

# STRATEGIC LEVERAGE

## Use of State and Local Laws to Enforce Labor Standards in Immigrant-Dense Occupations



By Andrew Elmore and Muzaffar Chishti

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## Executive Summary

Immigrants account for 17 percent of the domestic labor force and are twice as likely as native-born workers to work in industries where violations of core labor standards, such as wage-and-hour and safety-and-health laws, are widespread. While discussion of immigration and work often focuses on globalization and the use of temporary, or “guest,” work visas by U.S. companies, the decline of labor standards in low-wage, immigrant-dense workplaces is often a product of broad economic transformations that have destabilized the relationship between all low-wage workers and the companies that seek their labor. To maximize workforce flexibility and efficiency, companies that once employed all workers within a single location now increasingly outsource non-core services, such as cleaning, warehousing, and food preparation and delivery. Classifying workers as “independent contractors” instead of employees is also now pervasive in many low-wage industries, such as construction and transportation. All of these sectors have a high density of foreign-born workers.

Regulating labor standards in low-wage, immigrant-dense industries where outsourcing and misclassification are common—which this report will call the “informal economy”—has historically been difficult. Workplace laws typically only protect employees, not independent contractors. Related laws, such as the requirement that employers pay payroll taxes, contribute to unemployment insurance, procure workers’ compensation, and offer health insurance benefits, also only apply to employers of employees. This has created an incentive for companies to contract out and to inappropriately classify employees as independent contractors to avoid the costs and liability for violation of these laws. Subcontractors are often small and undercapitalized; to keep their labor costs low and remain competitive, they have little incentive to comply with these laws. Studies have consistently shown that subcontractors contracted by companies to provide low-wage work and companies that classify workers as independent contractors often violate labor standards.

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Immigration law has further complicated efforts to regulate the low-wage workplace. Provisions of the *Immigration Reform and Control Act of 1986* (IRCA), designed to prevent employers from hiring unauthorized workers, have instead allowed many to undermine workplace protections by deterring foreign-born workers from filing complaints and limiting their legal remedies for labor-standards violations. It has also provided an additional incentive for companies to outsource immigrant labor to avoid sanctions for hiring unauthorized workers.

Combined with deep cuts in labor-standards enforcement resources, these factors have resulted in widespread violations in these industries, including workers being underpaid and/or paid off the books, and subjected to unsafe conditions. Misclassification of workers as independent contractors, which deprives them of workers’ compensation or unemployment insurance, also is widely prevalent. These violations hurt native-born and immigrant workers alike, deprive states of tax revenue, and in many cases make it difficult for law-abiding employers to compete against companies that cut costs through noncompliance.

The question of how to regulate low-wage, immigrant-dense workplaces is also complicated by the federal policy shift to a deregulatory agenda. Over the past year, the federal government has sharply reduced the budget of the U.S. Department of Labor (USDOL) and reversed policies intended to regulate



the low-wage workplace. The stated purpose of these policy shifts is to promote employer self-regulation. While self-regulation of the workplace by employers can work in industries where compliance levels are already high, particularly if backed by oversight from nongovernmental organizations such as unions, worker centers, and private-sector attorneys, it is an unrealistic strategy for industries characterized by widespread noncompliance and in which nongovernmental organizations have limited private enforcement tools. For these sectors, there is a need for strategic, public enforcement.

The deterioration of labor standards in immigrant-dense sectors and the recent federal withdrawal from workplace regulation underscore the need for robust, strategic state and local enforcement. Indeed, state and local efforts are a natural fit to fill this regulatory vacuum: state and local governments have a large, direct financial stake in deterring underpayments and payroll fraud, as both practices have huge implications for their budgets. Core workplace rights, moreover, have long been at the heart of states' police powers, and states often surpass federal agencies in their ability to access data to target and impose civil orders, and criminally prosecute companies that egregiously violate workplace laws. Cities and counties have increasingly regulated labor standards as well.

However, since states also contend with limited resources, what is needed is not just more enforcement, but strategic enforcement of workplace statutes that change employer behavior. This has led states—both red and blue—to develop innovative strategies that leverage their unique powers and access to data, and place a high premium on less time-consuming, higher-yielding, targeted approaches that prioritize for enforcement the worst practices in industries most prone to poor labor standards. In some locations, state and local governments have also combined their powers in task forces across agencies and levels of government to maximize their impact.

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Not surprisingly, states with a long history of labor-protection regimes—including California, Connecticut, Illinois, Massachusetts, New York, and Washington—have led the development of some of these innovative strategies. But other states with less history in this area, among them Florida, North Carolina, and Tennessee, also stand out for their creative responses. Taken together, these strategies provide valuable lessons for states across the country, particularly those that have recently become a destination for immigrants and for those facing budget cuts and looking for ways to strategically leverage existing resources to enforce labor laws.

The promising strategies outlined here have been adopted in various states, providing useful examples of where these models are most effective and how they can be improved.

### **A. Targeted Enforcement of Civil Law**

A number of states have adopted a directed approach to civil enforcement, in which agencies prioritize civil investigations and litigation against certain employers, based on the potential of those actions to improve compliance in regions and sectors rife with violations, including the informal economy. New York and California have led the way. The New York State Attorney General, for example, has used directed enforcement to crack down on poor employment practices within the fast-food industry. Though these targeted efforts only required a few attorneys, they resulted in multimillion-dollar settlements and criminal prosecution of a fast-food franchisee for wage theft. In many cases, even the threat of wide-ranging civil investigation can be an effective tool to address pay practices that erode labor standards.





To pursue cases identified for directed enforcement, state and local agencies use a combination of their civil powers, including civil administrative orders that do not need prior judicial intervention, licensing regimes that regulate businesses through suspension and revocation powers, and administrative hearings that adjudicate smaller claims in lieu of a more resource-intensive investigation or prosecution.

### **I. Administrative Orders**

Many states use administrative orders to create an enforceable obligation to pay wages and penalties and/or to change business practices, without a judicial order. Though subject to judicial review, orders issued by state and local workforce agencies are often less time- and resource-intensive than when those same agencies seek a judicial order. While in some states administrative orders are primarily used to restore owed wages or correct employer behaviors, others assess penalties for willful violation of labor laws. Arizona and Tennessee, for example, collect penalties that are then earmarked to fund future enforcement work—a valuable, stable funding mechanism where budgets are tight. Many state agencies responsible for workers’ compensation also have the authority to issue administrative orders requiring companies to stop doing business until they comply with workers’ compensation law. In states such as Florida these injunctive orders play an important role in deterring payroll fraud when the cost of potential business closure is greater than the cost of compliance. And in industries such as construction, where a “stop-work” order has the potential to negatively impact both a noncompliant subcontractor and the contractor that hires them, the mere threat of injunction may lead client firms to pressure businesses to correct unlawful practices in order to meet their contractual obligations.

### **2. Licenses**

State agencies also regulate occupational licenses and can suspend or revoke them from companies that violate labor laws. Suspension and revocation of licenses have been most commonly used in the construction industry to enforce prevailing wage laws in government-funded or public works projects. But in the past decade, states and cities have suspended or revoked the licenses of employers, in a number of industries, that are the subject of criminal prosecution or that have been found to have misclassified their employees. In Massachusetts, for example, the Alcohol Beverages Control Commission has begun requiring companies to show legal compliance to receive or renew a liquor license, resulting in the recovery of more than \$8 million in unemployment insurance contributions in 2012 alone.

### **3. Administrative Hearings**

States and local government may also choose to adjudicate wage claims through hearings with an administrative law judge. Such hearings are often more efficient than investigations of small, single-worker complaints, can be navigated by workers without representation, and have a lower claims threshold that makes them accessible to low-wage workers. California conducts the largest number of such state-administered hearings, which resulted in more than \$100 million in awards in 2015. That figure is impressive when compared to the nearly \$190 million in owed minimum and overtime wages USDOL collected from investigations across the entire United States in fiscal year (FY) 2017. Another striking example of the importance of wage-claim adjudication can be seen in Florida, where the Governor abolished the state Department of Labor in 2005. Labor advocates there successfully lobbied for the creation of county-level “wage-theft” laws to enable workers to assert small private claims through county hearing processes—a model at least five other counties and one city in Florida have since followed. Florida local wage-theft laws are an important emerging approach for other jurisdictions without a strong history of labor standards enforcement.

## **B. *Data-Driven Targeting for Audits and Investigations***

In an effort to use limited resources wisely and maximize their impact, some states have developed strategies to use data to drive investigation and prosecution decisions. In 2009, USDOL provided states software to identify employers who attempt to lower their unemployment insurance rates by transferring



employees from one company to another. Since then, states have taken the lead in identifying instances of misclassification and underpayment by cross-referencing employer data housed in multiple repositories.

This has not, however, been an easy shift. Because state agencies generally develop their own data-retention and format standards, workforce data are often difficult to share between agencies. Data integration among related agencies thus became a priority for many state legislatures in the mid-2000s. Washington State, which funds its own workers' compensation policies and thus has a strong interest in deterring payroll fraud, formed an interagency task force in 2007 to identify barriers to data sharing. The result was the development of sophisticated fraud-detection software that allows auditors in the state Department of Labor and Industries to identify likely cases of misclassification, using Internal Revenue Service (IRS) data and state-maintained data about particular employers and previous infractions issued by other state agencies. North Carolina has partnered with analytics company SAS to develop similar software; Louisiana, Massachusetts, and Tennessee have all purchased software from private analytics firms—all with the aim of making the smartest use of limited enforcement resources.

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### **C. Criminal Prosecutions**

States have the authority to criminally prosecute employers that engage in repeated, egregious violations of labor laws, even after repeated civil penalties. Willful nonpayment of wages (“wage theft”) is often a criminal offense, and fraudulent under-reporting of employees or their earnings to workers’ compensation insurers and the state (“payroll fraud”) is always a violation of criminal law and often a felony.

Some states, including Florida and New York, stand out for their use of criminal prosecution as a tool to punish or incapacitate bad actors. Florida, for example, launched Operation Dirty Money in 2011 to crack down on payroll fraud by targeting not the small shell companies created as tools to facilitate fraud, but the employers and check-cashing stores that orchestrate the operation. Florida has been able to disrupt the networks of construction subcontractors, check-cashing stores, and other entities that make large-scale misclassification so profitable, by treating payroll fraud in the construction industry as a form of insurance fraud that can be proven by close review of the targets’ own business records and enlisting as witnesses low-level actors such as shell companies. When used strategically, criminal cases can thus magnify the effects of civil enforcement actions.

Nationwide, however there are few state-level criminal prosecutions of labor crimes. In many states, wage-and-hour law violations are either not crimes or are misdemeanors, no matter how egregious, and thus of lower priority for enforcement agencies with limited resources. And in cases of wage theft, which often require witness testimony to prove willful failure to pay, unauthorized immigrants may be reluctant to testify in criminal court and workers more broadly may favor quick resolution and repayment of wages owed over more time-consuming criminal prosecution. State and local decisions about whether to use criminal prosecution as an enforcement tool may thus be most effective in agencies with both civil and criminal jurisdiction that can effectively triage and reserve criminal enforcement for egregious violations that cannot be suitably resolved civilly.





## D. Stakeholder Cooperation

State and local agencies have also amplified their enforcement by partnering with private organizations and with other federal and subnational government agencies. These partnerships have allowed agencies to draw on information from wide-reaching community networks and, in cases of interagency and federal-state cooperation, to combine their enforcement authority and to deploy pooled resources strategically in key sectors and regions.

### 1. Public-Private Partnership

State agencies are increasingly looking for ways to collaborate with key community stakeholders, especially when it comes to enforcing labor standards in the informal economy. Since 2014, the California Labor Commissioner's Office (also called the Division of Labor Standards Enforcement) has taken steps toward making the department more welcoming of low-wage workers, particularly immigrants, by establishing special investigative units to work closely with worker advocacy groups. And in New York, a partnership between the state Attorney General and a coalition of labor and community-based organizations led to an agreement in 2014 that one of the largest owners of U.S. car-wash establishments would pay \$2.2 million in restitution for unpaid wages and \$1.7 million in penalties for failing to pay unemployment insurance contributions and workers' compensation premiums. In both states, enforcement agencies have benefited from access to timely information about egregious violations and the cooperation of workers in the informal economy.

To build these key relationships, states have devised strategies for encouraging complainants from a range of communities to access the public enforcement system. In immigrant-dense industries, this may include ensuring that official forms are provided in a range of languages, having multilingual staff on hand to communicate with workers, and training law enforcement officers on how and when to seek U visas for victims of crime who assist with investigations. More broadly, some cities—including San Francisco and Seattle—have provided funding to worker advocacy groups to conduct educational outreach to immigrant communities on new municipal labor standards, including local minimum wage and fair scheduling laws, and to make appropriate referrals to enforce these municipal labor standards. Seattle has additionally invited these and business groups to form an advisory commission to guide the city agency's rulemaking.

### 2. Interagency Coordination

Until relatively recently, state regulatory agencies typically were siloed, cooperating only to the extent required by law. Although compartmentalization sometimes serves a purpose, such as insulating agencies from violating criminal procedure and privacy law, it can also undermine responsive workplace regulation. At a time when state resources are limited, coordination, information sharing, and joint enforcement have all become more important.

To foster institutional coordination, at least 14 states have established task forces comprised of state agencies that investigate and prosecute misclassification in the informal economy. Tennessee's development of a misclassification task force provides an instructive example of how coordination can improve state regulation of workers' compensation and unemployment insurance systems, even without criminal enforcement powers such as those in Florida. The Tennessee task force has its genesis in an informal advisory council of labor and business lobbyists who, after examining agency data, recommended its creation. With this industry-stakeholder support, a heavily Republican legislature approved the task force in 2010 and granted it the power to collect penalties from employers who fail to purchase workers' compensation insurance—funds that are then used to support misclassification enforcement. When built on metrics and wide-ranging stakeholder input, such task forces—as Tennessee has demonstrated—can negotiate incremental reforms without incurring partisan backlash.



### 3. Federal-State Cooperation

Because the federal government and states have a shared interest in enforcing labor standards, they also have incentives to cooperate. Federal standards are woven into a variety of state laws, including state unemployment insurance systems and state-administered Occupational Safety and Health Administration (OSHA) programs. Because federal and state agencies have different enforcement powers and access to different data, coordination between the two can ensure that cases are followed through in a thorough and timely manner.

Beginning in 2011, USDOL embraced federal-state coordination as a core element of its strategic enforcement of wage-and-hour law, signing formal but nonbinding written agreements with 31 states to share information and coordinate enforcement actions. Early evidence has shown promising results. In Utah, which signed a Memorandum of Understanding (MOU) with USDOL, the Worker Classification Coordinated Enforcement Council identified a widespread practice among construction companies of asking their employees to become “member/owners”—a move that deprived them of certain labor rights and benefits. When Utah began requiring LLCs to provide employee benefits to members, one company simply moved its operation to Arizona under a new name. Utah referred the case to USDOL, which required the company to pay \$600,000 in back wages and \$100,000 in penalties. Utah has since reported that construction companies have abandoned the practice.

#### E. Recommendations for Best Practices

In sum, state and local governments, liberal and conservative alike, have important stakes in a well-regulated workplace, and have increasingly leveraged their unique enforcement tools to detect and resolve labor standards violations. The case studies offered in this report, from agencies in varied regions and with a range of political affiliations, detail the innovative use of these enforcement tools, and offer lessons about the ways in which these tools can be used in a range of state and local agencies.

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Most importantly, state and local governments that purely react to complaints on a first-come, first-served basis should consider measures to build a directed-enforcement strategy for high-impact enforcement in low-compliance sectors of the economy. They can leverage their unique enforcement tools with data-sharing agreements, and in multiagency task forces that harness powers across agencies, as revenue-neutral ways to improve their ability to target noncompliant employers and resolve cases. Where officials find an individual violation that shows a pattern, agencies should require the employer to comply across the entire workforce. Agencies should also consider self-funding directed enforcement—for example, to support investigations that deter misclassification—through penalties. And agencies with criminal jurisdiction can selectively prosecute egregious violations. These practices, while either revenue-neutral or low-cost, have been shown to amplify the deterrent effect of enforcement, particularly in sectors where noncompliance is widespread. Local, cost-neutral enforcement innovations are also more insulated from backlash by employer groups than raising or creating new local labor standards, which face the significant threat of preemption by employer-backed state legislatures.

Another crucial lesson from these case studies is that a directed-enforcement approach ultimately depends on worker engagement, which will require state and local officials to take measures to deter retaliation and ensure access to justice, and to improve public agency accessibility. Agencies may do this by moving aggressively against retaliation with motions for restraining orders and criminal sanctions



where appropriate, and with funds to provide restitution to employees of judgment-proof employers. Not asking about immigration status and a protocol for U visas for immigrant workers who come forward despite the fear of retaliation are also important ways to encourage complaints in immigrant-dense sectors. Agencies in jurisdictions in which workers lack adequate access to justice should also consider creating a venue for adjudication of small wage claims to provide access to justice.

## I. Introduction

Many immigrant workers in the United States have been driven into low-wage, under-regulated work by a confluence of immigration law and economic transformations, including the now routine practice of companies contracting out to fly-by-night contractors for their labor needs. For these workers, the basic labor and safety guarantees that, at least on paper, apply to all workers are often absent. One report—extrapolating from a study of labor standards in New York City, Chicago, and Los Angeles that estimated wage-and-hour law violations cost low-wage workers in those cities \$3 billion each year—concluded that such violations could cost all low-wage workers in the country \$50 billion annually.<sup>1</sup> Because foreign-born, low-wage workers—particularly those who lack authorization to work in the United States—disproportionately work in the informal economy, they are also disproportionately likely to work in dangerous conditions, be paid off the books, and receive below the legal minimum wage. Pushing back against the deterioration of labor standards in the informal economy requires robust enforcement. But enforcement, both government and private-sector driven, is stymied by limited resources and disincentives for workers to file complaints.

When searching for ways to bolster labor and safety standards in low-wage industries, studies often recommend strengthening private and federal enforcement, neglecting the potential of state and municipal measures. This is a mistake. Many of the most important innovations in regulating labor and safety standards involve state and local enforcement and coordination. States have unique access to employer tax, insurance, and employee-income information, and tools to deter violations of wage-and-hour and safety-and-health laws. They also play the primary role in regulating unemployment insurance, workers' compensation, and state tax fraud.

This report details new, effective strategies state and local governments across the United States are using to ratchet up compliance with labor and safety standards. After outlining the dynamics in low-wage workplaces and immigration law that have contributed to systematic noncompliance with standards, the report examines enforcement strategies that involve uniquely local policy tools, such as civil orders, licensing regimes, and criminal prosecution. Study of these approaches reveals where they have been most effective and how they can be improved.

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1 In this initial survey of low-wage workers in New York City, Chicago, and Los Angeles more than one-quarter reported being paid less than the minimum wage, and three-quarters were not paid owed overtime or were not compensated for some portion of their shift. See Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (Chicago, New York, and Los Angeles: Center for Urban Economic Development, National Employment Law Project, UCLA Institute for Research on Labor and Employment, 2009), [www.labor.ucla.edu/publication/broken-laws-unprotected-workers/](http://www.labor.ucla.edu/publication/broken-laws-unprotected-workers/). Researchers at the Economic Policy Institute (EPI) then used the average underpayments reported in *Broken Laws, Unprotected Workers* to estimate the nationwide figure of more than \$50 billion per year. See Brady Meixell and Ross Eisenbrey, "An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year" (issue brief, Economic Policy Institute, Washington, DC, September 11, 2014), [www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/](http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/).



## II. Immigrants and the Low-Wage Workplace

Immigrants form the backbone of many industries that employ low-wage workers. However, sanctions on employers for employing unauthorized immigrants—and the threat of immigration enforcement—push many foreign-born workers out of the formal economy and into workplaces that are poorly regulated or operate outside of the reach of government regulation (the “informal economy”).<sup>2</sup>

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In addition, immigrant workers often work in “fissured workplaces,” in which a company (lead firm) contracts out its labor needs and selects among bidding contractors primarily based on cost—effectively splitting corporate functions into core and periphery, and increasingly assigning low-wage workers to peripheral work performed by contractors.<sup>3</sup> Over the past two decades, lead firms across the United States have lowered business costs by shedding labor-intensive units (such as commercial cleaning and the security industry) and instead contracting out for these services. Outsourcing low-wage work often permits these firms to contract out of liability for employment, labor, tax, and even immigration laws that prohibit the hiring of immigrants who lack authorization to work.<sup>4</sup> Companies that provide these services are typically small, operate on thin profit margins, and have little bargaining power because of intense competition.<sup>5</sup>

To undercut competitors, contracting companies often illegally push employees off payroll by misclassifying them as independent contractors, under-reporting these employees’ income or leaving them off business records entirely. This report will refer to these illegal practices as “misclassification.”<sup>6</sup> Keeping workers off of payroll allows these companies to evade their insurance and tax obligations<sup>7</sup> and to hide noncompliance with employment-based labor and safety requirements.<sup>8</sup> Misclassified workers

2 The informal economy comprises “all income-earning activities that are not regulated by the state in social environments where similar activities are regulated.” See Manuel Castells and Alejandro Portes, “World Underneath: The Origins, Dynamics, and Effects of the Informal Economy,” in *The Informal Economy: Studies in Advanced and Less Developed Countries*, ed. Alejandro Portes (Baltimore, MD: Johns Hopkins University Press, 1989), 12. Other researchers refer the informal sector as the “underground economy.” See, for example, Friedrich Schneider and Dominik Enste, “Hiding in the Shadows: The Growth of the Underground Economy” (Economic Issues brief no. 30, International Monetary Fund, Washington, DC, March 2002), [www.imf.org/external/pubs/ft/issues/issues30/](http://www.imf.org/external/pubs/ft/issues/issues30/).

3 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014).

4 Steven Greenhouse, “Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Illegal Workers,” *The New York Times*, March 19, 2005, [www.nytimes.com/2005/03/19/business/walmart-to-pay-us-11-million-in-lawsuit-on-illegal-workers.html](http://www.nytimes.com/2005/03/19/business/walmart-to-pay-us-11-million-in-lawsuit-on-illegal-workers.html).

5 Weil, *The Fissured Workplace*, 180, 244–45.

6 This report uses “misclassification” to capture all business practices that shift employees off payroll, fraudulent or not, and reserves the term “payroll fraud” for intentionally fraudulent payroll schemes.

7 Weil, *The Fissured Workplace*.

8 The Internal Revenue Service (IRS) estimates that the amount of federal tax revenue lost each year due to practices in the underground economy rose dramatically from \$80 billion in 1992 to \$385 billion in 2006. See James Surowiecki, “The Underground Recovery,” *The New Yorker*, April 29, 2013, [www.newyorker.com/magazine/2013/04/29/the-underground-recovery](http://www.newyorker.com/magazine/2013/04/29/the-underground-recovery).



earn far less than those paid as employees.<sup>9</sup> Because immigrants make up a significant share of workers in the informal economy,<sup>10</sup> where such practices are most common, payroll fraud traps many in jobs with wages below the poverty level and without basic labor and safety guarantees.<sup>11</sup>

### A. Scope of Misclassification and Labor Violations in Immigrant-Dense Industries

Misclassification is a persistent, growing problem. Studies from 2000 have found that in the informal economy between 10 percent and 40 percent of employers misclassify at least some employees, and that about 10 percent to 18 percent of workers are misclassified.<sup>12</sup> At the state level, studies have demonstrated the increasing prevalence of misclassification. In Massachusetts, for example, a review of misclassification audits found that from the mid-1990s to the early 2000s, employer misclassification rates rose from approximately 10 percent to 16 percent.<sup>13 14</sup> These findings are consistent with a 2017 report by the Treasury Inspector General for Tax Administration, which found that the number of employers with egregious violations of employment tax laws tripled since 2000.<sup>15</sup>

*Misclassification is a persistent, growing problem.*

Studies at the state and regional level also consistently find that misclassification is more common in industries characterized by seasonal employment, dangerous work conditions, and low wages, such as construction, transportation, warehousing, and security.<sup>16</sup> A 2014 study of state audit data in

- 9 One study found that California construction workers who were paid off the books earned approximately half of what those paid on the books earned—a wage gap of \$1.2 billion per year for the 144,000 construction workers in the state’s informal economy. See Yvonne Yen Liu, Daniel Flaming, and Patrick Burns, *Sinking Underground: The Growing Informal Economy in California Construction* (Los Angeles: Economic Roundtable, 2014), 10–11, <https://economicrt.org/publication/sinking-underground/>. A Massachusetts study reported that audited employers who misclassified or under-reported the number of or income earned by workers paid contractors approximately 16 percent less than other audited businesses. See James B. Rebitzer and David Weil, *Findings and Implications of the RSI Report to the Joint Task Force on Employee Misclassification and the Underground Economy: Contractor Use, Analysis, and Impact Results* (Boston: Joint Task Force on Employee Misclassification and the Underground Economy, 2014), 15, [www.mass.gov/lwd/eolwd/jtf/technical-advisory-board-report.pdf](http://www.mass.gov/lwd/eolwd/jtf/technical-advisory-board-report.pdf).
- 10 A 2009 study of the informal economy found that 70 percent of surveyed workers were foreign born and 39 percent were unauthorized. See Bernhardt et al., *Broken Laws, Unprotected Workers*, 14–15.
- 11 Donald M. Kerwin and Kristen McCabe, *Labor Standards Enforcement and Low-Wage Immigrants: Creating an Effective Enforcement System* (Washington, DC: Migration Policy Institute, 2011), [www.migrationpolicy.org/research/labor-standards-enforcement-immigration](http://www.migrationpolicy.org/research/labor-standards-enforcement-immigration).
- 12 The most recent nationwide study, conducted in 2000, relied on targeted audits in addition to random audits which may have skewed the reported incidence of misclassification since targeted audits tend to reflect a higher level of misclassification. See Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (Rockville, MD: Planmatics, Inc., 2000), <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>. Drawing from the same types of audit data, state-level studies have found similar rates of misclassification. See Dale L. Belman and Richard Block, *Informing the Debate: The Social and Economic Costs of Employee Misclassification in Michigan* (East Lansing, MI: Michigan State University, 2009), <http://ippsr.msu.edu/publications/ARMisClass.pdf>; James Noble, *Misclassification of Employees as Independent Contractors* (St. Paul, MN: Minnesota Office of the Legislative Auditor, Program Evaluation Division, 2007), [www.auditor.leg.state.mn.us/ped/pedrep/missclass.pdf](http://www.auditor.leg.state.mn.us/ped/pedrep/missclass.pdf); Françoise Carré and Randall Wilson, *The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry* (Cambridge, MA: Harvard Law School and Harvard School of Public Health, 2005), <https://lwp.law.harvard.edu/publications/social-and-economic-costs-employee-misclassification-maine-construction-industry>; Françoise Carré and Randall Wilson, *The Social and Economic Costs of Employee Misclassification in Construction* (Cambridge, MA: Harvard Law School and Harvard School of Public Health, 2004), <https://lwp.law.harvard.edu/publications/social-and-economic-costs-employee-misclassification-construction>; Michael P. Kelsay and James I. Sturgeon, *The Economic Costs of Misclassification in the State of Indiana* (Kansas City, MO: University of Missouri-Kansas City, Department of Economics, 2010).
- 13 Carré and Wilson, *The Social and Economic Costs of Employee Misclassification in Construction*, 12.
- 14 Yen Liu, Flaming, and Burns, *Sinking Underground*, 7.
- 15 For example, the number of employers with 20 or more quarters of employment tax debt increased from 5,000 in 1998 to 17,000 in 2015. See Treasury Inspector General for Tax Administration, *A More Focused Strategy Is Needed to Effectively Address Egregious Employment Tax Crimes* (Washington, DC: U.S. Department of Treasury, 2017), 5, [www.treasury.gov/tigta/ier/reports/2017reports/2017ier004fr.pdf](https://www.treasury.gov/tigta/ier/reports/2017reports/2017ier004fr.pdf).
- 16 Planmatics, Inc., *Independent Contractors*, 63.





Massachusetts found that 23 percent of audited companies in the transportation and warehousing industries misclassified workers.<sup>17</sup> Similarly, a 2012 study found that 18 percent of drivers in the New York trucking industry were misclassified.<sup>18</sup> Illegal payroll practices, including minimum-wage and overtime violations, also appear to be concentrated within the same industries and sectors in which employers commonly misclassify workers.<sup>19</sup>

The true scale of misclassification is, however, difficult to pinpoint. The methodology typically used in these studies estimates misclassification based on government audits of tax and unemployment insurance filings by employers that expressly state that work is performed by independent contractors and not employees. This methodology is likely to undercount misclassification as it excludes employers who do not report their employees at all. This is a particular problem in the informal economy, where widespread minimum-wage violations are most common<sup>20</sup> and where employers are most likely to pay employees off the books. For example, a 2014 study of the growth of the informal economy in the California construction industry found that more than 70 percent of misclassified workers were paid off the books entirely.<sup>21</sup>

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The construction industry provides an example of an immigrant-dense industry in which the growth in the informal economy has led to both misclassification and a deterioration of labor standards. In 2015, foreign-born individuals accounted for 16.9 percent of the U.S. labor force, but nearly one-fourth of the U.S. construction workforce.<sup>22</sup> Unauthorized immigrants comprise 5 percent of the U.S. labor force, but 16 percent of the U.S. construction industry in 2014.<sup>23</sup> Studies of the construction industry have found misclassification rates of around 15 percent to 25 percent,<sup>24</sup> with even higher rates in some areas.<sup>25</sup>

Construction is an important example of this trend because the growth of misclassification has been well documented, but it is by no means the only example. In the trucking industry, more than 80 percent of truckers who drive routes from and to ports (“port truckers”) are classified as independent contractors, not employees. Port truckers classified as independent contractors earn 75 percent of an employee’s wages, with no overtime; they are also far less likely to have health insurance and a pension than drivers

17 Rebitzer and Weil, *Findings and Implications of the RSI Report*, 13.

18 John Petro, *The Road to Nowhere: How the Misclassification of Truck Drivers Hurts Workers, Job Quality, and New York State* (New York: Drum Major Institute for Public Policy, 2012).

19 Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, eds., *The Gloves-Off Economy: Workplace Standards at the Bottom of America’s Labor Market* (Champaign, IL: Labor and Employment Relations Association, 2008).

20 This study found that more than 40 percent of garment and domestic workers reported minimum-wage violations. See Bernhardt, Boushey, Dresser, and Tilly, *The Gloves-Off Economy*, 4.

21 Yen Liu, Flaming, and Burns, *Sinking Underground*, 7.

22 Migration Policy Institute (MPI) Data Hub, “State Immigration Data Profiles,” accessed January 2, 2018, [www.migrationpolicy.org/data/state-profiles/state/workforce/US](http://www.migrationpolicy.org/data/state-profiles/state/workforce/US).

23 MPI Data Hub, “Profile of the Unauthorized Population: United States,” accessed January 2, 2018, [www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US#laborforce](http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US#laborforce).

24 See, for example, Linda H. Donahue, James Ryan Lamare, and Fred B. Kotler, *The Cost of Worker Misclassification in New York State* (Ithaca, NY: Cornell University, 2007), <http://digitalcommons.ilr.cornell.edu/reports/9/>; William Canak and Randall Adams, *Misclassified Construction Employees in Tennessee* (Nashville: Tennessee Department of Labor and Workforce Development, 2010); Noble, *Misclassification of Employees as Independent Contractors*; Carré and Wilson, *The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry*; Carré and Wilson, *The Social and Economic Costs of Employee Misclassification in Construction*.

25 A 2009 report estimated that more than one-third of construction workers in Texas and North Carolina were misclassified as independent contractors. See Mandy Locke, “Contract to Cheat: How the Reporting was Done,” McClatchy DC, September 4, 2014, <http://media.mcclatchydc.com/static/features/Contract-to-cheat/Investigation-built-on-payroll-records.html>. Similarly, a report of misclassification in Austin, TX found that 38 percent of construction workers in that city were misclassified. See Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin’s Construction Industry* (Austin: Workers Defense, 2009), [www.workersdefense.org/wp-content/uploads/2013/04/Building-Austin-Report-2.pdf](http://www.workersdefense.org/wp-content/uploads/2013/04/Building-Austin-Report-2.pdf).





classified as employees.<sup>26</sup> Recent litigation has shown similar trends in other fissured industries as well, including warehousing, transportation, and janitorial firms.<sup>27</sup>

Why is misclassification a growing phenomenon, and why is it concentrated in certain industries? In brief, misclassification significantly lowers a company's payroll costs, both by removing the wage floor and by sidestepping the need to pay workers' compensation premiums and the employer's share of state and federal payroll taxes. Employers who misclassify employees can decrease payroll costs by between 30 percent<sup>28</sup> and 50 percent (in industries involving dangerous work, such as transportation and construction),<sup>29</sup> not including health or other discretionary benefits provided to employees. For industries with fixed costs and heightened pressure to reduce the price of bids, misclassification is one of the few means available to labor contractors to increase profit—or simply remain competitive.

Over time, the prevalence of misclassification and labor violations in these industries reaches a tipping point, having become so pervasive it establishes a self-reinforcing norm of noncompliance. Once this point has been reached, as has been reported in residential construction and transportation, companies that may otherwise comply with the law cannot fairly compete with those that do not.<sup>30</sup> Without more—and more effective—enforcement, misclassification and the deterioration of labor standards are likely to continue to spread.

## B. The Limitations of Private Stakeholder Efforts to Counter Violations

Workers in most industries lack the recourse—or power—to stop misclassification and to enforce wage-and-hour and safety-and-health laws. They lack standing to enforce Occupational Safety and Health Administration (OSHA) programs, workers' compensation, unemployment insurance, or tax laws through private lawsuits. While most wage-and-hour laws may be privately enforced by underpaid workers, this is often not enough to establish a norm of compliance within informal sectors; the fact that contract workers lack intermediaries, such as unions and other worker-led groups, means they often lack assistance filing a complaint and protection from retaliation should they complain.

*Workers in most industries lack the recourse—or power—to stop misclassification and to enforce wage-and-hour and safety-and-health laws.*

Unions and other labor organizations are not well positioned to strengthen weak labor and safety standards in low-wage, immigrant-dense industries by themselves. While unionized workplaces report extremely low rates of labor and safety violations compared with non-unionized firms,<sup>31</sup> unions now represent very few workers (6.6 percent of the private-sector workforce) and are almost nonexistent in the industries where underpayment and misclassification are most common. For example, union density

26 Rebecca Smith, David Bensman, and Paul Alexander Marvy, *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports* (Washington, DC: National Employment Law Project, 2011), 13–14, <http://nelp.org/content/uploads/2015/03/PovertyPollutionandMisclassification.pdf>.

27 See, for example, *Williams v. Jani-King of Philadelphia, Inc.*, 837 F.3d 314, 320 (3rd Cir. 2016); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989–90, 993 (9th Cir. 2014); *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, No. 2:11-8557, 2014 WL 183956, at \*7-17 (C.D. Cal. Jan. 14, 2014).

28 Yen Liu, Flaming, and Burns, *Sinking Underground*.

29 Center for Construction Research and Training (CPWR), *The Construction Chart Book: The U.S. Construction Industry and its Workers*, 5th ed. (Silver Spring, MD: CPWR, 2013), [www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf](http://www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf).

30 Weil, *The Fissured Workplace*, 245–46.

31 Alison D. Morantz, "What Unions Do for Regulation," *Annual Review of Law and Social Sciences* 13 (2017): 520–22.



is 1.2 percent in food and drink services and 0.5 percent in building/grounds cleaning and maintenance occupations.<sup>32</sup> Perversely, misclassification is also an effective union avoidance strategy as unions, by definition, exist only where there is an employer-employee relationship. Nor can worker centers and other nongovernmental organizations (NGOs), despite important enforcement and legislative achievements, fill the historic role of unions in monitoring labor and safety compliance. Unlike unions, NGOs are not considered “labor organizations” under the *National Labor Relations Act*,<sup>33</sup> and as a result cannot collectively bargain on behalf of all the employees in a company pursuant to a collective bargaining agreement (CBA). Workers aided by these organizations thus do not have the benefit of a grievance procedure and arbitration to quickly and securely complain about labor and safety violations.

Private attorneys have also been undermined in enforcing labor standards through litigation and may soon find themselves shut out of class-action lawsuits that lower the barrier to entry for small-scale violations that affect an entire workforce. Individual workers and private attorneys do not have a private right of action to enforce many federal workplace statutes, including the *Occupational Safety and Health Act* and the *National Labor Relations Act*.<sup>34</sup> A recent survey found that most employers now require employees to waive access to civil litigation and instead arbitrate disputes for employment claims.<sup>35</sup> The U.S. Supreme Court in *National Labor Relations Board v. Murphy Oil USA*<sup>36</sup> recently heard oral argument about whether these mandatory arbitration provisions may require employees to also waive participation in class claims. Should the Supreme Court agree that employers may require employees to waive civil litigation and class claims as a condition of employment, employees will increasingly be required to individually arbitrate all disputes even if they affect an entire workforce.

## 1. Workers Who Complain Face Severe Repercussions

Workers can also no longer play the primary role in ensuring employer compliance with workplace laws because many are justifiably afraid that their complaints will result in retaliation. One survey found that nearly 75 percent of those who complained about workplace conditions reported employer retaliation.<sup>37</sup> Without strong institutions, such as unions and worker centers, to protect workers against retaliation, employee complaints have declined as misclassification has grown.<sup>38</sup> The norm of noncompliance itself also deters complaints because it reinforces their futility and heightens the risk of retaliation.<sup>39</sup> For these reasons, it is the most vulnerable workers in the most violation-laden industries who are the *least* likely to complain.<sup>40</sup>

## 2. The Particular Sensitivities of Immigrant Workers

Immigration law has played an undeniable role in channeling foreign-born workers, and particularly unauthorized workers, into the informal economy. In enacting the *Immigration Reform and Control Act of 1986* (IRCA), Congress for the first time introduced sanctions for U.S. employers who hire unauthorized immigrants. These sanctions were designed to reduce illegal immigration by preventing employers from hiring unauthorized workers and, in so doing, improve the wages and labor standards of U.S. workers. In reality, however, the unauthorized population has grown more than threefold since 1986.

<sup>32</sup> Ibid.

<sup>33</sup> *National Labor Relations Act* (NLRA), Public Law 74–198, 29 U.S. Code § 152(5).

<sup>34</sup> The *Occupational Safety and Health Act of 1970* only permits an employee to file a complaint with the Occupational Safety and Health Administration (OSHA). See U.S. Government, “Occupational Safety and Health—Judicial Review,” 29 U.S. Code § 660(c)(2), accessed January 2, 2018, [www.law.cornell.edu/uscode/text/29/660](http://www.law.cornell.edu/uscode/text/29/660); *Hobbs v. Hawkins*, 968 F.2d 471, 478–79 (5th Cir. 1992).

<sup>35</sup> Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* (Washington, DC: EPI, 2017), 4–5, [www.epi.org/files/pdf/135056.pdf](http://www.epi.org/files/pdf/135056.pdf).

<sup>36</sup> *National Labor Relations Board v. Murphy Oil USA*, U.S. Supreme Court docket no. 16–307 (argued October 2, 2017).

<sup>37</sup> Bernhardt et al., *Broken Laws, Unprotected Workers*, 7.

<sup>38</sup> In California, the number of misclassifications tripled since the 1970s, while at the same time unionization declined sharply. See Yen Liu, Flaming, and Burns, *Sinking Underground*, 12–13.

<sup>39</sup> Bernhardt et al., *Broken Laws, Unprotected Workers*, 3, 20, 24–25.

<sup>40</sup> David Weil, “Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters,” *Comparative Labor Law and Policy Journal* 28, no. 2 (2007), 136, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=996901](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996901).



Employer sanctions have also proven to be a deeply flawed policy tool for regulating the foreign-born workforce, encouraging the growth of the informal economy and undermining important labor protections.<sup>41</sup> Under IRCA, it is not unlawful for an employer to hire an unauthorized worker, only to *knowingly* hire such a worker. Upon hiring workers, employers must attest on an I-9 form that they have examined documents that establish the workers' identity and eligibility to work; there is no requirement to verify the authenticity of the documents presented. As a result, employers who hire unauthorized immigrants find it easy to comply with the letter of the law, and unauthorized workers find employment by presenting false identity documents.

Employers have also increasingly shielded themselves from sanctions by turning to intermediary entities, such as temporary employment firms, to hire workers and to the practice of reclassifying workers as independent contractors. A RAND Corp. and Urban Institute study found that soon after IRCA's enactment, agricultural employers increased their reliance on farm labor contractors to hire workers, continuing to use unauthorized farm workers and simply bypassing the law's verification requirements.<sup>42</sup> This practice of outsourcing the hiring process has grown far beyond agriculture to white-collar professionals, garment workers, and computer programmers, among many others.<sup>43</sup>

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*Some employers have also used employer sanctions as an effective tool to retaliate against workers who assert their rights.*

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Yet increased enforcement of employer sanctions is unlikely to reduce the unauthorized workforce. Unauthorized workers, who must work to survive, are likely to respond to restrictions on formal employment by shifting to the margins of the labor market.<sup>44</sup> Such has been the experience in states that in recent years have implemented state laws to mandate employer use of E-Verify, an electronic verification system that confirms a potential employee's identification and authorization to lawfully work in the United State. Studies in these states have shown that since unauthorized workers could not pass the E-Verify screening, some moved into the informal labor market and some experienced reduced earnings.<sup>45</sup> IRCA employer sanctions can thus undermine workplace enforcement by forcing unauthorized workers to accept off-the-books work arrangements that are difficult to regulate.

Some employers have also used employer sanctions as an effective tool to retaliate against workers who assert their rights.<sup>46</sup> Since employers can only be sanctioned if they *knowingly* hire unauthorized workers, some employers choose to acquire that knowledge by (re)verifying a worker's status only when he or she asserts rights, such as those related to wage, hour, health, and safety standards or to joining a union.<sup>47</sup> The newly acquired knowledge then justifies the termination of the worker.

41 Muzaffar Chishti and Charles Kamasaki, *IRCA in Retrospect: Guideposts for Today's Immigration Reform* (Washington, DC: MPI, 2014), [www.migrationpolicy.org/research/irca-retrospect-immigration-reform](http://www.migrationpolicy.org/research/irca-retrospect-immigration-reform).

42 Phillip L. Martin and J. Edward Taylor, *The Initial Effects of Immigration Reform on Farm Labor in California* (Washington, DC: RAND Corp. and Urban Institute, 1990).

43 Catherine Ruckelshaus and Bruce Goldstein, *From Orchards to the Internet: Confronting Contingent Work Abuse* (New York: National Employment Law Project and Farmworker Justice Fund, 2002), [www.nelp.org/content/uploads/2015/03/From-Orchards-to-the-Internet-Subcontracting-Rep.pdf](http://www.nelp.org/content/uploads/2015/03/From-Orchards-to-the-Internet-Subcontracting-Rep.pdf).

44 Portes and Haller note the tension inherent to government efforts to regulate the informal economy: "Too much tolerance would compromise the credibility of the rule of law and the willingness of formal firms and taxpayers to continue shouldering their obligations. On the other hand, too repressive a stance would . . . drive them further underground, depriving authorities of any information or control on them." See Alejandro Portes and William Haller, "The Informal Economy," in *The Handbook of Economic Sociology*, eds. Neil J. Smelser and Richard Swedberg (New York: Russell Sage Foundation, 2005), 420.

45 See Pia M. Orrenius and Madeline Zavodny, "The Impact of E-Verify Mandates on Labor Market Outcomes," *Southern Economic Journal* 81, no. 4 (April 2015): 947–59.

46 Muzaffar Chishti, "Employer Sanctions against Immigrant Workers," *WorkingUSA* 3, no. 6 (March 2000).

47 Ibid.



IRCA has also changed the level of legal recourse available to unauthorized immigrants. While all labor protection laws continue to apply to all workers without regard to status, the remedies available to aggrieved workers have changed. Prior to IRCA, determination of unfair labor practice would result in an order of reinstatement, conditioned on lawful readmission; since the law's enactment, employers cannot be ordered to reinstate an unauthorized worker.

Taking one step further, the Supreme Court held in the 2002 case of *Hoffman Plastic Compounds Inc. v. National Labor Relations Board (NLRB)* that an unauthorized worker unlawfully terminated in retaliation for labor organizing activities is not eligible for back pay under the *National Labor Relations Act*.<sup>48</sup> The Supreme Court ruled that IRCA employer sanctions provisions override conflicting labor protection statutes, such as the *National Labor Relations Act*. This decision has since been cited to deny reinstatement as a remedy for retaliation and, by some courts, to justify denial of other benefits such as workers' compensation.<sup>49</sup> Certain labor protections—historically guaranteed to all workers in the United States—may thus no longer apply to unauthorized workers, should they conflict with the employer sanctions provisions of ICRA.

### C. Private Stakeholders Have Little Incentive to Target Illegal Practices

Employer self-regulation, usually in return for a lower regulatory burden, flourished in the 1980s and is still an element of federal and state enforcement of workplace standards.<sup>50</sup> But self-regulation without accountability, either to state actors or to unions, quickly devolves into deregulation.<sup>51</sup> In low-wage, fissured workplaces, personnel departments rarely exist to oversee compliance efforts and business owners are often directly responsible for the illegal practices. And because employers in most industries have imperfect knowledge about their competitors' practices, they may assume the need to engage in illegal practices to keep up, while at the same time being unaware of egregious violators that might be reported to regulators. For all these reasons, employers are generally ill suited to regulate labor practices in the informal economy.

There are, however, important examples that buck this trend. Most of these involve employers in under-regulated sectors subject to a collective bargaining agreement, who face heightened legal obligations to comply with labor standards and unfair competition by firms that do not. These employers have agreed to co-fund organizations such as Taft Hartley funds in the janitorial and construction industries to enforce standards among their competitors (the other funds are provided by employees as part of their union membership fees). One such Taft Hartley fund, the Indiana-Illinois-Iowa Foundation for Fair Contracting, enforces state and local responsible bidding laws by investigating publicly funded construction worksites in which a subcontractor's bid is far below prevailing rates to determine if the low bid is a result of misclassification.<sup>52</sup> Even some nonunion employers have seen value in defending standards. Construction

48 *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board (NLRB)*, 535 U.S. 137 (2002). In 2013, the Second U.S. Circuit Court of Appeals extended the reach of *Hoffman Plastic* and held that a group of unauthorized workers who never presented false identification or work authorization documents were also ineligible for back pay as a remedy for their employer's violation of the NLRA. The court rejected the workers' argument that their case was distinguishable from *Hoffman* because it was the employer, rather than the workers themselves, who had violated federal immigration law at the time of their hiring. See *Palma, et al. v. NLRB*, 723 F.3d 176, 181-185 (2d Cir. 2013).

49 Angel A. Darmer, "Reconciling IRCA with the Anti-Retaliation Provisions of the NLRA: How Far Should *Hoffman Plastic Compounds v. NLRB* Be Extended?" *American Journal of Trial Advocacy* 34 (2011): 687-713. See also *Ambrosi v. 1085 Park Ave. LLC*, 2008 WL 4386751 (S.D.N.Y. 2008); *Wielgus v. Ryobi Technologies, Inc. et al.*, 875 F. Supp. 2d 854, 862-63 (N.D. Ill. 2007). In other cases, courts have decided that unauthorized immigrants may seek to recover lost wages or may be eligible for workers' compensation. See *Lucas, et al. v. Jerusalem Café*, 721 F.3d 927, 930 (8th Cir. 2013); *Bollinger Shipyards Inc. v. Office of Workers' Compensation Programs*, 604 F.3d 864, 877 (5th Cir. 2010).

50 For more on self-regulation programs, see Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven, CT: Yale University Press, 2010), 78-82.

51 *Ibid.* at 82; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 101-32.

52 Author interview with Marc Poulos, Executive Director, Indiana-Illinois-Iowa Foundation for Fair Contracting, March 2, 2017; author interview with Daniel Aussem, Executive Director, Illinois Valley Contractors Association, March 13, 2017.





contractors in Utah, alarmed by downward pressure on bids due to widespread misclassification, successfully lobbied the legislature to enact far-reaching legislation to crack down on this practice. But where unions are absent, these employers have little leverage to drive out the firms that violate standards and misclassify employees. It is thus unrealistic to conclude that employers will self-police labor and safety standards by whistleblowing.<sup>53</sup>

In contrast, insurance companies that underwrite workers' compensation policies theoretically have a powerful incentive to detect and deter payroll fraud. Insurance companies depend on accurate employer information about the number of persons employed to calculate owed insurance premiums, which are based on occupational risk and likely cost of injuries per employee. Employers who commit payroll fraud by under-reporting employees lower their premium liability costs in part by fraudulently reducing their workers' compensation liability, reducing insurance company revenue.

However, insurance companies have historically ignored premium fraud, even as they aggressively audit other areas, such as medical provider fraud. This is likely because premium fraud only harms the insurance company if workers file claims that the insurance companies are found responsible for, and few workers in the informal economy do. A 2009 study of low-wage workers in three cities found that of surveyed workers who reported experiencing a serious on-the-job injury in the previous three years, just 8 percent filed a workers' compensation claim.<sup>54</sup> Moreover, when employees do file a claim, the likelihood it will be paid is slim; employers have both incentive and tools to suppress the claim by aggressively contesting it and intimidating unauthorized workers and those paid off the books.

To the extent that insurance companies do bear a cost as the result of fraud, they can insulate themselves from losses. According to a Florida grand jury report examining the problem, "While it appears that the insurance company is left holding the bag, in fact, the insurance rates simply go up to offset the fraud and contractors who don't cheat pay ever higher rates for their coverage."<sup>55</sup> The cost of misclassification is spread across all policyholders, who effectively subsidize the fraud. Insurance companies have also maintained their profitability by successfully lobbying state legislatures to reduce workers' compensation awards and thus lowering their own expenses.<sup>56</sup> As a result, insurance companies lack the incentives to deter payroll fraud among their clients and have instituted only weak forms of fraud monitoring, such as employer self-audits and third-party monitoring.<sup>57</sup>

### III. The Case for State and Local Workplace Enforcement

The lack of effective worker and private-sector options for reducing misclassification and payroll violations makes a compelling case for aggressive government enforcement. The Obama administration made strides to improve federal enforcement of workplace laws. However, over the past year the Trump administration has shifted U.S. Department of Labor (USDOL) enforcement policy in line with

53 California Labor Commissioner Julie Su has prioritized engaging employer groups, to obtain tips about noncompliant competitors. While noting the assistance of janitorial firms in identifying "scofflaws who were beating out employers who were complying with the law," she described other groups as "reluctant" to come forward. Author interview with Julie Su, Labor Commissioner, State of California, March 24, 2016.

54 Bernhardt et al., *Broken Laws, Unprotected Workers*, 25–26.

55 Supreme Court of the State of Florida, *First Interim Report of the Fourteenth Statewide Grand Jury, Report on Workers Compensation Fraud 3* (Tallahassee: Supreme Court of the State of Florida, 1998).

56 Despite widespread misclassification in the industry, a 2015 study found that "employers are paying the lowest rates for workers' comp insurance since the 1970s. And in 2013, insurers had their most profitable year in over a decade, bringing in a hefty 18 percent return." See Michael Grabell and Howard Berkes, "The Demolition of Workers' Comp," ProPublica, March 4, 2015, [www.propublica.org/article/the-demolition-of-workers-compensation](http://www.propublica.org/article/the-demolition-of-workers-compensation).

57 Author interview with John Dygon, Bureau Chief, Division of Insurance Fraud, Florida Department of Financial Services, Ft. Lauderdale, FL, May 21, 2015.



a deregulatory agenda, and moreover, longstanding resource and jurisdictional limitations hamper the ability of USDOL to improve compliance by itself. These limitations, as well as the regular disruption and shifting of enforcement priorities as federal administrations change, suggest the need for robust state and local enforcement to complement federal efforts. State and local governments also have unique tools for and interests in workplace enforcement, particularly to protect vulnerable communities and deter payroll fraud as it affects state budgets.

### A. The Deregulatory Shift and Limited Reach of Federal Enforcement

Reversing a long trend of failing to engage in targeted enforcement of workplace laws, USDOL under the Obama administration made gains in improving compliance with the *Fair Labor Standards Act* (FLSA) and *Occupational Safety and Health Act* (OSHA). Previously, the USDOL Wage and Hour Division had addressed FLSA concerns on a complaint-driven and first-come, first-served basis, drawing resources away from industries most in need of enforcement but where workers are least likely to complain. In response to this inability to act on pervasive noncompliance in industries lacking worker complaints, USDOL beginning in 2007 doubled its directed wage-and-hour law investigations—those that proactively initiate investigations, including in areas where a complaint has not been made—as a proportion of its total investigations. The agency has also increased its safety-and-health penalty amounts to historic levels.<sup>58</sup> In 2016, OSHA nearly doubled the fines for health and safety violations,<sup>59</sup> which had been widely criticized for failing to keep up with inflation.<sup>60</sup> There is a growing body of research showing that these efforts have made an impact on recovering wages owed to workers.<sup>61</sup>

But despite these USDOL commitments—and promising results—the Trump administration has publicly expressed a policy shift toward deregulation, with dramatic implications for workplace regulation. The administration's budget blueprint for fiscal year 2018 proposed cutting USDOL funds by 21 percent.<sup>62</sup> The department recently withdrew its guidance setting forth standards by which firms are considered joint employers—and therefore responsible for preventing employment law violations—and by which firms may deem a worker an independent contractor. USDOL has replaced this guidance with an ad hoc policy of providing firms that send individual inquiries about their policies with opinion letters—often after an informal meeting with authorities to clarify what practices the agency would consider lawful.<sup>63</sup> This shift risks providing the agency's blessing for practices that may increase the number of employees employed only by judgment-proof employers or who are not considered employees at all, without the political accountability of agency rulemaking or broadly applicable guidance. If the previous federal deregulatory

58 David Weil, "Afterward: Learning from a Fissured World – Reflections on International Essays Regarding the Fissured Workplace," *Comparative Labor Law & Policy Journal* 37, no. 209 (2015): 216–17.

59 OSHA announced a 78 percent increase in OSHA penalties, effective August 1, 2016, to reflect inflation from the last increase in 1990. See OSHA, "OSHA Penalty Adjustments to Take Effect after August 1, 2016" (fact sheet, U.S. Department of Labor, OSHA, Washington, DC, June 2016), [www.osha.gov/Publications/OSHA3879.pdf](http://www.osha.gov/Publications/OSHA3879.pdf).

60 OSHA penalties of \$7,000 to \$70,000 are dwarfed by the penalties of the *Clean Water Act* of up to \$250,000 per day. See Cynthia Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," *Columbia Law Review* 105, no. 2 (2005): 319.

61 For example, U.S. Department of Labor (USDOL) announced in 2014 that it had recovered \$280 million in owed minimum and overtime wages in the previous year, and that it has engaged in extensive directed enforcement initiatives across the United States. See USDOL, *FY 2014 Department of Labor Budget in Brief* (Washington, DC: USDOL, 2014), 46, [www.dol.gov/dol/budget/2014/PDF/FY2014BIB.pdf](http://www.dol.gov/dol/budget/2014/PDF/FY2014BIB.pdf).

62 Ben Penn, "Trump Wants 21 Percent Cut in Labor Department Budget," Bloomberg News, March 27, 2017, [www.bna.com/trump-wants-21-n57982085353/](http://www.bna.com/trump-wants-21-n57982085353/).

63 Daniel Wiessner, "U.S. Labor Department Rescinds Obama-Era Rule on 'Joint Employment,'" Reuters, June 7, 2017, [www.reuters.com/article/us-usa-labor/u-s-labor-department-rescinds-obama-era-rule-on-joint-employment-idUSKBN18Y2PZ](http://www.reuters.com/article/us-usa-labor/u-s-labor-department-rescinds-obama-era-rule-on-joint-employment-idUSKBN18Y2PZ); USDOL, "US Department of Labor Reinstates Wage and Hour Opinion Letters" (news release, June 27, 2017), [www.dol.gov/newsroom/releases/whd/whd20170627](http://www.dol.gov/newsroom/releases/whd/whd20170627).





shift from 2000-08 is any indication, federal workplace inspections and litigation will almost certainly decline as a near-term regulatory strategy.<sup>64</sup>

Moreover, despite a memorandum of understanding between USDOL and the Department of Homeland Security (DHS) requiring the latter to refrain from enforcing immigration laws in worksites under USDOL investigation, Labor Department staff have reported that the stepped-up immigration enforcement announced by the administration appears to have caused some unauthorized workers to refuse to cooperate with USDOL investigations for fear of deportation.<sup>65</sup> The current aggressive DHS immigration enforcement approach also impacts state and local enforcement, as California labor officials have complained that DHS agents have discouraged worker complaints by showing up at state labor standards hearings.<sup>66</sup>

Independent of policy shifts, federal options for enforcement are constrained by limited resources for inspection and litigation and by restrictions on federal jurisdiction. The budgets of federal agencies charged with enforcing national workplace standards have remained virtually flat since the 1970s, despite the U.S. workforce having doubled in size.<sup>67</sup> The decades-long decline in the amount of resources available per workplace has, predictably, undermined federal enforcement efforts. Resource constraints have limited the ability of the Wage and Hour Division (WHD) and OSHA to inspect workplaces. Even with a 25 percent increase in staffing in 2009, USDOL has only 1,000 inspectors, compared to the United States' 8 million employers, making investigation an extremely rare event.<sup>68</sup>

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*The budgets of federal agencies charged with enforcing national workplace standards have remained virtually flat since the 1970s.*

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Resource constraints also limit the ability of USDOL to litigate when WHD and OSHA identify workplace violations they cannot resolve administratively. Because USDOL cannot itself issue enforcement orders based on findings of employer noncompliance,<sup>69</sup> it must either seek a judicial order or decline to pursue the matter. Yet the USDOL Solicitor's Office, which litigates the department's cases, saw its staffing decline by 25 percent from 1992 to 2008.<sup>70</sup> At the same time, the Solicitor's Office has been assigned the task of enforcing a much broader array of laws, including the *Family and Medical Leave Act* and *Mine Safety and Health Act*. As a result, while in 1987 the Solicitor's Office filed nearly half of all FLSA lawsuits (705 cases),

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64 The USDOL Solicitor's Office, which litigates the department's cases, saw its staffing decline by 25 percent from 1992 to 2008. As a result, while in 1987 the Solicitor's Office filed nearly half of all FLSA lawsuits (705 cases), in 2007 that share had plunged to 2 percent (151 cases). See David Weil, *Improving Workplace Conditions through Strategic Enforcement* (Boston: Boston University, 2010), 90, [www.dol.gov/whd/resources/strategicEnforcement.pdf](http://www.dol.gov/whd/resources/strategicEnforcement.pdf); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, 1987 Annual Report* (Washington, DC: Administrative Office of the U.S. Courts, 1987), Table C-2; James C. Duff, *Judicial Business of the United States Courts, 2007 Annual Report of the Director* (Washington, DC: Administrative Office of the U.S. Courts, 2007), Table C-2, [www.uscourts.gov/sites/default/files/2007judicialbusiness\\_0.pdf](http://www.uscourts.gov/sites/default/files/2007judicialbusiness_0.pdf).

65 Federal "Safe Harbor Rule" permits companies to avoid remedying misclassification by paying back taxes, or even reclassifying them as employees, if they can show a "reasonable basis" for the practice. See Sam Levin, "Immigration Crackdown Enables Worker Exploitation, Labor Department Staff Say," *The Guardian*, March 30, 2017, [www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor](http://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor).

66 Natalie Kitroeff, "Officials Say Immigration Agents Showed Up at Labor Dispute Proceedings. California Wants Them Out," *Los Angeles Times*, August 3, 2017, [www.latimes.com/business/la-fi-ice-california-labor-20170802-story.html](http://www.latimes.com/business/la-fi-ice-california-labor-20170802-story.html).

67 Weil, *The Fissured Workplace*, 215.

68 Low likelihood of inspections in restaurants, residential construction, janitorial, moving companies, landscaping, home health care, and retail. See *ibid.*, 217.

69 Irene Lurie, "Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes," *Employee Rights and Employment Policy Journal* 15, no. 2 (2011): 411, 425.

70 Weil, *Improving Workplace Conditions through Strategic Enforcement*.



in 2007 that share had plunged to 2 percent (151 cases).<sup>71</sup> While private enforcement has taken up some of the slack, many FLSA cases go unlitigated.<sup>72</sup>

Federal agencies are also hampered in their enforcement by jurisdiction limitations. As previously noted, USDOL must typically seek a court order to force an employer to pay owed wages or penalties. Federal agencies have limited power to criminally prosecute and generally must refer criminal matters to the Department of Justice, which has its own enforcement priorities. Agencies also do not have direct jurisdiction over workers' compensation and unemployment insurance, and the Internal Revenue Service (IRS)—which does—often lacks the power to seek owed back taxes for misclassified workers.<sup>73</sup>

Even assuming a strong federal commitment to workplace regulation, therefore, there is a need for state and local governments to supplement federal enforcement.

## **B. The Role of State and Local Enforcement**

In light of federal resource and jurisdiction limitations, state and local enforcement are a natural fit for the task. State and local governments have separate stakes in deterring underpayment and payroll fraud. States rely on payroll taxes to fund unemployment insurance programs and are the primary regulator of workers' compensation systems. Companies that underpay employees and shift workers off payroll deprive state governments of billions in taxes and insurance premiums.<sup>74</sup> A one-year news investigation in seven states reported in 2014 that misclassification of construction workers in Florida, North Carolina, and Texas alone resulted in more than \$2 billion in lost annual state tax revenue.<sup>75</sup> At the same time, wage-and-hour law violations lower the income of low-wage workers, increasing their need for local social services and driving down local commerce, harming local businesses, and reducing local government revenue from sales taxes.

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*State and local governments have separate stakes in deterring underpayment and payroll fraud.*

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Equally importantly, beginning long before the New Deal federalized labor standards, states and local governments have regulated labor conditions in low-wage workplaces. States and municipalities often have laws that set more protective and more easily enforced workplace standards, and those with a long history of labor protection have dedicated staff to conduct workplace investigations. All told, there are more than 650 state wage-and-hour investigators spread among the states, equivalent to more than

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<sup>71</sup> Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts, 1987 Annual Report*, Table C-2; Duff, *Judicial Business of the United States Courts, 2007 Annual Report of the Director*, Table C-2.

<sup>72</sup> Private wage and hour class actions recovered \$467 million during the same period that USDOL recovered \$280 million for wage and hour violations. See Meixell and Eisenbrey, "An Epidemic of Wage Theft is Costing Workers," 2

<sup>73</sup> Françoise Carré, "(In)dependent Contractor Misclassification" (briefing paper, Economic Policy Institute, Washington, DC, June 8, 2015), [www.epi.org/publication/independent-contractor-misclassification/](http://www.epi.org/publication/independent-contractor-misclassification/).

<sup>74</sup> Payroll fraud costs the federal government more than a billion dollars in tax losses, and costs states an even greater amount in payroll taxes, contributions to unemployment insurance funds, and disability and workers' compensation premiums. In 1984, the IRS estimated that nationally, employers misclassified 3.4 million workers, resulting in a \$1.6-billion-dollar loss in payroll taxes. See Jim Efstathiou Jr., "States Clamping Down on Workers Mislabeled as Contractors," Bloomberg, October 18, 2013, [www.bloomberg.com/news/articles/2013-10-18/states-clamping-down-on-workers-mislabeled-as-contractors](http://www.bloomberg.com/news/articles/2013-10-18/states-clamping-down-on-workers-mislabeled-as-contractors).

<sup>75</sup> This includes \$400 million in lost tax revenue in Florida, \$500 million in North Carolina, and \$1.2 billion in Texas. See Mandy Locke and Franco Ordoñez, "Taxpayers and Workers Gouged by Labor-Law Dodge," McClatchy DC, September 4, 2014, <http://media.mcclatchydc.com/static/features/Contract-to-cheat/Labor-law-dodge-hurts-taxpayers-and-workers.html>.



half of USDOL's investigative capacity.<sup>76</sup> State and local agencies often have different and more powerful enforcement powers than the federal government. State and local governments have access to vast data repositories to target noncompliant employers, and because they are the traditional enforcers of criminal law, they can more easily draw on career prosecutors to build criminal enforcement models. They also only rarely have immigration enforcement obligations or authority, making it easier to build relationships and trust with immigrant communities in order to effectively police low-wage workplaces.

## 1. The Need for Strategic State and Local Enforcement

There is a consensus among labor policy experts that what is needed is not just *more* enforcement, but *new* approaches to enforcement.<sup>77</sup> Previous Migration Policy Institute (MPI) research has demonstrated the need for high-impact strategies at the federal level to deter violations and enforce workplace laws against willful and repeat offenders.<sup>78</sup> Chief among those strategies is to prioritize directed enforcement, or enforcement that targets the worst offenders and will benefit the most workers, whether or not a complaint has been filed.<sup>79</sup> By targeting industries where violations are widespread or employers that commit the worst violations, directed enforcement is much more likely to encourage future compliance than complaint-based enforcement.<sup>80</sup> Much less research has been done on state enforcement practices, which are unevenly distributed and at times lax.<sup>81</sup> However, in recent years some states have adopted strategic enforcement approaches that leverage their unique motivations and enforcement tools.<sup>82</sup>

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*What is needed is not just more enforcement, but new approaches to enforcement.*

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There is also growing recognition that states not only have important mechanism to address worker protection issues, but state policymakers are receptive to the concerns of immigrant constituencies.<sup>83</sup> Even states that have advanced staunchly anti-immigrant measures, such as Arizona, have simultaneously

<sup>76</sup> A 2010 survey found a total of 659.5 state investigators in 43 states and the District of Columbia, jurisdictions that account for 90 percent of the private-sector workforce nationwide. See Zach Schiller and Sarah DeCarlo, *Investigating Wage Theft: A Survey of the States* (Columbus, OH: Policy Matters Ohio, 2010), 2, [www.policymattersohio.org/wp-content/uploads/2011/10/InvestigatingWageTheft20101.pdf](http://www.policymattersohio.org/wp-content/uploads/2011/10/InvestigatingWageTheft20101.pdf).

<sup>77</sup> Weil, *The Fissured Workplace*, 214; Annette Bernhardt, *The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the U.S.* (New York: Roosevelt Institute, 2014), <http://rooseveltinstitute.org/role-labor-market-regulation-rebuilding-economic-opportunity-u-s/>; David Weil and Amanda Pyles, "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace," *Comparative Labor Law & Policy Journal* 27, no. 59 (2005): 71.

<sup>78</sup> Kerwin and McCabe, *Labor Standards Enforcement and Low-Wage Immigrants*, 4.

<sup>79</sup> Bernhardt et al., *Broken Laws, Unprotected Workers*, 52.

<sup>80</sup> Directed investigations result in an estimated 56 percent probability of compliance the following year, compared to 13 percent for complaint-driven investigations. See Weil and Pyles, "Why Complain?"

<sup>81</sup> Survey of state workforce agencies revealed that most states do not strategically enforce the law, have cut staff in response to budget concerns, and/or have assigned investigators to enforce not only wage and hour law but also prevailing wage law, child labor law, and payday laws. See Schiller and DeCarlo, *Investigating Wage Theft*, 2-5. One article reported that between 2009 and 2014 the North Carolina Department of Labor only filed lawsuits against four companies to recoup owed wages, and that it took no action in more than half of the complaints received. See Mandy Locke, "For Many Workers Cheated Out of Wages, NC Department of Labor Offers No Help," *The News & Observer*, November 22, 2014, [www.newsobserver.com/news/special-reports/contract-to-cheat/article10141241.html](http://www.newsobserver.com/news/special-reports/contract-to-cheat/article10141241.html). In addition, Alabama, Florida, Georgia, Louisiana, and Mississippi have no agency dedicated to wage and hour investigations. See Jacob Meyer and Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* (New York: Columbia Law School, National State Attorneys General Program, 2011), 16, [www.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20FINAL.pdf](http://www.law.columbia.edu/sites/default/files/microsites/career-services/Wage%20and%20Hour%20Report%20FINAL.pdf).

<sup>82</sup> Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 422.

<sup>83</sup> See, for example, Ileana Najarro, "Cuomo Task Force to Investigate Worker Exploitation in Many Industries," *The New York Times*, July 16, 2015, [www.nytimes.com/2015/07/17/nyregion/cuomo-task-force-to-investigate-worker-exploitation-in-many-industries.html](http://www.nytimes.com/2015/07/17/nyregion/cuomo-task-force-to-investigate-worker-exploitation-in-many-industries.html).



championed labor protections that directly benefit immigrant workers.<sup>84</sup> This may be because such efforts are increasingly seen as bipartisan, helping both workers and honest businesses.<sup>85</sup> For example, in Tennessee—a state without a history of protecting foreign-born workers—there is “broad-based, bipartisan support for misclassification enforcement.”<sup>86</sup> According to one state agency head, “Misclassification is not a political issue. No matter how you feel about [worker] benefits, you want to stop misclassification.”<sup>87</sup> Some employers and heads of employer associations have also testified in favor of state agencies taking enforcement action against misclassification.<sup>88</sup>

While state and local enforcement of immigration laws has met with legal and political opposition, the labor rights issues stand on different legal and policy footing. Core workplace rights have long been at the heart of state police powers, and state workplace protections are rarely pre-empted by federal law.<sup>89</sup> Given these advantages and deep cuts in many state budgets, there is all the more reason to develop a strategic enforcement agenda to protect workplace rights at the state and local levels, one that prioritizes for inspection and litigation the worst practices in the most noncompliant occupations and industries.

## I. Scope of State and Municipal Powers to Enforce Labor Law

States have historically employed civil and criminal enforcement tools to protect the health and welfare of their residents. During the Progressive Era, before the New Deal established federal workplace standards and agencies to enforce them, workplace standards were primarily left to the states to set and police. In many states, the agencies charged with enforcing labor standards predate both USDOL and private forms of enforcement through class-action litigation. State statutes provide enforcement agencies with broad powers to investigate, assess damages, and set penalties for workplace violations, including wage-and-hour law violations.

84 Arizona passed model state legislation to protect workers from wage theft and protect them from retaliation, with treble damages to be awarded for underpayment violations. Adverse action taken against an employee within 90 days of a complaint is considered retaliatory. See Arizona State Legislature, “Labor—Minimum Wage—Enforcement,” *Arizona Revised Statutes* 23–364, accessed July 26, 2017, [www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/23/00364.htm](http://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/23/00364.htm).

85 In response to a sweep of the construction industry by a joint task force in California, the head of one construction association called for more enforcement, saying “It’s too hard to stay in business in this economy when forced to compete on an unlevel playing field. ... [Enforcement actions] put fraudulent contractors on notice and force compliance with the law.” See California Professional Association of Specialty Contractors, “Enforcement Agencies Find Millions of Dollars in Construction Underground: California Contractors Believe Findings are the Tip of the Iceberg,” CISION PR Newswire, November 5, 2012, [www.prnewswire.com/news-releases/enforcement-agencies-find-millions-of-dollars-in-construction-underground-177275801.html](http://www.prnewswire.com/news-releases/enforcement-agencies-find-millions-of-dollars-in-construction-underground-177275801.html). Another head of a construction association in Connecticut praised heightened state law enforcement efforts as “probusiness.” See Greg Bordonaro, “State Broadens Efforts to Eradicate CT’s Underground Economy,” *Hartford Business Journal*, November 10, 2014, [www.hartfordbusiness.com/article/20141110/PRINTEDITION/311079980](http://www.hartfordbusiness.com/article/20141110/PRINTEDITION/311079980).

86 Author interview with Scott Yarbrough, Director of Compliance, Division of Workers’ Compensation, Tennessee Department of Labor and Workforce Development, Nashville, May 29, 2015.

87 Author interview with Abbie Hudgens, Administrator, Tennessee Bureau of Workers’ Compensation, Nashville, May 29, 2015.

88 One Tennessee construction contractor with 225 employees on his payroll testified in favor of state legislation to authorize the state to fine competitors who misclassify employees because it put his firm at a competitive disadvantage with companies that “shave about 30 percent off” labor costs by misclassifying their employees. See Efstathiou, “States Clamping Down on Workers Mislabeled as Contractors.” Similarly, a plumbing contractor in Arizona criticized the lack of government enforcement because she kept losing bids to other companies that “bid 20 percent to 30 percent less for the same job” because of misclassification. See Joe Dana, “Illegal Labor on Industry Radar,” 12 News, October 4, 2013, [www.azcentral.com/business/realstate/articles/20131002illegal-labor-on-industry-radar.html](http://www.azcentral.com/business/realstate/articles/20131002illegal-labor-on-industry-radar.html).

89 States can establish and enforce wage and hour protections and enforce their own workers’ compensation and unemployment insurance laws. States and their subdivisions are preempted from enforcing laws that relate to collective bargaining between private sector employers and their employees, but while OSHA preempts states from enforcing safety and health laws without authorization, OSHA “expressly authorizes states to operate their own safety and health plans pursuant to OSHA approval and leaves states with considerable authority and room for innovation in this area.” Estlund, *Regoverning the Workplace*, 81.





As the primary regulators of insurance companies<sup>90</sup> and administrators of unemployment insurance, states have particularly broad authority over payroll fraud. State laws require companies to obtain adequate insurance coverage and make proper contributions to the state's unemployment insurance fund based on their industry and the number of job responsibilities of their employees. Many states require employers to file with the state a quarterly report with each employee's name, social security number, and income for that quarter. States also require employers to demonstrate they have obtained workers' compensation insurance coverage by disclosing the name of the insurance company and the effective dates of the policy. States may then use these reported data to audit employers for compliance with unemployment insurance and workers' compensation laws. State agencies that regulate workplace-based insurance also have the authority to conduct hearings, issue administrative orders, and refer cases for criminal prosecution.

States and local governments also have broad jurisdiction to prosecute violations of various labor, insurance, and tax laws criminally, though criminal statutes relating to employers vary widely from state to state. Nearly all states have statutes that criminalize payroll fraud. Most states and some municipalities also have criminal jurisdiction over underpayments,<sup>91</sup> either as a violation of a state labor statute<sup>92</sup> or as a type of theft or larceny.<sup>93</sup>

In regulating wage-and-hour compliance, state investigators often have the same inspection powers as USDOL. For example, labor investigators in New York State and California can enter any workplace in the state to inspect business records and interview employees, and may conduct inspections either based upon a complaint or as part of a routine sweep, and all evidence obtained can be used in a later proceeding or provided to other agencies by referral (including for criminal prosecution). In other states, such as Iowa, inspectors can enter workplaces and examine wage records only after the agency has received a written complaint.<sup>94</sup> Many state attorneys general have administrative subpoena power to compel companies and third parties (such as insurance companies) to produce documents and witnesses without the need for a court order. Many of these same administrative powers can also be invoked by municipalities where underpayment is pervasive and federal-state enforcement resources scant.

In addition to inspection power, many state wage-and-hour enforcement agencies create administrative procedures to adjudicate underpayment claims and issues concerning unemployment insurance or workers' compensation. Because state administrative hearings have no filing fees and are less formal than court proceedings, they are more accessible for low-wage workers who cannot afford an attorney and wish to file a claim pro se. Pursuant to this adjudication power, state and municipal agencies may issue administrative orders to employers without a court order. Administrative orders can assess not only owed wages, but also unpaid unemployment insurance contributions, workers' compensation premiums, and penalties for noncompliance with the law.<sup>95</sup> These orders can be judicially appealed and are generally reviewed at a deferential standard by the courts.

90 For example, Washington State administers its own workers' compensation program, and as a result misclassification deprives the state directly of funds that would otherwise pay for claims of injured workers.

91 Thirty states and the District of Columbia include criminal penalties for unpaid wages in their state wage and hour laws, and 38 states and the District of Columbia consider theft of services a violation of criminal law. See National Employment Law Project, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft* (New York: National Employment Law Project, 2011), 35, [www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf](http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf).

92 A violation of New York Labor Law is an unclassified misdemeanor for the first offense, while a subsequent offense is a felony. See New York State, "Labor—Payment of Wages—Criminal Penalties," *New York Consolidated Laws* LAB 6 § 198–A, accessed August 3, 2017, <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:>

93 Under a 2015 amendment to the criminal code of Seattle, Washington, failure to pay owed wages is a type of theft. See Seattle City Council, "Wage and Tip Compensation Requirements—Definitions," *Seattle Municipal Code* 14.20.010, accessed August 3, 2017, [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT14HURI\\_CH14.20WATICORE\\_14.20.010DE](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.20WATICORE_14.20.010DE).

94 Colin Gordon, Matthew Glasson, Jennifer Sherer, and Robin Clark-Bennett, *Wage Theft in Iowa* (Iowa City: The Iowa Policy Project, 2012), 19, <http://iowapolicyproject.org/2012docs/120827-wagetheft.pdf>.

95 Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 425. Texas law permits an administrative penalty of up to \$1,000 for "bad faith" failure to pay wages. See Texas State Legislature, "Protection of Laborers—Wages—Bad Faith; Administrative Penalty," *Texas Labor Code* 2(C)(61)(A), accessed July 26, 2017, [www.statutes.legis.state.tx.us/Docs/LA/htm/LA.61.htm](http://www.statutes.legis.state.tx.us/Docs/LA/htm/LA.61.htm).



## IV. Promising State Enforcement Strategies

To maximize their impact at a time of limited resources, state and local agencies should focus on investigative and enforcement strategies most likely to change employer behavior. The promising strategies outlined here stress less labor-intensive, high-yielding approaches that target the worst employers in industries and occupations with the worst record of labor standard compliance.

### A. Tapping into State Police Powers and Regulatory Authority

Many states, recognizing that their civil enforcement powers are often far broader than those of federal agencies, have used these powers to enforce labor standards. Common tools include administrative orders and other actions that prohibit businesses to operate while in violation of the law—measures that can often be introduced administratively, without having to file a lawsuit. State and municipal agencies have also conducted administrative hearings to adjudicate small wage claims that could not be efficiently litigated.

#### I. Targeted Enforcement of Civil Law

A number of states have used their discretion to adopt a “strategic” enforcement approach for civil enforcement. In such a strategy, agencies prioritize for civil investigation and litigation the employers that either violate laws impacting many employees, or in which enforcement will create a deterrent effect in sectors and regions with high rates of noncompliance because the employer is either well-known or has engaged in egregious conduct. New York and California have led the way by retooling their civil enforcement powers to better facilitate such directed enforcement. The New York State Department of Labor (NYSDOL) in 2009 and the California Labor Commissioner’s Office (also called the Division of Labor Standards Enforcement or DLSE) in 2011 each developed a triage system for complaints to prioritize those that raised the worst potential violations. When complaints suggest a widespread practice, NYSDOL and the California Labor Commissioner investigate the pay practices in the company’s entire workforce.

Civil investigations are unique in their ability to quickly build and resolve important cases without the extensive use of government resources. Many state and local agencies only require a handful of witnesses to begin investigating an entire company workforce, making possible the investigation of industries in which complaints are not frequently filed.<sup>96</sup> Agencies with civil investigation powers also have enormous leverage to resolve cases, even without the threat of imminent litigation, if the employer fears the widening of the investigation or the triggering of a criminal investigation.

Civil investigations have proven efficient and effective both for large workforce agencies, such as the California Labor Commissioner and the NYSDOL, and for agencies with relatively small budgets, such as state attorneys general. With the development of local minimum wage laws over the past decade, cities have also developed strategic approaches to labor standards enforcement that rely on municipal agencies to conduct civil inspections. For example, since the San Francisco minimum wage ordinance took effect in 2003, the city Office of Labor Standards has used civil investigations to resolve 91 percent of cases for at

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<sup>96</sup> To commence a civil investigation, the New York Attorney General, for example, needs only show a good-faith belief that a target engaged in “repeated” illegal conduct. See New York State, “Executive Law 63. General Duties,” *New York Consolidated Laws*, accessed July 26, 2017, <http://codes.findlaw.com/ny/executive-law/exc-sect-63.html>.





least the owed amount of back wages.<sup>97</sup> Seattle recently established a labor standards office with similar powers.<sup>98</sup>

Used strategically, civil investigations can map noncompliance in an industry and assist in deciding which violations are appropriate for civil administrative enforcement and which are so egregious as to merit litigation and criminal prosecution. The fast-food investigations conducted by the New York State Attorney General (NYAG) are an important example in this regard. In 2012, in response to complaints of wage-and-hour law violations in the fast-food sector brought to light by the Fight for Fifteen movement, NYAG began the targeted investigation of fast-food franchisees that represented many of the largest brands in the United States, including Domino's Pizza, Papa John's Pizza, McDonald's, and Kentucky Fried Chicken (KFC). By 2015, the Attorney General's office announced settlements totaling \$2.5 million in restitution, two judgments totaling \$2.8 million against Papa John's franchisees, and the criminal prosecution of a fast-food franchisee for wage theft.<sup>99</sup> More recently, the investigation culminated in a wage-and-hour lawsuit against Domino's as a putative joint employer of its franchise store employees, the first public agency action against a fast-food company for wage-and-hour law violations in franchise stores.<sup>100</sup>

Even the threat of a wide-ranging civil investigation can be an effective tool for reducing employer use of exploitative pay practices. In 2015, NYAG sent letters to major retailers questioning their use of "on-call staffing" practices, in which employers call employees to work on short notice instead of giving them a regular weekly schedule to reduce labor costs.<sup>101</sup> By April 2016 NYAG and eight other state attorneys general in California, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Minnesota, and Rhode Island had sent joint letters to retailers across the country, detailing their concerns and the ways that on-call schedule may violate state laws requiring employers to pay a minimum number of hours per shift.<sup>102</sup> This resulted in many retailers discontinuing their use of the practice.

States have also used their investigative powers to address issues that are outside of traditional labor laws, but that nonetheless directly affects workers. For example, employers of low-wage employees seeking to avoid the cost of issuing checks increasingly pay employees who lack a bank account using "payroll cards," which function like debit cards but often with large fees for transactions that eat away at

97 San Francisco Wage Theft Task Force, *Final Report* (San Francisco: City of San Francisco, 2013), 3, 14, <http://sfgov.org/olse/ftp/meetingarchive/www.sfgsa.org/modules/Wage%20Theft%20Task%20Force%20Final%20Report-documentid=11224.pdf>.

98 City of Seattle, "Ordinance Number 124643: An Ordinance Relating to the Organization of City Government; Creating an Office of Labor Standards; Establishing the Mission and Functions of the Office of Labor Standards; Describing the Responsibilities and Membership of a Labor Standards Advisory Commission; and Adding New Sections 3.14.934 and 3.14.945 to the Seattle Municipal Code," introduced October 27, 2014 and approved December 2, 2014, <http://clerk.seattle.gov/~scripts/nph-brs.exe?d=ORDF&s1=124643.ordn.&Sect6=HITOFF&l=20&p=1&u=/~public/cbor1.htm&r=1&f=G>; Los Angeles established the Office of Wage Standards to enforce the city's minimum wage, effective July 1, 2016. See City of Los Angeles, "Raise the Wage LA," accessed August 10, 2017, <http://wagesla.lacity.org/>.

99 New York State Office of the Attorney General, "A.G. Schneiderman Announces \$375k Settlement with KFC Franchise for Underpaying More than 700 Workers in NYC" (press release, May 1, 2015), <https://ag.ny.gov/press-release/ag-schneiderman-announces-375k-settlement-kfc-franchise-underpaying-more-700-workers>; New York State Office of the Attorney General, "A.G. Schneiderman Obtains Judgment for More than \$2 Million Against Papa John's Franchisee that Underpaid Employees" (press release, March 5, 2015), [www.ag.ny.gov/press-release/ag-schneiderman-obtains-judgment-more-2-million-against-papa-john%E2%80%99s-franchisee](http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-judgment-more-2-million-against-papa-john%E2%80%99s-franchisee); *Thomas Perez v. BMY Foods Inc.*, 1:15-cv-05428 (U.S. District for the Southern District of New York, 2015).

100 New York State Office of the Attorney General, "A.G. Schneiderman Announces Lawsuit Seeking to Hold Domino's and Its Franchisees Liable for Systemic Wage Theft" (press release, May 24, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-seeking-to-hold-dominos-and-its-franchisees-liable>.

101 Reuters, "New York Questions Big Retailers over 'On-Call' Staffing," Reuters, April 13, 2015, [www.reuters.com/article/us-retail-workers-nyag-idUSKBN0N40G420150413](http://www.reuters.com/article/us-retail-workers-nyag-idUSKBN0N40G420150413).

102 New York State Office of the Attorney General, "A.G. Schneiderman and Eight Other State Attorneys General Probe Retailers over Use of On-Call Shifts" (press release, April 13, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-and-eight-other-state-attorneys-general-probe-retailers-over-use-call>.



workers' wages.<sup>103</sup> USDOL is not well equipped to address payroll card use because the fees are charged by a banking institution, not an employer. But many state laws (including in New York) require that employers pay employees their wages without a fee and to give workers the option of being paid by check or cash. NYAG conducted a targeted investigation of the payroll card practices of major businesses and found that of the 40 companies targeted, nearly half significantly reduced workers' take-home pay and did not give workers the option to receive their pay through check or direct deposit.<sup>104</sup>

## 2. Administrative Orders

Many states have authority to enforce wage-and-hour laws by issuing administrative orders. These can be issued either before or after administrative proceedings and create an enforceable obligation to pay wages and penalties or refrain from illegal conduct—all without a judicial decision. For example, in New York, the NYSDOL investigates complaints and issues Orders to Comply, which require employers to either request a hearing to adjudicate the findings or to pay owed wages and penalties. If the employer chooses the latter, a NYSDOL attorney will appear to defend the order and present evidence collected by the agencies, including business records and worker testimony. If the order is upheld administratively, it is then subject to judicial review under a deferential "substantial evidence" standard, meaning that the court will uphold the order unless the agency's findings are not supported by the investigative record.

State administrative orders can be more efficient and effective than judicial orders obtained through litigation. By way of comparison, USDOL cannot issue administrative orders and must instead rely on the courts to enforce the findings of its investigations. Litigation is time- and resource-consuming and can be unpredictable. As a result, USDOL can only enforce a small proportion of its investigations through litigation.<sup>105</sup> An employer can delay payment of owed wages for months or years by simply refusing to pay and hoping that USDOL elects not to litigate the matter. This inefficiency forces USDOL to make difficult decisions about which investigations to enforce judicially and creates perverse incentives for USDOL to resolve investigations on unfavorable terms instead of litigating them. By contrast, state agencies with the power to issue administrative orders can resolve most investigations administratively, using fewer attorney resources. Furthermore, by setting standard guidelines for issuing orders, agencies can ensure uniformity in how and when to apply penalties and injunctive—or prohibitions of future conduct—relief in addition to back wages.

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*State administrative orders can be more efficient and effective than judicial orders obtained through litigation.*

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### a. Administrative Orders for Owed Wages

A state administrative order for owed wages can have far-reaching consequences. In California, the labor commissioner used her agency's power since 2011 to adjudicate and issue orders in response to the widespread misclassification of employees in the port trucking industry. The agency adjudicated 400 individual claims, finding that in every case the firms inappropriately misclassified the drivers as independent contractors instead of employees. These decisions found \$46 million owed to individual

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103 Jessica Silver-Greenberg and Stephanie Clifford, "Paid via Card, Workers Feel Sting of Fees," *The New York Times*, June 30, 2013, [www.nytimes.com/2013/07/01/business/as-pay-cards-replace-paychecks-bank-fees-hurt-workers.html](http://www.nytimes.com/2013/07/01/business/as-pay-cards-replace-paychecks-bank-fees-hurt-workers.html); Halah Touryalai, "Are Hourly Workers Being Short-Changed? The Truth About Payroll Cards," *Forbes*, July 23, 2013, [www.forbes.com/sites/halahtouryalai/2013/07/23/are-hourly-workers-being-short-changed-the-truth-about-payroll-cards/](http://www.forbes.com/sites/halahtouryalai/2013/07/23/are-hourly-workers-being-short-changed-the-truth-about-payroll-cards/).

104 New York State Office of the Attorney General, *Pinched by Plastic: The Impact of Payroll Cards on Low Wage Workers* (Albany: State of New York, Office of the Attorney General, 2014), [www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf](http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf).

105 One former Wage and Hour Administrator estimated that the USDOL's Solicitor's Office only litigates 100 to 150 cases annually, less than 1 percent of the of the roughly 30,000 investigations the department conducts each year. See Wolters Kluwer, Law & Business, "Former Wage and Hour Administrator Offers a Glimpse inside the DOL," accessed July 31, 2017, <http://hr.cch.com/topic-spotlight/emplaw/061508a.asp>.



drivers, and collectively have affected the rights of thousands of port truck drivers throughout the state to be entitled to the rights and protections of employees instead of independent contractors.<sup>106</sup>

States can also use administrative orders to adjudicate eligibility for workers' compensation and unemployment insurance benefits. Upon finding employee misclassification, state agencies may issue an order requiring employers not only to make contributions or purchase workers' compensation for the individual claimant, but also for all similarly situated workers. By doing so, state agencies can create important precedent with less litigation risk by defending administrative orders against administrative challenges under a deferential legal standard. For example, a contract photographer for the *New York Post* filed an unemployment insurance claim, asserting that the company directed the specifics of her work and set her work hours as it would an employee, not a contractor. The New York unemployment insurance appeal board ruled for her, finding that the company has control over important aspects of her work and ordering the *Post* to reclassify similar photographers as employees. A New York appeals court upheld the ruling,<sup>107</sup> a decision that has the potential to impact an entire class of contract photographers for newspapers in the state.

#### b. *Administrative Orders for Penalties*

Administrative orders, in addition to owed wages, may also impose fines for willful violations of wage-and-hour law, failure to obtain workers' compensation insurance, or failure to contribute to unemployment insurance. In some states, such as Arizona and Tennessee, the funds collected through such penalties are specifically earmarked to finance enforcement work, creating a stable funding stream that can prove essential during economic downturns.<sup>108</sup> Unlike civil forfeiture laws and other types of "policing for profit"<sup>109</sup> regimes, in which local governments seize the assets of suspects (usually of drug crimes) before prosecution and with little due process, administrative orders of penalties are only issued after an administrative determination of a willful violation, which is subject to administrative review.<sup>110</sup> While civil forfeiture has been criticized for overuse in areas such as drug law,<sup>111</sup> misclassification laws and labor standards are underenforced and employer defendants often have willing champions in state legislatures to represent their interests. Thus, while the use of penalties

<sup>106</sup> Author interview with Julie Su.

<sup>107</sup> *Nance v. NYP Holdings Inc.*, N.Y. Slip Opinion 03720 (New York Appellate Division, 2014), <https://casetext.com/case/nance-v-nyp-holdings-inc>.

<sup>108</sup> See National Employment Law Project, *Winning Wage Justice*, 45. Tennessee may impose a penalty of \$1000 or 1.5 times the unpaid premium for misclassified construction workers, which will then fund enforcement. See Bloomberg Bureau of National Affairs (BNA), "Tennessee Governor Signs Legislation Imposing Penalties for Misclassification," *Construction Labor Report* 59, no. 419. Similarly, the Connecticut Department of Labor funds seven investigators from collected penalties. See Tom Juravich, Essie Ablavsky, and Jake Williams, "The Epidemic of Wage Theft in Residential Construction in Massachusetts" (working paper, University of Massachusetts Amherst, Labor Center, Amherst, MA, May 2015), 41, [www.umass.edu/lrrc/sites/default/files/Wage\\_Theft\\_Report.pdf](http://www.umass.edu/lrrc/sites/default/files/Wage_Theft_Report.pdf).

<sup>109</sup> Use of civil forfeiture to fund the budgets of the Drug Enforcement Agency and local police departments has come under considerable criticism for preying on defendants unable to afford a lawyer to contest the forfeiture and for biasing law enforcement agencies to only prioritize actions likely to yield proceeds. Legal scholars have raised potential due process concerns with civil forfeiture because civil-forfeiture laws deprive individuals of property without due process. See, for example, Eric Blumenson and Eva Nilsen, "Policing for Profit: The Drug War's Hidden Economic Agenda," *University of Chicago Law Review* 65, no. 35 (1998): 35–114, <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4969&context=uclev>. Yet civil forfeiture has a long judicial pedigree and does not violate constitutional due process guarantees so long as the government provides adequate notice to the property owners. See Caleb Nelson, "The Constitutionality of Civil Forfeiture," *Yale Law Journal* 125, no. 8 (June 2016): 2182–555, [www.yalelawjournal.org/feature/the-constitutionality-of-civil-forfeiture](http://www.yalelawjournal.org/feature/the-constitutionality-of-civil-forfeiture).

<sup>110</sup> Directing administrative penalties to fund agency enforcement does not raise constitutional due process concerns so long as it would not impermissibly bias a law enforcement agency. The Supreme Court upheld the FLSA provision that funds investigations of child labor law violations with penalties against employer's due process challenge; because government officials did not profit from the distribution, the court reasoned, there was little possibility that the judgment of the USDOL would be biased by the prospect of institutional gain, and the collection represented a minute portion of the USDOL budget. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1977): 117–18, <https://supreme.justia.com/cases/federal/us/446/238/>.

<sup>111</sup> See David A. Kaplan, "Where the Innocent Lose," *Newsweek*, January 3, 1993, [www.newsweek.com/where-innocent-lose-192100](http://www.newsweek.com/where-innocent-lose-192100); Sarah Stillman, "Taken," *The New Yorker*, August 12 and 19, 2013, [www.newyorker.com/magazine/2013/08/12/taken](http://www.newyorker.com/magazine/2013/08/12/taken).



to self-fund enforcement might induce agencies to prioritize deep-pocketed defendants,<sup>112</sup> self-funding regimes structured to promote strategic targeting can be an important mechanism for strengthening chronically underfunded areas of enforcement.

c. *Injunctive Administrative Orders*

Injunctive relief, in which a state orders an employer to change its behavior, is a key component of public enforcement actions that aim to not only assist victims but also stop harmful business practices. USDOL, for example, has increasingly responded to the problem of employers retaliating or threatening retaliation against workers who file complaints by obtaining temporary restraining orders prohibiting retaliation during labor investigations.<sup>113</sup> Obtaining injunctive relief through the courts can be time- and resource-intensive, and may be unrealistic as a routine strategy for budget-strapped state and local agencies. Instead, some agencies issue injunctive orders that, like other administrative orders, are subject to judicial review. While USDOL has limited authority to issue “hot goods” injunctive relief orders to prohibit the interstate shipment of goods in violation in FLSA,<sup>114</sup> state agencies routinely use such orders, particularly to enforce workers’ compensation law with the aim of preventing workplace accidents involving uninsured workers.

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*Stop-work orders are a routine feature of law enforcement strategies to stop misclassification.*

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Many state agencies responsible for workers’ compensation have the authority to issue administrative injunctive orders requiring companies to stop doing business until they comply with workers’ compensation laws, also known as “stop-work” authority.<sup>115</sup> Stop-work orders are a routine feature of law enforcement strategies to stop misclassification. For example, Florida reported in 2013 that in the previous year it issued 2,444 stop-work orders to companies that failed to secure workers’ compensation coverage or that committed premium fraud.<sup>116</sup> This is in line with other states’ use of stop-work orders to ratchet up the enforcement of labor standards, because an employer who violates a stop-work order violates criminal law and can be arrested and referred for criminal prosecution.<sup>117</sup> Stop-work authority is particularly effective in industries that have a vertical supply chain since the effects of the order would be

<sup>112</sup> Margaret H. Lemos and Max Minzner, “For-Profit Public Enforcement,” *Harvard Law Review* 127, no. 3 (2014): 853–912, <https://harvardlawreview.org/2014/01/for-profit-public-enforcement/>.

<sup>113</sup> The department can obtain an injunction prohibiting the employer from violating the FLSA’s antiretaliation provisions, including by reporting the employee to immigration authority to inhibit their exercise of FLSA rights. See USDOL, “Nashua, New Hampshire, Painting Contractor to Pay Nearly \$500K in Wages, Damages and Penalties” (news release, August 4, 2015), [www.dol.gov/newsroom/releases/whd/whd20150804](http://www.dol.gov/newsroom/releases/whd/whd20150804). For a similar case in other states, see USDOL, “US Labor Department Obtains Temporary Restraining Order against BabyVision Inc. to Stop Intimidation of Workers During Investigation” (news release, October 1, 2014), [www.dol.gov/newsroom/releases/whd/whd20141001](http://www.dol.gov/newsroom/releases/whd/whd20141001); USDOL, “US Labor Department Obtains an Order Against Atlanta’s Antico Foods LLC to Stop Retaliation against Workers During Investigation” (news release, October 7, 2014), [www.dol.gov/newsroom/releases/whd/whd20141007-0](http://www.dol.gov/newsroom/releases/whd/whd20141007-0); USDOL, “Portland, Texas Restaurant Settles Worker Retaliation Allegation after US Labor Department Finds Nine Employees Owed \$25K in Back Wages” (news release, October 3, 2016), [www.dol.gov/newsroom/releases/whd/whd20161006](http://www.dol.gov/newsroom/releases/whd/whd20161006).

<sup>114</sup> USDOL has historically used its “hot goods” authority to enjoin the sale of clothing made by garment workers in violation of the FLSA. See *Fair Labor Standards Act of 1938*, Public Law 75–718, *U.S. Statutes at Large* 52 (1938), [www.legisworks.org/congress/75/publaw-718.pdf](http://www.legisworks.org/congress/75/publaw-718.pdf).

<sup>115</sup> See, for example, New York State, “Workers’ Compensation—Administration—Civil Enforcement,” *New York Consolidated Laws* § 141-a(4)(a), accessed January 2, 2018, <https://law.justia.com/codes/new-york/2015/wkc/article-8/141-a/>.

<sup>116</sup> Florida Department of Financial Services, Division of Insurance Fraud/Bureau of Workers’ Compensation Fraud, and Division of Workers’ Compensation, *2012/2013 Workers’ Compensation Annual Report* (Tallahassee: Florida Department of Financial Services, 2014), 14–15, [www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/DIF-DWC-2014-Joint-Annual-Report.pdf](http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/DIF-DWC-2014-Joint-Annual-Report.pdf).

<sup>117</sup> Will Bredderman, “Embattled Club Won’t Reopen Until All the Fines Are Paid, State Officials Say,” *The Brooklyn Paper*, October 1, 2012, [www.brooklynpaper.com/stories/35/40/br\\_amnesia\\_workers\\_2012\\_10\\_05\\_bk.html](http://www.brooklynpaper.com/stories/35/40/br_amnesia_workers_2012_10_05_bk.html).





felt all the way up the chain. For example, in construction worksites, where projects follow tight deadlines and one subcontractor cannot start work until another finishes, a stop-work order issued to a single subcontractor can lead to significant delays and costs to the general contractor. The risk of such knock-on effects from noncompliance can help enlist the general contractor in ensuring that subcontractors have adequate workers' compensation coverage for their employees.<sup>118</sup>

Stop-work orders are, however, controversial in some regulation-averse states and those that without a history of rigorous labor standards enforcement. A common concern, as voiced by a Tennessee commercial construction association lobbyist, is that decisionmakers are “not comfortable with stop-work orders where a general contractor has serious contractual problems because a subcontractor is screwing around.”<sup>119</sup> Yet even in states that do use stop-work orders, agencies are internally checked from overusing them to avoid potential backlash. As one lawyer for a state occupational safety and health agency in Tennessee noted, the mere threat of a stop-work order is often sufficient to change employer behavior: “We’ve never had to issue a stop-work order. There’ve been times when we’ve threatened it, but employers have always complied.”<sup>120</sup> To address concerns about overreach, the Florida Department of Insurance offers a flexible option for companies eager to resume work; it permits employers subject to a stop-work order to pay a fee and purchase a policy prospectively to lift the injunction pending the results of an audit.<sup>121</sup>

### 3. Licenses and Wage Bonds

State agencies also regulate occupational licenses and can suspend or revoke them for poor conduct, including violation of wage-and-hour laws. In California, for example, a law requires garment manufacturers to disclose outstanding wage judgments when applying for licenses and to prove their ability to pay the order, otherwise the application is rejected.<sup>122</sup>

The most prominent use of license revocation to enforce workplace laws is in the construction industry, where licenses are frequently linked to compliance with wage laws. Generally, construction companies must be licensed to engage in public works, such as government-funded construction of schools and hospitals. Under the federal *Davis-Bacon Act of 1931* and state equivalents, contractors can be temporarily barred from bidding on a public project for willful violations of prevailing wage laws.<sup>123</sup> Until the past decade, licensing powers were rarely invoked, outside of prevailing wage cases, to enforce wage-and-hour law. But since then, some states and cities have suspended or revoked the licenses of employers that are the subject of criminal prosecution or that are found to have misclassified employees. One striking example of this is in Massachusetts, where the Alcohol Beverages Control Commission began requiring companies to demonstrate legal compliance before issuing or renewing a license, resulting in the recovery of over \$8 million in unemployment insurance contributions in 2012.<sup>124</sup> In the past decade, many municipalities, including Chicago, San Francisco, and Seattle, have amended their licensing statutes

118 Weil, *The Fissured Workplace*, 227.

119 Author interview with Bob Pitts, Senior Policy Advisor, Association of Builders and Contractors, Inc., Greater Tennessee Chapter, Nashville, May 28, 2015.

120 Author interview with Daniel Bailey, Attorney, Tennessee Occupational Safety and Health Administration, Tennessee Department of Labor and Workforce Development, Nashville, May 29, 2015.

121 Author interview with John Dygon. Another potential approach can be found in the *Mine Safety and Health Act of 1977*, which provides the Mine Safety and Health Administration with the power to stop operations in a mine cited for safety violations. Still, the administration can only invoke this power where a mine operator was previously classified as a repeat violator. See Weil, *The Fissured Workplace*, 238–39.

122 Tim Judson and Cristina Francisco-McGuire, *Where Theft Is Legal: Mapping Wage Theft Laws in the 50 States* (New York: Progressive States Network, 2012), 22.

123 See 29 Code of Federal Regulations § 5.12.

124 Heather Rowe, *Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, Annual Report 2012* (Boston: Executive Office of Labor and Workforce Development, 2013), 7–8, [www.mass.gov/files/2017-07/annual-report-2012.pdf](http://www.mass.gov/files/2017-07/annual-report-2012.pdf).



to authorize license revocation or suspension based on a finding of unpaid wages.<sup>125</sup> In San Francisco, the Office of Labor Standards Enforcement (OLSE) coordinates with city Department of Public Health, which regulates the restaurant and laundry industries, to withhold license renewals from employers in those industries that OLSE has found to have violated wage-and-hour law.<sup>126</sup> And in California and New York City, legislators have enacted a license and wage bond requirement in the car wash industry that permits employees to seek unpaid wages from the employer's insurance company if the employer is judgment proof, and to seek license suspension or revocation for labor standards violations or retaliation.<sup>127</sup> Licensing and bonding can thus ensure that underpaid employees receive restitution and force businesses to comply with the law by creating costs that are greater than the cost of compliance.

#### 4. Administrative Hearings

In addition to enforcing the law, states and local government also adjudicate wage claims brought by workers through hearings with administrative law judges. Wage-claim hearings are less costly to administer and workers can more easily represent themselves than in the federal or state court system. Administrative hearings thus provide access to justice for workers who may otherwise abandon their claims, which are often too small and individualized to interest a private attorney.<sup>128</sup> Such hearings can be a particularly efficient enforcement strategy in industries made up of many small, isolated workplaces (e.g., residential construction and small retail establishments) where wage claims are often too small to merit an intensive civil investigation. Administrative hearings complement rather than supplant criminal enforcement, as one Florida immigrant rights advocate notes: "prosecution is about punishment, not making workers whole."<sup>129</sup> Whereas the hallmark of a successful criminal prosecution is punishing the perpetrator with a conviction and jail time, administrative adjudications primarily seek to efficiently compensate victims for their harm.

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*Wage-claim hearings are less costly to administer and workers  
can more easily represent themselves.*

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##### a. Large-Scale Adjudication by State Agencies

The largest example of state-administered hearings for wage claims is in California, where the state Labor Commissioner adjudicates complaints through hearings and issues administrative orders upon a finding

125 City of San Francisco, "Violations," *San Francisco Administrative Code* § 12R.17(a) and (b), accessed August 3, 2017, [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco\\_ca](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca); City of Seattle, "Denial, Revocation of, or Refusal to Renew Business License Tax Certificate," *Seattle Municipal Code* § 5.55.230(A), accessed August 3, 2017, [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT5REFITA\\_SUBTITLE\\_IITA\\_CH5\\_55GEADPR\\_5.55.230DEREREREBUGLITACE](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT5REFITA_SUBTITLE_IITA_CH5_55GEADPR_5.55.230DEREREREBUGLITACE); City of Chicago, "Public Ways—Maintenance—Liability," *Chicago Municipal Code* § 4-4-320(a) and (b), accessed August 3, 2017, [www.cityofchicago.org/dam/city/depts/bacp/ordinances/GeneralLicensing-Provisions.pdf](http://www.cityofchicago.org/dam/city/depts/bacp/ordinances/GeneralLicensing-Provisions.pdf).

126 San Francisco Wage Theft Task Force, *Final Report*, 20.

127 State of California, "Employment Regulation and Supervision—Car Washes," *California Labor Code* 2 § 8.5, accessed August 3, 2017, [http://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=LAB&sectionNum=2065](http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=2065); Erin Durkin, "NYC Car Washes Must Get Licenses under Bill Passed by City Council in Effort to Stem Labor Violations," *New York Daily News*, June 10, 2015, [www.nydailynews.com/new-york/nyc-car-washes-licenses-bill-article-1.2253812](http://www.nydailynews.com/new-york/nyc-car-washes-licenses-bill-article-1.2253812). Although the law has remained in place, a trial court recently found that the lower bond amount set for establishments subject to a collective bargaining agreement with a union is preempted by the *National Labor Relations Act*. See *Association of Car Wash Owners Inc. v. New York*, 15-CV-08157 Order Resolving Post-Termination Motions (New York Southern District Court, 2017).

128 This is particularly the case for claims by day laborers in the residential construction industry, who are often underpaid but also often work for employers whose revenues are below the \$500,000 threshold for FLSA coverage. See U.S. Government, "Fair Labor Standards—Definitions," 29 *U.S. Code* § 203(s)(1)(A)(ii), accessed January 2, 2018, [www.law.cornell.edu/uscode/text/29/203](http://www.law.cornell.edu/uscode/text/29/203).

129 Author interview with Jeannette Smith, Executive Director, South Florida Interfaith Worker Justice, Member, Florida Wage Theft Task Force, Ft. Lauderdale, Florida, May 22, 2015.





of underpayment. The California apparatus for wage-claims adjudication is impressive, awarding \$108 million in owed wages in 2015.<sup>130</sup> California's successful operation of such hearings at scale suggests that other state and municipal jurisdictions could provide a similar venue for workers to assert claims that are outside the jurisdiction of USDOL or that would not be of strategic enough importance for USDOL or other agencies to address through investigation or litigation.

*b. Small-Scale Municipal Wage-Claim Adjudications*

A striking example of the importance of wage-claim adjudication can be found in Florida, where the Governor abolished the state Department of Labor in 2005, and the Florida Attorney General has not brought a single action to enforce the state minimum wage law in recent memory. There are also only six USDOL investigators assigned to the state to protect the wage-and-hour rights of its 1.2 million workers.<sup>131</sup> Given the paucity of state and federal enforcement resources, labor advocates in Florida successfully lobbied for the creation of county-level "wage-theft" laws to permit workers to assert private claims through county hearing processes; as of mid-2017, six counties and one city had passed wage-theft ordinances.<sup>132</sup>

While local wage-theft adjudications are rare, they fit comfortably within traditional county and municipal powers to adjudicate a large number of relatively modest, individual claims. In the case of Florida, because these ordinances provide a venue to adjudication rather than resources for enforcement, there was less intense opposition to them than there has been to other county-level efforts to improve labor standards in the state.<sup>133</sup> When ordinance implementation is handled by an office that has experience hearing small-claims cases—as Miami-Dade County Office of Consumer Protection (OCP) does—existing staff capacity and expertise help keep case backlog under control. After the OCP receives the claim, OCP attempts mediation, and, if unsuccessful, the claim is heard by an OCP hearing officers. If the hearing officer finds the claim to be meritorious, the law allows the officer to award treble damages<sup>134</sup> to the victim. According to one member of the Wage Theft Task Force, which lobbied successfully for the Miami-Dade ordinance, treble damages is an important feature because "conciliation works better if you have strong tools at the outset."<sup>135</sup> Finally, the OCP also coordinates with the small business agency in revoking and suspending the licenses of businesses with outstanding final orders.<sup>136</sup>

130 Data shared with the authors by Julie A. Su, Labor Commissioner of California, on May 4, 2017. To the extent that claimants can collect sums ordered through these hearings, they compare favorably to the more routine agency function of investigations. As a comparison, the USDOL Wage and Hour Division collected nearly \$190 million in owed minimum and overtime wages in FY 2017. See USDOL, "Wage and Hour Division (WHD) Fiscal Year Data for WHD, Fair Labor Standards Act," accessed March 8, 2018, [www.dol.gov/whd/data/datatables.htm#panel2](http://www.dol.gov/whd/data/datatables.htm#panel2). Of course, not all assessed wages can be collected, particularly if the employer is judgment proof. One analysis of wage claims filed between 2008 and 2011 found that claimants recovered just 42 percent of wages assessed by the California Labor Commissioner's Office during that period. See Eunice Hyunhye Cho, Tia Koonse, and Anthony Mischel, *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers* (New York: National Employment Law Project, 2013), 2, [www.nelp.org/content/uploads/2015/03/Hollow-Victories-Unpaid-Wages-Report.pdf](http://www.nelp.org/content/uploads/2015/03/Hollow-Victories-Unpaid-Wages-Report.pdf). Assuming this same recovery percentage reflects an estimated annual recovery of \$45.36 million from California's wage claims process, nearly one-quarter of USDOL's total recovery of owed minimum and overtime wages across the entire United States.

131 Cynthia S. Hernandez and Carol Stepick, *Wage Theft: An Economic Drain on Florida* (Miami: Florida International University, Center for Labor Research and Studies, Research Institute on Social and Economic Policy, 2012), 6–7, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.366.4291&rep=rep1&type=pdf>.

132 Steven Girardi, "St. Pete Wage Dispute Office Gets Employers to Pay," *Tampa Bay Times*, February 1, 2016, [www.tbo.com/pinellas-county/st-pete-wage-dispute-office-gets-employers-to-pay-20160201/](http://www.tbo.com/pinellas-county/st-pete-wage-dispute-office-gets-employers-to-pay-20160201/).

133 Other county-level efforts to require paid sick time and to require "living wages" for publicly funded work were recently blocked by a state law preempting all such laws in the state. The preemption bill, HB-655, enacted in 2013, excluded wage-theft ordinances from its preemptive scope. Author interview with Jeannette Smith. See also Florida State Legislature, "House Bill 655: Employment Benefits," *Florida Statutes* Ch. 2013-200, [www.flsenate.gov/Session/Bill/2013/0655](http://www.flsenate.gov/Session/Bill/2013/0655).

134 Treble damages are three times the value of the actual damages.

135 Author interview with Jeannette Smith.

136 Author interview with Gregory Baker, Division Chief, Office of Consumer Protection, Department of Regulatory and Economic Resources, Business Affairs Division, Miami-Dade County, Miami, May 21, 2015.



The low claim threshold in Miami-Dade and other municipal hearing processes is especially important in low-wage industries, such as residential construction, where day laborers often live far below the poverty level and frequently complain that they have been cheated out of a day's pay. Miami-Dade OCP sees wage-claim adjudications as akin to consumer fraud cases, which should be welcomed by legitimate businesses as well as underpaid workers: "This is good for business because it keeps legitimate businesses on an even playing field" and for workers, "It is a good service—attorney[s are] not going to take the case ... even small claims [are] time consuming and complicated. Most of the people we see [do] not [present] frivolous claims."<sup>137</sup> For these reasons, this approach seems particularly promising in jurisdictions, such as Florida, without a strong history of labor standards enforcement. For example, in Texas, where prosecutions of wage theft of less than \$1,500 is unlikely because it is classified as a misdemeanor, the availability of an administrative proceeding through the Texas Workforce Commission may provide the only meaningful avenue for many low-wage workers to assert a claim.<sup>138</sup>

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*Labor and immigrant protection measures often have more bipartisan supporters at the local level.*

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One key advantage of local labor standards legislation for labor and immigration stakeholders lies in the political process. While labor standards enforcement may face intense political opposition at the federal or state levels, labor and immigrant protection measures often have more bipartisan supporters at the local level. In Florida, immigrant protection groups and organized labor found a Republican sponsor of the state's first wage-theft bill, passed in Miami-Dade County.<sup>139</sup> Local businesses are less inclined to oppose wage-theft legislation if proponents directly engage them in discussions "about the unfair competition of wage theft [and the] lack of disposable income [of workers who] spend their money locally when they don't get paid."<sup>140</sup> Notably, the historic absence of labor standards enforcement in Florida state government did not block political opportunity at the local level; in fact, it may have played to advocates' advantage as county legislators recognized that without local legislation workers in workplaces not covered by the FLSA were entirely unprotected.<sup>141</sup> The fact that wage-theft adjudications do not create new and potentially conflicting standards, but rather enforce existing rights, was also crucial to building bipartisan support.<sup>142</sup> The funding of ordinance implementation, at least in part, through fees collected from employers who attempt to evade collection of owed back wages rather than taxpayer dollars has also insulated the bill from political backlash. While 25 states have passed laws preempting local minimum wage ordinances, and the Florida legislature has previously blocked local mandatory paid sick leave ordinances, its attempt to preempt city and county wage-theft ordinances have so far been unsuccessful.<sup>143</sup>

## **B. Data-Driven Targeting for Audits and Investigations**

To investigate or prosecute the worst violators in the industries where noncompliance is most common, enforcement agencies must first identify important targets. States increasingly leverage their repositories of employer-related data by cross-referencing data points that show likely instances of underpayments and misclassification.

<sup>137</sup> Ibid.

<sup>138</sup> Texas provides for wage-claim hearings to adjudicate complaints received by the Texas Workforce Commission. See Texas State Legislature, "Protection of Laborers—Wages—Bad Faith; Administrative Penalty."

<sup>139</sup> Author interview with Jeannette Smith.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Melissa Etehad, "St. Louis Gave Minimum-Wage Workers a Raise. On Monday, It Was Taken Away," *Los Angeles Times*, August 28, 2017, [www.latimes.com/nation/la-na-st-louis-minimum-wage-20170828-story.html](http://www.latimes.com/nation/la-na-st-louis-minimum-wage-20170828-story.html). The latest legislative attempt in Florida to preempt county wage-theft laws, CS/HB 17 (Local Regulation Preemption), failed to pass the Florida House of Representatives Commerce Committee on May 5, 2017. See Florida State Legislature, "House Bill 17: Local Regulation Preemption," updated May 5, 2017, [www.flsenate.gov/Session/Bill/2017/17/ByVersion](http://www.flsenate.gov/Session/Bill/2017/17/ByVersion).



States have long used data about employers for auditing purposes. For example, state agencies that administer unemployment insurance compare quarterly reports that list employees and their quarterly income to audit companies that misclassify employees to avoid paying unemployment insurance contributions. USDOL sets the ground rules for this auditing process and in 1999 provided states with software to identify employers that attempted to lower their unemployment insurance rates (which are based on the company's "experience rating," or employee turnover rate) by "dumping" their workforce into new companies, effectively resetting their experience rating. This software detects high volumes of employee transfers from one company into another. Since the introduction of the software, states have taken the lead in identifying misclassification through the use of data. In Tennessee, for example, that state employment security agency selects companies for audits by comparing IRS data on different industries with income reported by individual companies to identify firms that claim that a high proportion of their workforces are independent contractors compared with other firms in the industry.<sup>144</sup>

The potential for states to use different data sources to target labor standards enforcement is, however, limited by how easily agencies can share data. Agencies often develop their own, idiosyncratic data retention and accessibility standards, with the result that data cannot easily migrate across different agency platforms.

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*The potential for states to use different data sources to target labor standards enforcement is ... limited by how easily agencies can share data.*

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Efforts to break down barriers to interagency data sharing became a state legislative priority in the mid-2000s. In North Carolina, an in-depth assessment of its technology in 2004–06 found that many state data systems were decades old and inaccessible across agencies. The state's legislative focus on data sharing grew in 2008, after a criminal investigation revealed that state law enforcement had no central information system for checking whether suspects were on probation or had been charged with additional crimes. The North Carolina legislature passed legislation requiring criminal justice agencies to make their data accessible across agency platforms and to develop a strategic plan for streamlining and funding data sharing.<sup>145</sup> Within 18 months—and with technical input from the North Carolina-headquartered analytics company SAS—the state created a criminal justice data platform, called CJLEADS, that has become a model for data sharing among agencies that work in the same regulatory space.<sup>146</sup>

With the economic downturn in 2010–11, North Carolina turned its focus to unemployment insurance and workers' compensation fraud. Investigative reporting had found that employers in the state were increasingly turning to misclassification as a way to cut costs, and the growth of misclassification was causing shortfalls in unemployment insurance contributions, ultimately forcing North Carolina to raise employer taxes and go deeply in debt to the federal government. In response, the Governor convened a task force to examine ways the state could better detect employee misclassification, which ultimately led to another partnership with SAS and the develop a single platform for all workforce-related data—the Government Data Analytics Center (GDAC). Building on the data-sharing approach as was used for CJLEADS, the state controller developed data access and usage agreements with agencies that produce and use workforce and revenue data; these include the Department of State, Department of Motor Vehicles (DMV), Department of Revenue, and the Industrial Commission. Having integrated these data sources, North Carolina agency personnel can now more easily identify fraud, such as employers that

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<sup>144</sup> Author interview with Mark Howell, Director of Employer Accounts Operation, Tennessee Department of Labor and Workforce Development, Nashville, May 29, 2015.

<sup>145</sup> Author interview with Kay Meyer, Principal Industry Consultant, SLG Operations, September 7, 2016.

<sup>146</sup> Ibid.



have a workers' compensation policy but no reported income for unemployment insurance contributions. Data integration even enables GDAC to identify nonobvious discrepancies, for example, between the revenue of a transportation company, its number of reported employees, and the number of vehicles reported to DMV. By estimating the expected revenue and number of employees or vehicles, the state can identify industry outliers for auditing.<sup>147</sup> A number of other states, including Washington State (see Box 1), have also turned to better use of data to combat payroll fraud.

### **Box 1. Data-Based Targeting in Washington State**

Washington State, more than most states, has a stake in detecting employer payroll fraud and misclassification because it funds its own workers' compensation policies. In 2007, the Washington State legislature directed the state agencies that regulate workplaces—the Departments of Labor and Industries, Employment Security, and Revenue—to form a joint task force and identify barriers to state efforts to combat misclassification. After the task force named the inability to share data between agencies a key barrier, the legislature passed a revenue-neutral law requiring the agencies to make their data accessible to each other and to report annually on their progress. This pushed the agencies to make a sustained effort to coordinate and to measure the impact of their data-sharing practices.

This paved the way for the development of innovative, sophisticated fraud-detection software that cross-references a variety of datasets to identify employers likely to engage in misclassification. The software uses Internal Revenue Service (IRS) data to identify unregistered employers with employees and to compare that data to a database of employers who have workers' compensation policies. Auditors in the Washington State Department of Labor and Industries, now have access to all state-maintained data about particular employers and, by typing the name of an employer into a web-based platform, can access “tax, master business application, [and] secretary of state data, with names of principals, their addresses, payroll, Labor and Industry referrals for construction compliance . . . with pictures of workers [and] vehicles[.]” This enables auditors, by matching social security numbers and phone numbers, to quickly identify employers who seek to evade enforcement by shutting down and reopening under a new name. The platform also contains all information about infractions issued by all three agencies, so that, for example, a workers' compensation auditor knows whether the Department of Revenue has previously found the audited employer to have under-reported income.

This data-based approach to detecting misclassification casts a simultaneously broad yet targeted net, capturing bad actors across many different industries. In 2014, Washington State used the software to audit employers with suspicious reporting activities, increasing its “hit rate” (the share of audited employers found to have engaged in some form of misclassification) to 88 percent, collecting \$153.2 million in delinquent premiums from them. Washington's fraud-detection software also lowered the overall cost of enforcement, helping the state to recover \$9.30 for every dollar invested in enforcement.

Sources: Washington State Department of Labor and Industries, *Partnering to Prevent Fraud and Abuse* (Olympia, WA: Washington State Department of Labor and Industries, 2012), 27, [www.lni.wa.gov/ClaimsIns/Files/WCFraud/FY2012FraudAnnual.pdf](http://www.lni.wa.gov/ClaimsIns/Files/WCFraud/FY2012FraudAnnual.pdf); author interview with Liz Smith, Director of Fraud Prevention and Labor Standards, Washington State Department of Labor and Industries, September 22, 2016; Washington State Department of Labor and Industries, *Improving Integrity and Accountability in the Workers' Compensation System* (Olympia, WA: Washington State Department of Labor and Industries, 2015), [https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=ImprovingIntegrityAccountabilityWorkersCompSystem\\_6c802f37-72ab-49cc-adea-42fc086a2c97.pdf](https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=ImprovingIntegrityAccountabilityWorkersCompSystem_6c802f37-72ab-49cc-adea-42fc086a2c97.pdf).

<sup>147</sup> Ibid.



The success of data-driven enforcement in Washington and North Carolina has generated demand in other states for similar tools to refine auditing processes, enabling them to become more targeted (more likely to find violations) *and* more efficient (fewer resources spent per violation found). So far, at least Massachusetts, Louisiana, and Tennessee have all purchased software from private analytics firms for this purpose.<sup>148</sup> And New York State agencies have also entered sharing agreements with one another for the purpose of developing a targeted data-based approach to identify misclassification that includes not only tax and insurance information, but also licensing information from the state Liquor Authority and vehicle information from the Department of Motor Vehicles.<sup>149</sup> By improving the cost-effectiveness of enforcement, data-driven targeting can also generate the political goodwill required to expand enforcement efforts.

There are, however, limits to the reach of such efforts. Privacy laws—both federal and state—constrain the use of data for investigations and detection. Federal law prohibits the use of personal tax information, including details listed on W-2 and 1099 forms, except under a very limited set of circumstances, and, generally, states may only use federal tax data for state tax administration purposes.<sup>150</sup> As a result, states seeking to integrate tax data with other data sources to detect misclassification must take into consideration federal tax disclosure prohibitions and other federal privacy laws. This is a particular challenge for states that integrate federal and state tax data, which requires states to create safeguards against the commingling of data from the two sources. Privacy constraints also require states to strictly control the users that have access to such data platforms in order ensure that state agency personnel access cannot be intentionally or inadvertently misused. North Carolina has addressed these constraints by housing data within GDAC, which cleanses state tax data before integrating it with other data sources. Through GDAC, North Carolina has also (1) determined the reasons personnel in each agency would have for access the data, (2) tailored the access to the agency personnel's needs, (3) trained and certified agency personnel on appropriate data use, and (4) routinely audited and evaluated data use to ensure that it is consistent with state governance standards.<sup>151</sup>

### C. Increased Use of Criminal Statutes to Prosecute Labor Crimes

Because of their broad criminal enforcement powers, states may also choose to criminally prosecute employers who engage in repeated, egregious violations of law even after civil penalties. Willful non-payment of wages (wage theft) is often a violation of criminal law, either as a general form of larceny or specifically through wage-theft statutes.<sup>152</sup> And fraudulent under-reporting of employees or their earnings to workers' compensation insurers and the state (payroll fraud) always violates criminal law and is often a felony.<sup>153</sup> In some cases, the targeted use of criminal enforcement can also deter labor violations more broadly. Prosecuting bad actors may increase the perception among honest employers that the regulatory system is fair and, in doing so, may prevent noncompliance from becoming an industry norm.<sup>154</sup>

Some states, such as Florida, stand out for their use of criminal prosecution to punish or incapacitate bad actors (see Box 2).

<sup>148</sup> Author interview with Scott Yarbrough.

<sup>149</sup> Joint Enforcement Task Force, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification* (Albany: New York State Department of Labor, 2013), 10, [www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf](http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf).

<sup>150</sup> U.S. Government, "Confidentiality and Disclosure of Returns and Return Information," 26 *U.S. Code* § 6103, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/26/6103](http://www.law.cornell.edu/uscode/text/26/6103).

<sup>151</sup> Author interview with Kay Meyer.

<sup>152</sup> For example, violation of New York labor law is a class B misdemeanor. See New York State, "Labor—General Provisions—Penalties and Civil Action; Prohibited Retaliation," *New York Consolidated Laws* LAB 7 § 215, accessed August 3, 2017, <http://public.leginfo.state.ny.us/lawsrch.cgi?NVLWO:>

<sup>153</sup> In Florida, failure to pay workers' compensation premiums is a felony, and rises up to a first-degree felony for \$100,000 in fraudulently unpaid premiums. See Florida State, "Labor—Worker's Compensation—Prohibited Activities; Reports; Penalties; Limitations," *Florida Statutes* 440.105, accessed August 3, 2017, [www.leg.state.fl.us/statutes/index.cfm?AppMode=Display\\_Statute&URL=0400-0499/0440/Sections/0440.105.html](http://www.leg.state.fl.us/statutes/index.cfm?AppMode=Display_Statute&URL=0400-0499/0440/Sections/0440.105.html).

<sup>154</sup> Weil, *The Fissured Workplace*, 237.



**Box 2. Florida's Operation Dirty Money**

Florida has long been aware that the misclassification of workers as independent contractors costs the state significant lost tax revenue and increases workers' compensation premiums. As recognition of the damaging effects of these business practices grew, Florida policymakers turned to criminal prosecution to look beyond the small "shell" companies that facilitate fraud to reach the lead contractors that initiate it.

Florida law attempts to deter fraud by requiring all construction companies to have a certificate of insurance (COI) showing that employees are covered under a workers' compensation policy. COIs do not, however, specify the number of workers covered or the jobs they do. In addition, contractors can receive a COI by purchasing a bare minimum insurance policy in the name of a fictitious subcontractor, at times listing as officers of this shell company names that are invented or that belong to victims of identity theft. State regulators report that when they inspected workplaces for payroll fraud, contractors routinely presented the COI of a purported subcontractor alongside cashed checks to demonstrate. But by the time the regulators identified the fraud, the company had dissolved, and the check-cashing stores that issued the checks claimed ignorance of the operation.

Florida responded in 2011 with Operation Dirty Money, an initiative that treats payroll fraud as a form of insurance fraud and that aims to investigate and prosecute check-cashing operations and construction contractors for misclassification and money laundering. The operation is led by the Division of Insurance Fraud (DIF) in coordination with the Florida Office of Financial Regulation (OFR) and the Division of Workers' Compensation. To identify employers whose reported payroll appears far too small to for the volume of business they do, DIF coordinates with OFR, which can review the quarterly logs of check cashers and find suspicious checks that reflect large amounts of money paid out to a single entity over a short span of time. These two agencies crosscheck their findings with the Division of Workers' Compensation, which can identify whether the payee of these checks is a construction company with a bare minimum workers' compensation policy. DIF then works with the Florida Department of Licensing to determine whether employers are licensed and have appropriate insurance. DIF inspectors then inspect the worksites identified, compare actual and reported payroll, and review the business records of employers without workers' compensation coverage. If the records show unpaid premiums, DIF issues a stop-work order and a financial penalty. It is a felony in Florida for a business subject to a stop-work order to continue to operate, but employers may pay \$1,000 to resume work while waiting for a full audit.

Where Operation Dirty Monday reveals egregious instances of premium fraud and money laundering, the agencies bring in the appropriate county prosecutor and work up a criminal case. Simultaneously, state licensing agencies revoke the licenses of the contractor and check casher and effectively bar them from doing business in the state. Recognizing that shell companies are often fleeting tools of a larger operation, Florida has in many cases treated them as potential cooperating witnesses in the prosecution of the contractors who use them and the check-cashing stores that launder wages.

In 2013, Florida referred 475 workers' compensation cases for prosecution—approximately one-third more than the previous year. In one prosecution that year, a criminal investigation found that a single shell company procured 287 COIs and negotiated nearly \$11 million dollars over a six-month period, mostly from a single liquor store that operated as a check casher. In another case, Florida charged an individual with operating a check-cashing store in order to launder money for contractors evading workers' compensation premiums, applying a maximum sentence of 150 years in prison and seizing more than \$1 million dollars. In total, Operation Dirty Money has closed down more than 40 fictitious companies and identified \$500 million in fraudulent transactions. Given the enormous profit to be made in misclassifying employees, the entrenched role of check cashers in facilitating misclassification and the impossibility of



## Box 2. Florida's Operation Dirty Money (cont.)

collecting on civil judgments from these fictitious entities, criminal prosecutions that rely on record inconsistencies and the testimonies of low-level conspirators appears to have achieved results that could not be obtained through civil enforcement alone—an important model for states seeking to push back against similar violations with limited resources.

Sources: Author interview with John Dygon, Bureau Chief, Division of Insurance Fraud, Florida Department of Financial Services, Ft. Lauderdale, FL, May 21, 2015; Eighteenth Statewide Grand Jury, *Second Interim Report, Check Cashers: A Call for Enforcement* (West Palm Beach, FL: Eighteenth Statewide Grand Jury, 2008), [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7CWS2N/\\$file/EighteenthStatewideGrandJuryReport2.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7CWS2N/$file/EighteenthStatewideGrandJuryReport2.pdf); Florida Department of Financial Services, Division of Insurance Fraud/Bureau of Workers' Compensation Fraud, and Division of Workers' Compensation, 2012/2013 *Workers' Compensation Annual Report* (Tallahassee: Florida Department of Financial Services, 2014), [www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/DIF-DWC-2014-Joint-Annual-Report.pdf](http://www.myfloridacfo.com/Division/WC/PublicationsFormsManualsReports/Reports/DIF-DWC-2014-Joint-Annual-Report.pdf).

Other states, including New York, have made criminal prosecution part of their enforcement repertoire as well. The New York Attorney General, which has both criminal and civil authority over wage-and-hour violations and payroll fraud, has strategically brought criminal cases in industries identified as enforcement priorities in order to send a message that egregious, willful, and repeat violators will be treated as criminals.<sup>155</sup> In 2015, the Attorney General found that the owner of a Papa John's franchise had a longstanding practice of failing to accurately pay overtime wages, instead paying the regular hourly rate. USDOL had previously inspected his business in 2013 and ordered him to pay unpaid overtime, but instead of correcting his payment practices the owner then began falsifying his payroll to avoid detection. After NYAG charged the franchisee with the misdemeanor of failing to pay wages and for falsifying business records, a felony. The owner pleaded guilty and, in addition to paying more than a half-million dollars in restitution and penalties, was sentenced to 60 days in prison.<sup>156</sup> Strategic enforcement initiatives such as this may, by magnifying civil enforcement actions with well-placed criminal cases, act as a deterrent by demonstrating that the price of violations will not always simply be collection of money owed or a fine.

State and local prosecutors can use payroll fraud to criminally prosecute safety violations, an underenforced area of workplace regulation. While most states do not have the authority to enforce federal safety standards, they are able to address some of the structural problems that make workplaces unsafe, such as employer misrepresentation in its workers' compensation policy. For example, in 2011, an immigrant working in a tortilla factory in Brooklyn fell into a mixing machine and was crushed to death. The federal Occupational Safety and Health Administration (OSHA) fined the company \$62,000 for safety violations.<sup>157</sup> After additional investigation by NYAG, the employer pleaded guilty to failure to pay the state minimum wage (a misdemeanor) and the company pleaded guilty to failure to secure workers' compensation insurance (a felony). The owner was ordered to pay \$450,000 in restitution and was sentenced to 90 days in jail.<sup>158</sup> Thus while neither charge related directly to the lack of safety and health protections in the workplace, the state was able to target workers' compensation fraud and noncompliant pay practices that often coexist with such issues.

155 The New York Attorney General has brought criminal prosecutions in a range of workplaces, from public-work construction sites, landscaping companies, and car washes to restaurants and fast-food stores. See State of New York Attorney General, *Fighting for New York's Workers: A Report from the Labor Bureau of Eric T. Schneiderman* (Albany: State of New York Attorney General, 2015), 5–6, [www.ag.ny.gov/pdfs/A.G.Schneiderman\\_Labor\\_Day\\_Report.pdf](http://www.ag.ny.gov/pdfs/A.G.Schneiderman_Labor_Day_Report.pdf).

156 New York State Office of the Attorney General, "A.G. Schneiderman and U.S. Department of Labor Announce Jail Time for Bronx Papa John's Franchisee Convicted of Wage Theft" (press release, November 16, 2015), [www.ag.ny.gov/press-release/ag-schneiderman-and-us-department-labor-announce-jail-time-bronx-papa-john%E2%80%99s](http://www.ag.ny.gov/press-release/ag-schneiderman-and-us-department-labor-announce-jail-time-bronx-papa-john%E2%80%99s).

157 Kirk Semple, "Safety Agency Cites Tortilla Company Where Worker Died," *The New York Times*, July 29, 2011, [www.nytimes.com/2011/07/30/nyregion/osha-cites-brooklyn-tortilla-firm-where-worker-died.html](http://www.nytimes.com/2011/07/30/nyregion/osha-cites-brooklyn-tortilla-firm-where-worker-died.html).

158 E.C. Gogolak, "Tortilla Factory Owner Gets Jail Time for Violating Payroll Laws," *The New York Times*, July 8, 2013, [www.nytimes.com/2013/07/09/nyregion/tortilla-factory-owner-gets-jail-time-for-violating-payroll-laws.html](http://www.nytimes.com/2013/07/09/nyregion/tortilla-factory-owner-gets-jail-time-for-violating-payroll-laws.html).



Yet despite the successful use of criminal enforcement of labor crimes as an element of strategic enforcement, challenges remain when it comes to scaling up this approach. A 2012 survey found few criminal prosecutions among the states,<sup>159</sup> particularly for wage theft. For example, despite a 2011 amendment making wage theft a felony in Texas, it rarely leads to prosecution, with the first reported conviction occurring in 2015.<sup>160</sup> The rarity of labor crime prosecutions, and particularly prosecutions that include wage theft, reveals several challenges:

- **Many statutes, courts, and prosecutors do not recognize wage theft and payroll fraud as serious and growing problems.** Unlike in California, where wage theft can be a felony, in many jurisdictions wage-and-hour law violations are not crimes at all or are classified as misdemeanors no matter how egregious. District attorneys from these jurisdictions may thus be hesitant to spend limited resources on prosecuting wage theft. To address this issue, NYAG has, for example, paired charges of wage theft with an additional charge of payroll fraud, which is a felony, in order to showcase the severity of the violations to criminal courts. And Washington State, a state without a history of wage-theft prosecution, has opted to use criminal prosecution selectively and as a last step; employing an “active escalation approach,” the state Department of Labor and Industries will first respond to a violation with efforts to persuade the employer to comply, then follow up with an audit, and only then proceed to prosecution after multiple, documented instances of noncompliance and attempts to assist the employer in correcting the violation.<sup>161</sup>

Still, in many places payroll fraud and related violations are underprosecuted because they are viewed as victimless crimes and thus a lower priority. Explaining why district attorneys in Tennessee generally do not prosecute employers who misclassify employees, one state administrator explained the attorneys “historically [have] not been interested in regulatory matters. We have rape, murder, tens of millions in white collar crime. Why should we be going after the little guy?”<sup>162</sup> This suggests that agencies seeking to build a labor crimes unit, particularly in jurisdictions without a history of labor law enforcement, may face resistance to the idea of treating labor crimes as equivalent to other forms of theft and fraud.

- **Unlike payroll fraud, wage-theft prosecution often requires witness testimony.** While payroll fraud can often be proven using the employer’s own government filings, prosecutors of wage theft often rely on witnesses to prove beyond a reasonable doubt that the employer willfully failed to pay wages owed. But workers, who are the victims of wage theft and thus key potential witnesses, may fear retaliation and may prioritize a quick resolution and recovery of owed wages over more time-consuming criminal sentences. Unauthorized immigration status may also deter some workers from testifying in criminal court, and law enforcement agencies may balk at prosecuting wage-theft cases if they perceive unauthorized workers as unsympathetic victims.<sup>163</sup> To overcome this tension between the need for witnesses and the barriers to securing their cooperation, enforcement agencies must build trust with low-wage workers, often immigrants, and their advocates (see Section IV.D.).

#### D. Public-Private Partnerships

For any type of strategic enforcement to be successful, state and local authorities need to develop cooperative relationships with industry stakeholders and workers’ groups in order to access in-

<sup>159</sup> Meyer and Greenleaf, *Enforcement of State Wage and Hour Laws*, 5-6.

<sup>160</sup> Scott Braddock, “First Reported Conviction under Texas’ New Wage Theft Law,” *Construction Citizen*, September 16, 2015, [www.constructioncitizen.com/blog/first-reported-conviction-under-texas-new-wage-theft-law/1509161](http://www.constructioncitizen.com/blog/first-reported-conviction-under-texas-new-wage-theft-law/1509161).

<sup>161</sup> Author interview with Liz Smith, Director of Fraud Prevention and Labor Standards, Washington State Department of Labor and Industries, September 22, 2016.

<sup>162</sup> Author interview with Abbie Hudgens.

<sup>163</sup> Stephen Lee for example, raises concerns that law enforcement officers will be resistant to enforcing wage-theft laws because of the perception that workers filing complaints are “unauthorized immigrant workers whose very presence in the United States renders them removable.” See Stephen Lee, “Policing Wage Theft in the Day Labor Market,” *UC Irvine Law Review* 4, no. 2 (2014): 655, 657, <http://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1151&context=uclir>.



depth deep and timely information about potential workplace problems. Laws protecting basic labor standards have historically relied on employee complaints to detect and remedy violations. But for a range of reasons—from declining union presence and a sense that complaints are futile in the informal economy to fear of retaliation (see Section II)—complaints have declined even as labor conditions in many industries have worsened.<sup>164</sup> In the absence of complaints, close partnership between government agencies and groups in tune with worker concerns and industry dynamics will prove indispensable.<sup>165</sup>

States and local governments have taken the lead in developing approaches to enforcement that build trust within vulnerable communities and enlist them as partners.<sup>166</sup> For example, in 2014 the California Labor Commissioner launched an initiative called Strategic Enforcement with Community Partners to build an institutional culture that is welcoming to low-wage workers, and particularly immigrants. The initiative designates special units of trained investigators who work closely with worker advocacy groups<sup>167</sup>—a relationship that provides the Labor Commissioner with a reliable referral source and permits it to use its resources strategically when investigating and prosecuting cases.

Partnerships between government agencies and private actors have also shown the potential to yield more significant and more sustained enforcement actions than the agencies could achieve on their own. An investigation by NYAG into large car wash operators in New York State benefited from timely information provided by a community-based organization called Wash New York that aims to improve conditions in the industry. NYSDOL audits had already shown in 2008 that nearly 80 percent of New York City car wash establishments, and more than half in New York State, violated wage-and-hour law.<sup>168</sup> NYAG decided to target for closer investigation the car wash establishments owned by John Lage and Fernando Magalhaes, one of the largest operators in the country and previous subject of a USDOL investigation that found \$3.4 million in unpaid wages. With information from Wash New York and victim testimony secured through the organization's network, NYAG eventually announced in 2014 that Lage would pay \$3.9 million—\$2.2 million in restitution for unpaid wages and the remainder as penalties for failing to pay unemployment insurance contributions and workers' compensation premiums.<sup>169</sup>

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These types of partnerships may also have benefits for strengthening enforcement systems. Workers who are actively mobilized around pay issues and who feel their concerns will be heard in government are more likely to file complaints and share valuable information about them. This flow of information may, in turn, lessen the need for agencies to hire independent monitors, freeing up resources for new affirmative cases. Public-private collaboration can also effectively deter employers from using retaliation as a tool to silence worker complaints. During the Lage investigation, for example, after the owner sold one of his car

164 Complaint rates to USDOL declined by more than 30 percent in industries including home health care and retail. See Weil, *The Fissured Workplace*, 247–48.

165 Such groups may include immigrant worker centers, unions, and service providers, as well as responsible employers interested in ensuring compliance with a particular industry. See Bernhardt, *The Role of Labor Market Regulation*; Weil and Pyles, "Why Complain?" 86–92.

166 For more on this approach, see Weil, *The Fissured Workplace*, 249.

167 For example, the California Labor Commissioner's Office has collaborated with the Maintenance Cooperation Trust Fund (MCTF), a watchdog organization of unionized janitorial firms and their employees that polices janitorial companies, which investigates labor standards violations and refers them for government enforcement.

168 Steven Greenhouse, "Carwashes Violating Wage Laws, State Finds," *The New York Times*, August 15, 2008, [www.nytimes.com/2008/08/16/nyregion/16carwash.html](http://www.nytimes.com/2008/08/16/nyregion/16carwash.html).

169 New York State Office of the Attorney General, "A.G. Schneiderman Announces Nearly \$4m Settlement with Two NYC Car Wash Chains for Underpaying Workers and Other Violations" (press release, March 6, 2014), <https://ag.ny.gov/press-release/ag-schneiderman-announces-nearly-4m-settlement-two-nyc-car-wash-chains-underpaying>.





wash establishments and threatened to lay off its 15 workers who had complained of labor violations, NYAG saw to it that the workers were instead transferred to other work sites.<sup>170</sup> Protecting these workers may have also emboldened other workers who would have otherwise been afraid to speak out to come forward, further strengthening information channels.

To be effective, public-private collaboration requires a deep agency commitment to worker access and services, particularly when working with vulnerable communities such as immigrants. In expanding its work with community partners, the California Labor Commissioner established an internal task force to train its inspectors to reach out to workers to obtain statements before a workplace inspection in order to preempt possible employer intimidation that would frustrate the investigation, and to collect retaliation complaints.<sup>171</sup> The Labor Commissioner has also addressed fears unauthorized immigrants may have of contacting public agencies by removing its requirement that wage-and-hour claimants provide a social security number on its claims form.<sup>172</sup> As many immigrant workers in fissured workplaces are Limited English Proficient (LEP), public agencies, also ensure that forms are provided in appropriate languages and that multilingual staff are on hand.<sup>173</sup> To encourage the cooperation of victims regardless of immigration status, some government agencies have developed guidelines for law enforcement agencies on how and when to provide certification for a U visas to immigrant victims of certain crimes who are willing to assist law enforcement agencies.<sup>174</sup>

Municipal labor standards agencies have also developed deep ties with local worker advocacy and employer groups through targeted grants and private stakeholder inclusion in rulemaking functions. San Francisco and more recently Seattle provide funding to worker advocacy groups to conduct educational workshops in immigrant communities on labor standards, and triage and refer complaints of legal violations to appropriate public agencies.<sup>175</sup> San Francisco grants require worker advocacy groups to refer workers with allegations of labor standards violations to the municipal Office of Labor Standards Enforcement, the California Labor Commissioner, or USDOL, or to resolve them directly with the employer.<sup>176</sup> The grants require worker advocacy groups to issue joint media statements about resolved cases and to attend trainings and quarterly meetings with municipal agency investigators, and permit investigators to jointly work on cases with worker advocacy groups.<sup>177</sup> Seattle adopted a similar model after the passage of its local minimum wage in 2014. Seattle's City Council funds worker advocacy organizations to provide outreach, education, and technical assistance about the minimum wage and other labor standards, and additionally provides a grant to employer associations to educate small

170 Julie Turkewitz, "Workers Who Protested Sale of Carwash Will Get New Jobs," *The New York Times*, February 20, 2013, [www.nytimes.com/2013/02/21/nyregion/after-sale-of-carwash-owners-agree-to-give-workers-new-jobs.html](http://www.nytimes.com/2013/02/21/nyregion/after-sale-of-carwash-owners-agree-to-give-workers-new-jobs.html).

171 Author interview with Julie Su.

172 Ibid.

173 Since 2011, the New York State Department of Labor's Division of Immigrant Policies and Affairs has implemented state language access requirements, including translating vital documents, providing interpretation services, developing a language access plan, and designating a language access coordinator. See New York State, Department of Labor, "Language Access and Assistance," accessed March 7, 2018, <https://labor.ny.gov/immigrants/language-access.shtm>. Other states have not yet developed effective policies to encourage Limited English Proficient (LEP) persons to provide complaints. For example, Tennessee's task force only has access to a single Spanish-speaking investigator, despite a large number of Spanish-speaking LEP individuals in the state. Author interview with Scott Yarbrough.

174 Crimes that may qualify an immigrant victim for a U visa include witness tampering, obstruction of justice, and perjury. See, for example, Andrew M. Cuomo and Colleen C. Gardner, "Memorandum and Order Regarding Certification of U Visa Petitions" (memorandum, New York Department of Labor, Albany, n.d.), [www.nationalimmigrationproject.org/PDFs/ny-dol-protocol.uvisa.pdf](http://www.nationalimmigrationproject.org/PDFs/ny-dol-protocol.uvisa.pdf).

175 City of San Francisco, "Outreach," *San Francisco Administrative Code* § 12R.25, accessed August 3, 2017, [http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco\\_ca](http://library.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca); San Francisco Office of Labor Standards Enforcement, *Minimum Wage Ordinance Annual Report FY 2012–2013* (San Francisco: Office of Labor Standards Enforcement, 2013), [https://sfgov.org/olse/sites/default/files/FileCenter/Documents/11225-FINAL%2069\\_MinWageOrdinanceReport\\_1213.pdf](https://sfgov.org/olse/sites/default/files/FileCenter/Documents/11225-FINAL%2069_MinWageOrdinanceReport_1213.pdf); author interview with Karina Bull, Senior Policy Analyst, Office of Labor Standards, Seattle Office for Civil Rights, Seattle, WA, May 25, 2016. Seattle also funds employer organizations to educate small businesses about measures they may take to comply with local requirements.

176 City and County of San Francisco, Office of Labor Standards, "Enforcement Wage Theft Prevention Education and Outreach Services Agreement," A-3(1)(A).

177 Janice Fine, *Co-Production: Bringing Together the Unique Capabilities of Government and Society for Stronger Labor Standards Enforcement* (Northampton, MA: Labor Innovations for the 21st Century Fund, 2015), 24, [http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductioOct\\_ExecSumm-rf\\_4.pdf](http://theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductioOct_ExecSumm-rf_4.pdf).





businesses about how to comply with the requirements. Seattle also established the Labor Standards Advisory Commission, appointed by the Mayor and City Council and composed of worker advocacy organizations and business representatives, to advise the municipal agency and city elected officials about labor standards, and to provide feedback about the municipal agency's proposed rulemaking.<sup>178</sup>

Funding long-term public-private collaboration, particularly by public departments that lack the power or capacity to target noncompliant employers without complaints, may be a promising model to extend the benefits of collaboration beyond a single enforcement action.<sup>179</sup> Seattle's inclusion of groups representing the regulated entities in its funding may also improve the political accountability of its grantmaking. The city's engagement with worker advocacy and employer groups in its rulemaking function, moreover, may improve its ability to channel the participation of these two critical private stakeholders into improving compliance with local labor standards.

## E. Inter-Agency Coordination

In the constellation of federal, state, and local agencies that play a role in enforcing workplace laws, agency jurisdictions often overlap. This raises important—and complicated—questions about whether and how they should coordinate. Within states, different agencies often have responsibility for regulating employer unemployment insurance contributions, wage-and-hour law, workers' compensation, and payroll taxes. State attorneys general and county and municipal criminal offices often have overlapping criminal jurisdiction over wage theft and payroll fraud. And still other state and municipal agencies regulate the licensure of employers in certain industries, such as the restaurant, construction, and garment industries.

On top of this complex network of shared regulatory authority within states, the federal government directly regulates federal wage-and-hour law. Various federal agencies also coordinate with states in regulating state unemployment insurance systems through the *Federal Unemployment Tax Act*,<sup>180</sup> assist in regulating workplace safety and health where states elect to enforce the *Occupational Safety and Health Act*,<sup>181</sup> and interact with state workers' compensation systems through OSHA,<sup>182</sup> the *Americans with Disabilities Act*<sup>183</sup> and the *Family and Medical Leave Act*.<sup>184</sup>

178 Seattle's Office of Labor Standards distributes these funds to ten worker advocacy groups, designating one lead group, the Fair Work Center, to provide technical assistance to the nine others, and for these groups to engage in "outreach, hosting community-based education events, developing training materials to educate workers and other organizations about Seattle's labor standards, and providing labor rights intake, counseling, and referral for workers experiencing labor standards violations." See City of Seattle, Office of Labor Standards, "2015-2016 Community Outreach and Education Fund," accessed January 15, 2017, [www.seattle.gov/laborstandards/outreach/community-fund/2015-2016-community-outreach-and-education-fund](http://www.seattle.gov/laborstandards/outreach/community-fund/2015-2016-community-outreach-and-education-fund); author interview with Karina Bull. The most recent budget has increased the annual grant to \$1.8 million for PIOs for worker education, outreach and referrals and \$800,000 for business trainings.

179 Matthew Amengual and Janice Fine, "Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States," *Regulation and Governance* 11, no. 2 (2017): 129–30.

180 U.S. Government, "Federal Unemployment Tax Act," 26 *U.S. Code* § 3301-11, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/26/subtitle-C/chapter-23](http://www.law.cornell.edu/uscode/text/26/subtitle-C/chapter-23). For the law establishing a tax credit program in which employers pay a federal and state payroll tax, subject to a 90 percent credit of the state tax if the state's unemployment insurance program meets federal requirements, see U.S. Government, "Payments to States; Computation of Amounts," 42 *U.S. Code* § 502, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/42/502](http://www.law.cornell.edu/uscode/text/42/502).

181 U.S. Government, "Congressional Statement of Findings and Declaration of Purpose and Policy," 29 *U.S. Code* § 651, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/29/chapter-15](http://www.law.cornell.edu/uscode/text/29/chapter-15). In OSHA, Congress established a cooperative federalist system in which states may (but are not required to) submit a state plan to OSHA which, if OSHA approves the plan, permits the state to regulate federal safety standards, and may establish occupational safety and health standards in any area in which there is no federal standard. See U.S. Government, "State Jurisdiction and Plans," 29 *U.S. Code* § 667, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/29/667](http://www.law.cornell.edu/uscode/text/29/667).

182 Author interview with Daniel Bailey.

183 For laws protecting employees from certain adverse treatment because of on-the-job injury that results in a disability, see U.S. Government, "Equal Opportunity for Individuals with Disabilities," 42 *U.S. Code* §§ 12101-12213, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/42/chapter-126](http://www.law.cornell.edu/uscode/text/42/chapter-126).

184 For laws requiring that employers provide unpaid leave to workers' compensation claimants whose on-the-job-injury results in certain health conditions that require medical leave, see U.S. Government, "Family and Medical Leave," 29 *U.S. Code* §§ 2601-2654, accessed August 3, 2017, [www.law.cornell.edu/uscode/text/29/chapter-28](http://www.law.cornell.edu/uscode/text/29/chapter-28).



Up until relatively recently, these agencies typically worked within separate silos to regulate their specific area of the workplace, collaborating only to the extent that the law requires. These regulatory and enforcement silos can serve important purposes, including insulating agencies in a way that prevents them from violating criminal procedure and privacy laws.<sup>185</sup> At the same time, when the compartmentalization of responsibilities serves no underlying purpose, it may instead undermine responsive workplace regulation. **An employer who fails to purchase a workers' compensation policy often also fails to pay payroll taxes or make unemployment insurance contributions.** Without strong institutional coordination, the discovery of this illegal conduct by one agency may not result in appropriate referrals of the case to other relevant agencies. Even assuming the first agency penalizes the company for failing to comply with a law within their jurisdiction, for example failure to have a valid worker's compensation policy, the employer may continue to underpay payroll taxes and unemployment insurance contributions. The logical calculation remains: as long as the employer saves more by skirting a particular law than they lose by paying a penalty from the one agency, they have little incentive to reform other poor business practices.

Recent efforts to crack down on misclassification and labor standards violations have resulted in diverse forms of effective multiagency coordination. Indeed, many of the strategies discussed in this section cannot be deployed effectively *without* such coordination. According to a long-time enforcement lawyer, the "theory of joint enforcement is . . . in a time of limited resources if you pool your targets, you have a much greater chance of being effective."<sup>186</sup> Coordination can occur horizontally, among state agencies in mission-driven task forces that span issues, and vertically, between the federal, state, and municipal agencies tasked with similar enforcement areas.

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*Recent efforts to crack down on misclassification and labor standards violations have resulted in diverse forms of effective multiagency coordination.*

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## I. State Task Forces

At least 14 states have established task forces to coordinate state agencies' enforcement of labor standards and laws prohibiting misclassification.<sup>187</sup> Coordination allows agencies to pool both state resources and different types of employer data to strategically target the worst violators. It also combines different agencies' civil and criminal enforcement powers, making it possible for participating agencies to easily refer cases to each other and tailor enforcement actions to the severity of the violation. Coordination also provides an opportunity for agencies to develop expertise in particular industries and practices and to hone or expand administrative tools to counter particularly widespread violations.

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<sup>185</sup> Criminal justice agencies may not disclose information obtained in the course of grand jury proceedings or turn regulatory agency staff into their agents, and privacy laws prevent agencies from disclosing employer tax and payroll information except under certain circumstances, such as state fraud investigations. Generally, materials presented to a grand jury are secret and may not be disclosed or used in a civil enforcement proceeding except under limited exceptions. See U.S. Government, "Rule 6. The Grand Jury," *Federal Rules of Criminal Procedure* § 6(e)(2), accessed August 3, 2017, [www.law.cornell.edu/rules/frcrmp/rule\\_6](http://www.law.cornell.edu/rules/frcrmp/rule_6). Florida criminal justice agencies do not coordinate with civil investigators once a matter has been referred for criminal prosecution. Author interview with John Dygon. States that request federal tax data are required to comply with federal privacy standards and use tax data consistent with state agency regulatory responsibilities. See IRS, "Legal Issues: Safeguards, Disclosure, Need and Use," *Internal Revenue Manual* 11.4.2.8, accessed August 3, 2017, [www.irs.gov/irm/part11/irm\\_11-004-002.html](http://www.irs.gov/irm/part11/irm_11-004-002.html).

<sup>186</sup> Author interview with Jennifer Brand, Associate Solicitor for Fair Labor Standards, USDOL Office of the Solicitor, September 21, 2012.

<sup>187</sup> See NELP, *Winning Wage Justice*, 87–88.



Joint agency cooperation, by checking potentially noncompliant employers for more than one type of violation at once, magnifies the deterrent effect of enforcement actions by making sure employers see “the full effect” of the laws they are breaking.<sup>188</sup> Coordinated action may also increase the profile of enforcement in industries with a norm of noncompliance. According to the former head of a state task force, “When I would go speak at employer groups, people sat up in their chairs when we said that we were referring cases to each other.”<sup>189</sup>

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*Coordinated action may also increase the profile of enforcement  
in industries with a norm of noncompliance.*

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New York offers a leading example of how an interagency state task force can improve the responsiveness of workplace regulation. Formed in 2007, the New York Joint Enforcement Task Force on Employee Misclassification (JETF) coordinates the efforts of six state agencies with regulatory and enforcement authority over state tax, workers’ compensation, unemployment insurance, and wage-and-hour laws. Led by NYSDOL, JETF pools targeting, investigative, and enforcement resources to identify cases, determine liability, refer appropriate cases for criminal prosecution, provide services to victims, and recommend administrative, legislative and regulatory changes to improve misclassification enforcement.<sup>190</sup> Since 2007, many other states have also formed misclassification task forces, including states such as Florida and Tennessee that do not have a long history of labor standards enforcement.<sup>191</sup> Tennessee’s efforts to build a misclassification task force provide an instructive example of how coordination can improve the effectiveness of state regulation of workers’ compensation and unemployment insurance systems, even without criminal enforcement powers (see Box 3).

<sup>188</sup> Former USDOL Solicitor General Patricia Smith, quoted in Lawrence E. Dubé, “DOL, State Agencies, and Litigants Proceed with Challenges to Worker Misclassification,” Bloomberg BNA, August 14, 2012, [www.bna.com/dol-state-agencies-n12884911162/](http://www.bna.com/dol-state-agencies-n12884911162/).

<sup>189</sup> Author interview with Jennifer Brand.

<sup>190</sup> Eliot Spitzer, “6.17 Executive Order. No. 17: Establishing the Joint Enforcement Task Force on Employee Misclassification,” *Official Compilation of Codes, Rules and Regulations of the State of New York*, September 5, 2007, [Annual Report of the Joint Enforcement Task Force on Employee Misclassification \(Albany: New York State Department of Labor, 2015\), 5, \[www.labor.ny.gov/agency-info/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf\]\(http://www.labor.ny.gov/agency-info/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf\).](https://govt.westlaw.com/nycrr/Document/14f087894cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

<sup>191</sup> Tennessee is among the few states that have no minimum or overtime wage at all. See USDOL, Wage and Hour Division, “Minimum Wage Laws in the States,” updated July 1, 2017, [www.dol.gov/whd/minwage/america.htm](http://www.dol.gov/whd/minwage/america.htm).

### **Box 3. Tennessee Task Force on Employee Misclassification**

A decade ago, employers and unions witnessed a shift in the Tennessee construction industry. The number of companies underbidding law-abiding operators by not paying workers' compensation premiums was on the rise. The idea to form a task force to push back against employee misclassification came from a working group of labor and business lobbyists who had formed an informal advisory council more than 25 years earlier to advise the state legislature about workers' compensation legislation. According to Bob Pitts, a representative of a construction contractor's association and member of the council, the "[l]egislature has never passed anything that we haven't recommended"—a standing relationship that lent credibility to the proposal of a misclassification task force.

The advisory council studied the work of other misclassification task forces, such as Florida's investigation and prosecution of fraud in the construction industry and Washington's use of data to identify suspicious employer activity. When the group proposed the task force to the Tennessee legislature, it "brought in University of Tennessee academics [and] we all testified" on the current impact of misclassification and the potential benefits of coordination. The heavily Republican Tennessee legislature authorized the task force in 2010, with the power to require employers who fail to purchase workers' compensation insurance to pay penalties—fees that would, in turn, fund further misclassification enforcement. Although the task force had a sunset provision that passed in 2014, William Canak, an academic and member of the council, noted that "what's very encouraging is that every stakeholder that has been involved in the task force, and every component of the business community, have all stayed active after the task force formally ended, [and] established themselves as the employee misclassification advisory committee."

The sustained coordination of the different agencies—along with labor and industry stakeholders—has enabled the group to track the progress of their enforcement efforts and to identify needed improvements. One of the most important achievements of the task force is its use of data to target misclassification. In 2014, Tennessee began integrating data systems across the state agencies responsible for unemployment insurance, workers' compensation, business and driver's licensing, and property deeds. As a result, the task force began to yield high-quality targets for enforcement. As Pitts observed, "Busting three or four significant companies, plaster[ing] it across newspapers ... will get more consistency in getting people to pay workers' compensation than anything else you can do." Since 2015, the task force has also been able to use the funds collected as penalties from noncompliant employers to provide benefits for uninsured workers who were illegally kept off workers' compensation policies.

Though the Tennessee misclassification task force has moved relatively slowly and has not achieved the same level of large, systemic actions seen in states with a longer history of labor standards enforcement, it has become a remarkably stable piece of the state enforcement landscape. By building its case through metrics that all stakeholders agree should justify increased agency powers, it has successfully pursued targeted, effective reforms that have not suffered from partisan backlash.

*Sources:* Author interview with Bob Pitts, Senior Policy Advisor, Association of Builders and Contractors, Inc., Greater Tennessee Chapter, Nashville, May 28, 2015; author interview with William Canak, Chair, Research and Resource Committee, Tennessee Task Force on Employee Misclassification, December 22, 2015; author interview with Abbie Hudgens, Administrator, Tennessee Bureau of Workers' Compensation, Nashville, May 29, 2015.



### c. *Why Does Cooperation Improve Enforcement?*

Mission-driven state task forces, such as the one in Tennessee, fill an important gap in the law enforcement approach to misclassification and underpayments. First, they can work collectively to *define* the problem, including by hiring external experts to study the scope of the problem, thus providing evidence to justify the use of state resources.<sup>192</sup> Importantly, while standard enforcement evaluations appraise the *efficiency* of an approach, task force reports also evaluate the extent to which the approach is *strategic*.<sup>193</sup> For example, the Massachusetts Joint Task Force on Employee Misclassification and the Underground Economy (JTF) commissioned a report on misclassification and the state's informal economy found that “businesses using contractors exhibited misclassification and under-reporting at rates that were nearly twice that of other audited establishments”—a finding that suggested it would be strategic to target industries where independent contracting is prevalent.<sup>194</sup> Similar reports evaluating underpayment and payroll fraud trends have also been conducted to inform the strategic use of enforcement in Tennessee, California,<sup>195</sup> and federally by the Government Accountability Office (GAO).<sup>196</sup>

After defining the problem, a task force can break down jurisdictional walls that would otherwise prevent agencies from pooling information and enforcement tools. One Tennessee agency head praised that state's task force because “it has allowed us more freedom, encouraged us to share information more freely. Before [the task force] we were compartmentalized in our own agency.”<sup>197</sup> Because agencies that are members of a task force are also more likely to refer cases across agencies instead of archiving the investigative file after resolving the offense first identified, collaboration has resulted in a more holistic approach to addressing poor labor practices.

For example, in Massachusetts, a tip about out-of-state workers being underpaid on a hotel renovation project at a Marriott Hotel in Boston led that state's task force to examine the project for underpayments and misclassification. The tip exposed a classic problem: Although Marriott operated the hotel, it was owned by an entirely different entity, Host Hotels, which had contracted with a construction contractor, Bayside Services, to renovate its guest rooms. Bayside Services in turn subcontracted this work to Victory

<sup>192</sup> Initial academic work detailing the prevalence of misclassification in the construction industry in Tennessee provided support for the creation of that state's task force. See Canak and Adams, *Misclassified Construction Employees in Tennessee*. This report then led to the appointment of the lead author, William Canak, as the chair of the task force's Research and Resource Committee. His findings, which were confined to misclassification in that state's construction industry, led to a wider discussion of misclassification and, ultimately, to the recommendation to extend the task force's work to other industries in which misclassification is common, including the trucking industry. Author interview with William Canak, Chair, Research and Resource Committee, Tennessee Task Force on Employee Misclassification, December 22, 2015.

<sup>193</sup> While an enforcement approach may be both efficient and strategic (or neither), the efficiency standpoint alone may actually work at cross-purposes with an evaluation of the strategic value of an approach. For example, the New York State Comptroller praised the New York State Department of Labor approach to reducing a backlog of claims by reducing “the investigative scope period from [the full state statute of limitations of] six years to three years.” See New York State Office of the State Comptroller, *Wage Theft Investigations: Department of Labor* (Albany: New York State, Division of State Government Accountability, 2014), 7, <http://osc.state.ny.us/audits/allaudits/093014/13s38.pdf>. The Comptroller issued the report without evaluating the extent to which reducing the cost of violations by limiting the claim period would reduce the deterrent effect of these investigations. The U.S. Government Accountability Office (GAO) criticized the then-failure of USDOL to assess penalties for willful and repeat violations of wage and hour law because “when employers are assessed penalties, they are more likely to comply in the future and other employers in the same region—regardless of industry—are also more likely to comply.” See GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance* (Washington, DC: GAO, 2008), 17, [www.gao.gov/newitems/d08962t.pdf](http://www.gao.gov/newitems/d08962t.pdf).

<sup>194</sup> Rebitzer and Weil, *Findings and Implications of the RSI Report*, 11.

<sup>195</sup> California requires its Labor and Workforce Development Agency to contract with a “nonprofit, nonpartisan, independent research organization . . . to study the most effective and efficient means of enforcing wage and hour laws.” For the report recommending, for example, joint employment efforts use of federal and state data to identify industries and sectors that are “at risk” of wage and hour violations, see Paul Ong, Jordan Rickles, Amy Ford, and Matthew Graham, *Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws* (Los Angeles: California Labor and Workforce Development Agency, 2003), 3, [www.its.ucla.edu/publication/analysis-of-the-california-labor-and-workforce-development-agencys-enforcement-of-wage-and-hour-laws/](http://www.its.ucla.edu/publication/analysis-of-the-california-labor-and-workforce-development-agencys-enforcement-of-wage-and-hour-laws/).

<sup>196</sup> GAO, *Fair Labor Standards Act*, 17.

<sup>197</sup> Author interview with Mark Howell.





Outreach, a Philadelphia-based church, which sent dozens of men to do the work, but claimed that they were all “volunteers” who only received a small, daily stipend. All four entities claimed that they did not employ the workers. After determining that the workers were not volunteers but were employees due a minimum wage, the state reached an agreement that would have Bayside pay the difference, a modest \$31,000 in restitution to the 37 workers. The state then conducted a joint investigation of the *entire* renovation project and found more than \$1 million in unreported wages and \$85,000 in unpaid unemployment insurance contributions, which led to the issuance of three stop-work orders.<sup>198</sup>

In addition to ensuring that enforcement agencies have a full picture of the situation when making decisions, task forces can also identify legislative fixes to enforcement gaps and effectively lobby state legislators. For example, the high-profile Operation Dirty Money prosecutions in Florida led to legislative reforms in 2013 that require check cashers to log data about the checks they cash in a statewide database that Florida agencies can then use to identify suspicious transactions.<sup>199</sup> The New York JETF has also played an important role in statutory changes to curb misclassification in the construction and transportation industries, providing testimony in favor of the *New York Construction Industry Fair Play Act* in 2010 and the *New York State Commercial Goods Transportation Industry Fair Play Act* in 2014.<sup>200</sup> And in Tennessee, the creation of a state task force led to important reforms that ranged from funding for analytic systems to better target violators and the creation of a fund for uninsured workers to the administrative power to issue penalties for workers’ compensation violations.

In other cases, effective enforcement is impossible *without* interagency collaboration. Operation Dirty Money, as detailed in Box 2, could not have occurred without the close coordination of several different state agencies in Florida. The lead agency, the Florida Division of Insurance Fraud, not only coordinated its own civil and criminal investigative staff, but that of the Florida Division of Workers’ Compensation and Office of Financial Regulation, and five different county prosecutors. In this case, as in many others, coordination not only links state agencies, but also state and municipal agencies.

The necessity of close cooperation can also be seen in day-to-day operations, as illustrated by an account of a Connecticut task force, the Joint Enforcement Commission for Worker Misclassification. This coordinated effort between Connecticut’s labor, tax and workers’ compensation agencies, in addition to its Attorney General, has been praised for its joint agency collaboration in workplace actions—a particularly important form of enforcement in temporary worksites such as construction. According to a field supervisor in the Connecticut Department of Labor (DOL):

*As soon as we go on the site and we start talking to the workers, we have somebody running [the misclassification investigation] in the car. We have access right away to find out first of all if they are a registered business in the state of Connecticut, if they’re paying taxes, if they’re reporting people as employees, if they have workers’ comp—and, if they have workers’ compensation how much they’re actually showing for the payroll.*<sup>201</sup>

<sup>198</sup> Rowe, *Joint Enforcement Task Force on the Underground Economy*, 6.

<sup>199</sup> Florida State Legislature, “Records of Check Cashers and Foreign Currency Exchangers,” *Florida Statutes* § 560.310, accessed August 3, 2017, [www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0500-0599/0560/Sections/0560.310.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0500-0599/0560/Sections/0560.310.html). Since October 1, 2015, the Florida Office of Financial Regulation has required all money services companies to enter all payment instruments greater than \$1,000 into the database. See Florida Office of Financial Regulation, “Smart, Efficient and Effective Regulation,” accessed August 3, 2017, [www.flofr.com/StaticPages/checkcashingdatabase.htm](http://www.flofr.com/StaticPages/checkcashingdatabase.htm).

<sup>200</sup> See the 2015 edition of Joint Enforcement Task Force, *Annual Report of the Joint Enforcement Task Force on Employee Misclassification*, 9-10; New York State, “The New York State Construction Industry Fair Play Act,” *New York Consolidated Laws LAB Art. 25-B*, accessed August 3, 2017, <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:>; New York State, “The New York State Commercial Goods Transportation Industry Fair Play Act,” *New York Consolidated Laws LAB Art. 25-C*, accessed August 3, 2017, <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:>. These statutes replace the various tests to determine if a construction worker or truck driver is an employee or independent contractor with the “ABC test,” which presumes the worker to be an employee unless the worker is (a) free from direction and control in performing the job; (b) the work is not part of the usual work done by the business that hired the individual; and (c) the individual has an independently established business.

<sup>201</sup> Juravich, Ablavsky, and Williams, “The Epidemic of Wage Theft in Residential Construction.”



By having real-time access to data from a variety of agencies, these Connecticut investigators can immediately determine whether workers' compensation policies and reported earnings match the actual workers in the field. If not, the Connecticut DOL issues a stop-work order and immediately refers the matter to the departments of unemployment and revenue for further investigation.<sup>202</sup> Cooperation thus enables the Connecticut task force to operate across areas of labor standards, but with speed and flexibility.

The need for cooperation between actors with different expertise and means of enforcement may explain why successful prosecutions are so rare outside of states without task forces or agencies with dual civil and criminal enforcement powers. Payroll fraud prosecutions are, for example, much more likely to be successful if worked up by experienced staff, such as forensic accountants, who have been given access to data that may reveal the violations. A 2012 survey of state regulators specifically urged "[g]reater communication between labor departments, attorney general's offices and local prosecutors," to improve enforcement.<sup>203</sup>

To effectively coordinate, state workforce and insurance agencies must address common challenges. These include agency resistance and technical barriers to sharing information, the difficulties of making decisions across agency lines, and managing interagency conflict. One common way to mitigate these challenges is to direct a single agency to take the lead, facilitate coordination among the wider group of agencies, and develop protocols for referrals and joint investigation. Misclassification task forces may be particularly effective for agencies answerable to a single executive, as these agencies ultimately report to the same elected official. And agencies may benefit from direction by their state legislatures to supervise their coordination to manage conflicts among the competing agencies.

## 2. Cooperative Federalism

Because the federal government and states have shared interests in governing labor standards, agencies at these levels also have shared incentives to cooperate. Since the New Deal, federal standards have been woven into a variety of state laws, including state unemployment insurance systems and state-administered OSHA programs. These types of cooperative federalism, in which states may but are not required to adopt federal standards, do not run afoul of the anticommandeering doctrine of the Tenth Amendment of the U.S. Constitution<sup>204</sup> and are commonly found in areas of shared federal-state interest, such as environmental<sup>205</sup> and health<sup>206</sup> policy.

Cooperative federalism has long been shown to improve state agency enforcement of federal standards. For example, in the late 1990s, USDOL offered funding to states to crack down on employers who manipulated their unemployment insurance data to lower their state unemployment tax (SUTA) contributions—so-called SUTA dumping. USDOL provided participating states with software to “sift through mountains of data” to identify SUTA dumping through the “movement of large numbers of employees reported on one account number to a different account number.”<sup>207</sup> According to one state employment security director, coordination between USDOL and state unemployment insurance staff

<sup>202</sup> Ibid., 41.

<sup>203</sup> Meyer and Greenleaf, *Enforcement of State Wage and Hour Laws*, 5-6.

<sup>204</sup> Cooperative federalist arrangements that permit but do not require states to enforce federal law, or that condition tax credits on adhering to federal standards, do not violate the Tenth Amendment. The Supreme Court upheld provision of *Social Security Act of 1935* that contained federal appropriations to aid states in administering unemployment compensation regimes that satisfied federal requirements, finding that Congress may directly regulate unemployment as a problem “national in area and dimensions.” See *Steward Machine Co. v. Davis*, 301 U.S. 548, 593 (1937).

<sup>205</sup> The *Clean Air Act* (CAA) contemplates that states regulate environmental standards at least as high as those of the U.S. Environmental Protection Agency (EPA), and directs the EPA to “encourage . . . reasonable Federal, State, and local government actions, consistent with the provision of this chapter, for pollution prevention. See *Clean Air Act*, Public Law 88-206, U.S. Statutes at Large 77 (1963), [www.gpo.gov/fdsys/pkg/STATUTE-77/pdf/STATUTE-77-Pg392.pdf](http://www.gpo.gov/fdsys/pkg/STATUTE-77/pdf/STATUTE-77-Pg392.pdf).

<sup>206</sup> The *Patient Protection and Affordable Care Act* (ACA) requires the federal government to assist states in establishing health-benefit exchanges, effectively delegating an important area of ACA implementation to the states. See *Patient Protection and Affordable Care Act*, Public Law 111-148, U.S. Statutes at Large 124 (2010): 119, [www.gpo.gov/fdsys/pkg/STATUTE-124/pdf/STATUTE-124-Pg119.pdf](http://www.gpo.gov/fdsys/pkg/STATUTE-124/pdf/STATUTE-124-Pg119.pdf).

<sup>207</sup> Author interview with Mark Howell.



“[m]akes perfect sense—we are charged with enforcing the law and we should go out and target those employers who are breaking the law.”<sup>208</sup> Doing so in coordination provides state workforce agencies with access to federal expertise and technical resources, and federal agencies with ground-level state enforcement capacity.

USDOL has also embraced federal-state coordination as an element of its strategic enforcement of wage-and-hour law. By signing memoranda of understanding (MOUs)—a formal but nonbinding written agreement—with state agencies, USDOL has committed to sharing information and coordinating enforcement efforts.<sup>209</sup> Additionally, in 2014 USDOL announced a \$10 million grant to states to improve misclassification enforcement in state unemployment programs.<sup>210</sup> USDOL credits its federal-state coordination with improving its identification of back wages owed to low-wage workers by nearly 30 percent between 2008 and 2015.<sup>211</sup>

Federal-state coordination through a formal MOU is more efficient and effective than either uncoordinated enforcement or coordination through ad hoc, case-by-case requests. Previously, for USDOL or a state agency to access data from the other, the agencies would typically draft a new MOU for each such request, each time requiring separate negotiation and approval by the heads of both agencies. As of 2011, however, agencies began signing MOUs permitting the agencies to delegate day-to-day information sharing to lower-level employees, subject to the standard terms set forth in the MOU. Because the MOUs provide for a uniform process that complies with federal and state privacy laws, agencies no longer need to research sharing protocols in individual cases. As a result, federal and state agency staff may coordinate efficiently on a much higher volume of cases without having to gain approval from a chain of command for each separate instance of coordination.

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Early evidence shows promising signs that USDOL-state MOUs sharing of data has proven more effective than using either federal or state data alone. In targeting misclassification as a driver of illegal pay practices, this has resulted in improved federal and state enforcement of wage-and-hour law. For example, in Utah, which had signed an MOU with USDOL, authorities became aware beginning in 2010 of a construction company required its workers to become “member/owners” of limited liability companies, effectively stripping them of their rights and benefits as employees, including minimum wage, overtime, unemployment insurance, and workers’ compensation. The Utah Worker Classification Coordinated Enforcement Council identified this scheme as a widespread practice in the state and the state legislature introduced a law requiring LLCs to provide workers’ compensation and unemployment

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208 Ibid. USDOL has a similar, though voluntary, program with states with “federally approved OSHA plans that the states enforce.” In those states, including Tennessee, USDOL oversees state programs to ascertain that they meet federal requirements. Author interview with Daniel Bailey.

209 Another early signal of the success of formal state-federal partnerships can be seen in the Questionable Employment Tax Practices (QETP) Initiative formed by the IRS in November 2007. By 2011, QETP had the participation of 37 states, and referrals from the IRS yielded \$1.3 trillion in income reclassified as wages and more than \$20 million in assessments. See Brian F. Curran and Linda H. Donahue, *Tax and Policy Implications of Changes to Reporting Requirements for Construction Services* (Ithaca, NY: Cornell University International Labor Relations School, 2013), 4, <http://digitalcommons.ilr.cornell.edu/reports/56/>; USDOL maintains a database of all memoranda of understanding (MOUs) with the states. See USDOL Wage and Hour Division, “Misclassification of Employees as Independent Contractors,” accessed August 3, 2017, [www.dol.gov/whd/workers/misclassification/#stateDetails](http://www.dol.gov/whd/workers/misclassification/#stateDetails).

210 USDOL, “\$10.2M Awarded to Fund Worker Misclassification Detection, Enforcement Activities in 19 State Unemployment Insurance Programs” (news release, September 15, 2014), [www.dol.gov/newsroom/releases/eta/eta20141708](http://www.dol.gov/newsroom/releases/eta/eta20141708).

211 The USDOL Wage and Hour Division reports that it identified \$74.3 million in back wages owed to workers in low-wage industries in 2015, a 29 percent increase over 2008. See USDOL Wage and Hour Division, “Data,” accessed August 3, 2017, [www.dol.gov/whd/statistics/](http://www.dol.gov/whd/statistics/).



insurance to their “members.”<sup>212</sup> The company in question responded by closing its operations in Utah and reopening—under a new name, but with the same misclassification practice—in Arizona. Under the terms of their information-sharing MOU, Utah referred the matter to USDOL, which eventually fined the company \$600,000 in back wages and \$100,000 for its willful violation of wage-and-hour law. Utah has since reported that construction companies have abandoned this practice, leading a U.S. Solicitor of Labor to comment that “This kind of cooperation among state and federal law enforcement authorities will serve as a model for preventing misclassification and similar practices that deny workers’ their wages and protections, and undermine law-abiding employers.”<sup>213</sup> In this case, the federal-state exchange of information enabled federal and state law enforcement officers to prevent a payroll fraud scheme from evading one state’s enforcement action by jumping state lines, by effectively federalizing the investigation.

Another example of successful federal-state cooperation is the USDOL-New York Attorney General investigation of Papa John’s franchise stores, which employed a coordinated enforcement approach pursuant to their MOU. In those joint investigations, USDOL used its inspection powers to obtain business records and speak with workers immediately, while NYAG used its subpoena power permitted to obtain sworn testimony from the franchisees without having to obtain a court order. NYAG relied on USDOL inspection powers and auditing staff to calculate the hours worked by and wages paid to each employee. In turn, USDOL benefited from the longer New York statute of limitations and higher minimum wage and overtime requirements.<sup>214</sup> Coordination in this case also improved the New York State’s ability to swiftly freeze assets and bring criminal charges for egregious conduct.<sup>215</sup> The NYAG criminal prosecution of a Papa John’s franchisee (see Section IV.C.) was another, important product of this federal-state coordination. USDOL first informed NYAG that it had previously found this franchisee to have willfully violated FLSA. This assisted the state in determining that the franchisee intentionally kept a double set of business records—a falsified set that it showed to investigators and another, internal set that recorded its true, illegal, pay practices. This led the state to file criminal charges of falsifying payroll records, a felony, while USDOL negotiated a consent judgment for \$500,000 in jointly recovered restitution.<sup>216</sup>

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*The federal-state exchange of information enabled federal and state law enforcement officers to prevent a payroll fraud scheme from evading one state’s enforcement action by jumping state lines.*

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These examples show the benefits of coordinating federal-state expertise, powers, and access to data. Federal and state inspections enable agencies to target a large set of employers in a particular geographic area or industry and to reveal violations and obtain worker statements quickly, before a noncompliant employer has the opportunity to fabricate records or threaten witnesses. State agencies can also benefit from the work of USDOL investigators, who can quickly compile large sets of payroll data to calculate

212 Utah State Legislature, “Construction Licensees Related Amendments,” Utah S.B. 35 (2011), <https://le.utah.gov/~2011/bills/sbillamd/sb0035s02.htm>; Bloomberg BNA, “Construction Industry Calls Utah Bill Model for Crackdown on Worker Misclassification,” *Construction Labor Report* 57, no. 245 (April 14, 2011).

213 USDOL, “Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified” (news release, April 23, 2015), [www.dol.gov/newsroom/releases/whd/whd20150518](http://www.dol.gov/newsroom/releases/whd/whd20150518).

214 New York Labor Law has a six-year statute of limitations, compared with the typical three years under FLSA, and has a higher minimum wage (\$13.50 per hour for fast-food employees in New York City), compared with the federal minimum wage of \$7.25 per hour. See New York State, “Labor—Payment of Wages—Costs, Remedies,” *New York Consolidated Laws LAB 6 § 198(3)*, accessed November 17, 2017, <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>; New York State, “Basic Minimum Hourly Rate,” 12 *New York Codes, Rules and Regulations* 146-1.2.

215 *People v. Emstar Pizza*, 17345/14 (NY, 2014), Order to Show Cause; *People v. Emstar Pizza*, 17345/14 (NY, 2014), Affirmation for Emergency Relief 9-16.

216 New York State Office of the Attorney General, “A.G. Schneiderman and U.S. Department of Labor Announce Jail Time for Bronx Papa John’s Franchisee Convicted of Wage Theft.”





wages owed to each individual employee. In turn, USDOL can benefit from state-held authority, including administrative subpoena power, access to expedited civil litigation and criminal jurisdiction, and (often higher) state-specific wage-and-hour requirements, including a higher minimum wage, a longer statute of limitations, and a broader definition of employer than federal law.<sup>217</sup> By conditioning administrative resolutions on a joint settlement document, USDOL and state agencies can further improve coordination by ensuring that neither agency will undercut the other by resolving the case for less than a reasonable amount of monetary and injunctive relief.

While these examples are drawn from wage-and-hour law, they demonstrate the potential of federal-state coordination across a wider spectrum of workplace laws and enforcement tools. While USDOL is primarily a civil investigation agency, states and municipalities often have an array of enforcement tools to handle a high volume of civil and criminal violations, including administrative penalties, stop-work orders, license suspension and revocation, and criminal prosecution. USDOL can thus refer cases to state agencies where a civil order is unlikely to result in compliance with the law. Conversely, in states without strong labor protections, federal-state coordination could lead state agencies to refer strategic misclassification cases to USDOL for wage-and-hour law enforcement.<sup>218</sup> Federal-state coordination may also facilitate state criminal prosecution for wage theft by making these prosecutions more protective of immigrant workers who cooperate as witnesses.<sup>219</sup>

## V. Recommendations

Immigrants disproportionately work in low-wage sectors of the economy in which outsourcing low-wage labor and the misclassification of employees as independent contractors are commonplace, leading to a deterioration of basic labor standards. Increasingly, state and local agencies have been tasked with regulating these sectors as federal enforcement has waned. They must now design an enforcement approach that leverages their unique powers with limited resources, in a way sensitive to the vulnerabilities of immigrant worker communities, to counteract entrenched norms of noncompliance with basic employment law. The recommendations here, offered to legislators and agency administrators, are designed to assist state and local agencies to develop directed-enforcement internal capabilities and to encourage complaints by and provide access to justice for workers in low-compliance sectors. Many of these recommendations are revenue-neutral and require no legislation.

### A. Maximizing the Use of State and Local Administrative Powers

1. State and municipal agencies that currently only enforce laws by investigating complaints on a first-come, first-served basis should consider building a strategic enforcement strategy that directs enforcement resources to high-impact cases in low-compliance sectors. Agencies should

<sup>217</sup> Twelve states use a more expansive test than FLSA to determine whether a worker is an independent contractor or an employee, which presumes an employment relationship unless all three factors showing a bona fide independent contractor relationship are present. In these states, a federal-state collaboration could identify possible instances of misclassification that would be easier to show using the more expansive state ABC test. See Judson and Francisco-McGuire, *Where Theft is Legal*, 19; Commonwealth of Massachusetts, “Persons Performing Service Not Authorized under this Chapter Deemed Employees: Exceptions,” 21 *Massachusetts General Legislature* 149 § 148B, accessed August 3, 2017, <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section148B>; State of New Hampshire, “Labor—Protective Legislation—Definitions,” 23 *New Hampshire Revised Statutes* 275 § 275:42(II), accessed August 3, 2017, <http://law.justia.com/codes/new-hampshire/2010/titlexxiii/chapter275/section275-42>; State of New Hampshire, “Labor—Minimum Wage Law—Definitions,” 23 *New Hampshire Revised Statutes* 279 § 279:1(X), accessed August 3, 2017, <http://law.justia.com/codes/new-hampshire/2010/titlexxiii/chapter279/>.

<sup>218</sup> Florida sometimes refers payroll fraud cases that reveal wage and hour law violations to USDOL. Author interview with John Dygon.

<sup>219</sup> Coordination between state prosecutors and DHS may also facilitate the role of state law enforcement agencies in certifying immigrant victims for immigration relief.





consider using a combination of data analysis and complaints to identify enforcement priorities and triage cases. USDOL can assist by providing access to federal data that will identify industries and regions that are likely to have high rates of noncompliance, and by sharing best practices in state and local law enforcement.

2. State and local governments should consider legislation that provides agencies with administrative tools to efficiently and effectively enforce the law. This may include making compliance with labor standards a requirement to hold a business license, as required by California for car wash establishments and garment manufacturers, by the Massachusetts Alcohol Control Board for restaurants and drinking establishments, and a number of cities (e.g., Chicago, San Francisco, and Seattle). Treble damages and stop-work orders are also important tools for employers who fail, often repeatedly, to comply. Where legislators are reluctant to grant injunctive powers to agencies, decisionmakers could consider introducing flexibility in the enforcement system, as was done by the Florida Department of Insurance in permitting employers subject to a stop-work order to pay a fee and purchase a workers' compensation policy prospectively to lift the injunction pending an audit.
3. State and local agencies with the power to issue orders administratively should create guidelines for personnel to ensure consistency and efficiency. These may include guidelines on orders for restitution and penalties that exceed the cost of noncompliance and orders for enjoining ongoing and willful illegal practices through stop-work orders and the suspension or revocation of business licenses of operators. Where misclassification is found, agencies may require employers not only to make contributions or purchase workers' compensation for the individual claimant, but also for all similarly situated workers. By ensuring that personnel know when to do so, state agencies can create important precedent with less litigation risk by defending administrative orders against administrative challenges under a deferential legal standard.
4. In states with severe budget shortfalls, states and local governments should consider innovative approaches to funding enforcement. In Arizona and Tennessee, penalties collected from noncompliant employers are specifically earmarked to fund enforcement work. This provides a dedicated revenue stream for enforcement—an essential level of stability, particularly during economic downturns. Concerns about abuse of self-funding regimes can be addressed by subjecting penalty assessment and collection to legislative review, and legislation restricting the use of this funding mechanism to target sectors characterized by widespread labor standards noncompliance or to efforts to combat particularly egregious practices.
5. States and local governments should also consider simplifying administrative proceedings to enable workers with small claims to access justice. Such cases often go unresolved through public investigations or private litigation, which generally reserve their limited resources for larger-scale cases. The Miami-Dade wage-theft ordinance offers a potential model for a cost effective administrative system that permits workers to personally present their cases and encourages the parties to resolve claims through mediation.

## **B. *Leveraging Data to Target Payroll Fraud and Wage-and-Hour Violations***

1. States and local governments with audit or inspection powers should develop their analytical capabilities as a way to strategically target employers who violate wage-and-hour law or engage in payroll fraud. The innovative approaches North Carolina and Washington State have taken to detect suspicious activity by cross-referencing federal, state, and municipal datasets demonstrates this potential. Other states and municipalities can mirror this success by requiring their workforce agencies to enter data-sharing agreements and by developing partnerships with agencies in other levels of government to the same end. As shown in Washington, requiring



agencies to enter data-sharing agreement is a revenue-neutral approach as implementation costs will be offset by revenue saved through better targeting.

2. Data-sharing requires the technical expertise to integrate data from disparate sources—all in compliance with federal and state privacy and tax laws. North Carolina’s approach to address these constraints by housing data within a central platform that cleanses state tax data before integrating it with other data sources is a promising one. States and local governments can develop this expertise internally, or they may choose to contract with private vendors.
3. USDOL should assist states in developing their analytical capabilities. It can do this by funding software upgrades for state agencies that regulate unemployment insurance and workers’ compensation and by ensuring that participating agencies store data in formats that can be used for crosschecking purposes. USDOL may also choose to develop and disseminate software tools to identify specific practices, such as payroll fraud, as it has in the past by helping states target companies that evade unemployment insurance contributions.

### **C. *Using Criminal Prosecution to Enforce Labor and Safety Standards and Payroll Fraud***

1. States and municipalities that criminalize wage theft and payroll fraud should criminally prosecute selective cases—those that involve egregious, willful, and repeat violators. Florida’s Operation Dirty Money and the NYAG’s criminal prosecution of a fast-food franchisee demonstrate how the deterrent effect of civil enforcement actions can be magnified by well-placed criminal cases.
2. Jurisdictions with no or only weak criminal provisions should consider amending the criminal code to include criminal penalties for underpayment and payroll fraud, with increasing penalties for more serious violations.
3. States and municipalities should consider providing sentencing guidelines to courts, clarifying which types of underpayment and payroll fraud merit a jail term.
4. USDOL and state legislatures should consider various options for funding dedicated prosecutors to handle underpayment and misclassification crimes.
5. Prosecutors, particularly in states with active payroll fraud criminal dockets, should investigate and prosecute wage theft uncovered during payroll fraud prosecutions when appropriate. Coupling the two charges provides the judges and juries with a more accurate view of payroll fraud as enabling illegal labor practices, rather than a “victimless” crime, and affords a remedy for victims whose misclassification masks wage-and-hour law violations. Prosecutors should seek restitution for victims or, alternatively, should partner with USDOL to engage in parallel (civil) proceedings for unpaid wages.
6. USDOL and states should develop uniform guidelines for assisting victims of wage theft and misclassification, including: a) creating a fund to provide restitution, or require a labor bond, in industries where labor and safety violations are common and in instances in which the employer is judgment proof, and extending workers’ compensation to uninsured workers, and b) establishing a standard protocol for law enforcement agencies to certify witnesses who cooperate in public enforcement actions for U visas.



#### D. *Strengthening Private Stakeholder Engagement in Public Enforcement*

1. Agencies should consider enforcement approaches that engage proactively with small employers and vulnerable worker communities, including immigrants. By reaching out to a range of stakeholders that includes employers, insurance agencies, unions, and worker centers, the agencies would deepen their knowledge about the worst practices and bad actors in different industries, and educate employers most likely to violate labor standards about the importance of compliance. The California Strategic Enforcement with Community Partners initiative and city-level efforts in San Francisco and Seattle demonstrate how sustained partnerships can extend the benefits of collaboration beyond a single enforcement action and can channel private participation into public agency rulemaking and enforcement priorities.
2. States and municipalities could encourage worker participation in enforcement by strengthening anti-retaliation protections, by aggressively moving to enjoin retaliatory conduct and criminally prosecuting employer retaliation against complainants as witness tampering and obstruction of justice.
3. State agencies seeking to enlist community partners in the enforcement of workplace protections should train staff to conduct triage and intake for retaliation complaints. This may include developing protocols to assure investigators will not inquire about the immigration status of victims and that complaint forms do not require a social security number, both of which may discourage unauthorized workers from cooperating. Statutory protections for immigrant workers in the California Labor Code could be a model in this respect.<sup>220</sup> Agencies should also take measures to ensure that investigations for labor standards enforcement do not trigger adverse immigration consequences.
4. State agencies that engage with significant immigrant populations should provide appropriate interpretation and translation services in relevant languages so all workers are able to file a complaint and communicate with investigators.
5. For state programs that allow insurance companies and employers to self-monitor compliance, agencies should mandate that firms with a history of violations (by themselves or their contractors) participate in enhanced monitoring regimes. As in California, in sectors where outsourcing has led to widespread noncompliance with labor standards, states could hold companies liable for the wage-and-hour law violations of their subcontractors if the company knew or should have known that the contract did not include sufficient funds to comply with labor standards.<sup>221</sup> States and USDOL should consider developing metrics that lead firms in these industries can use when deciding to reject bids below what is minimally sufficient to comply with the law.
6. States contemplating self-monitoring regimes should also consider measures to encourage lead firms in fissured industries to actively encourage labor and safety compliance by the firms they contract with. With Washington State as a model, states could deter premium fraud by tying high rates of workers' compensation premium fraud in particular industries or particular insurance companies to heightened disclosure and certification requirements and to participation in an insurance program administered by the state.

<sup>220</sup> California law expressly permits all remedies except reinstatement prohibited by federal law, regardless of immigration status, and prohibits discovery of immigration status except where "necessary in order to comply with federal law." See State of California, "Employment Regulation and Supervision—Employees—Wages, Hours and Working Conditions," *California Labor Code* § 1171.5, accessed August 4, 2017, [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=LAB&sectionNum=1171.5](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=1171.5).

<sup>221</sup> State of California, "Obligations of Employer," *California Labor Code* § 2810, accessed January 2, 2018, [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=LAB&sectionNum=2810](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=2810).



### **E. Building Cooperation between State Agencies and between State, Local, and Federal Governments**

1. State and local governments that currently do not have task forces for underpayment and misclassification fraud could consider establishing them. In taking the first steps, they should prioritize the study of the industries and practices producing the most severe violations in the state. Having examined the problem, the task force can then recommend strategic ways to use agency resources to address them. The task force should also develop measures to encourage cross-agency work that appropriately pools state and local agency authority, expertise and resources, including referring cases for complementary investigations and, for repeat and willful violators, criminal referrals to the agency best positioned to prosecute the case.
2. States should also consider partnering with federal agencies, in particular IRS and USDOL, to coordinate underpayment and misclassification enforcement. These partnerships benefit from the staff capacity, expertise, access to data, and jurisdictional advantages of each agency involved. Where joint investigations reveal criminal conduct, a state or municipal prosecuting agency may find it easier to build a case using information obtained from USDOL inspections. In prosecuting an employer, a federal-state partnership could also allow the state to focus on the criminal penalty while USDOL pursues claims for owed wages through a parallel proceeding.

These recommendations summarize some innovative strategies used by state and local agencies with diverse powers and in diverse political environments to improve compliance with the law in low-wage sectors where immigrants disproportionately work. These strategies are linked by their leverage and coordination of unique state and local enforcement powers and access to data, and their sensitivity to the vulnerabilities of immigrant groups in their engagement with private stakeholders. They are often revenue-neutral, supported by law-abiding employers in these sectors, and can be implemented in some form in a range of political environments. In sum, state and local governments play an important and underdiscussed role in workplace regulation, particularly as the federal government turns to a policy of deregulation, and can complement any federal regulatory strategy.

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*These strategies ... are often revenue-neutral, supported by law-abiding employers in these sectors, and can be implemented in some form in a range of political environments.*

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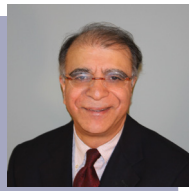
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Mr. Chishti has testified extensively on immigration policy issues before Congress and is frequently quoted in the media. In 1992, as part of a U.S. team, he assisted the Russian Parliament in drafting its legislation on forced migrants and refugees. He is a 1994 recipient of the New York State Governor's Award for Outstanding Asian Americans and a 1995 recipient of the Ellis Island Medal of Honor.

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The Migration Policy Institute is a nonprofit, nonpartisan think tank dedicated to the study of the movement of people worldwide. MPI provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic and thoughtful responses to the challenges and opportunities that large-scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

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