new-legislative-push-to-prevent-payroll-fraud-in-michigan>. Press release, R.I. ATT'Y GEN., AG Neronha seeks to strengthen penalties for wage theft, labor violations (Feb. 24, 2021), <https://www.ri.gov/press/view/40508>.

59. See Amicus Brief in Support of Respondents, *Mark Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466); Amicus Brief in Support of Respondents, *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019) (No. 17-340); Amicus Brief in Support of Respondents, *Epic Systems Corp. v. Lewis*, NLRB v. *Murphy Oil USA*, and *Ernst & Young v. Morris*, 138 S. Ct. 1612 (2018), (Nos. 16-285, 16-300, and 16-307).

60. Several AG offices have issued annual reports on their workers' rights activities. See, e.g., WORKING FOR JUSTICE, N.Y. ATT'Y GEN. (2017) <https://drive.google.com/file/d/0B75F7mtxX051ZFF2aW9nQkRMWG8/view>; PROTECTING MASSACHUSETTS' WORKERS, MASS. ATT'Y GEN. (2020), <https://www.mass.gov/doc/2020-labor-day-report/download>; 2020 LABOR DAY REPORT, WASH. STATE ATT'Y GEN. (2020), [https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press\\_Releases/2020%20LDR%20FINAL.pdf](https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/2020%20LDR%20FINAL.pdf). In addition, the New York State Attorney General's Office issued *Pinched by Plastic*, *supra* note 37.

61. Press Release, Kwame Raoul, Ill. Att'y Gen., Attorney General Raoul Testifies Before Congressional Committee About Wage Theft Crisis (Apr. 9, 2019), [https://illinoisattorneygeneral.gov/pressroom/2019\\_04/20190409.html](https://illinoisattorneygeneral.gov/pressroom/2019_04/20190409.html) [<https://perma.cc/G2YF-SSLT>]; Press Release, Karl Racine, D.C. Att'y Gen., Testimony on Worker Misclassification and Payroll Fraud Prevention Act (Sept. 26, 2019), <https://oag.dc.gov/release/testimony-worker-misclassification-and-payroll> [<https://perma.cc/Z2NC-KZJA>]; Written Testimony, Wash. State Att'y Gen., Written Testimony of Assistant Attorney General Rahul Rao (Oct. 29, 2019), <https://agportal-s3bucket.s3.amazonaws.com>



### B. *Localities*

Counties and cities have also sprung to the forefront on labor rights in recent years. This development is noteworthy; protecting workers and setting labor standards has not historically been a local or municipal function, but this activity is growing to be a role that progressive city and county leaders understand they must take on. As cutting-edge policies seem harder to attain at the federal (and sometimes, depending on the politics, state) level, cities and counties with high levels of worker activism, progressive leaders, or both, have passed groundbreaking laws and established their own enforcement agencies to ensure meaningful implementation.

City and county legislators have become far more engaged in workers' rights and labor standards, with some city leaders making workers' rights an important part of their public platform and their office's work.<sup>62</sup> This involvement in workers' rights is also assisted by groups like Local Progress, a network of over one thousand progressive local elected officials who have authored a dozen policy briefs on a range of subjects related to "dignity at work."<sup>63</sup> Section II, below, contains a more detailed discussion of laws that have passed; they include local minimum wage requirements, paid sick leave, secure scheduling, and more. In many jurisdictions, these county or city laws easily co-exist alongside state law, providing greater protection, while state and federal laws act as a floor. However, in a number of conservative states, progressive localities that have passed pro-worker ordinances have faced state preemption

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.com/uploadedfiles/Another/News/Press\_Releases/WA%20AAG%20Rahul%20Rao%20-%20Written%20Testimony\_0.pdf [https://perma.cc/AWZ3-L7N7].

62. For example, New York City Council Member Brad Lander's official biography prominently highlights his pro-worker record: "Brad has fought successfully to protect freelancers from wage theft, give fast-food workers a fair work week, and make sure Uber/Lyft drivers earn a living wage." See *District 39, Brad Lander: Biography*, N. Y. CITY COUNCIL DIST. OFFICE, <https://council.nyc.gov/brad-lander/> [https://perma.cc/EX8Y-XW95] (last visited Aug. 25, 2020).

63. See *Policy Briefs*, LOCAL PROGRESS, <https://localprogress.org/resources/policy-briefs/#dignity> [https://perma.cc/J4BG-3P57] (last visited Aug. 25, 2020).



challenges;<sup>64</sup> for example, paid sick leave ordinances passed by cities in Texas have been found preempted by state law.<sup>65</sup>

Of course, passing a law often has limited effect for the lowest-wage and most exploited workers unless there is enforcement. For this reason, a number of cities and municipalities have created agencies or sub-agencies specifically tasked with implementation. Implementation includes providing education to workers, compliance assistance to employers, and enforcement of new municipal standards. These offices vary widely in their size and scope. Some are one-person sub-units of a larger agency, while others are stand-alone agencies with dozens of employees.

The first city to create such an agency was San Francisco. Its Office of Labor Standards Enforcement (OLSE) was created over fifteen years ago.<sup>66</sup> It enforces several citywide laws, including ordinances on minimum wage, paid sick leave, fair chance employment, scheduling laws, and others,<sup>67</sup> as well as a handful of other laws related to government contracting.<sup>68</sup> Seattle's Office of Labor

64. See *Worker Rights Preemption in the U.S.*, ECON. POL'Y INST. (last visited Aug. 25, 2020), <https://www.epi.org/preemption-map/> [<https://www.epi.org/preemption-map/>]; Laura Huizar & Yannet Lathrop, *Fighting Wage Preemption: How Workers Have Lost Billions in Wages and How We Can Restore Local Democracy*, NAT'L EMP. L. PROJECT (July 3, 2019), <https://www.nelp.org/publication/fighting-wage-preemption/> [<https://perma.cc/65U2-SVDX>]; Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html> [<https://perma.cc/SX4A-QUKP>]. For background materials on state preemption of local initiatives, see RICHARD BRIFFAULT ET AL., *THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY'S STATE AND LOCAL GOVERNMENT LAW* (Richard Briffault et al. eds., 1st ed. 2019). For a discussion of preemption specifically during the pandemic, see Nestor M. Davidson & Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AM. CONST. SOC'Y EXPERT F. (June 22, 2020), <https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/> [<https://perma.cc/ZA49-THRA>].

65. Vail Kohnert-Yount, *Paid Sick Leave in the Time of Coronavirus: Lessons from Texas*, ONLABOR (Mar. 20, 2020), <https://www.onlabor.org/paid-leave-in-the-time-of-coronavirus-lessons-from-texas/> [<https://perma.cc/TAV7-2UX6>]; Kathleen Dailey & Genevieve Douglas, *Daily Labor Report: Dallas Paid Sick Leave Law Blocked Despite Pandemic*, BLOOMBERG LAW (Mar. 31, 2020), <https://news.bloomberglaw.com/daily-labor-report/dallas-law-bolstering-paid-sick-leave-blocked-despite-pandemic> [<https://perma.cc/RB2T-Y8WM>].

66. MINIMUM WAGE ORDINANCE, S.F. CAL. ADMIN. CODE § 12R.2 (2004), [https://code.library.amlegal.com/codes/san\\_francisco/latest/sf\\_admin/0-0-0-8543](https://code.library.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-8543) [<https://perma.cc/F3NW-FRWA>].

67. See SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT, <https://sfgov.org/olse/san-francisco-labor-laws-citywide> [<https://perma.cc/QFU2-73WE>] (last visited Aug. 21, 2020).

68. See SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT, <https://sfgov.org/olse/san-francisco-labor-laws-city-contractors> [<https://perma.cc/Y8Z9-T9R9>] (last visited Aug. 21, 2020).



Standards (OLS), currently funded for a staff of over two dozen,<sup>69</sup> enforces nine ordinances.<sup>70</sup> In New York City, the longstanding Department of Consumer Affairs changed its name in 2019 to the Department of Consumer and Worker Protection,<sup>71</sup> in part to denote a newfound emphasis on protecting workers. The Office of Labor Policy and Standards in that agency had a total of 39 positions in May 2020 (including both filled positions and vacancies).<sup>72</sup> It enforces the city's paid sick leave law, as well as the "Freelance Isn't Free Act" (protecting earnings of freelance workers) and several other municipal laws,<sup>73</sup> although it currently lacks jurisdiction to set a city minimum wage. In a particularly noteworthy development, the voters of Philadelphia in the June 2020 primary elections overwhelmingly approved a ballot question to amend the city charter to create a city department of labor, demonstrating widespread public support for municipal involvement in workers' rights issues.<sup>74</sup>

A host of other localities have also created offices focused on establishing, promoting, and enforcing workers' rights such as paid sick leave and/or anti-wage theft laws, including Chicago,<sup>75</sup> Denver,<sup>76</sup> Emeryville,<sup>77</sup> Los Angeles,<sup>78</sup>

69. Email from Martin Garfinkel, former Dir., Seattle Off. of Lab. Standards, to author (May 29, 2020); SEATTLE OFFICE OF LABOR STANDARDS, *Organizational Chart* (2020), [https://www.seattle.gov/Documents/Departments/LaborStandards/OLS\\_OrgChart\\_2020.pdf](https://www.seattle.gov/Documents/Departments/LaborStandards/OLS_OrgChart_2020.pdf) [https://perma.cc/7RU3-E2C6].

70. See SEATTLE OFFICE OF LABOR STANDARDS, <https://www.seattle.gov/laborstandards> [https://perma.cc/89EJ-2FXX] (last visited Aug. 25, 2020).

71. Jeff Greenbaum, *Advertising Law Updates: NYC Department of Consumer Affairs Changes Name and Expands Mission*, FRANKFURT KURNIT KLEIN + SELZ (Apr. 4, 2019), <https://advertisinglaw.fkks.com/post/102fhw1/nyc-department-of-consumer-affairs-changes-name-and-expands-mission> [https://perma.cc/77WH-NJ8J].

72. Email from Benjamin Holt, Deputy Comm'r, Off. of Lab. Pol'y and Standards at N.Y.C. Dep't of Consumer and Worker Prot., to author (May 29, 2020).

73. See *Office of Labor Policy & Standards (OLPS)*, N.Y.C. DEP'T OF CONSUMER & WORKER PROT., <https://www1.nyc.gov/site/dca/about/worker-protection-and-workplace-laws.page> [https://perma.cc/Y9NV-9WST] (last visited Aug. 25, 2020).

74. *Philadelphia, Pennsylvania, Question 1, Dep't of Labor Amendment*, BALLOTPEdia (June 2020), [https://ballotpedia.org/Philadelphia,\\_Pennsylvania,\\_Question\\_1,\\_Department\\_of\\_Labor\\_Amendment](https://ballotpedia.org/Philadelphia,_Pennsylvania,_Question_1,_Department_of_Labor_Amendment) [https://perma.cc/BN6M-X74M] (showing information about the ballot question); *Summary Results Report: Philadelphia County*, OFF. OF THE PHILA. CITY COMM'RS (June 2, 2020) [https://files7.philadelphiavotes.com/election-results/2020\\_06\\_GENERAL/SUMMARY\\_RESULTS\\_REPORT\\_FINAL.pdf#\\_ga=2.22729467.1917971340.1601592341-641741893.1601592341](https://files7.philadelphiavotes.com/election-results/2020_06_GENERAL/SUMMARY_RESULTS_REPORT_FINAL.pdf#_ga=2.22729467.1917971340.1601592341-641741893.1601592341) [https://perma.cc/5YPP-C5R5].

75. See CHI. OFF. OF LAB. STANDARDS, [https://www.chicago.gov/city/en/depts/bacp/supp\\_info/officeoflaborstandards.html](https://www.chicago.gov/city/en/depts/bacp/supp_info/officeoflaborstandards.html) [https://perma.cc/S4GD-BZJB] (last visited Aug. 25, 2020).

76. See DENVER LAB., <https://www.denverauditor.org/denverlabor/> [https://perma.cc/manage/create?folder=7821] (last visited Aug. 25, 2020).

77. See EMERYVILLE LAB. STANDARDS, <https://www.ci.emeryville.ca.us/1277/Labor-Standards> [https://perma.cc/82ZJ-JYUX] (last visited Dec. 8, 2020).

78. See L.A. OFF. OF WAGE STANDARDS, <https://bca.lacity.org/wage-standards> [https://perma.cc/5FMG-V75Q] (last visited Aug. 25, 2020).



Minneapolis,<sup>79</sup> St. Paul,<sup>80</sup> Santa Clara County,<sup>81</sup> and more. Some cities that have not created stand-alone agencies or units have nonetheless tasked specific government entities with enforcing wage theft or paid sick leave laws, such as: a city manager, treasurer, or attorney; office of human rights; unit of the Mayor's office; or other officials.<sup>82</sup> In some cases, city attorneys have enforced workplace laws. For example, the San Diego City Attorney sued the grocery delivery company Instacart for misclassifying its workers as independent contractors instead of as employees, and in February 2020 obtained a preliminary injunction against the company.<sup>83</sup>

### C. Criminal prosecutors<sup>84</sup>

A third new group of government actors engaged in enforcing workplace laws and protecting workers' rights are criminal prosecutors at the state and local

79. See MINNEAPOLIS LAB. STANDARDS ENFORCEMENT DIV., <http://www.ci.minneapolis.mn.us/civilrights/LaborStandardsEnforcement/index.htm> [<https://perma.cc/PKE4-KWFB>] (last visited Aug. 25, 2020).

80. See ST. PAUL DIV. OF LAB. STANDARDS ENF'T & EDUC., <https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/labor-standards-enforcement-and-education> [<https://perma.cc/55AU-NEKJ>] (last visited Aug. 25, 2020).

81. See COUNTY OF SANTA CLARA OFF. OF LAB. STANDARDS ENF'T, <https://www.sccgov.org/sites/olse/Pages/home.aspx> [<https://perma.cc/QR7D-C2ST>] (last visited Aug. 26, 2020).

82. The advocacy group "A Better Balance" has an option on its website which enables filtered searches of enforcement agencies handling paid sick day enforcement. See *Paid Sick Time Laws*, A BETTER BALANCE, <https://www.abetterbalance.org/paid-sick-time-laws/search/> [<https://perma.cc/TW5C-D2DG>] (last visited Aug. 26, 2020). Several localities assign this function to their office of human rights. See CITY OF BOULDER OFF. OF HUM. RTS. & WAGE ENF'T, <https://boulder.colorado.gov/community-relations/human-rights-and-wage-enforcement> [<https://perma.cc/NQ4J-4QFA>] (last visited Aug. 26, 2020); MONTGOMERY COUNTY MD. OFF. OF HUM. RTS., [https://www.montgomerycountymd.gov/humanrights/Employer\\_Corner.html](https://www.montgomerycountymd.gov/humanrights/Employer_Corner.html) [<https://perma.cc/ZS5F-Y947>] (last visited Aug. 26, 2020); PINELLAS COUNTY FLA. OFF. OF HUM. RTS., [http://www.pinellascounty.org/Humanrights/wage\\_theft.htm](http://www.pinellascounty.org/Humanrights/wage_theft.htm) [<https://perma.cc/6ES2-ETUB>] (last visited Aug. 26, 2020). In Duluth, Minnesota, the city clerk has authority to enforce the law. See *City Clerk: Earned Sick and Safe Time Resources*, CITY OF DULUTH MINN., <https://duluthmn.gov/city-clerk/earned-sick-safe-time/esst-employee-resources/> [<https://perma.cc/8VLQ-7F27>] (last visited Aug. 26, 2020). In Miami-Dade County, a consumer mediation center handles wage disputes. See *Report Wage Theft*, MIAMI-DADE COUNTY, [https://www.miamidade.gov/global/service.page?Mduid\\_service=ser146799265229380](https://www.miamidade.gov/global/service.page?Mduid_service=ser146799265229380) [<https://perma.cc/UHP4-JRFJ>] (last visited Aug. 26, 2020). Note that this list is illustrative but not exhaustive.

83. Press Release, Mara W. Elliott, San Diego City Att'y, City Attorney Obtains Landmark Injunction Against Instacart (Feb. 25, 2020), <https://www.sandiego.gov/sites/default/files/nr200225a.pdf> [<https://perma.cc/TF63-PBEN>].

84. For in-depth discussions of this topic, see César F. Rosado Marzán, *Wage Theft as Crime: An Institutional View*, 20 J. L. & SOC'Y 300 (2020); RENA STEINZOR, *WHY NOT JAIL? INDUSTRIAL CATASTROPHES, CORPORATE MALFEASANCE, AND GOVERNMENT INACTION* 256 (Cambridge Univ. Press 2014). See also Chris Opfer, *Prosecutors Treating 'Wage Theft' as a Crime in These States*, BLOOMBERG L.: DAILY LABOR REPORT (June 26, 2019, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states>



levels. In addition to state AGs, previously discussed (some of whom have criminal prosecution authority), this group includes district attorneys, county attorneys, and similar officials (referred to herein collectively as “district attorneys” or “prosecutors”). Criminal prosecutors at any level—federal, state, or local—have not traditionally handled or prioritized crimes against workers, with the exception of rare high-profile cases, such as the unsuccessful prosecution of the owners of the Triangle Shirtwaist Factory after the deadly fire in 1911,<sup>85</sup> or the successful federal prosecution of Massey Energy Company CEO Donald Blankenship, which was based on the 2010 Upper Big Branch mine explosion that killed twenty-nine people.<sup>86</sup> To the contrary, the power of the criminal justice system has more often been brought to bear against workers on behalf of employers and corporations. U.S. labor history is replete with examples of arrests of workers standing up for better conditions, from striking garment workers in the early 1900s to janitors toward the close of the twentieth century.<sup>87</sup>

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[<https://perma.cc/L3EF-C2TZ>]; Luke Darby, *Is Your Employer Stealing From You?*, GQ (Nov. 8, 2019), <https://www.gq.com/story/wage-theft#:~:text=Millions%20of%20workers%20lose%20billions,as%20all%20other%20property%20theft.&text=That's%20nearly%20half%20as%20much,are%20only%20for%20ten%20states> [<https://perma.cc/P8BT-62U8>]. For recent commentary see Diana Florence, *Defending Workers Is Now Life-and-Death: What Essential Workers Need in the Coronavirus Crisis*, N.Y. DAILY NEWS (Apr. 5, 2020, 6:11 PM), <https://www.nydailynews.com/opinion/ny-oped-defending-workers-is-now-life-and-death-20200406-voxxmtrb6zgodl6tektotbm-y4ba-story.html>; Terri Gerstein, *Stealing From Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, THE NATION (May 24, 2018), <https://www.thenation.com/article/archive/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/>; Terri Gerstein, *More States Should Follow Colorado Policy on Wage Theft*, THE HILL (May 30, 2019, 4:00 PM), <https://thehill.com/opinion/finance/446199-more-states-should-follow-new-colorado-policy-on-wage-theft> [<https://perma.cc/C5XE-LJYW>]; Lucy Lang, *Prosecutors Should Protect Workers from White-collar Crime*, CITY & STATE (Apr. 14, 2020), <https://www.cityandstateny.com/articles/opinion/opinion/prosecutors-should-protect-workers-white-collar-crime.htm> [<https://perma.cc/7PUQ-G28R>].

85. For background on the Triangle Fire and its aftermath, see DAVID VON DREHLE, *TRIANGLE: THE FIRE THAT CHANGED AMERICA* 166, 258 (Atlantic Monthly Press 2003).

86. Blankenship was convicted on a misdemeanor, but he was not found guilty of more serious felony charges. Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/07/us/donald-blankenship-sentenced-to-a-year-in-prison-in-mine-safety-case.html> [<https://perma.cc/GMV9-BFWV>].

87. For example, the owners of the Triangle Shirtwaist Factory in 1909 “hired prostitutes to accompany replacement workers—‘scabs’—to the Triangle factory.” This led to a fight with strikers “and then some male thugs materialized to further pummel the strikers. When the police arrived, they arrested the strikers and let the prostitutes and goons walk away.” STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* 52 (1st ed. 2019); See also Bob Baker, *Police Use Force to Block Strike March*, L.A. TIMES (June 16, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-06-16-me-33-story.html> [<https://perma.cc/ZRV3-L8JL>].



Yet in recent years, a number of district attorneys and other prosecutors, including but not limited to those in the progressive prosecutor movement,<sup>88</sup> have begun to investigate and prosecute a range of crimes against workers,<sup>89</sup> including wage theft;<sup>90</sup> labor trafficking;<sup>91</sup> predictable, preventable workplace fatalities and serious injuries;<sup>92</sup> payroll fraud, including failure to pay unemployment taxes and/or to procure workers' compensation insurance,<sup>93</sup>

88. For general background on the movement to overhaul the criminal justice system through progressive prosecutors and nonprofit organizations, see Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (March 19, 2020). See also FAIR AND JUST PROSECUTION, <https://fairandjustprosecution.org/> [<https://perma.cc/Q94F-CCJA>] (last visited Aug. 27, 2020); PROSECUTOR IMPACT, <https://prosecutorimpact.com/team> [<https://perma.cc/46DJ-AWMM>] (last visited Aug. 27, 2020). For a discussion of how criminal prosecution of crimes against workers fits into a progressive prosecutor vision, see Terri Gerstein & Arisha Hatch, *Re-Envisioning the Roles of Prosecutors and Attorneys General to Make the Justice System Work for Everyone*, STAN. SOC. INNOVATION REV., Winter 2020, at 13.

89. The Center for Progressive Reform has created a first-of-its-kind "Crimes Against Workers" database that lists many state criminal prosecutions of employers. See *CPR's Crimes Against Workers Database*, THE CENTER FOR PROGRESSIVE REFORM, <https://progressivereform.org/lists/incidents/> [<https://perma.cc/TU64-9RF7>] (last visited Aug. 27, 2020). District Attorney offices in Orange County and Queens County New York have recently announced a focus on this issue, for example. Heather Yakin, *Crackdown on Labor Crimes in Region Intensifies*, TIMES HERALD-RECORD (Oct. 17, 2019), <https://www.recordonline.com/news/20191017/crackdown-on-labor-crimes-in-region-intensifies> [<https://perma.cc/2PKP-TK9J>]; Bill Parry, *Queens DA Establishes Housing and Worker Protection Bureau*, QNS.COM (June 3, 2020), <https://qns.com/story/2020/06/03/queens-da-establishes-housing-and-worker-protection-bureau/> [<https://perma.cc/3RR9-MU97>]. The San Diego District Attorney in February 2021 announced the creation of a Workplace Justice Unit. Press Release, SAN DIEGO DIST. ATT'Y, "DA Forms New Unit to Protect Workers' Rights, Prosecute Employers of Paying Wages" (Feb. 22, 2021), [https://www.sdcda.org/content/office/newsroom/tempDownloads/33d8e703-5a68-4ef5-8c54-3d19888df233\\_Workplace%20Justice%20News%20Release%202-22-2021.pdf](https://www.sdcda.org/content/office/newsroom/tempDownloads/33d8e703-5a68-4ef5-8c54-3d19888df233_Workplace%20Justice%20News%20Release%202-22-2021.pdf).

90. See HPM Digital Team, *Prosecutors File First Wage Theft Case in Harris County*, HOUSTON PUBLIC MEDIA (Sept. 5, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/09/05/302921/prosecutors-file-first-wage-theft-case-in-harris-county/> [<https://perma.cc/CB9L-TDB4>].

91. Chris Graves, *Contractor Gets 9 Months in Hennepin Co. Labor Trafficking Case*, MPR NEWS (Jan. 15, 2020, 7:42 PM), <https://www.mprnews.org/story/2020/01/15/contractor-gets-9-months-in-hennepin-co-labor-trafficking-case> [<https://perma.cc/9NZ3-L4PU>]; Kiki Intarasuwan, *Rainbow Bright Daycare Trafficked Workers, Stole \$8.5 Million in Wages: Attorney General*, NBC BAY AREA (Sept. 7, 2018), <https://www.nbcbayarea.com/news/local/california-attorney-general-announces-arrests-in-bay-area-human-trafficking-case/208920/> [<https://perma.cc/Z5ZR-CU4U>].

92. Lisa Kashinsky, *Drain Company Owner Convicted of Manslaughter in South End Trench Collapse*, BOSTON HERALD (Oct. 31, 2019), <https://www.bostonherald.com/2019/10/31/drain-company-owner-convicted-of-manslaughter-in-south-end-trench-collapse/>.

93. Press Release, Bob Ferguson, Washington State Attorney General, *Contractor Sentenced for Criminal Wage Theft, False Reporting of Workers' Comp Payments* (July 27, 2018), <https://www.atg.wa.gov/news/news-releases/contractor-sentenced-criminal-wage-theft-false-reporting-workers-comp-payments> [<https://perma.cc/G5AR-H9MF>].



and/or misclassification of workers;<sup>94</sup> prevailing wage violations;<sup>95</sup> retaliation and witness intimidation;<sup>96</sup> and workplace sexual assault.<sup>97</sup> These cases have been brought in a range of jurisdictions, including California,<sup>98</sup> Colorado,<sup>99</sup> Maine,<sup>100</sup> Massachusetts,<sup>101</sup> Michigan,<sup>102</sup> Minnesota,<sup>103</sup> Montana,<sup>104</sup> New

94. Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Announces Guilty Pleas and Convictions of Three Queens Construction Companies for Failing to Pay 150 Workers Over \$370,000 Wages (Feb. 7, 2018), <https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-guilty-pleas-and-convictions-three-queens-construction> [<https://perma.cc/2BEY-7UVC>].

95. Bob Vosseller, *Ocean County Contractor: 3 Years For Fraud*, JERSEY SHORE ONLINE (Sept. 6, 2019), <https://www.jerseyshoreonline.com/toms-river/ocean-county-contractor-3-years-for-fraud/> [<https://perma.cc/N3UW-74D3>].

96. Press Release, Maura Healey, Mass. Att’y Gen., Temp Company Owners Plead Guilty to Wage Theft, Intimidation, and Retaliation Against Warehouse Workers (Dec. 12, 2019), <https://www.mass.gov/news/temp-company-owners-plead-guilty-to-wage-theft-intimidation-and-retaliation-against-warehouse> [<https://perma.cc/3DRZ-4BX2>].

97. Mitchell Byars, *Boulder Ice Cream Co-owner Facing New Sex Assault Charges*, DAILY CAMERA (Mar. 29, 2017, 3:23 PM), <https://www.dailycamera.com/2017/03/29/boulder-ice-cream-co-owner-facing-new-sex-assault-charges/>; AP, *Owner of Last Howard Johnson’s Restaurant Charged with Sexual Abuse*, BOSTON.COM (Oct. 12, 2017), <https://www.boston.com/news/restaurants/2017/10/12/owner-of-last-howard-johnsons-restaurant-charged-with-sexual-abuse> [<https://perma.cc/MUY7-KJFV>].

98. Intarasuwan, *supra* note 91.

99. Mitchell Byars, *Boulder Man Fails to Pay Undocumented Workers, Then Threatens Them, Police Say*, DAILY CAMERA (Jan. 8, 2019, 6:13 PM), <https://www.dailycamera.com/2019/01/08/boulder-man-fails-to-pay-undocumented-workers-then-threatens-them-police-say/>.

100. Matt Byrne, *Contractor Indicted on Manslaughter Charges in Worker’s Fatal Fall from Roof*, PORTLAND PRESS HERALD (Apr. 10, 2019), <https://www.pressherald.com/2019/04/10/owner-of-roofing-company-charged-after-worker-fell-to-death/> [<https://perma.cc/CPV2-43UJ>].

101. Press Release, Maura Healey, Mass. Att’y Gen., Temp Company Owners Plead Guilty to Wage Theft, Intimidation, and Retaliation Against Warehouse Workers (Dec. 12, 2019), <https://www.mass.gov/news/temp-company-owners-plead-guilty-to-wage-theft-intimidation-and-retaliation-against-warehouse> [<https://perma.cc/7W9D-7CTS>]; Lisa Kashinsky, *supra* note 92.

102. Associated Press, *Michigan AG Nessel Issues 13 Felony Charges in First Payroll Fraud Case*, FOX47 NEWS (Aug. 28, 2019), <https://www.fox47news.com/news/local-news/michigan-ag-nessel-issues-13-felony-charges-in-first-payroll-fraud-case> [<https://perma.cc/7W9D-7CTS>].

103. Graves, *supra* note 91.

104. Press Release, Mont. Department of Justice, Helena Man Pleads Guilty to Felony Employer Misconduct (Oct. 3, 2019), <https://dojmt.gov/helena-man-pleads-guilty-to-felony-employer-misconduct/> [<https://perma.cc/9YE6-TRLJ>].



Jersey,<sup>105</sup> New York,<sup>106</sup> Pennsylvania,<sup>107</sup> Rhode Island,<sup>108</sup> Texas,<sup>109</sup> and Washington.<sup>110</sup> Some district attorneys have convened trainings for their peers statewide; for example, in June 2020, Orange County (NY) District Attorney David Hoovler provided a continuing legal education course for district attorneys throughout New York.<sup>111</sup>

The charges brought in these cases vary. For wage theft, some offices are able to avail themselves of specific wage theft statutes, while others might bring charges under larceny, theft of services, or scheme to defraud provisions. Employers who under-report their employees for workers' compensation insurance or on unemployment insurance tax forms may be charged with filing false documents or maintaining false business records. Workplace fatalities have been charged and/or convicted as workplace manslaughter,<sup>112</sup> manslaughter,<sup>113</sup>

105. Press Release, Gurbir S. Grewal, N.J. Att'y Gen., Contractor Pleads Guilty to Falsifying Records to Cheat Workers Out of \$200,000 by Not Paying Prevailing Wages (Mar. 27, 2019), <https://www.nj.gov/oag/newsreleases19/pr20190327b.html> [<https://perma.cc/2L8U-QMSB>].

106. Erica Byfield, *6 Charged in 2018 NYC Wall Collapse that Killed Construction Worker*, NBC NEW YORK (Nov. 21, 2019), <https://www.nbcnewyork.com/news/local/6-charged-in-2018-nyc-wall-collapse-that-killed-construction-worker/2206094/#:~:text=Brooklyn%20District%20Attorney%20Eric%20Gonzalez%20says%20the%20death%20was%20preventable,site%20on%20a%20soggy%20day> [<https://perma.cc/3URF-PDZC>].

107. Press Release, Josh Shapiro, Pa. Att'y Gen., Central Pennsylvania Contractor Charged for Theft of Workers' Wages and Benefits (Sept. 27, 2019), <https://www.attorneygeneral.gov/taking-action/press-releases/central-pennsylvania-contractor-charged-for-theft-of-workers-wages-and-benefits/#:~:text=HARRISBURG%20%E2%80%94%20Attorney%20General%20Josh%20Shapiro,for%20at%20least%205%20years> [<https://perma.cc/4RXX-AGS7>].

108. Press Release, Peter F. Neronha, R.I. Att'y Gen., Lincoln Man Arrested on Wage Theft Charges After Joint Investigation (Sept. 23, 2019), <https://www.ri.gov/press/view/36771> [<https://perma.cc/S97L-Y4PW>].

109. See HPM Digital Team, *Prosecutors File First Wage Theft Case in Harris County*, HOUSTON PUBLIC MEDIA (Sept. 5, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/09/05/302921/prosecutors-file-first-wage-theft-case-in-harris-county/> [<https://perma.cc/P2SW-8RNE>].

110. Press Release, Bob Ferguson, Wash. State Att'y Gen., (July 27, 2018), <https://www.atg.wa.gov/news/news-releases/contractor-sentenced-criminal-wage-theft-false-reporting-workers-comp-payments> [<https://perma.cc/CL6W-5F6A>].

111. *Hoovler Holds Labor Fraud Training for State DAs*, MID HUDSON NEWS (June 24, 2020), <https://midhudsonnews.com/2020/06/24/hoovler-holds-labor-fraud-training-for-state-das/> [<https://perma.cc/CL6W-5F6A>].

112. Byrne, *supra* note 100.

113. Kashinsky, *supra* note 92; Ryan Osborne, *Colorado Boss Charged in Employee's 2018 Trench Collapse Death*, THE DENVER CHANNEL (Aug. 23, 2019), <https://www.thedenverchannel.com/news/local-news/colorado-boss-arrested-in-employees-2018-trench-collapse-death>; Press Release, Eric Gonzalez, Kings County District Att'y (May 10, 2017), <http://www.brooklynda.org/2017/05/10/construction-company-owner-indicted-for-manslaughter/> [<https://perma.cc/96K4-TG C8>].



criminally negligent homicide, and reckless endangerment.<sup>114</sup> Prosecutors have generally brought charges against employers for egregious conduct: employers who commit fraud, are repeat violators, intentionally target particularly vulnerable workers, or who otherwise have little argument that they did not know their conduct was illegal (such as employers who fail to pay wages at all). This may be in part because criminal prosecutors must prove cases beyond a reasonable doubt (a higher burden than the “preponderance of the evidence” requirement in most civil cases involving workplace rights).

Prosecutors have generally used existing penal or criminal laws to address crimes against workers. In some jurisdictions, new statutes have been enacted to enable more effective prosecution and thereby encourage more prosecutors to pursue such cases. For example, the available laws to address wage theft in some states fall within the low-level misdemeanor category, in stark contrast to the felony status of many other kinds of theft. This misdemeanor status makes such cases less attractive to prosecutors, who often prefer to focus their limited resources on higher-level felony cases, which convey more gravity and provide greater leverage to obtain results. Two states recently addressed this problem by creating stronger criminal penalties for wage theft. In the 2019 legislative session, both Colorado and Minnesota created first-time felony status for wage theft above a certain threshold amount.<sup>115</sup> Boulder District Attorney Michael Dougherty, who has been a leader in Colorado on these issues, strongly supported the bill and enlisted the Colorado District Attorneys’ Council in that support, which was influential in the bill’s eventual passage.<sup>116</sup> Similarly, Attorney General Keith Ellison played a key role in supporting the bill that passed there.<sup>117</sup>

114. Press Release, Cy Vance, Jr., New York County District Att’y (Dec. 15, 2016), <https://www.manhattanda.org/da-vance-construction-company-foreman-sentenced-prison-death-worker-site/> [https://perma.cc/E43G-BFUQ]. Note that such prosecutions are not preempted by the federal Occupational Safety and Health Act. See JANE FLANAGAN, TERRI GERSTEIN, & PATRICIA SMITH, HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH, HARVARD LAW LABOR & WORKLIFE PROGRAM & NATIONAL EMP. LAW PROJECT (May 15, 2020), [https://lwp.law.harvard.edu/files/lwp/files/state\\_local\\_workplace\\_protection\\_lwp\\_nelp.pdf](https://lwp.law.harvard.edu/files/lwp/files/state_local_workplace_protection_lwp_nelp.pdf) [https://perma.cc/38H2-MAGN].

115. See COLO. REV. STAT. § 8-4-101 (2019);, *Article 3: Wage Theft*, MINN. DEP’T OF LAB. & INDUS (2018) [https://www.dli.mn.gov/sites/default/files/pdf/Wage\\_theft\\_legislation\\_2019\\_Article3\\_SessionLawChap7%20\(6\).pdf](https://www.dli.mn.gov/sites/default/files/pdf/Wage_theft_legislation_2019_Article3_SessionLawChap7%20(6).pdf) [https://perma.cc/LN48-8ZYB].

116. Shaun Boyd, ‘Put The Exploiters In Jail’: Wage Theft Bill Cracks Down On Employers, 4CBS DENVER (Apr. 2, 2019, 11:59 PM), <https://denver.cbslocal.com/2019/04/02/wage-theft-bill-colorado/>.

117. Stephen Montemayor, *Minnesota Lawmakers, Officials Hail New Wage Theft Law as Nation’s Strongest*, STAR TRIBUNE (July 15, 2019, 8:14 PM), <https://www.startribune.com/minnesota-lawmakers-officials-hail-new-wage-theft-law-as-nation-s-strongest/512743152/> [https://perma.cc/GZ2U-6Z4Y].



Other areas could also benefit from stronger legislation. In some jurisdictions, employer retaliation against workers who report wage theft or other violations is a very low-level misdemeanor, if anything.<sup>118</sup> Such retaliation is common and particularly harmful because of its chilling effect on other workers, both at that worksite and in the broader neighborhood or community of the retaliated-against worker.<sup>119</sup> Terminating an employee who has reported unpaid or subminimum wages—and depriving that individual of their livelihood and sustenance—is surely analogous to intimidation of a witness and should be treated with similar weight. One challenge for a prosecutor is demonstrating beyond a reasonable doubt that an employer's motive was retaliatory, when employers often offer their own (sometimes pretextual) explanations of the reasons for discharge. But this challenge speaks to the potential difficulty of proving such cases, not to the gravity of the offense.

Given the tendency of many to view workplace disputes as civil in nature, taking on this work has required a shift in perspective for some prosecutors; for example, considering nonpayment of wages an appropriate subject for a lawsuit, not a criminal prosecution. But other offices have understood that wage theft is a form of theft.<sup>120</sup> Indeed, most prosecutors would not question the appropriateness of criminal prosecution if an employee stole money from an employer through embezzlement or another means. In fact, some offices have long prosecuted workers' compensation or unemployment insurance claimants, pursuing people who have fraudulently received benefits. It seems both unfair and unwise, then, to categorically refrain from prosecuting employers who have willfully cheated in relation to these same programs, generally defrauding the system of a far greater amount of money than any individual claimant.

Some of the most prominent reform-oriented district attorneys and prosecutors have embraced enforcement of workers' rights as part of their mission, even during the current period of profound criticism of many or most aspects of the criminal justice system.<sup>121</sup> Philadelphia District Attorney Larry

118. For example, in New York, it is a class B misdemeanor. N. Y. LAB. LAW § 215(3) (Consol. 1967).

119. See *New 50-State Analysis: Most States Leave Workers Who Report Employer Misconduct Unprotected*, NAT'L EMP'T L. PROJECT (June 24, 2019), <https://www.nelp.org/news-releases/workers-who-report-employer-misconduct-face-rampant-retaliation/#:~:text=In%20Exposing%20Wage%20Theft%20Without,lawsuits%2C%20or%20engaging%20in%20public> [https://perma.cc/83XW-4RA2].

120. Statistics show that the amount of money stolen from workers through wage theft dwarfs the amount stolen through many other forms of theft. See Ross Eisenbrey & Brady Meixell, *Wage Theft is a Much Bigger Problem Than Other Forms of Theft—But Workers Remain Mostly Unprotected*, ECONOMIC POL'Y INSTITUTE (Sept. 18, 2014), <https://www.epi.org/publication/wage-theft-bigger-problem-forms-theft-workers/> [https://perma.cc/Z3UC-W6T7].

121. For an exchange on the appropriateness of prosecuting crimes against workers, see Ben Levin, *Rethinking Wage Theft Criminalization*, ONLABOR (Apr. 13, 2018), <https://www.onlabor.org/rethinking-wage-theft-criminalization/> [https://perma.cc/ZY5U-ADTK]; Terri Gerstein &



Krasner and San Francisco District Attorney Chesa Boudin both appointed labor liaisons within their offices for this purpose, and Minnesota Attorney General Keith Ellison created a Wage Theft Unit.<sup>122</sup> Support for prosecution of employers might initially seem in discord with an overall focus on decreasing prosecutions and shrinking the criminal justice system. However, in comments announcing the creation of these units, leaders in this area framed the work as addressing power disparities and protecting those without power. District Attorney Krasner noted that the unit would “prosecute crimes committed against people who historically had few avenues to seek justice,” adding, “[e]mployers have enormous power over people, particularly low-wage and undocumented workers, and must be held accountable when they abuse that power, break the law, and take advantage of the vulnerable.”<sup>123</sup> Similarly, District Attorney Boudin noted that the new Economic Crimes Unit would “safeguard the rights of some of the most vulnerable people in our society: workers who are being exploited by their employers,” and noted that the unit was created “for those workers who far too frequently feel powerless in the justice system.”<sup>124</sup> Attorney

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David Seligman, *A Response to “Rethinking Wage Theft Criminalization,”* ONLABOR (Apr. 20, 2018), <https://www.onlabor.org/a-response-to-rethinking-wage-theft-criminalization/> [https://perma.cc/5E4Y-C39W]; Ben Levin, *Prosecutorial Power, Prisons, and the Problem with Wage Theft Criminalization: A Reply*, ONLABOR (Apr. 30, 2018), <https://www.onlabor.org/prosecutorial-power-prisons-and-the-problem-with-wage-theft-criminalization-a-reply/> [https://perma.cc/6SXE-3TAD].

122. Juliana Feliciano Reyes, *Philly DA’s Office Launches a Unit to Prosecute Employers or Crimes Against Workers*, THE PHILA. INQUIRER (Oct. 8, 2019), <https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html> [https://perma.cc/9937-6C68]; Press Release, Chesa Boudin, S. F. District Att’y, District Attorney Launches New Economic Crimes Unit to Protect Workers’ Rights (Apr. 21, 2020), <https://sfdistrictattorney.org/press-release/new-economic-crimes-unit-to-protect-workers/> [https://perma.cc/A5TD-D2NW]; Press Release, Keith Ellison, Minn. Att’y Gen., Attorney General Ellison Announces New Wage Theft Unit in AGO (July 15, 2019), [https://www.ag.state.mn.us/Office/Communications/2019/07/15\\_WageTheftUnit.asp](https://www.ag.state.mn.us/Office/Communications/2019/07/15_WageTheftUnit.asp) [https://perma.cc/YE2P-T8RC].

123. *District Attorney Krasner Announces New Labor Liaison to Bolster Protections for Workers*, CONSTRUCTION CITIZEN (Oct. 11, 2019), <https://constructioncitizen.com/blog/district-attorney-krasner-announces-new-labor-liaison-bolster-protections-workers/1910111> [https://perma.cc/7T29-MP66].

124. Press Release, Chesa Boudin, S. F. District Att’y, District Attorney Launches New Economic Crimes Unit to Protect Workers’ Rights (Apr. 21, 2020), <https://sfdistrictattorney.org/press-release/new-economic-crimes-unit-to-protect-workers/> [https://perma.cc/FU63-75FA]. This office, which has both criminal and civil jurisdiction, sued the platform-based company DoorDash for misclassification within two months of creating the unit and in 2021, along with Los Angeles District Attorney George Gascón, sued the platform-based company Handy. Press Release, Chesa Boudin, S. F. District Att’y, SFDA Chesa Boudin Announces Employee Protection and Unfair Business Practices Action Against DoorDash for Illegally Misclassifying Its Delivery Workers (June 16, 2020), <https://sfdistrictattorney.org/press-release/sfda-announces-action-against-door-dash/> [https://perma.cc/P4LN-ZLZ9]. “Press Release, Chesa Boudin, S. F. District Att’y, District Attorney Boudin and Los Angeles District Attorney George Gascón Announce Worker Protection



General Ellison noted the inequity of treating traditional theft seriously and failing to take action on wage theft: “[w]age theft is theft, pure and simple—but even though we prosecute folks who steal from people, it’s been hard to hold bad employers accountable for stealing wages from their workers.”<sup>125</sup> These leaders frame this work within a progressive vision of prosecution because prosecuting employers involves holding the powerful accountable for actions taken against those who are powerless. In this way, it strikes a stark contrast to the ways the criminal justice system has often been wielded against poor communities and communities of color, while leaving those with money or power untouched. Indeed, District Attorney Krasner stated that the new unit would combat a too-often pervasive attitude in government: “[y]ou take care of the powerful people, but not the workers.”<sup>126</sup>

## II. NEW LAWS AND STANDARDS

Over the past decade, states and localities have been increasingly active in passing worker protection laws, often creating new standards. These new requirements have been enacted through legislation, administration regulation, and, more recently during the Covid-19 pandemic, through executive orders. Most of these new laws have been passed in states and cities with Democratic leadership. In some instances, cities passing worker protection laws have spurred preemption legislation or legal challenges from the more conservative states in which they are located.<sup>127</sup>

Much of this new state and local lawmaking activity has occurred as a result of and in conjunction with extensive organizing on these topics by worker and community organizations. Unions have been involved in these efforts, including: the Service Employees International Union (SEIU), focused on airport and fast-food workers; the United Brotherhood of Carpenters and Joiners of America,

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Action Against Handy for Misclassifying Its Workers (March 17, 2021), <https://www.sfdistrictattorney.org/press-release/district-attorney-boudin-and-los-angeles-district-attorney-george-gas-con-announce-worker-protection-action-against-handy-for-misclassifying-its-workers/>.

125. Press Release, Keith Ellison, Minn. Att’y Gen., Attorney General Ellison announces new Wage Theft Unit in AGO (Jul. 15, 2019), [https://www.ag.state.mn.us/Office/Communications/2019/07/15\\_WageTheftUnit.asp](https://www.ag.state.mn.us/Office/Communications/2019/07/15_WageTheftUnit.asp) [<https://perma.cc/57N6-6ZRJ>].

126. Juliana Feliciano Reyes, *Philly DA’s Office Launches a Unit to Prosecute Employers or Crimes Against Workers*, THE PHILA. INQUIRER (Oct. 8, 2019), <https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html> [<https://perma.cc/7V5H-4978>].

127. The pandemic has led to an upsurge in state and local worker protection legislation; this article contains some but not all of the most up-to-date developments in this rapidly changing situation. For information about state preemption of local labor laws, see Nestor M. Davidson, Richard Briffault, Paul A. Diller, and Olatunde Johnson, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, September J. ACS ISSUE BRIEFS 3 (2017); Hunter Blair et al., *Preempting Progress*, Economic Policy Institute (September 30, 2020), <https://www.epi.org/publication/preemption-in-the-south/>.



focused on stronger laws against misclassification of workers, particularly in the construction industry; and UNITE HERE, aimed at laws protecting hotel workers. In addition, nonprofit organizations have pushed for state and local laws, including national networks like the Center for Popular Democracy, Jobs with Justice, and the National Domestic Workers Alliance, as well as local organizations like Make the Road New York (as well as Make the Road Connecticut, Nevada, New Jersey, and Pennsylvania), Towards Justice (Colorado), Raise the Floor Alliance (Chicago), Workers Defense Project (Texas), Centro de Trabajadores Unidos en La Lucha (Minnesota), and Justice at Work (Massachusetts), as well as scores of others. These organizations have played a critical role in advocating for a range of new state and local laws. Many of these organizations also advocate for change on the national level and have directed significant efforts in recent years to reforms at the state and local level, in part because of the conservative composition of the U.S. Senate.

Some states have seen a flurry of activity after an electoral transition. For example, in the 2020 legislative session, Virginia passed laws increasing the minimum wage, increasing penalties for wage theft, banning non-compete agreements for low-wage workers, adding sexual orientation and gender identity to the protected categories under state anti-discrimination laws, and enabled some collective bargaining by state employees.<sup>128</sup>

The discussion below is not comprehensive, but it provides an overview of many key developments, and it illustrates the surge of activity in recent years at all levels of state and local government.

*Wages:* Many states and localities have passed their own minimum wages. A total of twenty-four states and forty-eight cities and counties were slated to have minimum wage increases in 2020 alone, some through legislated increases and some based on cost-of-living adjustments. Many of these increases bring the applicable minimum wage to \$15 per hour or more. Notably, Florida voters overwhelmingly approved a ballot initiative to raise the state's minimum wage to \$15 by 2026.<sup>129</sup> As described above, Colorado and Minnesota strengthened their wage theft criminal statutes in 2019; other states, like New Jersey and Virginia also created stronger anti-wage-theft provisions.<sup>130</sup> Several states,

128. See Jordan Chillon, Sara Tandy, & Laura Windsor, *Virginia General Assembly 2020: What Virginia Employers Need to Know*, JD SUPRA (Apr. 14, 2020), <https://www.jdsupra.com/legalnews/virginia-general-assembly-2020-what-85702/> [https://perma.cc/37TK-87VK].

129. Yannet Lathrop, *Raises From Coast to Coast in 2020*, NAT'L EMP. L. PROJECT (Dec. 23, 2019), <https://www.nelp.org/publication/raises-coast-coast-2020/> [https://perma.cc/ZG4M-PND3]; *Florida Amendment 2 Election Results: Raise Minimum Wage*, NEW YORK TIMES (November 3, 2020), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-florida-amendment-2-raise-minimum-wage.html> [https://perma.cc/4JLB-T87Q].

130. Adil Syed Ahmed & David Tykulsker, *Revamped Wage Theft Law to Provide Unprecedented Relief for NJ Workers*, LAW.COM (Nov. 26, 2019, 12:00 PM), <https://www.law.com/njlawjournal/2019/11/26/revamped-wage-theft-law-to-provide-unprecedented-relief-for-nj-work>



including Colorado,<sup>131</sup> Pennsylvania,<sup>132</sup> and Washington,<sup>133</sup> promulgated regulations to create stronger overtime protection for white collar workers. These rules were in response to a Trump administration rule setting a salary threshold for the executive, administrative, and professional overtime exemption that was far lower than a prior Obama-era rule, and that would exclude many from coverage.<sup>134</sup> New York City passed a law requiring car washes to register with the city and post a bond<sup>135</sup> based on high violation rates in that industry, and New York State enacted a wage bond requirement for nail salons for the same reason.<sup>136</sup>

*Paid sick days and paid family and medical leave:* The United States has long been an outlier internationally in its failure to require or provide paid leave of any kind as a basic employment right.<sup>137</sup> Paid sick day laws require employers to pay workers for a modest number of days out of work for short-term health needs of themselves and their families, while paid family and medical leave laws

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ers/?slreturn=20200806230147 [https://perma.cc/3TXV-L47H]; Chillon, Tandy & Windsor, *supra* note 128.

131. *Colorado Overtime and Minimum Pay Standards Order (COMPS Order) #36*, 7 CCR-1103-1, COLO. DEPT. OF LAB. & EMP'T DIV. OF LAB. STANDARDS AND STAT. (2020), [https://www.colorado.gov/pacific/sites/default/files/Temporary%207%20CCR%201103-1%20COMPS%2036\\_Clean.pdf](https://www.colorado.gov/pacific/sites/default/files/Temporary%207%20CCR%201103-1%20COMPS%2036_Clean.pdf) [https://perma.cc/U3PN-ZKA2].

132. *Pennsylvania Moving Forward with New Overtime Rules*, COMMONWEALTH OF PA. (Oct. 17, 2019), <https://www.media.pa.gov/Pages/Labor-and-Industry-Details.aspx?newsid=413#:~:text=This%20increase%20will%20be%20phased,143%2C000%20workers%20in%20three%20years> [https://perma.cc/Q6ZE-CX35].

133. *New State Overtime Rules Will Restore Protections for Thousands of Workers*, WASH. STATE DEP'T OF LAB. & INDUS. (Dec. 11, 2019), [https://lni.wa.gov/workers-rights/\\_docs/Overtime-rules-news-release.pdf](https://lni.wa.gov/workers-rights/_docs/Overtime-rules-news-release.pdf) [https://perma.cc/SN4Z-ET7H].

134. Alina Selyukh, *New Federal Overtime Rule Takes Effect Jan. 1*, NPR (Apr. 2020), <https://www.npr.org/2020/01/01/792821129/new-federal-overtime-rule-takes-effect-jan-1> [https://perma.cc/J88N-GEU9].

135. N.Y. CITY ADMIN. CODE § 20-541 (2015). For requirements, see *Car Wash License Application Checklist*, NYC CONSUMER AFFAIRS, <https://www1.nyc.gov/site/dca/businesses/license-checklist-car-wash.page> [https://perma.cc/QC5G-TU5A] (last visited Oct. 1, 2020). The bonding requirement had a two-tier system (depending on whether a car wash was unionized or under a government settlement or not), which led to an ultimately unsuccessful NLRB preemption challenge. See Press Release, N.Y. City Law Dept., *City Wins Legal Battle to Make Car Wash Industry Fairer for Workers and Consumers* (Feb. 11, 2019), <https://www1.nyc.gov/site/law/news/004-19/city-wins-legal-battle-make-car-wash-industry-fairer-workers-consumers> [https://perma.cc/V9KK-6RWS].

136. Ileana Najarro, *New York, Combating Worker Abuse, Requires Salon Owners to Secure Wage Bonds*, N.Y. TIMES (Aug. 9, 2015), <https://www.nytimes.com/2015/08/10/nyregion/new-york-combating-worker-abuse-will-require-salon-owners-to-secure-wage-bonds.html> [https://perma.cc/5EKQ-44ZN].

137. Danielle Kurtzleben, *Lots of Other Countries Mandate Paid Leave. Why Not The U.S.?*, NPR (Jul. 15, 2015), <https://www.npr.org/sections/itsallpolitics/2015/07/15/422957640/lots-of-other-countries-mandate-paid-leave-why-not-the-us> [https://perma.cc/VX59-FYRM].



establish social insurance programs, typically funded by employer contributions and employee payroll deductions, to be used for longer-term medical issues, care for a new child, or care for a family member who is ill.<sup>138</sup> In the absence of any federal action on this issue (prior to the passage of the Families First Coronavirus Response Act, which created limited temporary paid sick leave), states and localities for years took the lead in passing laws of both kinds. San Francisco was the first, passing the country's first paid sick days law in 2006.<sup>139</sup> Since then, at least thirteen states plus the District of Columbia have passed paid sick time laws, as well as at least twenty-one localities (including seven within California).<sup>140</sup> Meanwhile, at least nine states and the District of Columbia have passed paid family and medical leave laws.<sup>141</sup>

*Fair workweek laws:* These laws seek to ensure predictable schedules for low-wage workers, often in particular industries, such as retail and restaurants. In these industries, widely varying and unpredictable schedules, combined with "on-call" shifts, "clopenings," and insufficient work hours, often create severe difficulties for workers needing to manage childcare or second jobs. These workers need more reliable schedules and income for themselves and their families. Generally, fair workweek laws require employers to provide work schedules at least two weeks in advance, pay money for additional shifts, allow at least ten or eleven hours of rest between shifts, and offer existing workers the chance to work additional hours before hiring new employees. Laws to this effect have been passed in at least seven localities and two states.<sup>142</sup>

*Collective bargaining:* The National Labor Relations Act ("NLRA") broadly preempts state and local legislation or action in the area of collective bargaining. However, states and localities have nonetheless found ways to

138. See *Paid Sick Days & Paid Family and Medical Leave: A National Partnership for Women & Families Resource*, NAT'L P'SHIP FOR WOMEN & FAMILIES (2019), <https://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/paid-sick-days-and-paid-family-medical-leave-primer.pdf> [<https://perma.cc/L6GG-NFEV>].

139. See Families First Coronavirus Response Act, H.R. 6201, 116th Cong. (2019–2020). See S.F. CAL. ADMIN. CODE § 12W (2007), <https://sfgov.org/olse/paid-sick-leave-ordinance-pslo> [<https://perma.cc/P4YP-W9CS>].

140. *Paid Sick Time Laws*, A BETTER BALANCE, <https://www.abetterbalance.org/paid-sick-time-laws/> [<https://perma.cc/9K4A-5X39>] (last visited May 31, 2020).

141. *Comparative Chart of Paid Family and Medical Leave Laws in the United States*, A BETTER BALANCE, <https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/> [<https://perma.cc/5CRU-KJ9M>] (last visited May 31, 2020).

142. See *Winning a Fair Workweek*, FAIR WORKWEEK INITIATIVE, <http://www.fairworkweek.org/policy-innovations> [<https://perma.cc/7LEC-WV39>] (last visited May 31, 2020). "Clopening" is a term commonly used to describe work arrangements in which the same employee closes an establishment and then opens it the next day. See Tom Starner, *The effects of 'clopening' on employees: What employers can do*, HR DIVE (Mar. 22, 2016) <https://www.hrdive.com/news/the-effects-of-clopening-on-employees-what-employers-can-do/416036/#:~:text=%22Clopening%22%20is%20a%20common%20catchphrase,to%20reopen%20the%20same%20business> [<https://perma.cc/KF4Y-AD7C>].



expand these rights in recent years, generally among workers not covered by the NLRA. New York State passed a longstanding bill to grant farmworkers the right to collectively bargain.<sup>143</sup> Colorado and Nevada granted collective bargaining rights to certain state employees,<sup>144</sup> and Virginia passed a limited law allowing collective bargaining for a subset of public employees as well.<sup>145</sup> In the wake of the Supreme Court's *Janus* decision, a number of states, concerned about having a stable bargaining partner, passed laws to enable public employee unions access to new employee orientations and other laws to facilitate organizing among public employees.<sup>146</sup> Finally, New York City passed a law requiring employers, upon a worker's request, to deduct money from the worker's pay and remit it to a fast food worker organization.<sup>147</sup> While not directed toward collective bargaining in the traditional sense, this law seeks to build a worker-focused organization and give collective voice to workers in this industry.

*Non-compete agreements:* Covenants not to compete ("non-competes") limit an employee's ability to work for a competitor employer for a certain amount of time after leaving a job.<sup>148</sup> While previously limited to high-level executives or high-level workers with access to trade secrets, their use has significantly increased in recent decades. A survey of workers found that approximately 20% of them were subject to non-competes,<sup>149</sup> and a survey of employers found even greater usage: roughly half of employers surveyed

143. See A. 8419, 2019-2020 Gen. Assemb., Reg. Sess. (N.Y. 2019).

144. See H.R. 20-1153, 73d Gen. Assemb., 1st Reg. Sess. (Co. 2020); S. 135, 2019 Leg., 80th Sess. (Nev. 2019); Geoff Dornan, *Nevada State Employees Now Have Collective Bargaining*, NEV. APPEAL (June 12, 2019), <https://www.nevadaappeal.com/news/government/nevada-state-employees-now-have-collective-bargaining/> [https://perma.cc/73BZ-ECLJ].

145. Sarah Rankin, *Virginia Lawmakers OK Limited Public Sector Bargaining Bill*, ASSOCIATED PRESS (Mar. 8, 2020), <https://apnews.com/article/6559ad8943dd4d1c22e519d27530c2f0> (although this provision's effective date will be delayed); Tyler Arnold, *Collective Bargaining Effective Date Delay Passes Virginia Legislature*, THE CENTER SQUARE (Apr. 22, 2020), [https://www.thecentersquare.com/virginia/collective-bargaining-effective-date-delay-passes-virginia-legislature/article\\_7c450012-84e8-11ea-b6f0-b785713dcba.html](https://www.thecentersquare.com/virginia/collective-bargaining-effective-date-delay-passes-virginia-legislature/article_7c450012-84e8-11ea-b6f0-b785713dcba.html) [https://perma.cc/5XFB-5KSN].

146. Sarah W. Cudahy et al., *Total Eclipse of the Court? Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts*, 36 HOFSTRA LAB. & EMP. L. J. 55, 95-107 (2018).

147. N.Y. CITY ADMIN. CODE § 20-1302 (2015).

148. For more information about non-compete agreements, see Jane Flanagan, *No Exit: Understanding Employee Non-Competes and Identifying Best Practices To Limit Their Overuse*, AM. CONST. SOC'Y (Nov. 2019), <https://www.acslaw.org/wp-content/uploads/2019/11/Understanding-Employee-Non-Competes-and-Identifying-Best-Practices-to-Limit-Their-Overuse.pdf> [https://perma.cc/8WR2-JMEP].

149. Evan Starr et al., *Noncompetes in the U.S. Labor Force*, UNIV. OF MICH. L. & ECON. RESEARCH PAPER NO. 18-013 (May 7, 2020).



indicated that at least some employees had to sign non-competes, and nearly a third said that all employees had to sign them, regardless of pay or duties.<sup>150</sup>

At least two federal bills have been proposed (one strong, one weaker) to curb overuse of non-competes,<sup>151</sup> and a petition is under review seeking a rulemaking on the subject by the Federal Trade Commission.<sup>152</sup> In the meantime, in the past several years, at least eleven states and the District of Columbia have passed laws limiting employers' ability to impose non-compete agreements, including Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Virginia, and Washington.<sup>153</sup> These laws either ban non-compete agreements or make them unenforceable for some or most workers in the state based on their income (some states ban them only for low-wage workers; others set a higher income threshold, like Washington, where non-competes are banned for employees paid less than \$100,000 annually). Some state reforms have limited non-compete use in particular professions,<sup>154</sup> or have set requirements that an employer must pay former employees during the time they are unable to work because of a non-compete.<sup>155</sup>

*Industry-specific laws:* Many states and localities have passed laws specific to problems facing workers in particular industries. New York City passed a wage floor for platform-based drivers (working for Uber, Lyft, and the like),<sup>156</sup> and Seattle did the same; Seattle also announced plans to create a mediation

150. Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, ECON. POL'Y INST. (Dec. 10, 2019), <https://files.epi.org/pdf/179414.pdf> [<https://perma.cc/Y842-PU96>].

151. Workforce Mobility Act of 2019, S. 2614, 116th Cong., 1st Sess. (2019) <https://www.congress.gov/bills/116th-congress/senate-bill/2614> [<https://perma.cc/SMP9-EDY5>]. For the weaker Act, see Freedom to Compete Act, S. 19040, 116th Cong., 1st Sess. (2019), [https://www.rubio.senate.gov/public/\\_cache/files/7563e7ae-ca85-423b-b3e8-b44ce3b4eb54/1DC3C59DB28D9D2D273ACEB3087742E4.the-freedom-to-compete-act.pdf](https://www.rubio.senate.gov/public/_cache/files/7563e7ae-ca85-423b-b3e8-b44ce3b4eb54/1DC3C59DB28D9D2D273ACEB3087742E4.the-freedom-to-compete-act.pdf) [<https://perma.cc/ZZY2-6XJH>].

152. *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MARKETS INSTITUTES, <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf> [<https://perma.cc/ET4C-UNQQ>].

153. See Ban on Non-Compete Agreements Amendment Act of 2020 (D.C. Act 23-563) (2021); 820 ILL. COMP. STAT. 90/5(c) (2017); ME. REV. STAT. ANN. tit. 26, §§ 599-A, B (2019); MD. CODE ANN., LAB. & EMP. § 3-716 (2019); MASS. GEN. LAWS ch. 149, § 24L (2018); N.H. REV. STAT. ANN. § 275:70-a (2019); OR. REV. STAT. § 653.295 (2020); 28 R.I. GEN. LAWS. § 28-59 (2020); WASH. REV. CODE § 49.62 *et seq.* (2020); S. 480, 2020 Sess. (Va. 2020).

154. FLA. STAT. § 542.336 (2019); UTAH CODE ANN. § 34-51-201 (2019); H.R. 7424 § 305 (Conn. 2019).

155. For example, Massachusetts' non-compete law requires payment of garden leave, limits duration to 12 months in most cases, and contains requirements regarding when the employee must be notified about a non-compete. MASS. GEN. LAWS ch. 149, § 24L(b) (2019).

156. Shumita Basu, *New York City Passes New Pay Standards for App-Based Drivers*, WNYC NEWS (Dec. 4, 2018), <https://www.wnyc.org/story/new-york-city-passes-new-pay-standards-app-based-drivers/> [<https://perma.cc/X8ER-JJDR>].



center for driver disputes with the companies.<sup>157</sup> Chicago and Seattle enacted requirements that hotels provide “panic buttons” to housekeepers to address potential sexual assaults by hotel guests.<sup>158</sup> A number of states have passed “Domestic Worker Bill of Rights” laws ending the historical exclusion of domestic workers from workplace law protection, and granting them various rights.<sup>159</sup> Philadelphia passed a “just cause” termination law, creating an exception to employment at will for workers in the parking industry and New York City did the same for fast food workers.<sup>160</sup> Delaware passed a law requiring construction contractors to register with the state and to demonstrate prior compliance with state labor laws.<sup>161</sup> The Port Authority of New York and New Jersey passed a higher minimum wage required for workers at JFK International,

157. SEATTLE, WASH., MUN. CODE 14.33; CITY OF SEATTLE, WASH., ORDINANCE 126189, <http://seattle.legistar.com/View.ashx?M=F&ID=8867291&GUID=B0A2328C-E81A-456E-96CE-A7C1E57F285D> [<https://perma.cc/3LBG-KJWV>]; see also Jeneé Jahn, *Transportation Network Company Minimum Compensation Ordinance*, SEATTLE.GOV, <http://www.seattle.gov/laborstandards/ordinances/tnc-legislation/minimum-compensation-ordinance> [<https://perma.cc/9NFZ-J57K>] (last visited Dec. 10, 2020); SEATTLE, WASH., MUN. CODE 14.32; see Press Release, Jenny A. Durkan, Mayor of Seattle, Mayor Durkan Announces Her Fare Share Plan to Mandate a Minimum Wage and Provide Critical Worker Protections for Uber and Lyft Drivers (Sept. 19, 2019), <https://durkan.seattle.gov/2019/09/mayor-durkan-announces-her-fare-share-plan-to-mandate-a-minimum-wage-and-provide-critical-worker-protections-for-uber-and-lyft-drivers-invest-millions-of-dollars-in-housing-near-transit-and-transport/> [<https://perma.cc/W3U2-NLLF>].

158. See *Hotel Employees Health and Safety Initiative*, CITY OF SEATTLE 1, 2 (May 31, 2018), [https://www.seattle.gov/Documents/Departments/LaborStandards/QA\\_HEHS\\_071218.pdf](https://www.seattle.gov/Documents/Departments/LaborStandards/QA_HEHS_071218.pdf) [<https://perma.cc/HK53-Q6MS>]; Alexia Elejalde-Ruiz, *Chicago Hotels Roll Out Panic Button Systems to Protect Housekeepers From Sexual Harassment*, CHICAGO TRIBUNE (June 7, 2018, 6:00 PM), <https://www.chicagotribune.com/business/ct-biz-hotel-housekeepers-panic-buttons-xxxx-20180605-story.html>.

159. These states include Oregon, California, Connecticut, Illinois, New York, Massachusetts, Hawaii, and Nevada, as well as more recently, the city of Seattle. Alexia Fernandez Campbell, *Kamala Harris Just Introduced a Bill to Give Housekeepers Overtime Pay and Meal Breaks*, VOX (July 15, 2019, 4:20 PM), <https://www.vox.com/2019/7/15/20694610/kamala-harris-domestic-workers-bill-of-rights-act#:~:text=Share%20All%20sharing%20options%20for,overtime%20pay%20and%20meal%20breaks&text=Few%20US%20workers%20are%20worse%20off%20than%20domestic%20employees.&text=The%20legislation%2C%20known%20as%20the,laws%20to%20include%20domestic%20workers>.

160. PHILA., PA., CODE Ch. 9-4700. Press release, N.Y.C. Mayor, Mayor DeBlasio Signs “Just Cause” Worker Protection Bills for Fast Food Employees (Jan. 5, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/005-21/mayor-de-blasio-signs-just-cause-worker-protection-bills-fast-food-employees>.

161. See *Delaware Moves to Crack Down On Workplace Fraud, Improve Oversight of Contractors*, DEL. DEP’T OF LAB. (Jul. 31, 2019), <https://news.delaware.gov/2019/07/31/delaware-moves-to-crack-down-on-workplace-fraud-improve-oversight-of-contractors/> [<https://perma.cc/G98T-K7JU>].



LaGuardia, and Newark Liberty International Airports.<sup>162</sup> Illinois passed a law protecting temp workers.<sup>163</sup> And New York City enacted the “Freelance Isn’t Free” Act to ensure timely payment of money owed to freelance workers.<sup>164</sup>

*Laws to address fissuring of the workplace:* California has passed numerous worker protection laws in recent years; two in particular address aspects of the fissured workplace. Most visibly, the state passed AB5, a law incorporating the simpler and more protective “ABC test”<sup>165</sup> for determining employee status under wage and hour, unemployment, and similar state laws.<sup>166</sup> This test makes it much harder for companies to misclassify workers as independent contractors and is already incorporated in whole or part into the law in a number of other states. For example, New Jersey uses the ABC test for wage and hour and unemployment insurance cases, Massachusetts for wage and hour cases, and New York in two particular industries.<sup>167</sup> Although a recent ballot initiative, Proposition 22, carves out certain platform-based delivery and transportation workers from AB5’s coverage, it otherwise remains in effect throughout the state.<sup>168</sup>

In addition to the nationally visible AB5, California passed a “client employer” law which took effect in 2015. The law makes it easier to hold up-chain companies liable as joint employers.<sup>169</sup> The state Labor Commissioner

162. Press Release, The Port Auth. of N.Y. and N.J., Port Authority Board Approves Minimum Wage Increase for Airport Workers (Sept. 27, 2018), [https://old.panynj.gov/press-room/press-item.cfm?headLine\\_id=2997](https://old.panynj.gov/press-room/press-item.cfm?headLine_id=2997) [<https://perma.cc/G98T-K7JU>].

163. 820 ILL. COMP. STAT. 175/2 (2006).

164. *Freelance Isn’t Free Act*, NYC CONSUMER AFFAIRS, <https://www1.nyc.gov/site/dca/about/freelance-isnt-free-act.page> [<https://perma.cc/E7VN-YYRY>] (last visited Oct. 1, 2020).

165. For a simple description of the ABC test, see Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NAT’L EMP. L. PROJECT (Jan. 28, 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/> [<https://perma.cc/M4SJ-M8MR>].

166. *Worker status: employees and independent contractors* A. 5, 2019 Cal. Assemb. Bill No. 5 (2019) [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) [<https://perma.cc/8ABL-72EB>].

167. See, e.g., N.Y. LAB. LAW §§ 861–862 (Consol.). For a 2016 map showing states that have at least partially adopted the ABC test, see Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT’L EMP. L. PROJECT (May 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf> [<https://perma.cc/FS9J-4EQS>].

168. BUS. & PRO. CODE, § 3 ch. 10.5, PROPOSITION 22 (Cal. 2020), <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf> [<https://perma.cc/JLW5-YZS4>]. For an analysis, see Terri Gerstein, *What Happened in California is a Cautionary Tale for Us All*, N.Y. TIMES (November 13, 2020) <https://www.nytimes.com/2020/11/13/opinion/prop-22-california-gig-workers.html> [<https://perma.cc/5B6S-QNWE>]; Rey Fuentes, Rebecca Smith & Brian Chen, *Rigging the Gig*, P’SHIP FOR WORKING FAMILIES & NAT’L EMP. L. PROJECT (July 2020), [https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig\\_Final%2007.07.2020.pdf](https://www.forworkingfamilies.org/sites/default/files/publications/Rigging%20the%20Gig_Final%2007.07.2020.pdf) [<https://perma.cc/Y9VN-V7PU>].

169. CAL. LAB. CODE § 2810.3.



used that law, for example, to hold Cheesecake Factory liable for violations by a company it used for janitorial services.<sup>170</sup>

*Provisions permitting consideration of labor violations and compliance history when granting licenses, or in relation to government agencies contracting for goods or services:* Several states and localities have passed ordinances or similar measures explicitly calling for potential licensing consequences (such as suspension or revocation) for employers with a history of unremedied wage theft or other violations, including Boston, Chicago, Columbus, Houston, Milpitas (CA), and New Jersey.<sup>171</sup> Measures in Boston and Houston also allow for potential consequences in government contracting as well.<sup>172</sup>

*Protections for immigrant workers:* California passed several laws specifically to protect immigrant workers—and specifically undocumented workers—in light of vulnerabilities related to their status. These protections include a law prohibiting employers from retaliating against workers who report violations by threatening to call immigration, and a law prohibiting employers from providing U.S. Immigration and Customs Enforcement (ICE) with access to their workplace unless ICE has a warrant or subpoena.<sup>173</sup> New York also passed a law prohibiting such employer retaliation.<sup>174</sup>

170. Christina Caron, *Cheesecake Factory is Found Partly Liable in \$4.6 Million Janitor Wage Theft Case*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/business/cheesecake-factory-wage-theft.html> [https://perma.cc/L7YB-TAXP].

171. Press Release, Martin Walsh, Mayor of Boston, Mayor Walsh Announces Additional Steps to Protect Workers from Wage Theft (Sept. 17, 2015), <https://www.cityofboston.gov/news/Default.aspx?id=20331> [https://perma.cc/K9TH-H995]; Mark Ferenchik, *City Council OKs employer penalties for “wage theft,” and more tax breaks*, COLUMBUS DISPATCH (Sept. 21, 2020) <https://www.dispatch.com/story/news/politics/county/2020/09/22/city-council-oks-employer-penalties-for-rsquo-wage-theft-rsquo-and-more-tax-breaks/42676983/> [https://perma.cc/WYK7-58CS]; MUNICIPAL CODE OF CHI. ch. 4–4–320, <http://op.bna.com.s3.amazonaws.com/dlrcases.nsf/r%3FOpen%3dkpin-948tnr>; CODE OF ORDINANCES CITY OF HOUSTON, TEX., Ch. 15, Art. IV § 15-65, [https://library.municode.com/tx/houston/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH15CO\\_ARTIVWATH\\_SS15-66—15-80RE](https://library.municode.com/tx/houston/codes/code_of_ordinances?nodeId=COOR_CH15CO_ARTIVWATH_SS15-66—15-80RE) [https://perma.cc/P3JA-RQ2U]; CITY OF MILPITAS, Ordinance No. 295 § 1-7, 10 (2018), [http://www.ci.milpitas.ca.gov/\\_pdfs/ordinance295.pdf](http://www.ci.milpitas.ca.gov/_pdfs/ordinance295.pdf) [https://perma.cc/Z2QQ-KNMS]; N.J. ADMIN. CODE § 12:4-1.1 (2020).

172. CODE OF ORDINANCES CITY OF HOUSTON, TEX., Ch. 15, Art. IV § 15-65, [https://library.municode.com/tx/houston/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH15CO\\_ARTIVWATH\\_SS15-66—15-80RE](https://library.municode.com/tx/houston/codes/code_of_ordinances?nodeId=COOR_CH15CO_ARTIVWATH_SS15-66—15-80RE) [https://perma.cc/C8AP-WFK4]; Exec. Order, Martin Walsh, Mayor of Boston, Establishing Requirements for City Contracts in an Effort to Prevent Wage Theft (Oct. 23, 2014), [https://owd.boston.gov/wp-content/uploads/2015/08/Wage\\_Theft\\_Executive\\_Order.pdf](https://owd.boston.gov/wp-content/uploads/2015/08/Wage_Theft_Executive_Order.pdf) [https://perma.cc/B8AH-5V6N].

173. See Daniel Costa, *California Leads the Way: A Look at California Laws that Help Protect Labor Standards for Unauthorized Immigrant Workers*, ECON. POL’Y INST. (Mar. 22, 2018), <https://www.epi.org/publication/california-immigrant-labor-laws/> [https://perma.cc/UAD2-HPK9].

174. See Press Release, N.Y. State Att’y Gen. Letitia James, Bill Protecting Immigrant Workers From Workplace Harassment Signed Into Law (July 29, 2019), <https://ag.ny.gov/press-release>



*Pandemic-related:* In the absence of adequate federal action in 2020, state and local officials played a leading role in protecting worker safety and health during Covid-19. A number of governors have issued Executive Orders. For example, Minnesota Governor Tim Walz issued an Executive Order which among other things prohibits employer retaliation against workers for raising workplace safety concerns or using personal protective equipment (PPE), and grants workers the right “to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm.”<sup>175</sup> Illinois Governor J.B. Pritzker issued an Executive Order requiring usage of masks in public indoor spaces, and also requiring employers to provide face coverings for employees and provide adequately socially-distanced workplaces.<sup>176</sup>

In the absence of enforceable Covid-specific standards (rules) on workplace safety issued by OSHA, Virginia leaders were the first to create a Covid-specific workplace safety standard at the state level;<sup>177</sup> California, Michigan, and Oregon have followed as well.<sup>178</sup>

A number of jurisdictions passed a range of laws addressing various concerns related to the pandemic. Some enacted expanded paid sick leave laws to fill in gaps left by the Families First Coronavirus Response Act. For example, the Los Angeles City Council passed an Ordinance to provide supplemental paid

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/2019/ag-james-bill-protecting-immigrant-workers-workplace-harassment-signed-law [https://perma.cc/8LEE-UWZV].

175. For more details about state action in this area, see Deborah Berkowitz, *Which States and Cities Have Adopted Comprehensive Covid-19 Worker Protections?* NAT. EMP’T L. PROJECT BLOG (Dec. 1, 2020). For Minnesota’s Executive Order, see Minn. Gov. Tim Walz, Emergency Exec. Order No.20-54, *Protecting Workers from Unsafe Working Conditions and Retaliation During the COVID-19 Peacetime Emergency*, STATE OF MINN. EXEC. DEP’T (May 13, 2020), <https://minnesotareformer.com/wp-content/uploads/2020/05/EO-20-54-Worker-Safety.pdf> [https://perma.cc/6SJT-DNQP].

176. Ill. Gov. J.B. Pritzker, Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx> [https://perma.cc/3MQ2-HGBW].

177. Eli Rosenberg, *Virginia Poised to Create First Pandemic Workplace Safety Mandates in Nation, as Trump Labor Agency Sits on Sidelines*, WASH. POST (Jun. 24, 2020, 4:15 PM), <https://www.washingtonpost.com/business/2020/07/15/coronavirus-workplace-regulation-safety-virginia/> [https://perma.cc/E58V-3XE2].

178. See News Release, California Department of Industrial Relations, Cal/OSHA Emergency Regulations to Protect Workers from Covid-19 in Effect (Dec. 1, 2020), <https://www.dir.ca.gov/DIRNews/2020/2020-99.html> [https://perma.cc/8QZ6-4DLZ]; Michigan Occupational Safety and Health Administration, Emergency Rules, Coronavirus 2019, filed with the Secretary of State October 14, 2020, [https://www.michigan.gov/documents/leo/leo\\_miosha\\_COVID-19\\_Emergency\\_Rules\\_705296\\_7.pdf](https://www.michigan.gov/documents/leo/leo_miosha_COVID-19_Emergency_Rules_705296_7.pdf) [https://perma.cc/9CSY-49HR] (last visited Dec. 8, 2020); OR. ADMIN. R. 437–001–0744 (2020), <https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf> [https://perma.cc/6WAA-BTU6] (last visited Dec. 8, 2020) (addressing Covid-19 workplace risks through this temporary rule).



sick leave; the Ordinance was later amended by the mayor.<sup>179</sup> Los Angeles County created a program in which workers in select industries help ensure employer compliance with workplace safety laws. Also, the City of Los Angeles passed Worker Retention and Right of Recall Ordinances, which require certain city employers to give hiring priority to previously laid-off workers.<sup>180</sup> San Francisco passed a similar right of recall law.<sup>181</sup> The Chicago City Council passed a proposal prohibiting employer retaliation against employees for complying with public health orders.<sup>182</sup> Philadelphia's City Council went even further, passing a bill to protect workers against retaliation for raising concerns about unsafe working conditions.<sup>183</sup> The Colorado legislature also passed a bill to strengthen anti-retaliation protections during the pandemic.<sup>184</sup> Colorado, at the beginning of the Covid-19 pandemic, passed a limited and modest paid sick days requirement through regulation,<sup>185</sup> and the state legislature subsequently passed a more robust measure. Meanwhile Colorado voters soundly passed a ballot measure, Proposition 118, to create paid family and medical leave in the

179. Mayor of the City of L.A. Eric Garcetti, Public Order Under City of L.A. Emergency Authority: Supplemental Paid Sick Leave Due to COVID-19 (Apr. 7, 2020), <https://www.lamayor.org/sites/g/files/wph446/f/page/file/SUPPLEMENTALPAIDSICKLEAVE.pdf> [https://perma.cc/E4R6-GT4B].

180. Leila Miller, *L.A. County approves program for workers to form public health councils to curb coronavirus spread*, L.A. TIMES (Nov. 10, 2020); See Barbra Ferrer, *Establishing County Public Health Councils Program*, L.A. COUNTY (Nov. 5, 2020), <http://file.lacounty.gov/SDSInter/bos/supdocs/150439.pdf> [https://perma.cc/994J-SJL8]; Charles L. Thompson, IV & Shardé T. Skahan, *Los Angeles Adopts COVID-19 Right of Recall and Worker Retention Ordinances*, LEXOLOGY (May 20, 2020), <https://www.lexology.com/library/detail.aspx?g=a14453a3-d146-47a2-ac94-445f330d33db> [https://perma.cc/CS3M-79MP].

181. Joshua Sabatini, *SF Adopts Emergency Law Requiring Large Employers to Rehire Their Workers Laid Off During Covid-19 Pandemic*, S. F. EXAM'R, (Jun. 23, 2020, 5:00 PM), <https://www.sfexaminer.com/news/sf-adopts-emergency-law-requiring-large-employers-to-rehire-their-workers-laid-off-during-covid-19/> [https://perma.cc/DNE9-72GC].

182. Office of the City Clerk, *Amendment of Municipal Code Section 1-24-010 Prohibiting Employer Retaliation for Covered Employees Complying with Public Health Orders*, CITY OF CHICAGO (May 20, 2020), <https://chicago.legistar.com/LegislationDetail.aspx?ID=4424788&GUID=200E1B58-E5D5-4B5C-B14C-294DAAACA6FC&Options=Advanced&Search=&FullText=1> [https://perma.cc/W9YJ-C453].

183. Juliana Feliciano Reyes, *Philadelphia Set to be First U.S. City to Protect Workers Against Retaliation for Calling Out Coronavirus Conditions*, THE PHILA. INQUIRER (Jun. 25, 2020), <https://www.inquirer.com/news/coronavirus-safety-whistleblower-anti-retaliation-law-20200625.html> [https://perma.cc/KG4V-YUSQ].

184. H.R. 20-1415, 72d Gen. Assemb., Reg. Sess. (Colo. 2020).

185. Press Release, Colo. Dep't of Labor and Emp't, State Labor Department Releases Emergency Rules on Paid Sick Leave for COVID-19 (Mar. 11, 2020), <https://cdle.colorado.gov/press-releases/press-release-state-labor-department-releases-emergency-rules-on-paid-sick-leave-for> [https://perma.cc/QQ8Y-75K7].



state.<sup>186</sup> The Seattle City Council approved paid sick days for platform-based workers for Uber, Lyft, and similar companies,<sup>187</sup> as well as premium (hazard) pay for such workers.<sup>188</sup>

*Cutting-edge proposals still under consideration:* Several potentially transformative laws have been proposed in various states and localities. For example, legislators in six states have proposed novel whistleblower laws, modeled after California's Private Attorney General Act, that would allow workers to bring wage theft and other cases on behalf of the state.<sup>189</sup> These laws would help expand enforcement capacity, and because workers would be acting on behalf of the state, they would not be unlikely to be found preempted by the Federal Arbitration Act. Also, just cause bills to prohibit arbitrary termination of employees were introduced in 2021 in the Illinois legislature.<sup>190</sup> As with Philadelphia's "just cause" parking attendant law, any exception to employment at will would be a significant development within U.S. employment law.<sup>191</sup> In response to the coronavirus pandemic, New York City Council members proposed a "Essential Workers' Bill of Rights," providing for pay premiums and

186. S. 20–205, 72d Gen. Assemb., Reg. Sess. (Colo. 2020); Andrew Kenney, *Colorado Voters Say Yes To A Paid Family and Medical Leave Program*, COLO. PUB. RADIO NEWS (November 3, 2020), <https://www.cpr.org/2020/11/03/colorado-voters-say-yes-to-a-paid-family-and-medical-leave-program/> [https://perma.cc/MR5N-LRFZ].

187. SEATTLE, WASH., ORDINANCE 126091 (2020) (as amended by SEATTLE, WASH., ORDINANCE 126123, signed August 14, 2020); Heidi Groover, *Seattle City Council Approves Paid Sick Days for Gig Drivers During the Coronavirus Emergency*, THE SEATTLE TIMES (Jun. 1, 2020, 5:12 PM), <https://www.seattletimes.com/seattle-news/health/seattle-city-council-approves-paid-sick-days-for-gig-drivers-during-the-coronavirus-emergency/> [https://perma.cc/KW8M-Q4F8]; see Office of Labor Standards, *Gig Worker Paid Sick and Safe Time Ordinance*, SEATTLE.GOV, <https://www.seattle.gov/laborstandards/ordinances/covid-19-gig-worker-protections-/gig-worker-paid-sick-and-safe-time-ordinance> [https://perma.cc/3C7Q-R8TQ] (last visited Aug. 20, 2020).

188. SEATTLE, WASH., ORDINANCE 126094 (2020) (as amended by SEATTLE, WASH., ORDINANCE 126122, signed August 14, 2020); see Office of Labor Standards, *Gig Worker Premium Pay Ordinance*, SEATTLE.GOV, <https://www.seattle.gov/laborstandards/ordinances/covid-19-gig-worker-protections-/gig-worker-premium-pay-ordinance> [https://perma.cc/W6MD-BXZA] (last visited Aug. 21, 2020).

189. See Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 538 (2020); Jane Flanagan & Terri Gerstein, "Sign on the Dotted Line": *How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It*, 54 U. S.F. L. REV. 441, 460–61 (2020); Terri Gerstein & David Seligman, *How States Can Enforce Workers' Rights When Trump and His Supremes Don't Want to*, THE AM. PROSPECT (Nov. 14, 2018), <https://prospect.org/economy/states-can-enforce-workers-rights-trump-supremes-want/> [https://perma.cc/84K3-QF8V].

190. H.B. 3530, 102nd Gen. Assemb. (Ill. 2021); S.B. 2332, 102nd Gen. Assemb. (Ill. 2021).

191. For a discussion of employment at will and just cause termination, see Sharon Block & Benjamin Sachs, *Worker Power And Voice In The Pandemic Response*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM 1, 11–12 (2020).



just cause termination for essential workers, among other things.<sup>192</sup> Also, states and localities continue to struggle with how to regular “gig” economy work; for example, a bill establishing collective bargaining rights for drivers of Uber, Lyft, and similar platform-based companies passed out of the relevant senate committee in Massachusetts.<sup>193</sup>

### III. NEW ENFORCEMENT STRATEGIES

An increasing number of states and localities are adopting one or more aspects of a strategic enforcement approach in order to drive compliance with workplace laws and deter violations. This approach was implemented in the U.S. Department of Labor’s Wage and Hour Division during the Obama administration under the leadership of Wage and Hour Administrator Dr. David Weil, who has defined strategic enforcement as seeking “to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way.”<sup>194</sup> For state and local workplace enforcement agencies, this has meant: being proactive rather than waiting for complaints; focusing resources on key industries with high rates of violations; collaborating closely with community and worker organizations; use of criminal prosecutions; strategic use of publicity; using licensing to drive enforcement; and seeking up-chain joint employer liability. These approaches are a departure from the reactive model of enforcement that has often been used in the past.

*Strategic enforcement:* California has been a leader in its strategic enforcement efforts. The Bureau of Field Enforcement within the California Labor Commissioner’s office conducts proactive, or directed, sweeps and investigations, in collaboration with community partners and fellow government agencies, and targets businesses with egregious violations.<sup>195</sup> Numerous other state and local labor enforcement agencies, from New York State and City to Colorado and Seattle, also engage in proactive and strategic enforcement, in addition to responding to worker complaints.

192. Press Release, N.Y.C. Council, New York City Council Announces COVID-19 Legislative Relief Package To Be Introduced on Wednesday (Apr. 21, 2020), <https://council.nyc.gov/press/2020/04/21/1940/> [<https://perma.cc/TH7D-2B2R>].

193. S. 2778, 191st Gen. Assemb., Reg. Sess. (Mass. 2020).

194. David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic’s Journey in Organizational Change*, 60 J. OF INDUS. REL. 437, 437–38 (2018).

195. See CAL. LABOR COMM’R OFFICE, 2017-2018 FISCAL YEAR REPORT ON THE EFFECTIVENESS OF THE BUREAU OF FIELD ENFORCEMENT 1, 3, [https://www.dir.ca.gov/dlse/BOFE\\_LegReport2018.pdf](https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf).



*Community Partnerships*:<sup>196</sup> State and local agencies have entered into longstanding relationships with worker and community organizations. Such organizations help these agencies reach low wage and immigrant workers who would otherwise be unlikely to seek government assistance, and also help agencies learn of serious violation trends and practices. Sometimes referred to as “co-enforcement,” community partnerships are formal and funded in certain jurisdictions: San Francisco’s Office of Labor Standards Enforcement and Seattle’s Office of Labor Standards both use city funds to contract with worker organizations to conduct outreach and community education regarding municipal labor standards laws, and to refer cases to the office.<sup>197</sup> The California Labor Commissioner’s Office has engaged in a similar partnership program, except that the community partners in this effort are funded by the James Irvine Foundation to engage in this work.<sup>198</sup>

In other instances, government agencies have built strong and formalized partnerships with worker organizations without creating a funded program. The Fair Labor Division in the Massachusetts Attorney General’s office has two sets of regular meetings with worker stakeholders: meetings with the Fair Wage Campaign (immigrant worker centers and legal services offices) every six to eight weeks, and with their Labor Advisory Council (comprised primarily of labor leaders) every three to four months. Participants in these meetings discuss cases, trends, challenges, new approaches, priorities, and other matters. These meetings also ensure that the office is reaching the immigrant community and immigrant workers who might otherwise be fearful of approaching the government for help. In addition, the office holds monthly wage theft clinics in

196. For a detailed discussion of community partnerships in San Francisco and California, see Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives That Facilitate Worker Organizing*, 12 HARV. L. & POL’Y REV. 1, 8 (2017).

197. San Francisco’s Office of Labor Standards and Enforcement lists its community partners on its website. See Office of Labor Standards Enforcement, *San Francisco Workers Know Your Rights!*, SFGOV.ORG, <https://sfgov.org/olse/workers> [<https://perma.cc/H65S-7WNZ>] (last visited Aug. 21, 2020). Seattle Office of Labor Standards has a Community Outreach and Education Fund. See Office of Labor Standards, *Community Outreach and Education Fund (COEF)*, SEATTLE.GOV, <https://www.seattle.gov/laborstandards/funding/community-outreach-and-education-fund> [<https://perma.cc/XHS4-LV6C>] (last visited Aug. 21, 2020). These more recent programs follow a longstanding model in the federal government, OSHA’s Susan Harwood program, created in 1978, which awards grants to organizations “to provide training and education programs for employers and workers on the recognition, avoidance, and prevention of safety and health hazards in their workplaces and to inform workers of their rights and employers of their responsibilities.” See Occupational Safety and Health Administration, *Susan Harwood Training Grant Program*, OSHA.GOV, <https://www.osha.gov/harwoodgrants/overview> (last visited Aug. 26, 2020).

198. Nat’l Emp’t Law Project, *California Strategic Enforcement Partnership*, JAMES IRVINE FOUND., <https://s27147.pcdn.co/wp-content/uploads/CA-Enforcement-Documents-Letter-11-27-18-1.pdf> [<https://perma.cc/FL3L-CKVS>].



conjunction with many of these organizations to meet the needs of workers with cases the AG's office cannot address because of resource limitations.<sup>199</sup>

*Outreach to the Immigrant Community:* Some states have made special efforts to reach the immigrant community. The New York State Department of Labor, for example, has a Division of Immigrant Policies and Affairs specifically to ensure that the agency is adequately reaching the immigrant workforce.<sup>200</sup>

*Criminal prosecution:* As described in Section II(C) above, some district attorneys and other state and local prosecutors have begun using their powers to prosecute crimes against workers. In addition, some state labor departments have played a role in catalyzing or collaborating in this work. In 2014, the California Labor Commissioner's Office created a "Wage Theft is a Crime" campaign,<sup>201</sup> with campaign materials including posters and radio spots.<sup>202</sup> Then-Labor Commissioner (now Secretary for the California Labor and Workforce Development Agency) Julie Su also started a project of collaborating with district attorneys throughout the state, training state labor investigators on how to identify and prepare potential criminal cases, while also offering training to district attorney offices<sup>203</sup> about how to bring wage theft, workers' compensation fraud, and related cases.<sup>204</sup> In addition, the New York State Department of Labor conducts outreach, collaborates with, and routinely prepares and refers cases to district attorneys throughout the states.<sup>205</sup>

*Use of publicity:*<sup>206</sup> Numerous state and local agencies have used strategic communications and publicity as a way to drive compliance and educate workers

199. Email from Cynthia Mark, formerly Fair Labor Division Chief of Massachusetts AGO, to author (Dec. 8, 2020).

200. See N.Y. State Dept. of Labor Division of Immigrant Policies and Affairs, *Information on Novel Coronavirus*, N.Y. DEP'T OF LAB., <https://labor.ny.gov/immigrants/> [<https://perma.cc/64RK-LLG2>] (last visited Sept. 5, 2020).

201. See *Wage Theft Public Awareness Campaign*, CAL. LAB. COMM'R OFF., <https://wagetheftisacrime.com/Campaign.html> [<https://perma.cc/L73K-HQZG>] (last visited Sept. 5, 2020).

202. See *id.*

203. See Mary Ramirez, *How To Prosecute Wage Theft: A Training for Prosecutors & Investigators*, EVENTBRITE (Dec. 13, 2018), <https://www.eventbrite.com/e/how-to-prosecute-wage-theft-a-training-for-prosecutors-investigators-tickets-50095867087> [<https://perma.cc/REW8-C7SR>].

204. Telephone call with Julia Figueira-McDonough, then attorney with the California Labor Commissioner's Office (July 11, 2018).

205. Telephone call with James Rogers, Deputy Commissioner, New York State Department of Labor (July 11, 2018).

206. For a discussion about why labor agencies should use publicity to drive labor enforcement efforts, see Terri Gerstein & Tanya Goldman, *Protecting Workers Through Publicity: Promoting Workplace Law Compliance Through Strategic Communication*, LAB & WORKLIFE PROGRAM HARV. L. SCH. (June 2020), [https://lwp.law.harvard.edu/files/lwp/files/protecting\\_workers\\_through\\_publicity\\_gerstein\\_goldman.pdf](https://lwp.law.harvard.edu/files/lwp/files/protecting_workers_through_publicity_gerstein_goldman.pdf) [<https://perma.cc/CUV8-22ML>].



about their rights and employers about their obligations. Some offices have multilingual websites,<sup>207</sup> which are critical for reaching the immigrant population. New York City's Department of Consumer and Worker Protection has issued an annual "State of Workers' Rights in New York City" Report,<sup>208</sup> and several state AG offices issue annual Labor Day reports.<sup>209</sup> Some agencies have an active social media presence.<sup>210</sup> A number of offices issue press releases about their enforcement and actively seek media coverage of their activities.<sup>211</sup> This use of publicity is a critical but sometimes underused tool in promoting labor law compliance. A recently-published study showed a significant deterrent impact resulting from OSHA's policy under the Obama administration of routinely issuing press releases for violations with penalties above a certain threshold.<sup>212</sup> The study's author, Assistant Professor Matthew Johnson at Duke's Sanford School of Public Policy, found that "OSHA would need to conduct 210 additional inspections to achieve the same improvement in compliance as achieved with a single press release."

*Use of licensing process to drive compliance:* Some agencies have used their licensing process in creative ways to drive compliance. In Alaska, construction contractors are required to obtain a state license. The application itself, in its structure and wording, serves to deter misclassification of workers as independent contractors. It requires proof of workers' compensation coverage, and advises applicants: "Do not classify workers as 'independent contractors' without calling the Alaska Workers' Compensation Division Special Investigations Unit at 907-269-4002." A prior version of the application had even stronger language; it required applicants to check off whether they were operating with or without employees, and those who checked the "without" box

207. *E.g.*, *Worker Rights*, N.Y.C. CONSUMER AFF., <https://www1.nyc.gov/site/dca/workers/worker-rights.page> (last visited Aug. 23, 2020); Mass. Att'y Gen. Office, *Resources During COVID-19*, MASS.GOV, <https://www.mass.gov/guides/resources-during-covid-19#-your-rights-as-an-employee-> [<https://perma.cc/Q5Z8-3WZU>] (last visited Aug. 23, 2020).

208. *See* N.Y.C. Mayor Bill de Blasio & Comm'r Lorelei Salas, *The State of Workers' Rights in New York City: Third Annual Report*, N.Y.C. CONSUMER & WORKER PROT. (May 2020), <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/StateofWorkersRights-Report-2020.pdf> [<https://perma.cc/46NY-M4ZG>].

209. *See* Terri Gerstein, *supra* note 21.

210. *See* N.Y. State Dep't of Labor, *Stop the Spread. It's Up To Us*, New York, TWITTER, <https://twitter.com/NYSLabor> [<https://perma.cc/ES5F-5MDP>] (last visited Sept. 5, 2020); *see also* New York State Department of Labor, FACEBOOK, <https://www.facebook.com/nyslabor/> [<https://perma.cc/7BXT-BBZG>] (last visited Sept. 5, 2020).

211. Labor Comm'r Office, *Division of Labor Standards Enforcement – What's New*, CA DEP'T OF INDUS. REL. (May 2020), [https://www.dir.ca.gov/dlse/DLSE\\_whatsnew.htm](https://www.dir.ca.gov/dlse/DLSE_whatsnew.htm) [<https://perma.cc/5R2G-82FT>]; *Labor Bureau Press Releases*, N.Y. STATE OFF. OF ATT'Y GEN., <https://ag.ny.gov/press-releases/51> [<https://perma.cc/6SVN-AZMZ>] (last visited Aug. 27, 2020).

212. Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. (Mar. 26, 2020).



encountered the following statement about Alaska workers' compensation insurance laws:

There are no exemptions for family, friends, or non-residents, or for part-time or temporary jobs. Alaska labor laws, not business owners, determine employee status. Misclassification of employee status is a crime under AS 23.30.250. Do not classify workers as 'independent contractors' without calling the Alaska Workers' Compensation Division Special Investigations Unit at 907-269-4002.<sup>213</sup>

In this way, the application form itself serves as a public education and preventive device even before any license has been granted. This simple form demonstrates how the generally unseen mechanics of government work by strategic civil servants can help drive employer conduct in the right direction.

The Santa Clara County Office of Labor Standards Enforcement has also taken a creative approach to using both its strategic communications and licensing powers to drive compliance. The office added information about outstanding wage theft violations in the county "SCCDineOut" app, which allows diners to check restaurants' food safety compliance records on their smartphones.<sup>214</sup> The office also announced a program in which restaurant licenses will be suspended and restaurants will be closed for a minimum of five days (with notice to the public as to the reason for the suspension) if they persist in failing to satisfy an outstanding wage theft judgment.<sup>215</sup>

Even without a specific law authorizing agencies to suspend or deny permits to applicants with a history of wage or other labor violations, many license-issuing agencies can use existing broad catch-all licensing law requirements of "good moral character," or "financial responsibility" for this purpose. For example, in 2010, the New York State Racing and Wagering Board revoked the license of a trainer of thoroughbred horses because of "financial irresponsibility"<sup>216</sup> as a result of ignoring a state labor department order based

213. For current application, see *General Contractor Registration Application Instructions*, THE STATE OF ALA. DEP'T OF COM., CMTY., AND ECON. DEV. DIV. OF CORP., BUS., AND PRO. LICENSING (July 30, 2019), <https://www.commerce.alaska.gov/web/Portals/5/pub/con4815.pdf>. Prior application on file with the author [<https://perma.cc/S4DE-YNYS>].

214. Vanessa Ochavillo, *Restaurants Accused of Wage Theft to be Outed in Santa Clara County*, THE MERCURY NEWS (Dec. 26, 2019), <https://www.mercurynews.com/2019/12/26/restaurants-accused-of-wage-theft-to-be-outed-in-santa-clara-county/> [<https://perma.cc/2T4K-T3AC>].

215. *Food Permit Enforcement Program*, CTY. OF SANTA CLARA OFF. OF LAB. STANDARDS ENF'T (May 15, 2020), <https://www.sccgov.org/sites/olse/enforcement/Pages/Food-Permit-Enforcement-Program.aspx> [<https://perma.cc/U8G5-S4NP>].

216. Paul Post, *Trainer's License Revoked for Violating State Labor Law at Saratoga Race Course*, THE SARATOGIAN (Jul. 29, 2010), [https://www.saratogian.com/news/trainers-license-revoked-for-violating-state-labor-law-at-saratoga-race-course/article\\_18287c2b-9032-5dad-b1da-a7cb674b6e01.html](https://www.saratogian.com/news/trainers-license-revoked-for-violating-state-labor-law-at-saratoga-race-course/article_18287c2b-9032-5dad-b1da-a7cb674b6e01.html) [<https://perma.cc/5A7R-F5ZY>].



on overtime violations, following a broader labor department investigation in that industry.<sup>217</sup>

*Joint employer liability:* As noted in Section II, California's client employer law enables it easier to hold liable an up-chain company in a supply-chain model industry.<sup>218</sup> Other agencies have also sought to hold up-chain entities responsible as joint employers. The Massachusetts Attorney General's Office in 2017 settled wage and hour cases with both a factory and the staffing company that placed workers there, holding both responsible.<sup>219</sup> And in 2016, the New York Attorney General's Office filed a lawsuit against Domino's Pizza along with three franchisees as joint employers in a case that is ongoing.<sup>220</sup>

### CONCLUSION

As the above discussion demonstrates, there has been an upsurge of activity among states and localities in protecting workers' rights in recent years, with new government players, new laws, and new methods of enforcement, particularly in jurisdictions with progressive leadership. This activity is in part the result of many workers' rights activists turning their attention closer to home, particularly because of Senate opposition to worker-friendly policies (preceding the Trump administration), as well as the Trump administration's own anti-labor positions.

State and local action has been critical for safeguarding workers' rights during this challenging time. However, this action at the state and local level can and should continue even in light of the Biden administration's welcome pro-worker approach. Sustained and even increased momentum among states and localities is important, for various reasons.

First, as Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

217. Steven Greenhouse, *Racetrack Workers Aren't Paid Minimum Wage, State Agency Finds*, N.Y. TIMES (Aug. 27, 2008), <https://www.nytimes.com/2008/08/28/nyregion/28saratoga.html> [<https://perma.cc/DL5Y-GDA6>].

218. Caron, *supra* note 170.

219. Press Release, Off. of the Att'y Gen. of Mass., *Factory in Dudley to Pay Nearly \$1 Million for Wage Violations, Hindering AG's Investigation* (Nov. 22, 2017), <https://www.mass.gov/news/factory-in-dudley-to-pay-nearly-1-million-for-wage-violations-hindering-ags-investigation> [<https://perma.cc/2M7M-4MEJ>]; Press Release, Off. of the Att'y Gen. of Mass., *AG Recovers \$95,000 in Wages and Penalties from Worcester Staffing Agency Over Failure to Pay Dudley Factory Workers* (Feb. 23, 2018), <https://www.mass.gov/news/ag-recovers-95000-in-wages-and-penalties-from-worcester-staffing-agency-over-failure-to-pay> [<https://perma.cc/XZ2L-QLDE>].

220. Press Release, Off. of the Att'y Gen. of N.Y., *A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino's and Its Franchisees Liable for Systemic Wage Theft* (May 24, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable> [<https://perma.cc/JXN8-GRRY>].



rest of the country.”<sup>221</sup> This concept of states (and now localities too) serving as laboratories of democracy has allowed experimentation and advancement in laws and rights in a number of areas, not least among them worker protection laws. Paid sick days and paid family leave are both examples of this phenomenon: paid sick days began in one city, and paid family and medical leave began in one state, but both have now grown to cover millions of workers nationwide in a number of different places. With years of evidence from multiple jurisdictions of their feasibility, positive impact for workers, and lack of harm to employers,<sup>222</sup> national consensus has grown that these laws should be passed at the federal level,<sup>223</sup> with conservatives agreeing to the concept of at least paid parental leave, even though their proposals are generally lackluster.<sup>224</sup> Creativity in state and local worker protection legislation enables the development of cutting-edge approaches that address new developments in workplace challenges, including those emerging from new business models or from technological changes. States and localities can test policies that are not yet within the Overton window of the national conversation, on which there is not yet a national consensus. Even in prior eras with worker-friendly leaders at the federal level, states and localities have often taken the lead on important workplace and other policy issues, while the federal government later, with proof of concept, follows.<sup>225</sup>

Another benefit of state and local involvement in workers' rights is their closeness to their constituents: they can easily partner with local organizations

221. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

222. Eileen Appelbaum & Ruth Milkman, *No Big Deal: The Impact of New York City's Paid Sick Days Law on Employers*, CTR. FOR ECON. & POL'Y RSCH., <https://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf> [<https://perma.cc/3PRT-MQK4>] (last visited Feb. 12, 2021).

223. Juliana Menasce Horowitz et al., *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RES. CTR. (Mar. 23, 2017), <https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/> [<https://perma.cc/5P89-Q986>]. More recent polls have shown even greater support. See *New Polling Confirms Strong, Broad Support for Paid Family and Medical Leave*, NAT'L P'SHIP FOR WOMEN & FAMILIES (Apr. 2020), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/new-polling-paid-family-and-medical-leave.pdf> [<https://perma.cc/5JW5-VRH8>].

224. See, e.g., Sen. Marco Rubio, *Economic Security for New Parents Act*, RUBIO.SENATE, [https://www.rubio.senate.gov/public/\\_cache/files/c434ed78-d855-4c7e-8716-4707d06f16b9/0E8DD4331CC02644842606DF4343990B.economic-security-for-new-parents-act-rubio-updated.pdf](https://www.rubio.senate.gov/public/_cache/files/c434ed78-d855-4c7e-8716-4707d06f16b9/0E8DD4331CC02644842606DF4343990B.economic-security-for-new-parents-act-rubio-updated.pdf) [<https://perma.cc/PXX9-XAPD>] (last visited Feb. 12, 2021).

225. During this moment of burgeoning action on workers' rights, as states and localities act as laboratories of experimentation, there is a key role for academics: conducting a rigorous analysis of the impact of these policies. There are natural experiments happening in numerous states and cities nationwide, ripe for systematic analysis. It would be useful to have an informed understanding of which interventions have actually had their intended impact. This analysis can help inform what policies should be replicated elsewhere, how they might be altered to be more effective, and in what form they could be adopted on the national level.



and identify and address problems specific to their workforce and industries; they can also incorporate enforcement into other state and local functions, like granting of licenses (or Santa Clara County's dining out app). States and localities are also often nimbler than the federal government, with the ability to roll out new policies more quickly given the smaller size of government and the smaller regulated community at play.

In addition, trends like the growth of forced arbitration and increasingly conservative federal courts call for a continued focus on state and local action. Forced arbitration clauses prevent workers from being able to bring lawsuits in court; they are often coupled with class waivers, which prohibit employees from joining together to bring a class action. An estimated fifty-six percent of workers are currently covered by forced arbitration,<sup>226</sup> and that number is predicted to increase to over eighty percent by 2024.<sup>227</sup> This coverage is greatly facilitated by the Supreme Court's decision in *Epic Systems v. Lewis*, which held that class waivers accompanying arbitration provisions do not violate the National Labor Relations Act's right to collective action.<sup>228</sup> The proliferation of arbitration means a significant diminishment of private litigation,<sup>229</sup> a longtime essential pillar of our employment rights enforcement system. This situation will not be fully resolved unless and until federal legislation is passed to prohibit forced arbitration at work.<sup>230</sup> In the meantime, forced arbitration places even more responsibility on, and creates more need for, *all* government enforcement agencies—federal, state, and local—to vindicate workers' rights and ensure employer compliance with workplace laws.

226. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [https://perma.cc/AY3U-LMVY].

227. Kate Hamaji et al., *Unchecked Corporate Power*, ECON. POL'Y INST. (May 20, 2019), <https://www.epi.org/publication/unchecked-corporate-power/#:~:text=Unchecked%20Corporate%20Power%2C%20a%20new,covered%20by%20forced%20arbitration%20clauses> [https://perma.cc/VMJ9-DSHJ].

228. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

229. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 692–99 (2018).

230. Flanagan & Gerstein, *supra* note 189, at 457.



In addition, the composition of the federal courts after confirmation of over 225 Trump-appointed federal judges<sup>231</sup> means that state courts may become a far more promising venue for worker claims in many jurisdictions.<sup>232</sup>

It is worth noting as well that corporations and conservative advocacy groups have long seen the value of engagement and activity, particularly at the state level. Organizations like the American Legislative Exchange Council routinely develop pro-business model legislation for state lawmakers.<sup>233</sup> Proponents of workers' rights and of stronger worker power would, accordingly, be wise to retain a concurrent focus on state and local government, even in the context of a more favorable federal administration.

Finally, continued focus and ongoing development at the state and local level also serve as a hedge of sorts. As the federal government's interest in protecting workers ebbs and flows over time, it will serve workers' long-term interests to have well-developed, thoughtful, robust, multi-faceted and effective laws and enforcement at the state and local levels. At times state and local action may be a bulwark against federal action or inaction; at times states and localities may be the spearhead of new policies and innovation. But for those concerned about worker rights and power, putting all eggs in the federal basket seems patently unwise. Allowing state and local worker protection laws and

231. As of December 4, 2020, President Trump had appointed 229 federal judges. *American Constitution Society Judicial News Roundup*, AM. CONST. SOC. (Dec. 4, 2020), <https://www.acs-law.org/judicial-nominations/on-the-bench/> [<https://perma.cc/JG59-XC5D>]. By early May of 2020, when he had appointed 193 federal judges, this figure already included 28% of all circuit court judges and 22% of all federal judgeships. Russell Wheeler, *How Close is President Trump to His Goal of Record-Setting Judicial Appointments?*, BROOKINGS (May 5, 2020), <https://www.brookings.edu/blog/fixgov/2020/05/05/how-close-is-president-trump-to-his-goal-of-record-setting-judicial-appointments/> [<https://perma.cc/D94S-289U>].

232. Indeed, although the sample size is small, public nuisance lawsuits related to working conditions during the coronavirus pandemic seem to have received at least initially a more favorable response by state courts than by federal courts. Lawsuits filed against Smithfield foods and against Amazon in federal court were both dismissed, while state courts in California and Illinois both issued preliminary injunctions against McDonald's franchisees based on unsafe working conditions. *See* Complaint, Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-CV-06063-DGK Document 1 (W.D. Mo. Apr. 23, 2020); Order Granting Defendant's Motion to Dismiss, Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-CV-06063-DGK Document 51 (W.D. Mo. May 5, 2020); Complaint, Derrick Palmer, et al. v. Amazon.com, Inc., No. 1:20-cv-02468-BMC Document 1 (S.D.N.Y. June 3, 2020); Memorandum Decision and Order, Derrick Palmer, et al. v. Amazon.com, Inc., No. 1:20-cv-02468-BMC, Document 73 (S.D.N.Y. Nov. 2, 2020). In contrast, a preliminary injunction was issued in Olimara v. VES McDonalds, California Superior Court, Alameda County, Case no. RG 20064825. *See* Complaint, Olimara v. VES McDonalds, No. RG 20064825 (Cal. Super. Ct. Alameda County Jun. 16, 2020); Temporary Restraining Order Granted in Part, Hernandez v. VES McDonald's, No. RG20064825 (Cal. App. Ct. Alameda County Jun. 22, 2020); Complaint, Massey v. McDonald's, No. 2020CH04247 (Ill. Cir. Ct. Cook County May 19, 2020).

233. *See* Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 AM. POL. SCI. ASS'N 582, 582-84 (2014).



government institutions to atrophy during times of federal worker friendliness would be an ill-advised lost opportunity. The current degradation of working conditions is now longstanding and profound, calling for an all-hands-on-deck approach in which change is propelled not only by officials in the federal government, but also by state and local leaders closer to home.