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

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

TERRI GERSTEIN*

ABSTRACT

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

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

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

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

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

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

The Trump administration also created obstacles for unions and worker organizations. See, e.g., Medicaid Program; Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19,718 (proposed May 6, 2019) (to be codified at 42 C.F.R. pt. 447); vacated on Nov. 17, 2020 in

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16. Levine, supra note 4.
exceedingly forceful immigration enforcement made immigrant workers less likely to report violations and more vulnerable to workplace exploitation. Finally, in the face of the coronavirus pandemic, in which workers deemed essential have been falling ill and dying, OSHA during the Trump administration largely fell down on the job.20

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


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

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

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

This article discusses each of these three developments in turn.


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

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

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

A. State AGs28

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

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

1. Creation of Dedicated Units

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

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

\begin{itemize}
  \item \textsuperscript{29} MINN. STAT. § 177.45 (2019); S.B. 0161, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).
  \item \textsuperscript{30} See, e.g., N.Y. EXECUTIVE LAW § 63(12) (Consol. 2020).
  \item For a discussion of AG sources of jurisdiction, see generally Terri Gerstein & Faisal Sheikh, \textit{An Overview of State Attorney General Labor Jurisdiction}, STATEAG.ORG (May 2017), https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5ad6a946f950b274bb3d6de9/1524017479077/An+Overview+of+State+Attorney+General+Labor+Jurisdiction.pdf [https://perma.cc/PA4T-XVG3].
  \item Gerstein & von Wilpert, \textit{supra} note 27 (noting that Massachusetts is an outlier among states in that the Attorney General’s Office, and not the state labor department, is tasked with all enforcement of the commonwealth’s worker protection laws).
vary in size, as some started with only one attorney, while others are more robustly staffed. They have a variety of names (“workplace rights bureau,” “payroll fraud enforcement unit,” “fair labor section”), but they all represent a commitment by these AGs to devote resources and institutionalize a section within their offices to focus on worker protection.

2. State-Specific Civil and Criminal Enforcement

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


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


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


liability. Certain state AGs have also used their criminal jurisdiction to pursue wage theft, payroll fraud, and other violations.


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

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

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


plans, and number of infections and deaths among the workforce.\textsuperscript{49} They also sought similar information from Walmart.\textsuperscript{50}

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

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


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

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


B. Localities

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

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


challenges; for example, paid sick leave ordinances passed by cities in Texas have been found preempted by state law.

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

The first city to create such an agency was San Francisco. Its Office of Labor Standards Enforcement (OLSE) was created over fifteen years ago. It enforces several citywide laws, including ordinances on minimum wage, paid sick leave, fair chance employment, scheduling laws, and others, as well as a handful of other laws related to government contracting. Seattle’s Office of Labor Standards Enactment (OLSE) was created over fifteen years ago. It enforces several citywide laws, including ordinances on minimum wage, paid sick leave, fair chance employment, scheduling laws, and others, as well as a handful of other laws related to government contracting. For background materials on state preemption of local initiatives, see Richard Briffault et al., The New Preemption Reader: Legislation, Cases, and Commentary on the Leading Challenge in Today’s State and Local Government Law (Richard Briffault et al. eds., 1st ed. 2019). For a discussion of preemption specifically during the pandemic, see Nestor M. Davidson & Kim Haddow, State Preemption and Local Responses in the Pandemic, AM. CONST. SOC’Y EXPERT F. (June 22, 2020), https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/ [https://perma.cc/ZA49-THRA].


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

A host of other localities have also created offices focused on establishing, promoting, and enforcing workers’ rights such as paid sick leave and/or anti-wage theft laws, including Chicago, Denver, Emeryville, Los Angeles, Seattle.


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


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

C. Criminal prosecutors

A third new group of government actors engaged in enforcing workplace laws and protecting workers’ rights are criminal prosecutors at the state and local levels. Criminal prosecutors are increasingly bringing charges against employers for wage theft, recognizing it as a crime.

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

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


87. For example, the owners of the Triangle Shirtwaist Factory in 1909 “hired prostitutes to accompany replacement workers—‘scabs’—to the Triangle factory.” This led to a fight with strikers “and then some male thugs materialized to further pummel the strikers. When the police arrived, they arrested the strikers and let the prostitutes and goons walk away.” STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR 52 (1st ed. 2019); See also Bob Baker, Police Use Force to Block Strike March, L.A. TIMES (June 16, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-06-16-me-33-story.html [https://perma.cc/ZRV3-L8JL].
Yet in recent years, a number of district attorneys and other prosecutors, including but not limited to those in the progressive prosecutor movement, have begun to investigate and prosecute a range of crimes against workers, including wage theft; labor trafficking; predictable, preventable workplace fatalities and serious injuries; payroll fraud, including failure to pay unemployment taxes and/or to procure workers’ compensation insurance.


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


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


\textsuperscript{98} Intarasuwan, supra note 91.


\textsuperscript{103} Graves, supra note 91.

Jersey, New York, Pennsylvania, Rhode Island, Texas, and Washington. Some district attorneys have convened trainings for their peers statewide; for example, in June 2020, Orange County (NY) District Attorney David Hoovler provided a continuing legal education course for district attorneys throughout New York.

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

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112. Byrne, supra note 100.
criminally negligent homicide, and reckless endangerment. Prosecutors have generally brought charges against employers for egregious conduct: employers who commit fraud, are repeat violators, intentionally target particularly vulnerable workers, or who otherwise have little argument that they did not know their conduct was illegal (such as employers who fail to pay wages at all). This may be in part because criminal prosecutors must prove cases beyond a reasonable doubt (a higher burden than the “preponderance of the evidence” requirement in most civil cases involving workplace rights).

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


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

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

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

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


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

121. For an exchange on the appropriateness of prosecuting crimes against workers, see Ben Levin, Rethinking Wage Theft Criminalization, ONLABOR (Apr. 13, 2018), https://www.onlabor.org/rethinking-wage-theft-criminalization/[https://perma.cc/ZY5U-ADTK]; Terri Gerstein &
Krasner and San Francisco District Attorney Chesa Boudin both appointed labor liaisons within their offices for this purpose, and Minnesota Attorney General Keith Ellison created a Wage Theft Unit. Support for prosecution of employers might initially seem in discord with an overall focus on decreasing prosecutions and shrinking the criminal justice system. However, in comments announcing the creation of these units, leaders in this area framed the work as addressing power disparities and protecting those without power. District Attorney Krasner noted that the unit would “prosecute crimes committed against people who historically had few avenues to seek justice,” adding, “[e]mployers have enormous power over people, particularly low-wage and undocumented workers, and must be held accountable when they abuse that power, break the law, and take advantage of the vulnerable.” Similarly, District Attorney Boudin noted that the new Economic Crimes Unit would “safeguard the rights of some of the most vulnerable people in our society: workers who are being exploited by their employers,” and noted that the unit was created “for those workers who far too frequently feel powerless in the justice system.”

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

II. NEW LAWS AND STANDARDS

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

Much of this new state and local lawmaking activity has occurred as a result of and in conjunction with extensive organizing on these topics by worker and community organizations. Unions have been involved in these efforts, including: the Service Employees International Union (SEIU), focused on airport and fast-food workers; the United Brotherhood of Carpenters and Joiners of America, Action Against Handy for Misclassifying Its Workers (March 17, 2021), https://www.sfdistrictattorney.org/press-release/district-attorney-boudin-and-los-angeles-district-attorney-george-gasccon-announce-worker-protection-action-against-handy-for-misclassifying-its-workers/


127. The pandemic has led to an upsurge in state and local worker protection legislation; this article contains some but not all of the most up-to-date developments in this rapidly changing situation. For information about state preemption of local labor laws, see Nestor M. Davidson, Richard Briffault, Paul A. Diller, and Olatunde Johnson, The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond, September J. ACS ISSUE BRIEFS 3 (2017); Hunter Blair et al., Preempting Progress, Economic Policy Institute (September 30, 2020), https://www.epi.org/publication/preemption-in-the-south/.
focused on stronger laws against misclassification of workers, particularly in the construction industry; and UNITE HERE, aimed at laws protecting hotel workers. In addition, nonprofit organizations have pushed for state and local laws, including national networks like the Center for Popular Democracy, Jobs with Justice, and the National Domestic Workers Alliance, as well as local organizations like Make the Road New York (as well as Make the Road Connecticut, Nevada, New Jersey, and Pennsylvania), Towards Justice (Colorado), Raise the Floor Alliance (Chicago), Workers Defense Project (Texas), Centro de Trabajadores Unidos en La Lucha (Minnesota), and Justice at Work (Massachusetts), as well as scores of others. These organizations have played a critical role in advocating for a range of new state and local laws. Many of these organizations also advocate for change on the national level and have directed significant efforts in recent years to reforms at the state and local level, in part because of the conservative composition of the U.S. Senate.

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

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

Wages: Many states and localities have passed their own minimum wages. A total of twenty-four states and forty-eight cities and counties were slated to have minimum wage increases in 2020 alone, some through legislated increases and some based on cost-of-living adjustments. Many of these increases bring the applicable minimum wage to $15 per hour or more. Notably, Florida voters overwhelmingly approved a ballot initiative to raise the state’s minimum wage to $15 by 2026.129 As described above, Colorado and Minnesota strengthened their wage theft criminal statutes in 2019; other states, like New Jersey and Virginia also created stronger anti-wage-theft provisions.130 Several states,


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

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

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

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

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

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

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

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

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

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


152. Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, OPEN MARKETS INSTITUTES, https://static1.squarespace.com/static/5e449c8c3ef6d752f3e70dc/t/5eaa04862h5216d11d04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Claus.pdf [https://perma.cc/ET4C-UNQQ].


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

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

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


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


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

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

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

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169. CAL. LAB. CODE § 2810.3.
used that law, for example, to hold Cheesecake Factory liable for violations by a company it used for janitorial services.170

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

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


Pandemic-related: In the absence of adequate federal action in 2020, state and local officials played a leading role in protecting worker safety and health during Covid-19. A number of governors have issued Executive Orders. For example, Minnesota Governor Tim Walz issued an Executive Order which among other things prohibits employer retaliation against workers for raising workplace safety concerns or using personal protective equipment (PPE), and grants workers the right “to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm.”

Illinois Governor J.B. Pritzker issued an Executive Order requiring usage of masks in public indoor spaces, and also requiring employers to provide face coverings for employees and provide adequately socially-distanced workplaces.

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

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


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


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

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

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191. For a discussion of employment at will and just cause termination, see Sharon Block & Benjamin Sachs, *Worker Power And Voice In The Pandemic Response*, HARV. L. SCH. LAB. & WORKLIFE PROGRAM 1, 11–12 (2020).
just cause termination for essential workers, among other things. Also, states and localities continue to struggle with how to regular “gig” economy work; for example, a bill establishing collective bargaining rights for drivers of Uber, Lyft, and similar platform-based companies passed out of the relevant senate committee in Massachusetts.

III. NEW ENFORCEMENT STRATEGIES

An increasing number of states and localities are adopting one or more aspects of a strategic enforcement approach in order to drive compliance with workplace laws and deter violations. This approach was implemented in the U.S. Department of Labor’s Wage and Hour Division during the Obama administration under the leadership of Wage and Hour Administrator Dr. David Weil, who has defined strategic enforcement as seeking “to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way.”

For state and local workplace enforcement agencies, this has meant: being proactive rather than waiting for complaints; focusing resources on key industries with high rates of violations; collaborating closely with community and worker organizations; use of criminal prosecutions; strategic use of publicity; using licensing to drive enforcement; and seeking up-chain joint employer liability. These approaches are a departure from the reactive model of enforcement that has often been used in the past.

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

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

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

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


conjunction with many of these organizations to meet the needs of workers with cases the AG’s office cannot address because of resource limitations.199

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

Criminal prosecution: As described in Section II(C) above, some district attorneys and other state and local prosecutors have begun using their powers to prosecute crimes against workers. In addition, some state labor departments have played a role in catalyzing or collaborating in this work. In 2014, the California Labor Commissioner’s Office created a “Wage Theft is a Crime” campaign,201 with campaign materials including posters and radio spots.202 Then-Labor Commissioner (now Secretary for the California Labor and Workforce Development Agency) Julie Su also started a project of collaborating with district attorneys throughout the state, training state labor investigators on how to identify and prepare potential criminal cases, while also offering training to district attorney offices203 about how to bring wage theft, workers’ compensation fraud, and related cases.204 In addition, the New York State Department of Labor conducts outreach, collaborates with, and routinely prepares and refers cases to district attorneys throughout the states.205

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

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


202. See id.


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

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

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

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


209. See Terri Gerstein, supra note 21.


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

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

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

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

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


\textsuperscript{215} \textit{Food Permit Enforcement Program}, CTY. OF SANTA CLARA OFF. OF LAB. STANDARDS ENF’T (May 15, 2020), https://www.sccgov.org/sites/olse/enforcement/Pages/Food-Permit-Enforcement-Program.aspx [https://perma.cc/U8G5-S4NP].

on overtime violations, following a broader labor department investigation in that industry.217

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

CONCLUSION

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

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

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


218. Caron, supra note 170.


rest of the country.”

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

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

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225. During this moment of burgeoning action on workers’ rights, as states and localities act as laboratories of experimentation, there is a key role for academics: conducting a rigorous analysis of the impact of these policies. There are natural experiments happening in numerous states and cities nationwide, ripe for systematic analysis. It would be useful to have an informed understanding of which interventions have actually had their intended impact. This analysis can help inform what policies should be replicated elsewhere, how they might be altered to be more effective, and in what form they could be adopted on the national level.
and identify and address problems specific to their workforce and industries; they can also incorporate enforcement into other state and local functions, like granting of licenses (or Santa Clara County’s dining out app). States and localities are also often nimbler than the federal government, with the ability to roll out new policies more quickly given the smaller size of government and the smaller regulated community at play.

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


230. Flanagan & Gerstein, supra note 189, at 457.
In addition, the composition of the federal courts after confirmation of over 225 Trump-appointed federal judges means that state courts may become a far more promising venue for worker claims in many jurisdictions.

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

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


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