

# **SB838 Support.pdf**

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Position: FAV

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS - LOCAL UNION No. 24

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Baltimore Port Council

Baltimore Metro Council — AFL-CIO

Central MD Labor Council — AFL-CIO

Del-Mar-Va Labor Council — AFL-CIO

Maryland State - D.C. — AFL-CIO

National Safety Council



AFL-CIO-CLC

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## Written Testimony of

**Rico Albacarys, Assistant Business Agent, IBEW LOCAL 24**

**Before the Senate Finance Committee On**

**SB 838 Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals**

### Support

March 1, 2023

Madame Chair Griffith and Committee Members,

I am writing to express my **support** for **SB 838**, which seeks to address the extensive underground economy in the construction industry. This issue involves misclassification of workers as independent contractors or off-the-books payments, resulting in the denial of necessary tax revenues to the public and wage and hour protections to workers.

The prevalence of this issue has grown from single-family residential construction and renovation to the largest commercial construction sites, creating a level of unfair competition for responsible businesses that classify their workforce as employees. This leads to lost work opportunities for law-abiding firms or the pressure to consider evading the law to compete on an uneven playing field.

Furthermore, taxpayers are negatively impacted by having to subsidize those who cheat the system through lost revenues. It is time to act to combat this underground economy and ensure that all workers are properly classified and paid, as well as to promote fair competition in the industry.

I ask you vote **favorably** on **SB 838** addressing this issue, and protecting both workers and taxpayers.

Sincerely,

Rico Albacarys

Assistant Business Agent IBEW Local 24

# **Darwin Bonilla- Support - SB 838.pdf**

Uploaded by: Darwin Bonilla

Position: FAV



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## Senate Finance Committee

**To:** Senator Melony Griffith, Chair; Senator Kathy Klausmeier, Vice-Chair; and Members of the Committee.

**From:** Darwin Bonilla, Executive Director, Mid-Atlantic Pipe Trades Association.

On behalf of our 10,000+ United Association of Plumbers, Steamfitters, Sprinkler fitter members across Maryland, and the thousands of unrepresented workers I ask you to **SUPPORT SB 838**.

Many workers, especially in the construction industry in Maryland are victims of Wage theft and Misclassification. Company owners have said it to my face that this is the way of doing business in this area! Is that something your members of this committee agree with????

By misclassifying workers, these contractors are allowed to under bid honest Union and Nonunion contractors. When workers are misclassified as independent contractors, they don't receive any benefits and protections, most of them pay taxes, contrary to the companies who pay no federal, state, or local taxes, workers comp, or unemployment insurance and cheat the state and federal government.

When we expose or workers act on their behalf and companies get caught misclassifying workers, they face little or no penalties. Many of them even budget to pay the fines and back wages saying, "it's the cost of doing business."

SB 838 addresses this issue by making Wage Theft a misdemeanor offense. The bill also mandates that the Department of Labor refers cases to the Comptroller's office so they can go after the lost taxes, workers comp, and unemployment.

Workers should worry about getting the work done, not on how to end misclassification!

For these reasons, I ask that you support **SB 838**.

Sincerely,

Darwin Bonilla  
Executive Director  
Mid-Atlantic Pipe Trades Association

**DOC030123.pdf**

Uploaded by: Donna Edwards

Position: FAV



# INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO DISTRICT COUNCIL NO. 51

March 1, 2023

District Council No. 51  
4700 Boston Way  
Lanham, MD 20706  
(301) 918-0182  
(301) 918-3177 Fax

Maryland State Senate Finance Committee:  
Melony Griffith, Chair  
Katherine Klausmeier, Vice Chair  
State Senate Building,  
11 Bladen St., Annapolis, MD 21401

## ONE VOICE

Dear Honorable Members of the Senate Finance Committee:

Representing:  
Protective and Decorative  
Coatings Applicators  
Painters  
Decorators  
Wall Coverers  
Drywall Finishers  
Glaziers  
Architectural Metal Workers  
Glass Workers  
Civil Service Workers  
Shipyard Workers  
Maintenance Workers  
Metal Polishers  
Metalizers  
Bridge Painters  
Riggers  
Tank Painters  
Marine Painters  
Containment Workers  
Lead Abatement Workers  
Sand Blasters  
Water Blasters  
Sign Painters  
Paint Makers

I am Roxana Mejia Director of Government and Community Affairs at the International Union of Painters and Allied Trades District Council 51 covering the Maryland, Virginia, and District of Columbia jurisdictions. I represent over 1,500 members in the finishing trades of the construction industry.

I want to thank the Committee Members for taking the time to read our SUPPORT to Senate Bill 0838 - Workplace Fraud and Prevailing Wage - Violations -Penalties and Referrals

I write to you today to urge you to vote in support of SB0838. The construction industry features an extensive underground sector in which workers are misclassified as independent contractors or paid in cash off the books, denying the public necessary tax revenues and denying workers the protection of wage and hour laws. This “underground economy” has long been the case in single-family residential construction and renovation, today this form of workplace fraud has penetrated the largest commercial construction sites. Employers who force their employees into this underground economy, either by misclassifying them as independent contractors or by paying them off the books, routinely violate wage and overtime laws. Responsible businesses that classify their workforce as employees operate at a competitive disadvantage with employers that illegally treat their workers as independent contractors. The cost savings associated with misclassification are sufficiently substantial that law-abiding firms in highly competitive industries either lose work opportunities or feel the pressure to consider evading the law in order to compete on what is no longer a level playing field. All taxpayers are negatively impacted because their payments make up for the lost revenues and effectively subsidize those who cheat the system, the county the tax payers.

## ONE AGENDA

Please vote favorable on SB0838.

Affiliated Local Unions  
Local Union 1  
Local Union 368  
Local Union 474  
Local Union 890  
Local Union 963  
Local Union 1100  
Local Union 1846  
Local Union 1937  
Local Union 1997

Thank you

Over 100 Years Serving  
Maryland  
Virginia  
Washington, DC

Roxana Mejia  
Director of Government & Community Affairs  
IUPAT DC 51

# **SB 838 - Workplace Fraud and Prevailing Wage - Vio**

Uploaded by: Donna Edwards

Position: FAV



# MARYLAND STATE & D.C. AFL-CIO

AFFILIATED WITH NATIONAL AFL-CIO

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*President*

**Donna S. Edwards**

*Secretary-Treasurer*

**Gerald W. Jackson**

## **SB 838 - Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals Senate Finance Committee March 2, 2023**

### **SUPPORT**

**Donna S. Edwards  
President**

**Maryland State and DC AFL-CIO**

Madame Chair and members of the Committee, thank you for the opportunity to submit testimony in support of SB 838. My name is Donna S. Edwards, and I am the President of the Maryland State and District of Columbia AFL-CIO. On behalf of Maryland's 300,000 union members, I offer the following comments.

Worker misclassification is a crime. It is fraud. By illegally classifying workers as independent contractors, employers are able to cheat the federal, state, and local governments of taxes and revenues. Wage theft is the largest form of theft in this country.<sup>1</sup> The Northwestern Institute for Policy Research found that stricter state laws lead to less wage theft, even when controlling for demographic, economic, and political factors.<sup>2</sup> The same study found that victims of wage theft were disproportionately, "low-wage workers, especially women, minorities, non-U.S. citizens, and nonunion workers." One study found that Minnesota, a state with a comparable population size, lost, "\$136 million in state tax revenues due to construction payroll fraud— including \$65 million in income taxes, \$13 million in unemployment insurance contributions, and \$58 million in workers' compensation premiums."<sup>3</sup>

SB 838 imposes real penalties by labeling workplace fraud as a misdemeanor, subject to \$5,000 and potentially 60 days imprisonment for each violation. By requiring the Commissioner of Labor and Industry to refer clear and convincing evidence of workplace fraud violations to the Comptroller, the state can seek to reclaim the money that it is owed.

Wage theft and misclassification robs our state unemployment and workers compensation systems. Current state penalties are not serious enough to dissuade some contractors from making wage theft and misclassification their entire business model. With only 15 wage and hour enforcement officials

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<sup>1</sup> Brady Meixell and Ross Eisenbrey. "Wage Theft is a Much Bigger Problem Than Other Forms of Theft—But Workers Remain Mostly Unprotected." Economic Policy Institute.

<sup>2</sup> Daniel Galvin, "Policies to Protect Workers from Wage Theft." Northwestern Institute for Policy Research. Policy Research Brief: July 2017.

<sup>3</sup> Nathaniel Goodell and Frank Manzo IV. "The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois." Midwest Economic Policy Institute. January 2021.



for the entire state, unscrupulous companies can price in the cost and risk of current penalties if they are caught and still continue with their model.<sup>4</sup> This is workplace fraud and the state must intervene to allow contractors that play by the rules to survive.

Failing to treat wage theft for the crime that it is, with stiff financial penalties and even threats of imprisonment, continues to reward unscrupulous businesses at the cost of good businesses and workers.

We urge a favorable report for SB 838.

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<sup>4</sup> CBS News, Maryland workers say they're owed millions in unpaid overtime and benefits as WJZ investigates wage theft." January 25, 2023.

**SB 838.pdf**

Uploaded by: Gerald Jackson

Position: FAV



## PLUMBERS AND STEAMFITTERS

### UA LOCAL UNION 486

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Baltimore, Maryland 21236  
Phone: 410-866-4380  
Fax: 410-933-3515  
www.UALocal486.com  
Founded 1889

### Support SB 838

**Chair: Sen. Griffith**

**Vice Chair: Sen. Klausmeier**

**Committee Members:**

**Pasquale D. Petrovia**  
*Business Manager*

**Gerald W. Jackson**  
*Assistant Business Manager*

**Gary G. Glab**  
*Financial Secretary/Treasurer*

**C. Ryan Ambrose**  
*Business Agent*

**Harry M. Schleicher Jr.**  
*Business Agent*

**Stephen M. Nitsch**  
*Business Agent*

**Todd E. Eckley**  
*Recruiter*

Thank you for the opportunity to submit testimony in support of **Senate Bill 838**.  
**I would personally like to thank the sponsors of this bill, which if found favorable is a great step in protecting Maryland workers and the State revenues that are loss because of Wage Theft and misclassification.**

My name is Gerald Jackson and I am the Secretary Treasurer of the Maryland State & D.C. AFL-CIO. I'm also the Assistant Business Manager for the Plumbers & Steamfitters Local Union #486 in Baltimore. On behalf of all workers, Union and non-union I ask this committee to support **SB 838**.

As a Steamfitter who spent the first 31 years of my career on construction sites, I have seen firsthand what happens when workers are exploited by unscrupulous employers. Employee misclassification is a problem because when workers are misclassified as independent contractors by their employers, it not only diminishes their access to labor protections, but it also has real consequences on the State's economy and tax revenues. In 2018 a New Jersey Department of Labor audit discovered more than 12,000 cases in which workers were being misclassified, which resulted in more than \$460 million in underreported wages and \$14 million in lost state unemployment and temporary disability contributions. This widespread practice not only cheats workers out of their entitled wages, but also cheats taxpayers and the government out of dollars that would fund worker's comp and UI.

Wage Theft and Misclassification is even more egregious on Prevailing Wage Jobs where taxpayer dollars are funding these Projects. **SB 838** will put all employers on notice that Maryland protects its' workers and taxpayers alike. If passed, this bill mandates that the DOL refers cases to the Comptroller's Office so that they can recover loss taxes, worker's comp and unemployment Insurance.

Before all else we must protect the rights of the men and women who are working hard each and every day to earn decent, honest and fair living. We cannot build a stronger and fairer economy without strong workplace protections that ensure parity for employees union and nonunion.

On behalf of Maryland Workers, Taxpayers and Businesses, I'm asking for a favorable opinion for **SB 838**.

Sincerely,

  
Gerald W. Jackson Sr.

Sec-Treasurer MDDC AFL-CIO/ Assistant Business Manager Plumbers & Steamfitters LU #486

# **Jason Ascher - Support - SB 838 - Workplace Fraud**

Uploaded by: Jason Ascher

Position: FAV



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## Senate Finance Committee

**To:** Senator Melony Griffith, Chair; Senator Kathy Klausmeier, Vice-Chair; and Members of the Committee.  
**From:** Jason Ascher, Political Director, Mid-Atlantic Pipe Trades Association.

On behalf of the Mid-Atlantic Pipe Trades Association and our 10,000+ United Association of Plumbers and Steamfitter members across Maryland, I ask you to **SUPPORT SB 838**.

Wage theft and misclassification are one of the biggest problems faced by legitimate contractors in the construction industry. Unfortunately, it has become a way of doing business for some contractors. It allows them to beat out honest contractors and increase their profits by bidding 30% less and winning work. These “bad actors” will misclassify workers, paying them as independent contractors when they should be paid as employees so they can lower their labor costs. In doing this, they pay no federal, state, or local taxes, workers comp, or unemployment insurance. Doing this cheats the taxpayers and their workers out of hard-earned money. These contractors face little or no penalty if they get caught. It gets so bad that they can budget to pay the fines and back wages treating it as a cost of doing business. This is not something that happens accidentally.

SB 838 moves Maryland in the right direction by making Wage Theft a misdemeanor. This will allow stiffer penalties, such as \$5000 per worker or jail time if the violation is horrendous. The bill also mandates that the Department of Labor refer cases to the Comptroller's office so she can go after the lost taxes, workers comp, and unemployment. When the “bad actors” start facing real penalties that hurt them financially, Wage Theft and Misclassification will begin to disappear.

For these reasons, I ask that you support **SB 838**.

Sincerely,

Jason Ascher  
Political Director  
Mid-Atlantic Pipe Trades Association

MID-ATLANTIC PIPE TRADES ASSOCIATION



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**Phone: 410-290-3890  
[www.midatlanticpipetrades.o](http://www.midatlanticpipetrades.o)**

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**Plumbers and Gasfitter Local 5** – Camp Springs, MD  
**Plumbers and Steamfitters Local 10** – Richmond, VA/Roanoke, VA  
**Plumbers and Pipefitters Local 110** – Norfolk, VA  
**Road Sprinkler Fitters Local 669** – Columbia, MD

**Plumbers and Steamfitters Local 486** – Baltimore, MD  
**Plumbers and Steamfitters Local 489** – Cumberland, MD  
**Steamfitters Local 602** – Capitol Heights, MD

# **BDCBT SB 0838 Workplace Fraud and Prevailing Wage**

Uploaded by: Jeffry Guido

Position: FAV



**Maryland Senate - Finance Committee**

**Chair: Melony Griffith**

**Vice Chair: Katherine Klausmeier**

**Senate Bill 0838 - Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals**

**Position: Support**

The Baltimore DC Metro Building Trades Council supports SB 0838. The construction industry features an extensive underground sector in which workers are misclassified as independent contractors or paid in cash off the books, denying the public necessary tax revenues and denying workers the protection of wage and hour laws. This “underground economy” has long been the case in single-family residential construction and renovation, today this form of workplace fraud has penetrated the largest commercial construction sites. Employers who force their employees into this underground economy, either by misclassifying them as independent contractors or by paying them off the books, routinely violate wage and overtime laws. Responsible businesses that classify their workforce as employees operate at a competitive disadvantage with employers that illegally treat their workers as independent contractors. The cost savings associated with misclassification are sufficiently substantial that law-abiding firms in highly competitive industries either lose work opportunities or feel the pressure to consider evading the law in order to compete on what is no longer a level playing field. When you have to "cheat to compete" it becomes "how low can you go". All taxpayers are negatively impacted because their payments make up for the lost revenues and effectively subsidize those who cheat the system.

We urge the Committee for a favorable report. Thank you.

Sincerely,

Jeffry Guido

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# **Melvin Crespo SB383 Testimony .pdf**

Uploaded by: Melvin Crespo

Position: FAV

Madam President and members of the committee.

My name is Melvin Crespo, I am a resident of Maryland, and I was a victim of wage theft and misclassification. In 2020 I started working on a school construction project in Charles County. I have 8 years of experience as a plumber and was working for a subcontractor of a contractor who paid me cash.

One day, some organizers visited the construction site and explained to me and other workers that this construction site was called a prevailing wage job and showed me that I was earning less than half of what I should according to what the law stated. They also explained to me that I was not on certified payrolls, and we realized that no one on these payrolls was working in that place.

I decided to file a lawsuit against my employer, the contractor company, and the general contractor. While this was happening, my family and I were victims of threats if I did not withdraw the lawsuit. In the end I received \$80,000 in late payments, but this was because I decided to take actions.

Contractors like the two subcontractors I worked for should be held liable for wage theft and misclassification without me or another worker having to file a lawsuit. I worked with 12 other people who did not file a lawsuit and will not receive their lost wages. The contractors took advantage of all of us. While I found the courage to speak out, my co-workers didn't because they fear threats and retaliation, including the possibility of being blacklisted in future jobs.

SB838 will give more security to workers like me and help end misclassification in the state of Maryland, which is why I ask you to vote in favor of this bill.

Thank you.

**Señora presidenta y miembros de la comisión.**

**Mi nombre es Melvin Crespo, soy residente de Maryland, y fui víctima de robo de salarios y clasificación errónea. En 2020 comencé a trabajar en un proyecto de construcción de una escuela en el condado de Charles. Tengo 8 años de experiencia como plomero y estaba trabajando para un subcontratista de un contratista que me pagaba en efectivo.**

**Un día, algunos organizadores visitaron el sitio de construcción y me explicaron a mí y a otros trabajadores que este sitio de construcción se llamaba un trabajo con salario prevaleciente y me mostraron que estaba ganando menos de la mitad de lo que debería de acuerdo con lo que establecía la ley. También me explicaron que yo no estaba en las nóminas de pago certificadas, y nos dimos cuenta de que nadie en estas nóminas estaba trabajando en ese lugar.**

**Decidí presentar una demanda contra mi empleador, la compañía contratista y el contratista general. Mientras esto sucedía, mi familia y yo fuimos víctimas de amenazas si no retiraba la demanda. Al final yo recibí \$ 80,000 en pagos atrasados, pero esto fue porque yo decidí tomar acción.**

**Los contratistas como los dos subcontratistas para los que trabajé deben ser considerados responsables por robo de salarios y clasificación errónea sin que yo u otro trabajador tenga que presentar una demanda. Trabajé con otras 12 personas que no presentaron una demanda y no recibirán sus salarios perdidos. Los contratistas se aprovechaban de todos nosotros. Si bien encontré el coraje para hablar, mis compañeros de trabajo no lo hicieron porque temen recibir amenazas y represalias, incluida la posibilidad de ser incluidos en la lista negra en futuros trabajos.**

**SB838 dará más seguridad a los trabajadores como yo y ayudará terminar la clasificación errónea en el estado de Maryland, es por eso por lo que les pido que voten a favor de esta propuesta de ley.**

**Gracias.**

**EASRCC Carpenters Testimony SB838 FAV.pdf**

Uploaded by: Roger Manno

Position: FAV



**Eastern Atlantic States**  
REGIONAL COUNCIL OF CARPENTERS

8500 Pennsylvania Avenue, Upper Marlboro, MD 20772 | Phone: 301-735-6660 | EASCARPENTERS.ORG

TESTIMONY

SB 838 / HB 1261 - WORKPLACE FRAUD AND PREVAILING WAGE - VIOLATIONS -  
PENALTIES AND REFERRALS

FAVORABLE

Dear Chair Griffith and honorable members of the Senate Finance Committee:

On behalf of the Eastern Atlantic States Council of Carpenters (EASRCC), representing 42,000 members throughout the region, I write today to express our strongest support for SB 838 - Workplace Fraud And Prevailing Wage - Violations - Penalties And Referrals, and to ask for a favorable report.

This legislation is extremely consequential, in that it addresses two of the most egregious practices of social, racial and economic injustice: Wage Theft and Misclassification. Within these two practices exist a range of other injustices that harm workers, government, and the general public, by draining public revenues that serve public social services, health care and education: Tax Fraud, Payroll Fraud, Insurance Fraud, and Workers Compensation Fraud.

When employers target defenseless workers through Misclassification and wage Theft, particularly large numbers of workers of color with certain sectors of the construction industry, it stifles the very progress and upward mobility of hard working Maryland families. In addition, these practices allow for unscrupulous employers to gain an unfair bidding advantage of up to 30 percent by knowingly misrepresenting the classification of workers as independent contractors, hiring off the books, and utilizing exploitative human trafficking labor brokers. In doing so, these employers engage in wholesale Tax Fraud, Payroll Fraud, Overtime Fraud, Insurance Fraud, and Workers Compensation Fraud.

That's why the Eastern Atlantic States Council of Carpenters (EASRCC) strongly supports this legislation. By elevating Misclassification from a mere civil violation to a misdemeanor criminal violation, Maryland will begin to address the "safe haven" that Maryland has become for bad actors from other states. In addition, by requiring referrals from the Maryland Department of Labor to the Comptroller of Maryland, this legislation enables prosecution of tax violations, which are already a crime in the state, by effectively cross referencing the Labor and Employment Article of the statute (which addresses wage violations as civil violations) with the Tax General Article of the statute (which currently addresses tax and other related frauds as criminal violations).

For these reasons, we urge a favorable report on SB838.

Sincerely,

Mungu Sanchez

# **EPI Report Wage Theft Enforcement (2).pdf**

Uploaded by: Roger Manno

Position: FAV

# **How district attorneys and state attorneys general are fighting workplace abuses**

An introduction to criminal prosecutions of wage theft and other employer crimes against workers

**Report** • By Terri Gerstein • May 17, 2021

*This is the second report in EPI's "New Enforcers" series, which highlights new players at the state and local level involved in enforcing workplace laws and protecting workers' rights.*

## Summary

Historically wage theft and other crimes against workers have not been prosecuted. Rather, civil enforcement by labor departments, along with private class-action lawsuits, have more commonly been the methods used to enforce crucial workplace protections like the right to be paid wages owed. However, responding to widespread, entrenched, and often egregious violations of workplace laws, an increasing number of district attorneys (DAs) and state attorneys general (AGs) have been bringing criminal prosecutions against law-breaking employers. This development is particularly important in light of limits in worker protection laws, underfunding of labor enforcement agencies that enforce those laws, and employers' increasing use of forced arbitration clauses—which deprive workers of their right to take their employer to court, all of which have narrowed the options for workers whose rights have been violated.

■ **State and local prosecutors have been bringing charges in a range of cases:**

- wage theft
- misclassification (of workers as independent contractors) and payroll fraud
- failure to pay unemployment insurance taxes
- workers' compensation insurance fraud
- labor trafficking
- egregious workplace safety and health violation
- workplace sexual assault
- witness tampering and retaliation

■ **Criminal prosecution of violations of workers' rights is appropriate and helps strengthen worker protection laws by establishing meaningful consequences for lawbreaking employers.**

Egregious violations of workers' rights harm workers and communities, make it difficult for honest employers to compete, and deprive public coffers of

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money needed for critical safety net programs. Prosecutors engaged in workers' rights issues should continue to build on this work, and more offices should join the effort.

- **State legislatures should strengthen statutes protecting workers, and ideally create funding mechanisms for pursuing criminal cases against lawbreakers.**
- **Worker organizations and advocates should build relationships with DAs and the AG in their states to draw these untapped resources into the effort to protect workers' rights.**

## **Introduction: Prosecutors are increasingly pursuing employer crimes against workers**

Increasingly, district attorneys (DAs), state attorneys general (AGs), and other criminal prosecutors<sup>1</sup> are bringing charges against employers for wage theft,<sup>2</sup> misclassification and payroll fraud,<sup>3</sup> workplace safety hazards, sexual assault, and human trafficking, among other crimes against workers. This development represents a shift, because historically, crimes against workers have not generally been prosecuted. More often, the criminal justice system has intervened to protect employers; for example, a worker stealing from an employer would likely face charges, while an employer committing wage theft likely would not. Yet state and local prosecutors have unique tools and an important role to play in protecting workers. Many are taking on this function as an enforcement priority, and more should get involved in this area.

The involvement of prosecutors is timely and has the potential for significant impact. As explained in this report, violations of workplace laws are widespread; state and federal labor agencies face serious limitations from a lack of resources, limited authority, and more; and private lawyers are often blocked from bringing cases because workers have been forced to sign arbitration provisions waiving their right to sue in court.

To familiarize prosecutors and worker advocates with this important work, this report provides:

- background on the increased involvement of criminal prosecutors in workers' rights enforcement, the context in which such activity occurs, and a discussion of the rationale for such prosecutions
- descriptions and examples of the types of cases that have been brought

- discussions of several considerations related to such cases, including applicable statutes, sources of case referrals, criminal justice concerns, and funding sources
- appendices that include sample pleadings from recent cases, compilations of case reports, more detailed information about two state funding mechanisms, and tips for prosecutors and worker advocates on getting started in this work

## **Background: The growing involvement of prosecutors in addressing employer misconduct emerges in the context of widespread violations of workers' rights and fits squarely within a prosecutor's function**

Increased involvement of prosecutors in workers' rights violations has taken form in several ways. Offices have brought various types of cases. Some offices have created dedicated units or subunits to do this work, while others have handled individual cases as they have arisen. Increased prosecutor activity has emerged within a landscape in which violations of workers' rights are widespread and avenues for redress are inadequate. In this context, there are numerous reasons for prosecutors to actively pursue employer crimes against workers.

## **Criminal prosecutors across the country are addressing a wide range of employer crimes against workers**

A set of federal and state laws extend to most employees in the United States a bundle of protections covering wages paid and hours worked (wage and hour laws), safety hazards in the workplace (safety and health laws), economic security in the event of injury or unemployment (workers' compensation and unemployment insurance laws), discrimination and harassment (equal opportunity laws), and other workplace conditions. In recent years, a powerful new enforcer has entered the picture in numerous jurisdictions: District attorneys and other prosecutors have brought cases involving employer-committed crimes against workers<sup>4</sup>—crimes including wage theft; labor trafficking; creating conditions causing predictable, preventable workplace fatalities and serious injuries; payroll fraud, including failure to pay unemployment insurance (UI) taxes and/or to procure workers' compensation insurance, and/or misclassification of workers; prevailing wage violations;<sup>5</sup> retaliation and witness intimidation; and workplace sexual assault (CPR n.d.; HPM Digital Team 2018; Graves 2020; Kashinsky 2019; Wash. AG 2018; Reyes 2021; Vosseller 2019;

Mass. AG 2019; Byars 2017).

These cases have been brought in a range of jurisdictions, including in California, Colorado, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and Washington (Intarasuwan 2018; Pace 2019a, 2019b; Byars 2017; Kashinsky 2019; Byrne 2019; Mass AG 2019; AP 2019; Graves 2020; Christian 2019; N.J. AG 2019; Byfield 2019; Warsmith 2019; Pa. AG 2019; R.I. AG 2019; R.I. AG 2020; HPM Digital Team 2018; Haynes 2019; Wash. AG 2018).

Several district attorneys have created dedicated units or subunits specifically for this function, including San Diego DA Summer Stephan in 2021; Queens (N.Y.) DA Melinda Katz and San Francisco DA Chesa Boudin in 2020; Philadelphia DA Larry Krasner in 2019; and more. (Christian 2020; S.D. DA 2021; S.F. DA 2020; Reyes 2019).

In Nassau County (N.Y.), the Labor Unit is located within the Rackets and Enterprise Crime Bureau (Nassau DA n.d.) and in Brooklyn (N.Y.) the Labor Fraud Unit is located within the Frauds Bureau. (Brooklyn DA n.d.). In the New York State AG's office, the Labor Bureau has a dedicated criminal section (N.Y. AG n.d.). Staff in these units include lawyers with labor law and/or criminal prosecution experience; some also have access to investigators and forensic auditors.

By creating a dedicated unit, DAs and AGs enable assigned lawyers to develop expertise in the subject matter and handling of these cases, which require a different approach than many other criminal cases. These cases often entail building relationships with worker organizations, conducting extensive interviews with workers who may be reluctant witnesses for a variety of reasons (including fear of retaliation or potential immigration consequences for themselves or family members), and thoroughly reviewing and auditing payroll and other employer records. Creation of a dedicated unit also allows for lawyers to build relationships with other government agencies (for example, state and local labor departments) and stakeholders (such as unions and other worker organizations) that are potential sources of cases. Finally, lawyers in a dedicated unit are able to develop legal expertise in the overlap between labor and criminal law, as well as knowledge regarding common violations and problematic industries. A dedicated unit also institutionalizes the work within an office, thus promoting the likely longevity of a DA's office involvement in such prosecutions (Gerstein 2020). Professor Cesar Rosado Marzán examined the topic and specifically recommended specialized prosecutors for this work, given “the vulnerable nature of the workers who seek their aid” and potential immigration and other consequences that could result from nonspecialized prosecutors handling such cases (Rosado Marzán 2020).

Even without a dedicated unit, prosecutions of employer crimes can be added to existing divisions or bureaus, such as those handling economic or financial crimes. In Boulder, Colorado, for example, wage theft cases are handled within the Community Protection Division, which handles the office's economic crimes cases. Indeed, offices without a dedicated unit have played a leadership role on this topic within their states. Within the last few years, Boulder County DA Michael Dougherty, along with the Colorado District Attorneys' Council, co-hosted a training on prosecution of wage theft and human

trafficking;<sup>6</sup> he also played an instrumental role in promoting stronger anti-wage theft legislation in his state (Boyd 2019).

Similarly, Orange County (New York) DA David Hoovler announced a new focus on labor crimes by his office, and held a training for fellow prosecutors on the topic (Yakin 2019; Mid Hudson News 2020). The Alameda (California) District Attorney's Office started a labor trafficking task force in 2015 (H.E.A.T. Watch n.d.). The Westchester (New York) district attorney's office has a multilingual hotline for the public to report a number of crimes typically affecting immigrants, including wage theft (Westchester DA 2021). The Manhattan District Attorney's Office in 2017 used criminal forfeiture funds obtained through settlements with International banks to make grants to several organizations serving underserved communities, including over \$1.5 million to the New York Committee for Occupational Safety and Health to provide outreach and training regarding wage theft, health and safety, and more (NY Cty. DA 2017).

In several jurisdictions, state attorneys general have used their criminal prosecution authority to pursue employers for wage theft and other crimes against workers (Gerstein 2020). In Rhode Island, for example, where the attorney general is the sole criminal prosecutor for the state, AG Peter Neronha proposed stronger anti-wage-theft and misclassification legislation during the 2021 legislative session; his office brought three wage theft criminal prosecutions in 2020, apparently the first ever brought within the state (R.I. AG 2021).

## The increased involvement occurs in the context of high rates of violations of workplace laws and inadequate enforcement resources

Although violations of workplace law are widespread, resources to address such violations are grossly insufficient. Familiarity with this landscape—extensive, largely civil workplace violations with inadequate deterrence—helps one understand the scope of the enforcement chasm. The statistics below demonstrate the overall context in which employer crimes occur. Simply put, routine and widespread violations, inadequate enforcement resources, low union density, and other factors allow too many exploitative employers to operate with impunity. The statistics below do not suggest that all cases should be handled criminally, of course; criminal prosecutions should be reserved for the most serious violations and, of course, brought in situations in which intent and acts can be proven beyond a reasonable doubt.

- **Wage theft.** A 2017 study on minimum wage violations in the 10 most populous state found that each year, 2.4 million workers, or 17% of the low-wage workforce in these states, reported being paid less than the applicable minimum wage, losing an average of \$3,300 per year (nearly a quarter of their earned wages) (Cooper and Kroeger 2017). State-specific studies of wage theft in Colorado, Iowa, New Mexico, New York, and Ohio have found similarly high rates of violations while examining a broader range of workplace infractions (Gordon et al. 2012; Schrank and Garrick 2013; Shields

2019; Sen 2016; Stiffler 2019). According to a 2020 Washington Center for Equitable Growth study, Black, Latinx, noncitizen, and women workers experience higher rates of wage theft (Fine et al. 2020).

- **Workplace safety and health.** The Occupational Safety and Health Act (OSH Act) was enacted in 1970 to ensure that workplaces are free of hazards that kill or injure workers. Even before the COVID-19 pandemic, workplace fatalities, many of them preventable, were common. In 2019, 5,333 workers were killed on the job, and hundreds of thousands experienced nonfatal injuries and illness (BLS-IFF 2019a and 2019b). A 2017 study by the National Employment Law Project reviewing U.S. Occupational Safety and Health Administration (OSHA) severe injury data from 29 states reported that 27 workers per day suffer amputation or hospitalization (Berkowitz 2017). As with the other workplace harms discussed in this report, there are racial disparities: the overall fatality rate of Black and Latino workers is higher than that of white workers (AFL-CIO 2020). Occupational safety and health risks and violations are even more stark in light of widespread workplace outbreaks during COVID-19.
- **Misclassification and payroll fraud.** A 2019 study of Washington state found that the proportion of employers that misclassify their workers as independent contractors (not including those who paid “off the books”) averaged 16% from 2013 to 2017 (Xu and Erlich 2019). An earlier analysis of state-level research found that between 10% and 20% of employers have misclassified at least one worker as an independent contractor, noting that employers who misclassify their workers avoid paying payroll taxes and workers’ compensation insurance, and often fail to comply with minimum wage and overtime pay requirements in the Fair Labor Standards Act (FLSA) (Carré 2015). Misclassification is costly for workers, who lose significant money each year because of it (Shierholz 2020). Misclassification also costs the public. The Washington state study conservatively estimated that from 2013 to 2017, the state annually lost over \$30 million in unemployment insurance taxes and more than \$53 million in unpaid workers’ compensation premiums; losses are even greater when federal taxes are considered (Xu and Erlich 2019). Misclassification is a particularly acute problem in certain industries. A recent study found that in an average month of 2017, between 12.4% and 20.5% of the construction industry workforce nationwide was either misclassified as independent contractors or working “off the books,” and a report issued by the District of Columbia Attorney General’s Office found that construction contractors save between 17% and 40% by misclassifying workers (Ormiston, Belman, and Erlich 2020; D.C. AG 2019). Another study found extensive wage theft and misclassification in the construction industry in several midwestern states (Goodell and Manzo 2021).
- **Workplace harassment, including sexual harassment.** Data suggest that workplace harassment is extensive, despite federal, state, and often local equal employment opportunity (EEO) laws prohibiting employment discrimination (including harassment) on the basis of race, color, religion, sex, national origin, disability, age, and more. A 2016 report by the U.S. Equal Employment Opportunity Commission (EEOC)—the agency that enforces these laws at the federal level—noted that one-third of the

approximately 90,000 charges the agency received in the prior year included allegations of workplace harassment. The report also suggested that harassment statistics of worker complaints likely seriously understate the extent of the problem, because “the least common response to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint” (Feldblum and Lipnic 2016). A number of surveys and reports, usually based in specific industries, have found extensive incidence of sexual harassment (ROC United and Forward Together 2014; Covert 2020; NASEM 2020; Chatterjee 2018). However, the U.S. Government Accountability Office in 2020 noted the scarcity of data on this issue and recommended further surveys (U.S. GAO 2020).

- **Labor trafficking.** Labor trafficking occurs when a person is compelled or coerced to provide labor or services, and often afflicts people who are vulnerable because of life circumstances and economic hardship (U.S. DOJ n.d.). The National Human Trafficking Hotline identified nearly 5,000 labor trafficking cases in 2019 based on its complaint line alone (NHTH 2019). Despite its frequency and severity, labor trafficking often goes undetected and is rarely prosecuted (Smith 2021).
- **Employer retaliation against workers for exercising their rights.** Although retaliation is illegal, employers commonly retaliate against workers for exercising their workplace rights. Illegal retaliation has been identified in a wide range of circumstances, including when workers report or file lawsuits challenging labor violations, and when workers join together to organize a union or engage in collective action (a right guaranteed under the National Labor Relations Act or NLRA). One study revealed that employers were charged with illegally firing workers or other retaliatory conduct (discipline, threats) in one-fifth to nearly one-third of union elections (McNicholas et al. 2019). A seminal 2009 study of working conditions in three major cities found that of workers who had complained to their employers about violations or tried to form a union in the prior year, 43% experienced retaliation (Bernhardt, Milkman, and Theodore 2009). In workplaces or communities with undocumented workers, a common form of retaliation for asserting workplace rights involves threats or acts related to immigration status. In many cases, laws are insufficient to adequately address or deter forms of employer retaliation (Hulzar 2019; Rhinehart and McNicholas 2021).

Several factors play a role in enabling these widespread violations:

- **Federal and state enforcement resources are inadequate.** The shortcomings in enforcement occur at all levels, starting at the top. Federal resources for the enforcement of worker protections have declined while the U.S. workforce has grown. The U.S. Department of Labor’s Wage and Hour Division (WHD) enforces federal wage and hour laws. In 1978, WHD had one investigator for approximately every 69,000 workers; by 2018, that figure was one investigator per 175,000 workers. In many states, the federal WHD may be the primary or only government agency enforcing wage and hour laws (Costa, Martin, and Rutledge 2020). Similarly, in 1978, OSHA—the federal agency charged with protecting and enforcing workers’ rights to a safe workplace—had one compliance officer for approximately every 60,000 workers; by

2018 that number had almost tripled to nearly 180,000 (Hamaji et al. 2019).<sup>7</sup> Meanwhile, at the state level, in 2018, seven states had no investigators at all whose responsibilities included enforcement of minimum wage and overtime laws, while most states had fewer than 10 on staff (Levine 2018). In addition to the low frequency with which penalties are imposed on violators as a result of inadequate resources, the amounts employers must pay are frequently modest, often limited to paying back what they should have paid in the first place. In addition, back wages and penalties are also often difficult to collect, even by civil labor enforcement agencies (Cho, Koonse, and Mischel 2013).

- **Low union density leaves workers unprotected.** Unions have traditionally helped ensure compliance with workplace laws, by serving as an on-site monitor in unionized workplaces, and by creating pressure on nonunionized workplaces to improve conditions (in order to compete for employees). However, as a result of several factors, including unfavorable federal labor laws and common employer retaliation for organizing, union density (meaning union membership as a share of employment) has diminished greatly over the past several decades (Rhinehart, Windham, and Mischel 2020). The national union membership rate of private-sector workers was only 6.3% in 2020 (BLS-CPS 2021).
- **Forced arbitration blocks an increasing number of workers from suing in court, and hides misconduct from public view.** Historically, attorneys in the private bar and public interest organizations have played a significant role in addressing wage theft, discrimination, and other workplace violations. As experts have noted, often underfunded public enforcement agencies are unable to address all violations of workers' rights in the workplace. That is why the ability of workers to take their employers to court—and join together in doing so—to fight wage theft, discrimination, harassment, and other violations has been crucial to enforcing workplace protections (Hamaji et al 2019). However, private attorneys are increasingly unable to address workplace protections. As of 2017, more than half (56.2%) of all private-sector nonunion employees were required by their employer, as a condition of employment, to sign a forced arbitration agreement (Colvin 2018). Under these agreements, workers waive their right to take their employer to court and consent instead to resolving disputes in private arbitration—a secretive process heavily tilted toward the employer. These agreements often include class- and collective-action waivers, under which employees give up their right to sue on a collective basis. In 2017, 41.1% of private-sector nonunion employees covered by mandatory arbitration procedures were also subject to class action waivers (Colvin 2018). The share of private-sector nonunion workers blocked from going to court by forced arbitration clauses with class- and collective-action waivers is projected to exceed 80% by 2024. (Hamaji et al. 2019). Workers win less often in forced arbitration than in court, and when they do win in arbitration, they win less money than in court (Stone and Colvin 2015). Importantly, when workers are required to give up their right to bring a class action, it becomes extremely difficult for them to find a private attorney to bring their case, since bringing a solo arbitration case eliminates the economies of scale that make wage theft and discrimination cases economically feasible for private lawyers. Most often, when there

are forced arbitration and class waiver provisions, workers never bring cases at all: one scholar estimated that hundreds of thousands of claims are not even brought each year because workers are subject to forced arbitration and never file cases; she referred to the “black hole” of forced arbitration (Estlund 2018). The secrecy of arbitration proceedings also allows violations to persist unabated, by preventing wrongdoing from coming to light as would occur in a court case.

- **The growth of the “fissured workplace” leads to increased violations and creates challenges for effective enforcement.** The “fissured workplace” refers to companies that subcontract, use temporary agencies, use a franchise model, or otherwise use business models in which they avoid bearing the legal responsibilities of an employer (Weil 2014). According to Weil, growth of fissured workplaces over the past several decades contributes to workplace law violations. Lower-level contractors are often less capitalized and may exist within the underground economy. Also, mid-level firms, such as temp agencies, must make a profit themselves, leaving smaller margins and pressure to cut corners to make a profit by paying less money to workers at the bottom level. In addition, effective enforcement of minimum wage requirements, overtime pay obligations, and other workplace standards is often more difficult in a fissured workplace, because it can be difficult for enforcers to impose liability on higher-level “up-chain” entities that drive working conditions and have the ability to bring about lasting compliance.<sup>8</sup>

## The rationale for prosecution of wage theft and other employer crimes against workers is sound

Several reasons have been offered to support the position that violations of workers’ rights are an appropriate subject for criminal prosecution.

### Employer crimes against workers cause significant harm

Although wage theft and other crimes against workers are—like most white collar and property crimes—typically nonviolent, they nonetheless cause significant harm to workers, to honest employers, and to neighborhoods and communities. The amount of money denied to workers because of wage theft dwarfs the amount stolen through many other forms of theft: One study found that in 2012, the total value of property taken in robberies reported to police across the United States was \$341 million, compared with \$933 million in wages recovered for known victims of wage theft. (Meixell and Eisenbrey 2014). Note that the wage theft figure includes actually recovered back wages, which is likely a significant undercount, given underreporting of wage theft for various reasons.

- Persistent wage theft impacts workers, their families, and neighborhood businesses (since underpaid workers have less money to spend), and it can affect the economic stability of neighborhoods and communities. As the cases in Section 3 demonstrate, employers’ crimes in wage theft or workplace safety cases often impact numerous victims. Moreover, given the social determinants of health, some public health experts



have noted that wage theft may exacerbate adverse health impacts of low wages and low-income status by generating income insecurity. Individuals not paid for hours worked, or paid less than what they earned, may not reliably be able to pay rent or heating, buy groceries, or access transit. This in turn may result in increased crowding or homelessness, hunger, decreased mobility, and decreased ability to pay for child care or medical care—all having an adverse impact on health. Wage theft may also increase the number of hours or jobs worked, which may in turn decrease time spent with family, leisure time for physical activity, and sleep or rest (Minkler et al. 2014).

- Workers who are sexually harassed or assaulted in the workplace experience serious effects, including harm to mental and physical health, reduced opportunities for on-the-job learning and advancement, forced job change, unemployment, and abandonment of careers. Sexual harassment and assault in the workplace also harm employers, causing absences, turnover, reduced productivity, and litigation (Shaw, Hegewisch, and Hess 2018).
- Other crimes, like human trafficking and workplace fatalities, have clear and devastating lifelong impacts on victims and their families.
- Wage theft, payroll fraud, and related crimes also harm lawful businesses that comply with the law, since they must operate at a disadvantage relative to competitors that save money through breaking the law. When a business offers lower prices because it underpays employees, or when a company wins a contract because it cheats on unemployment insurance and other taxes, these acts create unfair competition for law-abiding employers (D.C. AG 2019). Widespread unaddressed violations by employers and corporations also undermine respect for the rule of law.
- Employer crimes harm the general public. Employers who evade unemployment insurance taxes deprive the system of resources needed to provide this critical safety net; those who lie in relation to their workers' compensation insurance burden public health care resources and increase insurance costs for all employers. In addition, given that very low wages in certain sectors require full-time workers to rely on government assistance to survive (Cooper 2016), persistent underpayment of workers' wages likely exacerbates reliance on public benefit programs.

## The crimes are intentional

As many of the case examples provided in Section 3 demonstrate, crimes against workers generally result from conscious decision-making. Creating false payroll records; underreporting workers on unemployment insurance or workers' compensation documents; shaving employee work hours or stealing tips; retaliating against employees who speak up when their rights are violated; paying no wages for an entire month or longer; assaulting minors or undocumented women workers; and eschewing critical and obvious workplace safety requirements are not inadvertent mistakes. Some employers are repeat violators (N.Y. AG 2014a). In addition, employer crimes often occur in clusters: The same employer who fails to pay workers is also evading UI and other taxes and violating workers' compensation laws (Plore and Schrank 2018, 37–39). The Colorado legislature, in a recent statute targeting labor trafficking and wage theft, noted, "Persons who commit the

crime of human trafficking often commit other crimes such as wage theft, tax evasion, and workers' compensation fraud, which drains local and state resources, as well as denies the state its right to revenue."<sup>9</sup> Further, certain predatory employers specifically take advantage of young people, immigrants, or other particularly vulnerable worker populations.

## **Criminal prosecution of employer crimes against workers is likely to deter similar violations by other employers**

Inefficiencies in and weaknesses of our regulatory systems have been cited as necessitating criminal prosecutions against companies for workplace and other abuses (Steinzor 2015, 15–39). As described in Section 2B, civil labor enforcement agency resources are inadequate, limiting their effectiveness. DA involvement could have a particularly decisive effect in jurisdictions where state labor department enforcement is minimal or nonexistent. Elsewhere, too, criminal prosecutions are likely to have a significant deterrent impact on employer misconduct.

Prosecution of an employer can result in specific deterrence, meaning prevention of violations by the prosecuted employer through, for example, a plea agreement requiring ongoing compliance as a condition of probation or incorporating independent monitoring. While it requires further study (see Section 5 below), criminal prosecution of employers also appears likely to have a meaningful general deterrent impact on exploitative business models that treat civil enforcement as unlikely to occur and civil penalties as a modest "cost of doing business."

Noncompliance with wage and hour laws (for example) has been described as a "rational" profit-maximizing decision made by unethical employers in response to low enforcement rates and deficient penalties. Scholars who have analyzed employer costs and benefits of noncompliance find that "employers will not comply with the law if the expected penalties are small either because it is easy to escape detection or because assessed penalties are small" (Ashenfelter and Smith 1979). Currently, as described in Section 2B, the likelihood of detection is low. The cost of detection is generally modest: Civil enforcement frequently recovers only back wages owed to employees, essentially converting workers' wages into an interest-free loan to the employer. In this context, criminal prosecution could change an employer's equation, by increasing the likelihood of detection through adding a visible and powerful new enforcer to the picture, as well as increasing the cost of detection (in the form of individual financial, reputational, and other costs). Media coverage of criminal prosecutions should also increase the *perceived* likelihood and cost of detection. Such publicity serves an additional deterrent purpose: A recent study showed that press releases about OSHA enforcement of workplace safety violations deterred other workplace safety violations (Johnson 2020), a conclusion likely applicable to other aspects of workplace compliance as well.

## **Prosecutions related to workplace conduct already routinely occur, indicating that workplace matters are not**

## **currently treated as solely civil in nature**

Prosecutors routinely bring charges against employees who embezzle or otherwise steal from their employers. In addition, many prosecutors routinely pursue claimants who have fraudulently received workers' compensation or unemployment insurance benefits.<sup>10</sup> Given that the criminal justice system already addresses workplace matters when employers are harmed, it is appropriate to use the same jurisdiction and power when workers are harmed. Fairness in administration of justice would seem to require examination of employer misconduct, perhaps particularly urgently so during a time when workers deemed essential often experience serious workplace dangers and violations of law. (Rosenthal 2021). Moreover, fraud or wage theft by one employer will often cause a greater magnitude of harm than fraud perpetrated by an individual worker; for example, one employer that evades UI taxes year after year will generally cheat the UI program of significantly more money than one individual fraudulent UI claimant. In addition, criminal prosecution of a single employer who is a serial violator is likely to result in justice for many workers, past and future.

## **More resources are needed to enforce workplace protections**

It is insufficient to rely on civil enforcement agencies or workers themselves to enforce labor standards protections on their own. Public enforcement resources dedicated to civil enforcement agencies are too limited, and there are too many impediments to private enforcement, including forced arbitration and workers' realistic fears of retaliation. Such challenges are more acute in cases involving particularly egregious employer conduct, where fraudulent behaviors may impede or prevent civil enforcement agencies from readily identifying violations. Dedicating criminal enforcement resources to enforcing workplace protections would fill a significant currently unmet need.

## **Prosecution of employers for crimes against workers is consistent with a reform-oriented approach to criminal justice**

Along with a number of more traditional prosecutors, several prosecutors associated with the "progressive prosecutor" movement have taken on this work, and they have articulated how they believe it fits within a criminal justice reform framework.<sup>11</sup> For example, Philadelphia District Attorney Larry 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. These officials have cited the power employers wield over workers, and the vulnerability of workers, as a basis for committing to these prosecutions (Reyes 2019; S.F. DA 2020; Minn. AG 2019). Attorney General Ellison and Boulder County District Attorney Michael Dougherty both noted the inequity of pursuing other kinds of theft but not wage theft (Minn. AG 2019, Boyd 2019). Moreover, prosecuting extreme employer abuses aligns with the work of advocates and worker organizations on the ground (CTUL 2019; Svoboda 2011; Colorado General

Assembly, 2019). Relationships between prosecutors and organizations that are accountable to workers can also help the criminal justice system become more accountable to marginalized communities more broadly. As Professor César Rosado Marzán has noted, “The value of criminalization lies in its unambiguous moral condemnation of wage theft, in its capacity to shame employers who abuse their power, and in the real threat of imprisonment. Criminalization will help activists to co-enforce wage and hours laws, likely deter wage theft, and better resolve a dire problem affecting some of the most powerless individuals in U.S. society” (Rosado Marzán 2020). Prosecution of wage theft also involves reorienting enforcement resources “toward aggressive enforcement of the predations of powerful economic entities” (Bhargava and Hertel-Fernandez 2020).

## Case types and examples cover a range of worker abuses and span the country

Prosecutors have brought charges to address numerous different types of employer crimes against workers. The following are descriptions and examples of some common types of cases, pulled primarily from publicly available news media articles and agency communications.<sup>12</sup> Often, infractions occur in clusters: the same employer commits wage theft and evades UI taxes, commits workers’ compensation insurance fraud, has unsafe working conditions, and retaliates against workers who complain about any of these problems. The discussion below is organized by violation type in the interest of clarity, but many cases involve multiple violations. In addition to the discussion below, **Appendix A** contains links to a number of court-filed documents such as indictments, plea agreements, and more. **Appendix B** links to resources including a database and spreadsheet containing information and news reports of additional cases.

## Prosecutors have used various statutes and charges to pursue wage theft

Wage theft takes many forms but essentially involves not paying workers what they are owed, whether it is for hours worked, or at levels required under the statutes that govern required minimum wages and overtime pay.<sup>13</sup> Employers may avoid paying a worker for all hours worked, or avoid paying overtime, through a variety of methods: altering time cards, maintaining two sets of payroll records (one real and one false), or requiring people to work before clocking in or after clocking out. Some employers pay workers in cash, to avoid creating a record of underpayments (as well as to avoid paying unemployment insurance taxes and workers’ compensation premiums). In certain instances, including in the restaurant, construction, and home health care industries, prosecuted employers have failed to pay any wages at all for a period of time, including up to one or two months. There have been cases of employers taking permissible deductions from workers’ pay for health insurance, union dues, or other benefits—but then simply keeping the money for themselves. While the majority of wage underpayment situations that are reported are

handled by the civil legal system, a growing number of prosecutors have brought criminal charges in appropriate situations.

DAs and AGs bring criminal prosecutions under state laws. The relevant state statutes, and therefore the charges brought in these cases, vary. Some state statutes explicitly address workplace conduct and may even use the term “wage theft.” Other prosecutors have brought these cases using theft of services, theft by swindle, larceny, scheme to defraud, or similar statutes. Prosecution of wage theft, prevailing wage and payroll fraud cases typically requires not only witness testimony, but also audits of employer documents—evidence similar to that needed to pursue other types of economic crimes.

## Sample wage theft cases

- **Nonpayment of overtime.** In 2021, the Santa Clara County Office of the District Attorney brought charges against a flooring company owner who was accused of owing workers nearly \$1 million of overtime wages, and also accused of workers’ compensation premium fraud (Green 2021).
- **Keeping payroll deductions intended for specific purposes.** In 2021, the Worker Protection Unit of the Philadelphia Office of the District Attorney charged a plumbing company’s owner with multiple counts of theft for deducting union dues from workers’ pay and keeping the money instead of remitting the dues to the union as required (Phil. DA 2021). In a similar case, Michigan’s attorney general brought criminal charges against an employer who allegedly withheld more than \$52,000 from workers’ paychecks for deferred retirement contributions but failed to deposit the funds into their accounts or pay the employer match (Mich. AG 2019).
- **Failing to pay wages.** In 2020, Colorado’s 5th Judicial District Attorney’s Office charged a contractor with tax evasion and theft from a person; the contractor ultimately pleaded guilty to one count of each. The investigation, which began in late 2019, was conducted by the DA’s office in collaboration with the Colorado Department of Revenue Criminal Tax Enforcement Division after past employees of the defendant complained about not having been paid (Colo. 5th DA 2020, Lotshaw 2021).
- **Writing bad checks to undocumented workers.** In 2019, Colorado’s 20th Judicial District Attorney’s Office (in Boulder County) brought charges against an employer accused of giving undocumented workers bad checks for various projects and threatening to report them to immigration when they asked for payment (Byars 2019a, 2019b). The employer was sentenced to four years of probation and ordered to pay restitution (Oravetz 2019).
- **Failing to pay for work performed.** In 2018, the Harris County (Texas) district attorney charged the owner of a high-value home with theft of service for failing to pay a painter for repair work completed after a hurricane (McPherson 2018).
- **Wage theft of elder care employees.** Numerous DAs in California have brought charges against elder care homes for wage theft, tax fraud, and other criminal violations (Gartrell 2016).
- **Not paying wages to immigrant workers.** In 2016, the San Diego district attorney,

partnering with the California labor commissioner, secured a criminal jury trial conviction for felony grand wage theft by false pretenses. A San Diego restaurant owner was sentenced in 2016 to two years in jail for paying immigrant workers only in tips. The San Diego County Superior Court also ordered the employer to repay \$20,000 in stolen wages and tips to six of the restaurant workers (CSLEA 2016).

- **Failing to pay overtime and other wages.** The New York attorney general's office has brought wage theft-related cases in several industries. For example, in 2015, the office charged a Papa John's franchisee who was accused of continuing to underpay workers even after being investigated for wage theft by the U.S. Department of Labor. The charges included creating fictitious worker names to conceal overtime hours worked and filing fraudulent quarterly state tax returns. The employer pleaded guilty to failure to pay wages and falsifying business records (NY AG 2015a, 2015b). In 2012, the New York AG's office announced a guilty plea by the owner of a home health agency in a case that involved failing to pay workers \$300,000 in wages (NY AG 2012b).

## **Crimes related to prevailing wage laws involve cheating employees, government agencies, and the public**

Prevailing wage laws require contractors on government-funded public works projects (typically government construction contracts) to pay their workers at least the locally prevailing wages and fringe benefits paid on similar projects in the area (Mahalia 2008). In addition to the federal prevailing wage law (the Davis-Bacon Act of 1931), many states have enacted state-level prevailing wage laws. Prevailing wages are set based on a worker's location and occupation, and they are often considerably higher than the applicable minimum wage in a given jurisdiction. To allow government contracting agencies to ensure compliance, prevailing wage laws generally require public contractors to routinely submit "certified payroll records" of hours worked and wages and benefits paid on a given contract. When employers violate these laws, they are not only underpaying workers, but also cheating the government agency and taxpayers, since the agency awarded the contract based on the premise that workers would be paid prevailing wages. As a method of violating prevailing wage laws, employers may, for example, create and submit false certified payroll records that fraudulently demonstrate compliance by showing artificially inflated pay amounts, artificially deflated hours, or even listing as employees individuals who were not on the job at all.

Some prevailing wage laws directly include criminal sanctions for violations. Violations such as submitting false payroll records may also result in other charges, such as filing a false instrument or maintaining false business records.

### **Sample prevailing wage cases**

- **Cheating on fringe benefit requirements.** In 2021, the Pennsylvania attorney

general's office charged a contractor with extensive and complex violations of prevailing wage laws in what the AG described as "the largest prevailing wage criminal case on record." The contractor was charged with appropriating retirement benefits owed under the law, and falsely inflating the amount of money paid for health benefits in order to pay workers less. These charges came on the heels of another separate criminal prevailing wage case by the Pennsylvania AG's office that resulted in a guilty plea. (Pa. AG 2021, Rushton 2021).

- **Failing to pay required prevailing wages.** In 2020, the Queens (New York) district attorney announced the guilty plea to a prevailing wage labor law violation by a contractor for the New York City School Construction Authority and the New York City Department of Education, who "pocketed more than \$1.5 million that should have gone to employees." (Queens DA 2020).
- **Falsifying records and underpaying workers.** In 2019, New Jersey's attorney general announced the guilty plea of a construction contractor for falsifying payroll records to conceal his underpayment, and in some cases nonpayment, of wages to workers, many of whom were immigrants (N.J. AG 2019).
- **Underpayment, falsifying records, and demanding kickbacks of money back from workers.** In 2013, New York's attorney general charged a contractor for the Port Authority with prevailing wage violations. The contractor, who ultimately pleaded guilty to grand larceny and prevailing wage violations, created false business records demonstrating compliance with the law and issued checks to workers which would demonstrate compliance; he then made his workers cash the checks at his bank and kick back, or return, most of the cash to him. Under the plea agreement, the contractor was sentenced to five years of probation, was banned for five years from working on public projects in New York, and was ordered to pay \$200,000 in restitution to workers (N.Y. AG 2013, 2014b).

## **Payroll fraud cases include worker misclassification, workers' compensation fraud, and nonpayment of unemployment insurance taxes**

Numerous employers have been criminally prosecuted for payroll fraud, including crimes resulting from misclassifying workers as independent contractors, or from paying workers in unreported cash "off the books." In such cases, employers often falsely underreport the number of workers on unemployment insurance (UI) tax returns filed with the state or on workers' compensation insurance applications. These actions can lead to charges of filing a false document or maintaining false business records, or specific workers' compensation- or insurance-related charges. Additional charges may stem from an employer's failure to pay UI taxes or to procure required workers' compensation insurance, acts which themselves have criminal consequences in some states. In addition, as noted above, often employers committing these offenses engage in wage theft as well.

## Sample payroll fraud cases

- **Underreporting employees on workers' compensation forms.** In 2020, the Hennepin County Attorney (Minnesota) won convictions against the owners of a drywall company for insurance fraud and theft by swindle, based on allegations that the company underreported employees on workers' compensation documents and wrongly treated workers as independent contractors. As part of a guilty plea, both owners of the Minnesota drywall company received five years of probation, 180 days of home monitoring, and 30 days of community service, along with a \$30,000 fine and an order to pay \$309,000 in restitution (Hennepin CA 2020a, 2020b).
- **Failure to pay wages, UI taxes, and workers' compensation insurance.** In 2020, the Suffolk County (New York) DA's office announced that eight people and nine businesses had been charged in a labor-related crackdown in Suffolk County. The alleged crimes collectively involved the theft of more than \$250,000 in employees' wages and benefits, nonpayment of more than \$58,000 to the New York State Department of Labor for unemployment insurance fund contributions, and failure to pay more than \$133,000 to the state insurance fund for workers' compensation insurance premiums (Suffolk Cty. DA 2020b).
- **Wage theft and workers' compensation insurance crimes, related in part to underreporting payroll.** In 2020, the Rhode Island attorney general brought charges against the former owner of a cleaning company (a contractor for the Community College of Rhode Island) for wage theft, failure to maintain workers' compensation insurance coverage, and workers' compensation insurance premium fraud. Among other things, the defendant allegedly falsely reported only \$10,000 of payroll, instead of almost \$400,000, lowering business expenses and gaining a competitive advantage in bidding (R.I. AG 2020).
- **Workers' compensation insurance fraud.** In 2019, the Stanislaus County (California) DA's office announced that a former temp agency owner had been convicted of workers' compensation insurance premium fraud and ordered to pay close to \$1 million in restitution. An insurance audit revealed that the agency owner had underreported payroll and the number of employees to obtain a lower premium (CSLEA 2019).
- **Misclassifying workers to avoid paying overtime and UI taxes.** In 2018, the New York state attorney general obtained guilty pleas (to grand larceny and falsifying business records) from three construction companies that had misclassified their workers as independent contractors to avoid paying overtime and unemployment insurance taxes (N.Y. AG 2018).
- **Hiding the existence of workers to avoid workers' compensation costs and payroll taxes.** In 2017, the San Diego district attorney obtained a guilty plea from a married couple accused hiding the existence of at least 800 housekeeping and janitorial workers to avoid paying millions in workers' compensation insurance rates and payroll taxes (Littlefield 2017).



## Workplace safety and health cases target highly predictable, avoidable, and sometimes fatal workplace hazards

While most violations of workplace safety and health laws are addressed through civil enforcement by OSHA or an OSHA-approved state plan (U.S. DOL-OSHA n.d.a, n.d.b), prosecutors have brought various charges in several cases of highly predictable, easily avoidable workplace fatalities or serious injuries, such as unsecured roofers who fell to their deaths or workers killed when trenches that had not been shored up collapsed. State exercise of traditional police powers, such as criminal prosecutions of such cases, is generally not preempted by the OSH Act (Flanagan, Gerstein, and Smith 2020). Charges have included workplace or involuntary manslaughter, criminally negligent homicide, reckless endangerment, and assault. There is long-standing precedent for prosecution in this area; for example, in the 1980s, a program was established in Los Angeles involving collaboration between the district attorney and the state OSHA plan (McCluskey et al. 2016).

### Sample workplace safety and health cases

- **Roofing fatalities.** In 2019, the Office of the Maine Attorney General charged a contractor with workplace manslaughter when a roofing worker without required protection against falls fell to his death (Flaherty 2019). In a similar case that year, the prosecutor from Summit County, Ohio, obtained an involuntary manslaughter guilty plea from a contractor in a roofing fatality case (Warsmith 2019).
- **Trench collapses.** Several employers have been prosecuted following workplace fatalities resulting from trench collapses, including in Boston; Brooklyn, New York; Fairfax County, Virginia; Granby, Colorado; Manhattan, New York; and Seattle. In all cases, the employers were charged with manslaughter, except in the Seattle case; there the charge was criminal negligence (NBC10 Boston 2019; Brooklyn DA 2019; Haynes 2019; Pace 2019a, 2019b; Chen 2016; Green 2016)
- **Forklift fatality.** In 2018, the San Francisco district attorney brought involuntary manslaughter charges against the employer of a worker crushed to death by a forklift; the victim was assigned to use the forklift, despite not being certified to do so, and a ramp at the worksite lacked a required curb to prevent the forklift from falling (Sernoffsky 2018).
- **Crane-related injuries.** In 2018, the Manhattan district attorney brought assault charges against a contractor on a construction site where two workers were gravely injured by the fall of a mini crane (NY Cty. DA 2018).
- **Child labor.** In the last decade, child labor charges were brought in two New York cases, both involving teenagers assigned to operate machinery prohibited at their age. A 14-year-old was killed on the job at a farm (Harris 2014; N.Y. AG 2019) and a 17-year-old's arm was severed at a restaurant (N.Y. AG 2014c). Both employers pleaded guilty.

## Labor trafficking cases involve extreme worker exploitation

Labor trafficking occurs when a person uses force, fraud, or coercion to obtain labor or services of another person (U.S. Department of State 2021). State statutes defining labor trafficking vary in their precise language, and some encompass a wider range of conduct than federal trafficking statutes (NCSL 2018). Although labor trafficking has been less commonly prosecuted than sex trafficking (Smith 2021), state or local criminal prosecutors have brought labor trafficking charges in a few notable cases. In some instances, a focus on trafficking has served as a pathway for prosecutors' offices to get involved in broader worker exploitation issues.<sup>14</sup>

### Sample labor trafficking cases

- **Paying grossly subminimum wages and threatening workers.** In 2020, the Suffolk County (New York) district attorney arrested a gas station owner for several charges, including labor trafficking, scheme to defraud, grand larceny, and retaliation. The employer was accused of paying grossly subminimum wages and no overtime for workweeks of 70 to 100 hours; he was also alleged to have threatened to file false police reports or call immigration authorities regarding any employees who complained about working conditions or cooperated in state labor department investigations. The case was referred to the DA's office by the New York State Department of Labor (Suffolk Cty. DA 2020a).
- **Coercing, underpaying, and threatening undocumented workers in unsafe conditions.** In 2019, a contractor in the Twin Cities, Minnesota, region was sentenced to 270 days in jail and five years of probation for labor trafficking and insurance fraud, after pleading guilty on the eve of trial in a case brought by the Hennepin County Attorney. According to the criminal complaint, the contractor recruited workers for construction work, knowing that they were undocumented, and used that leverage to force them to work long hours at low pay and without adequate safety protection, allegedly also telling workers they would be fired and deported if they went to a doctor for injuries suffered on the job (Hennepin CA 2019, 2020c). The investigation was conducted by a state law enforcement agency after reports were made to the Hennepin County Attorney's Office by a trade union and a local workers' rights organization, Centro de Trabajadores Unidos en la Lucha (CTUL) (Feshir 2019).
- **Underpaying, keeping passport, and threatening immigrant cleaning worker with deportation.** In 2018, the Massachusetts attorney general's office charged an employer with labor trafficking, among other offenses. In a case in which the defendant was accused of recruiting a worker from abroad and requiring her to perform cleaning work, for which she was paid subminimum wages; he allegedly retained the worker's passport and threatened that if she tried to return to her home country of origin, she would be arrested by immigration authorities (Mass. AG 2018).
- **Subjecting care workers to brutal conditions.** In 2018, the California attorney general's office brought human trafficking and other charges against four individuals

who ran an adult residential and child care company. The complaint alleged that workers were forced to work around the clock, seven days a week, and sleep on floors and in garages, and that defendants also confiscated some workers' passports and threatened to report workers to immigration authorities (Calif. AG 2018).

- **Taking visas and passports from farmworkers and threatening harm.** In 2018, a jury in Fresno County, California, found an individual guilty of human trafficking and extortion in relation to farmworkers. The defendant was accused of taking victims' visas and passports, and of threatening to harm them and report them to immigration if they stopped working for him (Lopez 2018a, 2018b).

## **Sexual assault cases target extreme harms of harassment**

The #MeToo movement, which gained momentum in 2017, has led to an increase in awareness and exposure of workplace sexual harassment. In certain instances, this conduct has risen to a level resulting in assault and even rape charges.<sup>15</sup>

### **Sample workplace sexual assault cases case summaries**

- In a nationally high-profile case, the Manhattan DA office brought criminal charges against former Hollywood producer Harvey Weinstein, who in 2020 was found guilty of criminal sexual assault and rape, and sentenced to 23 years in prison (Ransom 2020a, 2020b).
- The owner of a Boulder, Colorado, ice cream company pleaded guilty to two counts of misdemeanor unlawful sexual conduct based on allegations that he sexually abused female employees, including two undocumented immigrants. In 2018, he was sentenced to six months in the Boulder County Jail followed by a year of work release, among other conditions of probation (Bear 2018).
- The owner of the country's last Howard Johnson's restaurant (located in Lake George, New York) was sentenced to six months in jail and six years' probation after being charged in 2017 with sexual abuse, unlawful imprisonment, and endangering the welfare of a child based on allegations that he sexually harassed about 15 female employees, including minors (AP 2017, 2018).

## **Retaliation and witness intimidation cases target actions that hamper investigations**

Retaliation against workers who report violations can consist of termination, demotion, pay reduction, assignment to less desirable schedule or job assignment, threats of any kind (including calling immigration), or advising other employers not to hire a person. Retaliation is particularly harmful because of its potential to deter other workers from reporting violations or cooperating with an investigation. In some cases pursued by prosecutors, employers pressured workers to withdraw complaints or provide inaccurate testimony in

wage-related proceedings. Other cases involved retaliation or conduct similar to witness tampering.

## Sample retaliation and witness intimidation cases

- **Retaliating against gas station workers who reported violations.** In 2020, the Suffolk County (New York) District Attorney charged a gas station owner with, among other things, retaliation against workers who reported violations (Suffolk Cty. DA 2020a). (This case is also described in the labor trafficking case section above) (Suffolk Cty. DA 2020a).
- **Intimidating laundry temp workers serving as witnesses in a wage theft case.** In 2019, the Massachusetts attorney general's office announced guilty pleas of owners of a temp agency for, among other things, witness intimidation and retaliation against workers placed at an industrial laundry facility. Workers placed by the temp agency in the warehouse were paid subminimum wages and no overtime for workweeks of 60 to 70 hours. The temp company owners were accused of threatening to terminate witnesses cooperating with the AG's investigation, directing employees not to cooperate with investigators, and reducing the hours of workers who spoke with investigators during an on-site inspection. The investigation began when a local branch of the United Food and Commercial Workers International Union contacted the AG's office (Mass. AG 2019).
- **Dissuading witnesses of crimes related to a state construction subcontract.** In 2014, the Orange County, California, district attorney's office obtained a guilty plea from a construction subcontractor for taking workers' wages on a public work project and dissuading witnesses from prosecuting a crime. Hired by the general contractor refurbishing a state hospital, the subcontractor required workers to turn over a portion of their paychecks to him. When workers contacted the DA's office about their wages, leading to an investigation, the subcontractor invited workers to his house to receive their final paychecks, but instead attempted to dissuade them from acting as witnesses against him (Dobruck 2014).
- **Witness tampering.** In 2012, the New York attorney general's office brought witness tampering charges against a garment factory owner accused of instructing a former employee to falsely testify that her work tenure was shorter than it was. The case was referred to the AG's office by staff from the New York State Department of Labor and Industrial Board of Appeals (administrative hearing body) when they learned of the tampering before a hearing (N.Y. AG 2012a).
- **Intimidating immigrant car wash workers.** In 2010, the Los Angeles city attorney obtained a protective order against two car wash owners after they made immigration-related threats to workers amid an ongoing wage theft case. The protective order directed the employers not to "harass, intimidate or retaliate" against workers, and also not to "attempt to prevent or discourage any employee or named victim...from participating or cooperating" in the investigation, prosecution, or enforcement of the case (CA Superior Court 2010).

## **Past prosecutions of crimes against workers provide some guidance on common questions about bringing such cases**

Although providing prosecutors with a road map on how to bring such cases is beyond the scope of this report,<sup>15</sup> past prosecutions provide some initial guidance regarding several common questions:

- What statutes may be used to bring such cases?
- How can prosecutors learn about cases? What sources of potential referrals exist?
- How can prosecutors engage in this work in a manner that responds to racial equity, social justice, and similar concerns?
- What funding sources may be available to support this work?

## **A range of applicable statutes can provide prosecutors with authority to take on various workplace-related crimes**

In some states, there may be labor or wage-specific criminal provisions. But as noted in the case studies section, many prosecutors have brought workplace-related crimes cases using a variety of generally applicable state statutes. Often, prosecutors may be able to use existing law to bring such cases, including statutes addressing the following conduct:

- Theft (including theft of services or theft by swindle)
- Larceny
- Scheme to defraud
- Check fraud or passing bad checks
- Filing false documents with government agencies
- Creating and maintaining false business records to conceal wage theft and other violations
- Witness tampering and retaliation
- Insurance fraud
- Unlawful activity related to unemployment insurance, workers' compensation, and prevailing wage requirements
- Manslaughter and homicide
- Labor trafficking

- Criminal sexual assault
- Endangering the welfare of a minor
- Child labor

## Examples of state statutes governing workplace crimes

Some states, such as New York, have relatively long-standing statutes specifically addressing workplace-related employer crimes. Other states, such as Colorado, Minnesota, and Texas, have passed specific statutes on wage theft in recent years. Colorado and Minnesota passed laws that would define wage theft beyond a certain monetary threshold as a felony. This designation makes such cases more appealing to prosecutors for various reasons, including that it affords them more options in plea bargaining situations. Also, in some states, such as California, prosecutors have a more robust set of tools to address felonies (as compared with misdemeanors), including search warrants and use of a grand jury.

- **New York.** Under New York Workers' Compensation Law § 52(1)(a), failure to secure workers' compensation for more than five employees is a Class E felony; under Labor Law 220(3)(d)(i), willful failure to pay prevailing wages totaling more than \$25,000 is a Class E felony (with higher level felonies for larger underpayments).
- **Colorado.** Legislation passed in 2019 explicitly included within its statutory definition of theft an employer who "being able to pay wages or compensation and being under a duty to pay, willfully refuses to pay wages or compensation." In Colorado, theft is a felony if the dollar amount involved is at least \$2,000.
- **Texas.** In 2011, Texas enacted a wage theft law specifying that within the existing "theft of services" law, partial payment of wages is not sufficient to negate the intent to avoid payment by an actor (in this case, an employer). (Contemporaneous news articles noted that this was a common employer defense, see for example McPherson 2011.) Tex. Penal Code Section 31.04(d-3)(1, 2)(1994).
- **Minnesota.** Minnesota's theft statute includes "wage theft" as a type of theft, and defines the term "wage theft" as occurring, among other things, "when an employer with intent to defraud: (i) fails to pay an employee all wages, salary, gratuities, earnings, or commissions at the employee's rate or rates of pay or at the rate or rates required by law." MN Statutes 2020 Section 609.52 subdivision (1)(13).

## Proposed legislation

- **Rhode Island.** A bill proposed in Rhode Island in 2021 (Rhode Island Legislature 2021 Regular Session Senate Bill 195) would increase penalties for wage theft, making nonpayment of wages a felony if the value of the wages owed to an employee is at least \$1,500, or if the violation was a knowing or repeat violation (R.I. AG 2021).
- **California.** A bill proposed in California in 2021 would increase criminal penalties for wage theft (Alvarez 2021).

## Prosecutors may receive workers' rights case referrals from a variety of sources

State and local prosecutors who have brought cases against employers for violating workers' rights have received case referrals through a variety of sources. Accordingly, prosecutors wishing to receive referrals should build relationships with a number of organizations and offices. These relationships should be ongoing and systematic; referrals and successful collaborations are unlikely to result from one-off conversations or one-sided presentations.

### Organizations and agencies representing or assisting workers are the most common case referral sources

- **Worker advocacy groups.** Worker centers, workplace safety and health advocates, and other worker advocacy groups regularly speak with and hear from workers seeking help for a range of workplace violations.
- **Labor unions.** In addition to representing their members, many unions are actively organizing in a range of workplaces and industries, and routinely speak with workers experiencing violations. Unions might bring forward cases involving employers that are violating workers' rights, or winning government contracts and cheating on taxes owed and worker pay.
- **State labor departments.** As the state's primary regulators and civil enforcers of workplace laws, many state labor departments receive a considerable volume of incoming complaints. While most do not have a systematic method for referring cases to prosecutors, labor departments of both California and New York have regular methods of ongoing referrals, which could readily be replicated elsewhere. In fact, in 2014, the California Labor Commissioner's Office (the equivalent of the state labor department) created a "Wage Theft is a Crime" campaign, with materials including posters and radio spots (CA Lab. Com. 2021); the office also offered training to district attorney offices on how to develop and bring these cases (Ramirez 2018).<sup>17</sup>
- **Labor advisory boards or councils.** A noteworthy model is provided by the labor advisory boards or councils established by both the Queens and Suffolk County district attorneys in New York. The councils consist of unions, worker centers, worker advocacy groups, and others within their jurisdiction. The office holds quarterly meetings (in person prior to the COVID-19 pandemic), which allow for formal discussions as well as informal conversations, relationship-building, and case referrals. These formalized groups create a way for DA offices to engage systematically and regularly with the community. (Suffolk Cty. DA 2020b).

## **Government agencies and officials outside of labor agencies are additional potential sources for case referrals**

- **State agencies** such as those overseeing workers' compensation insurance are sources of referrals, as are any state inspectors general
- **City or municipal labor standards offices**, where they exist, or city departments of investigation may refer cases. Many cities, including Chicago, Denver, Minneapolis, New York, Philadelphia, San Francisco, Seattle, and more, have city-level labor offices devoted to protecting workers' rights. Also, for example, the New York City Department of Investigation hosts inspectors general for the School Construction Authority, the New York City Housing Authority, and more; these inspector general offices have been an active source of cases for prosecutors in New York City.
- **Elected officials** may be sources of referrals, particularly those representing immigrant or low-income communities.
- **The U.S. Department of Labor, especially the Wage and Hour Division and OSHA**, may be a source of referrals, although generally they first refer cases to U.S. attorney offices.
- **DAs, AGs, and labor enforcers in other states** can refer cases in situations involving employers operating in multiple jurisdictions.

## **Nongovernmental organizations are another important source of potential case referrals. They include:**

- legal services and other public interest law offices
- plaintiffs' wage and hour lawyers, such as members of the National Employment Lawyers Association or its state or local affiliate
- organizations that serve victims of human trafficking
- immigrants' rights organizations and lawyers/nonprofits representing immigrants
- media, including social media and foreign language media, whose coverage can provide leads on cases
- law school clinics
- companies that compete with employers who are violating the law

## **Traditional law enforcement sources, like police departments or sheriffs' offices, may also be helpful, but may presently be more useful as supplements to referrals from and collaboration with worker-focused organizations and agencies described above**

- Workers face barriers to reporting violations directly to law enforcement for a variety



of reasons, including fear of retaliation, agency language access limitations, unfamiliarity with legal rights or avenues for complaints, and fear of potential immigration consequences, among others (Grittner and Johnson 2021). One study estimated that there are about 130 violations for every one complaint lodged overall, and that this ratio varies tremendously across industries (Weil and Pyles 2007). Thus, a lack of worker complaints does not indicate employer compliance.<sup>18</sup>

- Still, a prosecutor's own intake phone number, hotlines, or other avenues for receiving calls and tips from the public can sometimes lead to cases, especially after an office has publicly communicated its involvement in worker issues. These public engagement resources may receive more intakes and calls from workers after media or other announcements about workers' rights cases. However, based on the barriers to worker complaints, relying solely on already-existing passive intake systems is unlikely to lead to information about the most egregious violations, especially during an office's initial stages of involvement on these issues.
- To date, few prosecutions appear to have been initiated by law enforcement, such as sheriffs' offices or the police. Prosecutors may wish to consider offering trainings to such agencies on workers' rights issues.
- In a recent development, the Los Angeles County Sheriff in February 2021 launched a wage theft task force "to protect undocumented and documented workers in Southern California." The task force is a collaboration of the sheriff's department with the state labor commissioner, the Los Angeles County Office of Immigrant Affairs, the Los Angeles County District Attorney's Office, the Los Angeles County Federation of Labor, and several community groups (LACSD 2021a). The sheriff's department will be receiving complaints and referring them for criminal prosecution, civil enforcement, or other handling, as well as playing a direct role in enforcement and collections (LACSD 2021b). The sheriff also authored a *Washington Post* op-ed about the task force (Villanueva 2021). In addition, the Travis County (Texas) Sheriff's Office added "wage theft" to a form allowing for online reporting of certain crimes (Travis CSO 2021).

## **Criminal justice concerns should be considered when prosecuting workplace violations**

Racial and economic inequities in the criminal justice system and vulnerabilities of immigrant workers raise important concerns about these criminal prosecutions, including the following:

- **Charging only low-level supervisors may fail to punish those with real responsibility for and authority over workers' conditions.** Some prosecutors may lean toward pursuing low-level supervisors with limited authority, while taking no action regarding higher-level officials with greater decision-making power. Prosecutions should seek to avoid this focus only on the "low-hanging fruit," and instead attempt to target those with greatest responsibility for causing violations and with genuine ability to stop or prevent the violations. Prosecuting actors higher up the hierarchy is likely to prove challenging at times, because it is necessary to demonstrate that the defendant had *mens rea*, or the requisite criminal intent, and

also because the standard of proof in criminal cases—“beyond a reasonable doubt”—is higher than the standard in civil cases. Prosecuting higher-level officials is important, however, to place responsibility on those who truly can change workers’ conditions, and to more effectively deter violations. As University of Maryland School of Law Professor Rena Steinzor observes, “the law must authorize prosecutors to climb the managerial ladder to find those responsible for making such incidents inevitable” (Steinzor 2015, 92.) In addition, prosecutors should be aware of racial disparities that may exist in pursuing only lower-level actors.

- ◆ **Certain convictions have collateral immigration consequences for defendants.** Under current immigration laws, certain criminal convictions can have immigration consequences, including threat of deportation. Prosecutors may wish to seek to avoid such consequences in considering charges for these cases. In 2017, for example, Brooklyn District Attorney Eric Gonzalez hired immigration attorneys to help prosecutors in his office “tailor criminal charges and plea bargains to avoid placing immigrant defendants in jeopardy of deportation” (Ryan 2017).
- ◆ **Prosecutors should consider certifying victims and witnesses or U visas, where appropriate.** Immigration issues also arise in relation to victims and witnesses, who may fear coming forward because of perceived potential consequences. The U visa is an immigration benefit for victims of certain crimes who are currently assisting, have assisted, or are likely to be helpful in assisting law enforcement in the investigation or prosecution of a qualifying crime. The U visa provides eligible victims with temporary immigration status to remain in the United States while assisting law enforcement, and if certain conditions are met, the U Visa holder can ultimately obtain lawful permanent resident status. Individuals seeking U visas must be certified by a qualifying law enforcement agency, a category that includes prosecutors, and the certification process is relatively uncomplicated. Qualifying crimes include, among other things, human trafficking, involuntary servitude, manslaughter, obstruction of justice, peonage (holding someone in debt in servitude), sexual assault, and witness tampering (U.S. DHS 2019; NILC 2010).
- ◆ **Alternatives to incarceration may be appropriate.** Our country is undergoing an extensive national conversation about systemic racial inequities involved in mass incarceration. While a discussion of the problem of mass incarceration is beyond the scope of this report, prosecutors may want to consider alternatives to incarceration in resolving these cases. They may also want to consider whether innovative approaches to sentencing might be more effective. Finally, some criminal prosecutions of workers’ rights violations have been brought against corporations, not individuals; while such prosecutions are often seen as having less of an impact, they obviously raise no concerns about incarceration.
- ◆ **Case resolution should include measures to ensure future compliance.** In cases involving employers that continue to operate, prosecutors should seek terms that include monitoring or other measures to ensure future compliance. Monitoring could be performed by third-party monitors paid by the employer, or in partnership with administrative enforcement agencies. Prosecutors should also seek asset forfeiture where appropriate. A powerful tool in prevailing wage cases is debarment, which

prevents a company from bidding on public works contracts in a given jurisdiction for a set period, sometimes up to five years. In addition, prosecutors may want to consider whether a restorative justice approach may be warranted or appropriate in these cases.<sup>19</sup>

- **Workers who are victims should be provided with the opportunity to submit victim impact statements.** Victims are often permitted or encouraged to submit victim statements (in writing or orally) regarding the impact of the crime on their lives. This opportunity should be provided to workers, because it enables their voices to be included in the process. Having the opportunity to address the court orally or in writing can be meaningful for workers, educates employers about the human consequences of their actions, and helps fully inform courts about the impact of wage theft and other employer crimes against workers.
- **Civil enforcement may be a good option for prosecutors in some states.** In some states, district attorneys have the authority to bring not only criminal prosecutions, but also civil lawsuits. For example, the Los Angeles and San Francisco district attorneys recently filed a civil lawsuit against the platform cleaning company Handy (L.A. DA 2021). To the extent that district attorneys have civil authority, they can consider exercising it to enforce workers' rights.

## **While most prosecutors have brought workers' rights cases without dedicated funding, limited dedicated funding mechanisms exist in some jurisdictions**

Most DAs and state AGs who have brought workers' rights cases have done so without any specific or dedicated funding. Just as they regularly prosecute theft, larceny, fraud, manslaughter, and other cases without dedicated funding, they simply add labor-related cases to their caseload when they emerge. However, there are a few examples of dedicated funding mechanisms.

- **Funding to combat human trafficking.** The U.S. Department of Justice has awarded funding to combat human trafficking; a 2020 press release describes over \$101 million in grants for, among other things, "enhancing the capacity of law enforcement and other stakeholders to identify victims and provide justice for those victims through the investigation and prosecution of their traffickers" (U.S. DOJ 2020).
- **Examples of state funding programs that may be used to pursue employer crimes.** California and New York both have unique programs that are not specifically devoted to prosecution of employer crimes, but that have routinely been used to prosecute them. The infractions that qualify for the funding include those related to payroll fraud (such as failure to carry workers' compensation), workers' compensation fraud, and failure to pay or accurately report unemployment insurance taxes. Prosecutors have often also brought wage theft charges as part of those cases, given that these offenses often occur in clusters by the same employers.
  - **Funding created by state legislation in California.** California's Workers'

Compensation Insurance Fraud Program, established in 1991, came about as part of a legislative package making workers' compensation fraud a felony, requiring insurers to report suspected fraud, and establishing a mechanism for funding enforcement and prosecution activities. The funding comes from an assessment on employers. The aggregate assessment in the 2017–2018 fiscal year was more than \$62 million. The legislation also established a commission, with representatives from labor, employers, and insurers, to determine the level of assessments and award grants to prosecutors. (Calif. DOI n.d.a, n.d.b).

- **State funding without legislation in New York.** New York's Crimes Against Revenue Program (CARP) was established in 2004 as a program funded by the state's Division of Criminal Justice Services. It provides grants to district attorneys' offices across the state to fund investigations and prosecutions of tax crimes as well as Medicaid, public assistance, and workers' compensation fraud. Under the program, local district attorneys' offices partner with various state agencies in bringing prosecutions. CARP funds have been used to support prosecutions of cases involving violations of prevailing wage, unemployment insurance, and workers' compensation laws. Successful cases under CARP allow the state to recoup the costs of the program through restitution, fines, and penalties. The program has been revenue-generating for the state (NYS DCJS 2015, 2020, 2021; DAASNY 2019).

## Areas for further exploration include research on deterrence and questions about implementation

The incidence and impact of state and local criminal prosecutions of employers have not been extensively studied to date, leaving a number of questions for researchers, prosecutors, worker advocates, legal scholars, and others.

One set of key research questions relates to the impact of criminal prosecution. Does prosecution of one employer deter violations by others? If so, how can such deterrence be measured, and how does it compare with that of civil enforcement? Does deterrence stem from the greater likelihood of detection resulting from more enforcers addressing labor issues, from publicity and reputational harm, from the gravity of potential consequences, or from all of the above?

Questions related to implementation include: What is the capacity of district attorneys and state attorneys general to bring such cases and build practices in this area? What training needs do such offices have? How can current staff, including investigative staff or law enforcement, be trained to effectively handle cases that are often considerably different than many typical criminal prosecution cases?

There are also questions related to partnerships between prosecutors and other government and nongovernmental actors. What partnerships can and should be built with

labor enforcement agencies, unions, or worker organizations? How should roles in partnerships with labor enforcement agencies be defined to ensure compliance with respective ethical obligations and agency priorities?

## Conclusion and recommendations

Numerous DAs and state AGS have begun to prosecute wage theft, payroll fraud, and other crimes committed by employers. These state and local prosecutors are responding to egregious violations that harm workers and communities, make it difficult for honest employers to compete, and deprive public coffers of money needed for critical safety net programs. We recommend that state and local prosecutors, state legislatures, and worker advocates build on this valuable work by taking further action. More detailed tips for getting started are included in Appendix C. Some general recommendations are as follows.

### Recommendations for state and local prosecutors

**Become involved.** If your office has not yet become engaged in protecting workers' rights, begin to do so. Learn more about the issue, meet with relevant stakeholder groups, review your office's authority and potentially applicable statutes, research pressing needs in your jurisdiction, and begin to map out a plan of action.

**Increase involvement.** Offices that have brought occasional prosecutions in this area should continue to develop and increase their involvement.

**Establish dedicated units or build existing ones.** DA and AG offices without dedicated workers' rights units should consider creating such units, using existing staff and jurisdiction if necessary. District attorney offices may consider including such units within an economic crimes, white-collar crime, financial investigations, or community protection bureau, if such bureaus already exist within the office. Offices with dedicated units should continue and expand their work in this area.

**Connect with other prosecutors involved in this area,** to share best practices and learn from each other.

### Recommendations for state legislatures: next steps

**Review statutes to assess whether they adequately address wage theft, payroll fraud, retaliation, and other crimes against workers.** If appropriate, states should strengthen laws protecting workers' rights, including laws related to civil enforcement and criminal jurisdiction. They should also provide jurisdiction for labor enforcement, both civil and criminal, to state attorneys general.

**Consider establishing funding mechanisms.** California's Workers' Compensation Insurance Fraud Program and New York's Crimes Against Revenues Program both provide funds for prosecutions that can include violations of workplace laws, and result in recoveries for the state. Prosecutions of workers' rights cases can sometimes generate revenue, because employers who commit payroll fraud fail to pay unemployment and other taxes.

## Recommendations for worker organizations and advocates

**Engage with DA and state AG offices.** Worker organizations and advocates—including unions, worker centers, advocacy groups, legal services providers, and others—should consider ways to engage with the local DA's office as well as their state AG's office, particularly where the DA or AG have expressed support for or concern about worker issues, low-income communities, or economic and/or racial justice.

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## Endnotes

1. This report describes the role of criminal prosecutors at the state and local level, typically including district attorneys, county attorneys, and state attorneys general. They will collectively be referred to herein as "criminal prosecutors," "prosecutors," or "district attorneys." This report does not include a discussion of federal prosecutions.
2. Wage theft is the practice of employers failing to pay workers the full wages to which they are legally entitled. It includes situations in which employers refuse to pay promised wages, pay less than legally mandated minimums, fail to pay for all hours worked, keep worker tips or deductions intended for worker benefits, or do not pay overtime. In some states, the term "wage theft" is defined in the law, but more commonly it is used as a colloquial and descriptive term to refer to a set of practices. See Rosado Marzán 2021 for a detailed description of wage theft.
3. When employers wrongly treat workers as independent contractors instead of as employees, this is known as misclassification. When employers pay workers in unreported cash "off the books," this leads to payroll fraud. Both practices result in employer failure to pay unemployment insurance taxes or buy required workers' compensation insurance; they are often also accompanied by various forms of wage theft. Misclassification and payroll fraud harm workers, deprive public coffers of revenue, and hurt honest employers who struggle to compete with lawbreakers.
4. See the "CPR's Crimes Against Workers Database" (Center for Progressive Reform n.d.)

5. Prevailing wage laws exist in a number of states; they generally require contractors on government contracts to pay workers at least the locally prevailing wages and fringe benefits paid on similar projects in the area. This topic is discussed in greater detail in section Three B.
6. Training materials on file with author.
7. In about half of the states, workers' OSH Act rights are enforced by state agencies that have state plans approved by OSHA (Rosenthal 2021, note 4B).
8. The difficulty of holding companies accountable for complying with federal wage and hour requirements has been analyzed by EPI research on joint-employer standards (standards that guide when contractors and the firms that use them can be held jointly responsible for complying with the law). See, for example, Shierholz and Poydock 2021.
9. An Act Concerning Criminal Offenses for Failure to Pay Wages, and, In Connection Therewith, Implementing Recommendations from the Colorado Human Trafficking Council, CO H.B. 19-1267, sec. 1, § 3(a) (2019).
10. There are also many examples in U.S. history of arrests of workers who are striking or otherwise seeking better conditions, from striking garment workers in the early 1900s to striking janitors toward the close of the century. For example, when the owners of the Triangle Shirtwaist Factory in 1909 hired "thugs" to attack striking workers, the police ultimately arrested the strikers (Greenhouse 2019; Baker 1990).
11. One academic commentator, Professor Ben Levin, has raised concerns about prosecuting wage theft and other employer crimes; however, these objections are based on general critiques of the criminal justice system and opposition to incarceration, rather than anything specific about prosecution of employers for crimes against workers. A thorough discussion of such objections is beyond the scope of this report; for those who are particularly interested in more details regarding this critical appraisal, see Levin 2018a and 2018 b; Gerstein and Seligman 2018; and Migiel-Schwartz 2021.
12. This list of sample cases seeks to provide an overview of the types of cases pursued. Thus, some examples describe charges brought but not outcomes if, for instance, charges are announced when a case is started, but the agency does not issue a press release when the case is resolved.
13. See endnote 2 above for a discussion of the term "wage theft."
14. In Colorado, a law strengthening penalties for wage theft stemmed in part from a report by the state's human trafficking council; the bill's legislative declaration notes that employers who commit human trafficking "often commit other crimes such as wage theft, tax evasion, and workers' compensation fraud," and also that "not all victims of wage theft are victims of human trafficking." An Act Concerning Criminal Offenses for Failure to Pay Wages, and, In Connection Therewith, Implementing Recommendations from the Colorado Human Trafficking Council, H.B. 19-1267, sec. 1, § 3(a) (2019).
15. For information about workplace sexual assault in the agriculture and janitorial industries, see Frontline documentaries "Rape in the Fields" (Cediel and Bergman 2013) and "Rape on the Night Shift" (Altan, Cediel, and Bergman 2018).
16. For a manual with practical guidance on prosecuting occupational safety and health-related crimes against workers, see McCluskey et al. 2016.
17. Various legal ethics issues arise in relation to cases that may be either criminal, civil, or both. For

example, ethical rules prohibit threatening criminal charges to gain advantage in a civil suit. Prosecutors and any civil agencies referring cases should carefully review and discuss these and other restrictions as part of the process of establishing any collaborations.

18. See "Strategic Complaint Response Matrix," Figure 6.2, p. 84 (Well 2010).

19. "Restorative justice is an approach that focuses on meeting the needs of those who have been harmed while inviting those who have caused harm into a process of active accountability" (CCI n.d.).

## **Appendix A: Sample legal documents from past prosecutions of employer crimes against workers**

The following list contains samples of public record documents in a range of prosecutions of employers. For simplicity and ease of reference, the listing includes the name of the prosecuting office, the state (where not included in the office name), the type of document, and year the document was filed. Documents are organized according to the primary issue in a given case; however, as discussed throughout this report, the same case may often include a number of different charges and violations.

### **Child labor**

New York State Attorney General, misdemeanor complaint, 2014

New York State Attorney General, supporting deposition, 2014

New York State Attorney General, appellate court decision, 2018

### **Fraudulent garment shop licensing**

California Attorney General, felony complaint, 2018

California Attorney General, declaration in support of arrest warrants, 2019

### **Labor trafficking**

California Attorney General, felony complaint, 2018

Minnesota, Hennepin County District Attorney, complaint, 2018

New York, Suffolk County District Attorney, Singh case. Four felony complaints were filed in this case: labor trafficking, labor trafficking, offering a false instrument for filing, and scheme to defraud, all 2020



## Payroll fraud primarily

- California Attorney General, amended felony complaint, 2010
- California Attorney General, petition to preserve property and assets, 2011
- California, Alameda County District Attorney, felony complaint, 2016
- California, Contra Costa County District Attorney, felony complaint, 2020
- California, Contra Costa County District Attorney, forfeiture and restitution order, 2020
- California, Contra Costa County District Attorney, plea agreement, 2020
- New York, Suffolk County District Attorney, felony complaint, 2020
- New York, Suffolk County District Attorney, indictment, 2020
- New York, Suffolk County District Attorney, information, 2020
- [Wage theft and payroll fraud] New York State Attorney General, indictment, 2013

## Prevailing wage violations

- California, Yolo County District Attorney, preliminary hearing brief, 2014
- California, Yolo County District Attorney, sentencing brief, 2019
- Massachusetts Attorney General, joint proposed motion and order for agreed restitution amount, 2018
- New York State Attorney General, felony complaint, 2017
- New York State Attorney General, indictment, 2017
- New York, Kings County District Attorney, debarment stipulation, 2017
- New York, Kings County District Attorney, indictment, 2019
- New York, Queens County District Attorney, indictment, 2019
- New York, Suffolk County District Attorney, felony complaint, 2020
- Pennsylvania Attorney General, complaint and affidavit of probable cause, 2021
- Pennsylvania Attorney General, sentencing order, 2021
- Pennsylvania Attorney General, complaint and affidavit of probable cause, 2019

## **Wage theft and payroll fraud**

### **Wage theft**

California, Contra Costa County District Attorney, TRO barring dissipation of assets, 2016

Minnesota, Hennepin County District Attorney, complaint, 2013

Washington State Attorney General, Sandoval case (multiple documents): defendant's sentencing memorandum, judgment and sentence of corporate defendant, judgment and sentence of individual defendant, all 2018

### **Wage theft and payroll fraud**

California, Alameda County District Attorney, complaint, 2016

California, Alameda County District Attorney, order barring dissipation of assets, 2017

California, Contra Costa County District Attorney, application for TRO barring dissipation of assets, 2015

California, Contra Costa County District Attorney, complaint, 2015

California, Contra Costa County District Attorney, felony complaint, 2014

California, Santa Monica City Attorney, complaint, discovery request, 2013

California, Santa Monica City Attorney, first amended complaint, 2013

California, Santa Monica City Attorney, terms and conditions of probation, 2013

Massachusetts Attorney General, memo to aid the court regarding sentencing, 2018

Massachusetts Attorney General, statement of the case, 2018

New York State Attorney General, complaint, 2015

New York State Attorney General, felony complaint, 2015

New York State Attorney General, indictment, 2018

### **Workplace safety and health**

New York, Kings County District Attorney, corporate summons, 2019

New York, Kings County District Attorney, indictment, 2017

New York, Kings County District Attorney, indictment, 2018

New York, Kings County District Attorney, letter to court, 2020

## Appendix B: Additional sources of information about cases

While no comprehensive list of all relevant cases has been compiled, the Center for Progressive Reform maintains a “Crimes Against Workers” database.

In addition, this informal spreadsheet contains information about numerous cases that have recently been the subjects of press releases or media coverage.

## Appendix C: Getting started

While this report does not include a detailed roadmap for implementing a new criminal prosecution program in a jurisdiction, the following are some tips, mostly from front-line prosecutors engaged in this work, for district attorneys’ offices wanting to get started, as well as tips for worker advocates hoping to encourage their local DAs to begin prosecuting employer crimes against workers. Finally, there are some tips for both prosecutors and worker advocates about building their relationships.

### Tips for prosecutors’ offices wanting to get started

#### Prepare to do the work

- **Conduct initial research**
  - Review your jurisdiction’s criminal, labor, and insurance fraud statutes and compile a list of all laws with criminal provisions that may apply in an employment setting (even if there is no precedent). Determine what elements need to be proven.
  - Think about what background information can inform the work: the shape of the local economy, which kinds of workers are most vulnerable, who handles these cases civilly, etc.
  - Connect with prosecutors from other jurisdictions to understand how they have brought cases (even under different laws).
  - Connect with labor-focused national organizations and think tanks (like the Economic Policy Institute, the National Employment Law Project, and others) that can provide background and orientation.
- **Prepare the team**
  - Identify lawyers who will staff the unit (if applicable) or handle the cases. Ideally, there would be at least two: one with labor background and one with a

background in criminal prosecution, although this may be difficult. Another effective combination would be to identify an attorney from the state or local labor enforcement agency who can work in close partnership with the assistant DA handling cases.

- Train lawyers on the team regarding finding and prosecuting cases.
- Clarify who will be responsible for conducting your investigations—local police, DA investigators, attorneys, sworn or nonsworn investigative personnel from other agencies—and try to prepare some initial trainings or find other offices that can share training resources.
- **Ask big picture questions**
  - Consider setting some basic parameters for cases that you will consider for criminal prosecution (such as number of workers, amount of theft, evidence of discrimination). This will help set realistic expectations for worker advocates who refer cases and help maintain those relationships. If needed, you can make exceptions to the parameters for particularly egregious cases in which criminal charges are appropriate.
  - Consider the broad goals of the work. What would constitute a “success” for your office in this area: restitution to large numbers of workers? evidence of deterrence? How might you assess your office’s impact?
- **Plan for implementation issues**
  - Think about what it might take for your office to collaborate with vulnerable workers: language assistance? Certain kinds of investigators? Strategic collaborations? Be sure to ensure language accessibility by having interpreters on staff or on standby if needed for interviewing witnesses. Working closely with community-based and worker organizations can enhance trust with witnesses.
  - Set up a complaint form, phone line, and e-mail submission access.

## **Reach out to a wide range of stakeholders and partners**

- **Build relationships with organizations that engage with workers**
  - Identify, reach out to, and build relationships with unions, worker centers, advocacy groups, and other community-based organizations that serve and advocate for workers, as well as private and nonprofit employment and labor lawyers. In addition to organizations focusing on workers, consider reaching out to social services, immigration services, or religious organizations; community or cultural centers; and consulates.
  - It is often helpful to meet in the offices of these partner organizations or attend events they hold, to learn about what they do and who they serve. Talk to their members and ask about their experiences.
  - Offer to do a presentation on wage theft and related crimes for their members, maybe highlighting cases in other jurisdictions that may have parallels in cases in

your jurisdiction.

- Keep in regular touch so that you are top of mind and staff at these organizations feel comfortable contacting you should a particularly egregious case come to their attention.
- **Connect with other government agencies**
  - Get to know state agency partners—and not just those in the labor department. Include insurance regulators, revenue departments, financial institution regulators, and others. Identify, reach out to, and build relationships with other law enforcement agencies that operate in the following workplace areas: wage and hour standards, employment tax issues, health and safety, and industry-specific areas (for example, public health departments may inspect nursing homes). Research which of the laws/regulations they enforce could constitute criminal violations.
  - Meet and greet and talk about what other jurisdictions have done, and explore how coordinated enforcement can make all your cases stronger. If you have investigative resources, offer them to support joint investigations. When a specific case is referred to you, reach out to them as experts for questions related to their agencies' jurisdiction.
  - Connect with other law enforcers in your county/state from the offices of the attorney general, department of labor, human rights, etc.
- **Reach out to the employer community**
  - Reach out to business associations, the local Chamber of Commerce, and the management bar, and inform them of your office's intention to start bringing cases in this area.
  - In some industries, law-abiding employers appreciate enforcement because they lose work and struggle to compete with businesses that gain a competitive advantage by violating laws.
  - This outreach also places the community that may face prosecution on notice. In fact, outreach itself can help drive legal compliance, as concerned employers may change practices.
- **Consider a general outreach campaign**
  - A general outreach campaign, along the lines of the California Labor Commissioner's "Wage Theft is a Crime" media campaign, can be helpful for raising awareness.

## Select and handle cases

- **Choose initial cases carefully.** While your office surely selects all cases carefully, it is wise to choose your first several cases in any new area extremely carefully, so that you begin by taking on cases with egregious facts and exceedingly strong evidence, as well as witnesses committed to the case, which can be facilitated through working with community-based and worker organizations.

- **Set realistic expectations regarding outcomes.** Set realistic expectations with workers who are victims and witnesses regarding case outcomes, including regarding restitution amounts and likelihood of incarceration.
- **Plan your investigative steps**
  - Visit and observe the place of employment if open to the public.
  - Conduct interviews with as many workers as possible. Learn the witnesses' stories. Be sure to ask what they experienced on the job (pay rates, schedules, cash or check, type of work, etc.)
  - If applicable, work closely with the organization or advocates that referred the case to you, to help build a relationship of trust with the witnesses, facilitate a thorough investigation, and foster open communication throughout the course of the investigation.
  - If possible, work closely with an investigator and financial auditor. Try to enlist a forensic accountant, who can help follow the money and be able to explain how things went bad.
  - Serve grand jury subpoenas when warranted: recipients may include the employer, payroll services, banks, insurance companies that have issued liability or workers' compensation policies, and unemployment insurance agencies.
  - Where appropriate, obtain a search warrant if needed when you have probable cause and reliable information as to the location of payroll and employee information.

## Tips for worker advocates hoping to engage with their local DAs

### Prepare to do the work

- Talk with workers or members about their needs and your organizational goals, and discuss the pros and cons of engaging with the criminal justice system for these cases.
- Reach out to advocates in jurisdictions where there have been successful criminal wage theft prosecutions. Talk to the community-based organization partners there to learn how they got started, what worked and didn't work, what challenges they faced, what they would do differently. Ask for contact information for the prosecutors and administrative enforcement agencies they worked with.
- Reach out to the administrative enforcement agencies you already work with to ask whether they have ever considered referring cases for criminal prosecution. Offer to facilitate a conversation with their colleagues in other jurisdictions who have.
- Connect with labor-focused national organizations and think tanks (like the Economic Policy Institute, the National Employment Law Project, and others) that can provide background and orientation.

## Meet with your local DA's office

- Plan before the meeting. Consider how you might best educate prosecutors about what you see happening on the ground, including different kinds of sample cases you might share with them.
- Learn about the office's structure, jurisdiction, and staffing. Are there economic crimes or consumer protection units, which might be a good fit? Does the prosecutor's office also have civil jurisdiction in addition to criminal authority?
- Prepare to educate them about worker issues and workplace laws. These issues may be new to them, and they may not be familiar with the labor laws in your jurisdiction. Understand that what you are asking them to do may be different from the cases they have traditionally brought. Share information about cases brought in other jurisdictions, and share resources about the growing trend of criminal prosecution of employer crimes against workers.
- Ask prosecutors and investigators what information they need, and how and when they want it presented to them. Also try to learn where resources and the law are lacking. Ask how they work differently from civil attorneys or agencies.
- Share information about the working conditions you believe should be addressed by criminal prosecution. Share compelling, egregious stories, and also information about successful prosecutions in other jurisdictions. Explain why criminal prosecutions can be so powerful in terms of deterrence and compliance.
- Offer to connect them with prosecutors from other jurisdictions who have brought cases enforcing workplace rights.
- Consider inviting your local prosecutor to your space, so they can get to know your workers and vice versa. Or invite the prosecutor to one of your organization's meetings or events, so they can hear firsthand about unlawful working conditions from the workers experiencing them. Offer them time at a meeting or event to speak about what their office does and how the office can help the community, beyond the specific issue of prosecution of work-related issues.

## Make referrals

- Ask beforehand what kind of information the office would like to receive. Ask also when referrals should be made: Sometimes prompt referrals, such as when a construction project is still ongoing, can enable covert investigation.
- Remember sensitive aspects of criminal prosecution and government work. For example, emails may be subject to freedom of information laws, and witness statements must be provided to the defense in criminal cases. Ask if prosecutors would prefer an email or phone call to start a conversation about a referral.
- Understand constraints faced by the prosecutor such as statutes of limitation and the more stringent "beyond a reasonable doubt" burden of proof.
- Be mindful of relationships among different prosecutors, agencies, and regulators: they may prefer not to have the same issue referred to multiple government offices. If

you are referring the same matter to more than one office, it's helpful to alert them.

- One of the most useful things you can do in referring a case is to help an office connect with workers who can serve as witnesses, and to help keep track of worker witnesses as an investigation and case proceed. Other helpful steps include providing background information about an employer, and helping workers gather evidence such as pay stubs, paychecks, or photographs.

## **Tips for both prosecutors and worker advocates about building their relationships**

### **Discuss priorities and concerns of advocates.**

Discuss relevant aspects of the prosecutor's office, including the following: investigative process, case selection criteria, enforcement priorities, and applicable statutes of limitation.

### **Share information about the prosecutor's office and worker organization as a whole, beyond the potential for case referrals.**

Learn about the full scope of each other's functions and activities:

- What areas does the office or organization work in? What services does it provide, or for an organizing group, what activities does it engage in?
- What resource limitations or constraints exist? What is the staffing level and structure?
- What are current priorities? Recent innovations?
- Are there other issues on which there is potential for collaboration, such as fighting elder abuse, affinity group fraud, or fraudulent immigration service providers?

### **Discuss the process for case referrals**

- What kinds of cases should be referred? Are there dollar or worker thresholds?
- When and how should cases be referred? What information should be included in a referral?
- To ensure that workers are willing to come forward and report violations, prosecutors' offices should not ask workers about immigration status. This should be explicitly discussed so that everyone involved understands the office's practices in this regard.
- Will there be a point person on both sides?
- What information can be shared with the worker organization referring the case? There is often a significant asymmetry in the information flow, as DA offices have significant limitations in what they can share with people outside of the DA's office.



- What are the general steps in cases and what is the typical timeline?
- How will any media coverage be handled?
- What may be included in a resolution?
- Will there be an opportunity for workers to submit victim impact statements?
- What information must be kept confidential to avoid compromising the case?

## Maintain regular contact

- Even though a DA office may not accept the first few case referrals, eventually there may be a referral that works.
- Remember that both offices share the goal of protecting workers.
- Stay in communication even if there's no case yet, and explore opportunities for collaboration. For example, the worker organization could provide training about a specific industry with high rates of violation, or the prosecutor's office could provide a know-your-rights presentation on an issue of interest to members.

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# Confronting Misclassification and Payroll Fraud:

## A Survey of State Labor Standards Enforcement Agencies

By Mark Erlich and Terri Gerstein – June 2019



**HARVARD LAW SCHOOL**  
Labor and Worklife Program

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# EXECUTIVE SUMMARY

## THE IDEA FOR THIS REPORT

stemmed from an annual meeting of the Interstate Labor Standards Association (ILSA), an organization of state labor departments and other agencies that enforce labor standards. The idea was to question labor standards agencies about their approach to misclassification and understand more broadly what has been done in this area. The report details the results of a written survey of agencies in twenty-seven states and follow-up interviews with representatives from nine states. The purpose is to help state labor standards agencies learn what is being done in other states; to establish some baseline practices that states should adopt, based on respondents' assessments; and to share innovative approaches that should be considered more broadly.

The report summarizes officials' reflections on various aspects of payroll fraud and misclassification enforcement, including most notably the legal framework and enforcement practices.

## Legal context:

- A number of states have adopted the streamlined "ABC test" for one or more laws in determining employee status, while the majority use a variety of tests for the relevant laws (wage and hour, workers' compensation, unemployment insurance). Survey respondents and interviewees identified the varied tests as a source of confusion, while states with the ABC test reported that it was workable and effective.
- In addition, some states have laws specifically treating misclassification as a stand-alone violation of the law, which they found useful; other states lack such provisions.
- Many states have sought ways to enforce the law not only in situations where workers are treated as independent contractors, but also in the increasingly more common situations where workers are paid cash wages "off the books."

## Enforcement practices:

- Most survey respondents reported that they use a combination of proactive and complaint-based (or reactive) enforcement approaches, and interviewees noted the value and impact of a more proactive and strategic approach, including on-site investigations (as opposed to only "desk audits") and use of stop work orders where available.
- A number of states have established task forces to monitor and address misclassification and payroll fraud. They reported that these allow them to address the problem in a more effective and comprehensive manner; however, the extent of operational integration of the various divisions and agencies varies by state.
- Finally, states that collaborated extensively with stakeholders, including unions, community-based organizations, high-road employer associations, and worker centers reported that these collaborations enabled them to be more effective.

The report also notes some areas where further work is needed, including the development of metrics and methods for measuring impact and effectiveness of enforcement efforts. Finally, the report contains recommendations for states wishing to improve their enforcement in this area, including more workable (while still protective) legal standards, establishment of active and ongoing multi-agency task forces, adopting a proactive and strategic approach to enforcement, and creating an effective metric for assessing impact.

# INTRODUCTION

**IN RECENT DECADES,** there has been a sharp increase in employers misclassifying workers as independent contractors when they should be treated as employees.<sup>1</sup> Misclassification is often an effort to reduce labor costs and evade workplace laws, virtually all of which only cover employees. In addition, many employers, particularly in industries like construction, pay workers cash wages “off the books.” This, too, is a method of avoiding employers’ legal obligations, including minimum wage, overtime, prevailing wage, workers’ compensation premiums, unemployment insurance contributions, and employer FICA taxes.

Misclassification and payroll fraud harm workers, depriving them of rights and protections to which they are legally entitled. Law-abiding businesses also suffer, as they struggle to compete with companies that unlawfully lower their costs. And public coffers suffer when employers fail to obtain workers’ compensation insurance, pay unemployment insurance contributions, or pay their share of payroll taxes.<sup>2</sup>

Because of the significant harm resulting from such practices, government agencies have made targeted and sustained efforts to address misclassification and payroll fraud. During the Obama administration, the Wage and Hour Division (WHD) of the United States Department of Labor (USDOL) escalated enforcement programs at the federal level and ultimately signed Memoranda of Understanding with twenty-seven states in order to collaborate in combating misclassification.<sup>3</sup>

In the past two years, however, the USDOL has been rolling back worker protections in a variety of ways, initially withdrawing a WHD Administrative Interpretation on misclassification, and piloting an amnesty program for wage and hour violators, called the PAID program. <sup>4</sup> As a result of this retreat at the federal level, state enforcement has become more critical than ever.

The gulf between federal and state policies continues to widen. On April 16, 2019, the general counsel of the National Labor Relations Board drafted a memorandum determining that Uber drivers were independent contractors rather than employees.<sup>5</sup> Two weeks later, in response to a request from an unidentified virtual marketplace company, the US Department of Labor issued an opinion letter on April 29, 2019 concluding that the workforce of a firm that operates in the ‘on-demand’ or ‘sharing’ economy should be considered independent contractors, not employees.<sup>6</sup> Yet in the same month, three states launched new initiatives to crack down on misclassification as Michigan’s Attorney General Dana Nessel established a new Payroll Fraud Enforcement Unit,<sup>7</sup> Wisconsin’s Governor Tony Evers signed an executive order to form a Joint Enforcement Task Force on Employee Misclassification,<sup>8</sup> and Montana’s Governor Steve Bullock issued an executive order to create a Task Force on Integrity in Wage Reporting and Employee Classification. <sup>9</sup>

***“Misclassification and payroll fraud harm workers, depriving them of rights and protections to which they are legally entitled. Law-abiding businesses also suffer, as they struggle to compete with companies that unlawfully lower their costs”***

In fact, states have been involved in combatting misclassification and payroll fraud for many years. The first statewide inter-agency task force on misclassification was created in New York in 2007.<sup>10</sup> Indeed, some of the worst consequences of misclassification – failure to pay unemployment insurance contributions and to procure workers’ compensation insurance – have the greatest impact on the state level, where those programs are administered. Over the past two decades, many states have taken considerable measures to root out and stop misclassification and payroll fraud.

In an effort to understand the variety of approaches, as well as states’ own assessments of what has been most effective, we conducted the research contained in this report in two stages: (1) a written survey of agencies from 27 states, generally labor standards enforcement agencies; and (2) in-depth follow-up interviews with agencies in 9 states. The vast majority of input came from state departments of labor, and not from agencies administering unemployment insurance benefits or enforcing workers’ compensation laws; given the nature of misclassification and payroll fraud, those agencies would likely have additional and perhaps distinctive insight.

This report contains the findings resulting from our survey and interviews. Our goal in sharing this information is threefold: (1) to help state labor standards officials gain awareness of what has been done by their counterparts elsewhere; (2) to establish some baseline practices that all states should be doing, based on officials’ assessment of their impact; and (3) to share innovative approaches that should be considered more broadly. We also identify several unanswered questions and missing pieces that are areas in need of further discussion and development.

## LEGAL CONTEXT

Enforcing the laws related to misclassification and payroll fraud involves a variety of legal issues. A full discussion of all the legal considerations is beyond the scope of this report. However, it is useful to have an overview of some of the key aspects of the misclassification laws, as well as the perspectives of agency officials as to what aspects of their state laws and powers are particularly useful or challenging.

### Definition of employee

Virtually all workplace laws cover “employees” and exclude “independent contractors.” As a result, a precondition of investigating and enforcing workplace laws includes the determination of employee status. Many of the states interviewed have statutory schemes that incorporate different tests for the various laws involved, including the wage and hour, unemployment insurance, workers’ compensation, and tax laws, for example. These tests tend to examine similar and overlapping factors, such as the extent of control exerted by the putative employer, the duration of the relationship, and whether the worker has investment in the business and the opportunity for profit and loss. On the federal level, the Internal Revenue Service, for example, examines 20 factors<sup>11</sup> and the Fair Labor Standards Act has a number of factors.<sup>12</sup> The tests under various state laws also examine a multitude of factors, and while they sound somewhat alike—and may well be difficult for a layperson to tell apart — they are not exactly the same. Several states reported that this multitude of tests presents a challenge: it makes it harder to enforce the law; creates inefficiencies in that one state agency cannot take action based upon the employee status determination of another; and makes it more difficult for companies to understand their compliance obligations and for workers to understand their rights.

Gerhard Taebel (OR) noted that even after making a determination, his agency refers cases to other agencies “to see whether they would want to take up a case based on their definitions.” Rhonda Gerharz (AK) observed that employers are “responsible for trying to sort out each and every aspect between federal, state and local government compliance requirements, which makes it hard for the ones who really want to do it right as opposed to those who deliberately misclassify to save money and underbid competitors.” Maura McCann (NY) argued that “a simpler test, or single test, could help the regulated community understand a bit better” and that a bright line rule would be helpful: “What’s easier to enforce?...theoretically, the simpler it is, the easier to enforce.” Brent DeBeaumont (WA) similarly noted that the variety of tests is “confusing for employers and employees alike.”

A number of states have adopted the more streamlined and clear “ABC test” either broadly or in a limited fashion. Under this test, the default assumption is that workers are employees unless certain conditions are satisfied. Specifically, an employer who wants to treat someone as an independent contractor rather than an employee has to show that the work:

- is done without the direction and control of the employer; and
- is performed outside the usual course of the employer’s business; and
- is done by someone who has their own, independent business or trade doing that kind of work.

Massachusetts adopted this test by statute in 2004, and New Jersey’s Supreme Court adopted the test for wage and hour laws in 2015; it was already codified in the unemployment insurance statute.<sup>13</sup> In 2018, California’s Supreme Court mandated use of the ABC test in *Dynamex Operations W v. Superior Court*. Dynamex, a package and document delivery company, was sued by two drivers on the grounds that the company had misclassified them

as independent contractors.<sup>14</sup> Prior to 2004, the company had treated drivers as employees and the subsequent nature of the work was unchanged. Business groups, particularly from the gig economy, are currently engaging in extensive lobbying attempts to unravel the Dynamex decision legislatively. However, on May 29, 2019, the California State Assembly passed AB5, a bill that would codify the ABC test and the Dynamex decision in the state's statutes. The bill awaits action by the Senate and the Governor. Other states have partially adopted the ABC test; for example, New York has largely incorporated the ABC test for two industries: construction and the commercial goods transportation industry.<sup>15</sup>

The terrain is constantly changing. In 2017, the Alaska legislature approved a transportation network company carve-out bill, one of many that have been introduced and passed in state legislatures around the country. The statute exempted Uber drivers from state employment laws, thereby resolving a 2015 dispute between Uber and the Alaska Department of Labor and Workforce Development in Uber's favor. For example, in 2018 the Alaska legislature passed HB79, a bill that clarified the definition of an independent contractor for the purposes of workers compensation insurance with a stringent seven factor test and mandated that corporate officers and limited liability company members needed to have a minimum of a 10% ownership interest in order not to be considered an employee.<sup>16</sup>

## Designation of misclassification as a stand-alone violation of the law

In many states, there is no express prohibition on misclassification, but the issue arises through the enforcement and case law development under wage and hour, unemployment, and other laws. In these jurisdictions, for example, misclassifying workers and failing to pay unemployment insurance contributions as a result would constitute a violation of only the unemployment insurance laws.

However, in a number of jurisdictions, misclassification itself is mentioned by name in statutes and is prohibited, with penalties or other consequences. For example, the workers' compensation law in Alaska creates both civil and criminal liability for misclassifying a worker.<sup>17</sup> The California labor code also explicitly prohibits willful misclassification,<sup>18</sup> and Maine law imposes penalties of between \$2,000 and \$10,000 for intentionally or knowingly misclassifying a worker as an independent contractor regardless of whether there are attendant minimum wage or other labor standards violations.<sup>19</sup>

***A representative from the Massachusetts Attorney General's office noted that under the Massachusetts ABC test workers are presumed to be employees and the putative employer has the burden of proving all three ABC factors are met... This is critically important because most workplace protections, including minimum wage, overtime, worker's compensation and anti-discrimination laws, are based on employee status.***

Seventeen of the states surveyed reported that their states had laws specifically addressing and/or establishing penalties for misclassification.

## Criminal enforcement

Only a handful of states reported that there had been criminal prosecution of the various violations resulting from misclassification. Criminal prosecutions that occur are typically handled either by state attorneys general or the local prosecutor (county or district attorney). California Labor Secretary Julie Su reported a district attorney prosecution of a case "in which the misclassification was egregious and rampant."

A number of survey respondents did not have information needed to report whether criminal prosecutions had occurred in their jurisdiction. One state official (Charles Ziegert of WA) reported that talks were ongoing in his agency regarding establishing a method for referring cases for criminal prosecution.

## **Misclassified independent contractors versus “off the books” workers in the cash economy**

Bringing criminal charges based solely on misclassification as independent contractors may be difficult in some cases, depending on the facts, given the high burden of proof in criminal cases (beyond a reasonable doubt) as well as the difficulty of proving the requisite intent.

However, when employers compensate their workers off the books entirely, this situation can give rise to a host of criminal charges, including violations related to the nonpayment of wages (depending on the jurisdiction, these may include wage theft, theft by swindle, larceny, scheme to defraud, theft of services, or other charges) as well as charges related to false documents created when workers are compensated off the books (filing a false document, maintaining false business records) and charges related to workers' compensation or unemployment insurance obligations specifically.

## **Joint employment and individual liability**

Imposing liability “up the chain” is particularly important for effectively addressing misclassification. Brent DeBeaumont (WA), an unemployment insurance official, noted that his agency cites both employers where there are more than one. A New Jersey wage and hour official noted that the state’s prevailing wage law creates joint liability for upper level and lower-tier subcontractors, and said that this would be helpful as well in the private sector: “We would like to be able to work our way up to the general contractor, the person who is responsible for actually hiring these subs.”

Several jurisdictions have laws that create liability for higher-level entities when their subcontractors commit violations, including California’s client employer law<sup>20</sup> (which has already been used to hold a national restaurant chain jointly liable for wage violations with a janitorial contractor)<sup>21</sup> and statutes in the District of Columbia.<sup>22</sup> If adopted more broadly, this type of statute could play a significant role in reducing misclassification and other workplace violations.

Various states allow a finding of individual, and not just corporate, liability provided that requisite facts are present. An official from a southern state observed that individual liability was his biggest stick, especially when an employer could evade corporate liability by declaring bankruptcy and reincorporating the next day.

## **Availability of private right of action**

Most states allow private litigants to bring wage and hour cases directly in court. However, typically there are not methods for a private litigant to file a lawsuit against a company for failure to comply with workers' compensation or unemployment insurance laws.

# ENFORCEMENT PRACTICES

## ENFORCEMENT PRACTICES

In the conventional practice of labor standards enforcement in recent years, worker complaints have typically served as the primary trigger for federal and state agency activity. Over time, the treatment of wage violations has been affected by the larger political dynamics of the systematic reduction of resources in the public sector.<sup>23</sup>

Over the past several decades, the conventional practice in federal and state labor standard enforcement agencies has generally been complaint-based enforcement: a worker complains, and the agency investigates that individual's employer, either from the office or through a field inspection. This complaint-based approach was largely, but not wholly, fueled by resource constraints. However, over the last decade, a discussion among leaders in government, unions, worker advocacy organizations, and academic researchers has challenged long-held assumptions about whether that complaint-based approach is the most effective vehicle to address the chronic and growing problem of labor law violations in US workplaces. Studies have demonstrated an imperfect overlap between sectors that are the sources of most complaints and sectors with the highest incidence of non-compliance with labor laws. The most problematic industries in terms of compliance are often found in low-wage industries with a large immigrant workforce that may be reluctant to use reporting tools requiring interactions with regulatory authorities.

David Weil, WHD administrator in the latter years of the Obama administration and currently Dean of the Heller School of Social Policy and Management at Brandeis University, developed a complaint/compliance matrix that suggests the limitations of relying on complaints as the driver of agency priorities. Weil has recommended shifting the focus from Quadrants 1 and 3 – the highest source of complaints – to Quadrants 1 and 2 – the greatest loci of violations. This re-imagined orientation has been termed a strategic enforcement model.<sup>24</sup>

***“Adopting a strategic enforcement prototype requires targeting industries where evidence shows workers are most likely to be mistakenly or deliberately cheated out of their wages, and making particular efforts to reach those sectors where workers are least likely to report such violations”***

	High Noncompliance	Low Noncompliance
High CR	<b>QUADRANT 1</b> Complaint response: High threshold for conciliations; Integration with directed initiatives <u>Directed initiatives: Focused on special industry initiatives only (e.g., garment, eating &amp; drinking)</u>	<b>QUADRANT 3</b> Complaint response: Conciliate* <u>Directed initiatives: Few</u>
Low CR	<b>QUADRANT 2</b> Complaint response: High threshold for conciliations; Integration with directed initiatives <u>Directed initiatives: Focus on these</u>	<b>QUADRANT 4</b> Complaint response: Conciliate* <u>Directed initiatives: Few**</u>

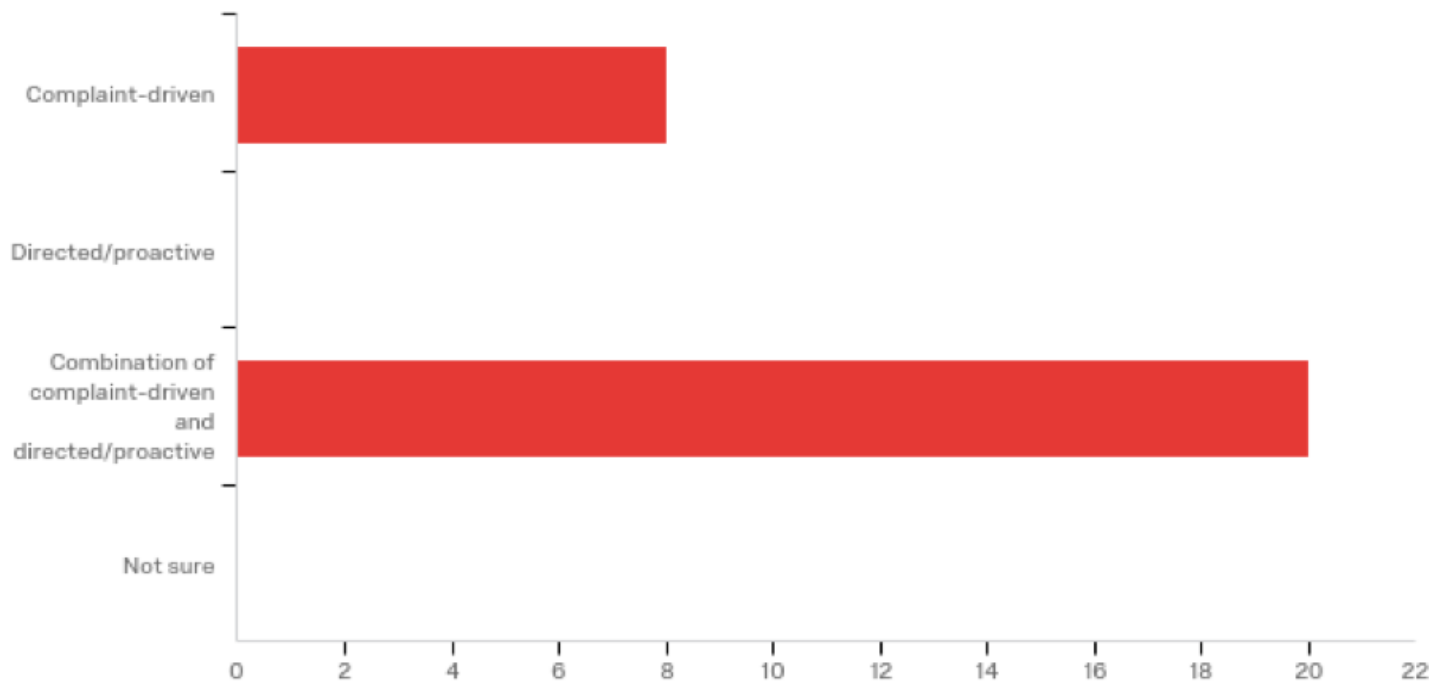
# ENFORCEMENT PRACTICES

Adopting a strategic enforcement prototype requires targeting industries where evidence shows workers are most likely to be mistakenly or deliberately cheated out of their wages, and making particular efforts to reach those sectors where workers are least likely to report such violations. Recognizing that public agencies operate with limited resources, strategic enforcement involves prioritizing which industries to focus on, which workplaces to target within selected industries, and determining which regulatory tools are most effective.

## Complaint-Based vs. Pro-Active Enforcement

Many state agencies are constrained from entirely abandoning a complaint-driven approach in favor of a pro-active enforcement strategy, for various reasons, including statutory mandates, political expectations, and historical tradition. Nonetheless, we asked our respondents to assess where they stood on this spectrum.\*

Respondents reported a wide range of sources of complaints, including not only complaints directly from individual workers themselves, but also referrals from unions, community organizations, worker centers, employer groups,



federal agencies, other state agencies, anonymous tips, and the general public. Most agencies surveyed (61%) have a telephone tip line, and even more (86%) indicated that they have a method to report violations through the internet.

Among the agencies in our survey, 29% reported that their priorities were driven solely by complaints while 71% said their investigations were based on a combination of responses to complaints as well as agency choices of directed or proactive investigations.

Brent DeBeaumont (WA) described his agency’s approach as “primarily complaint-driven. The reason for that is the department has a mandate under the Wage Payment Act to investigate every complaint that we receive from workers.” Representatives of the Massachusetts Attorney General’s Office suggested that there is a roughly 80-20

\*Although we surveyed a total of 27 states, in some cases we had more than one response per state. As a result, in this and other charts, the numbers may add up to a total higher than 27.

# ENFORCEMENT PRACTICES

split between acting on complaints compared to launching pro-active investigations but noted that they “try to make the biggest impact given limited resources. So even when we are opening complaint driven investigations, we focus on industries and geographic areas that fit into our priorities. We also try to help workers who wouldn’t otherwise have access to legal help.”

In many states, limited resources drive priorities. Lindsay Moore (AR) indicated that staffing cutbacks determined his agency’s choices. “We were being pro-active in areas where we knew problems exist,” he reported, “but I’ve had to scale back and go back to a complaint driven system right now.” Other states in similar situations have tried to adopt directed programs. Former Oregon Wage and Hour Administrator Gerhard Taeubel (OR) acknowledged that while his agency had been very complaint-driven in the past, the Oregon legislature recently subsidized several positions for pro-active enforcement by drawing on funds from the state’s Wage Security Fund -- a 1980s-era state program ensuring workers’ ability to receive final wages when companies went out of business.

In a parallel development, state agencies responsible for administering unemployment insurance have shifted auditing strategies as a means of improving efficiency in tracking down misclassification violations, moving from a system of exclusively random to a higher percentage of targeted audits. As an example, Ricky Masarracchia (LA) described the transition in 2011 from a focus on randomly chosen employers to a “risk-based system [that] searched for industries that we thought were ripe for misclassification.” As a result, the numbers of discoveries of misclassification increased from “very few” to a peak of 20,000 in 2015. “We are particularly proud of our selection process,” reported Masarracchia. “Very rarely do we do an audit now and not discover a misclassified worker.”

The survey respondents identified a litany of industries that are particularly problematic in terms of misclassification and other wage violations. While the single most egregious violators may vary slightly from state to state, the overall list is relatively consistent – construction, restaurants and hospitality, trucking and transportation, janitorial services, nail salons, car wash firms, home health care and medical staffing companies. Localized mini-booms in certain industries, such as the shale plain in northern Arkansas, were also cited as dependent on the use of misclassified workers.

Rhonda Gerharz (AK) urged agencies to be pro-active, to monitor various forms of media in order to track new businesses and trending industries. “Don’t wait for a claim to come in,” she suggested. “If your law allows it, don’t be so reactive. When you see a problem, be the first to contact them. Tell them about labor laws and encourage voluntary compliance.”

## **Sweeps / Stop Work Orders**

As part of the evolution of enforcement practices, a number of agencies have created opportunities for investigators to spend more time in the field, returning to an earlier method of policing worksites. “We definitely recommend the value of having an enforcement presence in the community,” said representatives from the Massachusetts Attorney General’s office. According to the AG’s Office, it is now part of the agency’s standard operating procedure. “But there’s a balance,” they pointed out. “For all the time that investigators are out in the field, they’re not at their desks doing audits and much of our work is paper-driven.” Similarly, John Monahan (NJ) reported that periodic ‘sweeps’ are part of his agency’s mission. A team of investigators sets out on a pre-planned series of site visits, as varied as



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searching for misclassification on construction projects to locating child labor issues among migrant workers on New Jersey's farms.

For the past decade, Connecticut has had an aggressive system of sweeps used in conjunction with the state's stop work order legislation passed on October 1, 2007.<sup>25</sup> Stop work orders allow enforcement agencies to halt a business' activities immediately if a violation has occurred. "We do targeted sweeps," said Resa Spaziani (CT), but "we are not going to issue a stop work order because of a complaint on a business. We are doing it much more industry-based." Spaziani described a statewide sweep on the nail salon industry in which four teams of two inspectors shut down 26 salons in one day for a series of violations, including failure to pay minimum wage, off-the-books compensation, and failure to procure workers' compensation insurance policies.

***"We do targeted sweeps," said Spaziani, but "we are not going to issue a stop work order because of a complaint on a business. We are doing it much more industry-based."***

Spaziani has applied similar tactics to the construction industry. Her team obtains building permits in a defined geographical part of the state to determine where construction is occurring, and subsequently visits area sites. One inspector enters the job-site trailer to speak with a representative of the general contractor, other inspectors fan out on the site to interview workers, and another works a computer from the car to see if the various contractors on the project are registered with the state, contribute to the unemployment system, and are up to date in their workers' compensation payments. Spaziani described the system as fast-paced and relatively effective

because businesses that receive a stop work order are motivated to settle in order to reopen or resume operations.

Spaziani claimed that the authority to issue stop work orders has expedited what had been a long and clumsy process. "If I went into a business and the workers told me they were getting paid cash, I would ask the employer for all the records. He wouldn't send them to me and I would subpoena him. The turnaround on a basic wage and hour case was probably 3-6 months. Now they get me their records by the end of that day or the next business day."

According to Spaziani, employer pushback to the expedited system "is not what people think. By the time I've left that site, my phone is already ringing by the owner of the company, by their attorney, by their accountant, by their insurance carrier...It's not that you're chasing the people, but they're chasing you." Depending on the violations involved, the cure can be as simple as getting a current workers' compensation policy, providing proof of payroll payment, or bonding with the departments of revenue or unemployment for out-of-state employers. "Our average turnaround on a stop work order –and somebody did this study – was a day and a half," she continued.

## Cash Compensation

As federal and state agencies increased their focus on the problem of employers misclassifying employees as independent contractors, some employers shifted to a simpler system of cash or off-the-books compensation as a different method to achieve the same labor cost saving goals. Paying workers in cash eliminated the complexities of

# ENFORCEMENT PRACTICES

filing 1099 tax forms and coincided with the growth of an immigrant workforce that many employers believed would be less likely to challenge employers' compensation practices.<sup>26</sup> The descent into an underground economy where worker payments are unrecorded and unreported has provided additional challenges for enforcement agencies.

The shift in employer tactics has forced agencies to reconsider their enforcement approach. As misclassification gives way to under-the-table payments without the issuance of 1099s, new enforcement challenges have emerged. Since cash payments are typically not, in and of themselves, wage and hour violations, the ability to crack down on employers that pay in cash as a means of avoiding tax and insurance obligations will vary from state to state depending on the jurisdictional responsibilities of each state's departments and the level of inter-agency cooperation. Typically labor standards agencies will be able to act only if there are also wage and hour violations in addition to the violations resulting from off-the-books compensation, which is often, but not always, the case. Maura McCann (NY) noted that "off-the-books situations that don't necessarily involve wage theft" are "really tax theft." In the case of an investigation into a cash payment employer, Gerhard Taeubel (OR) indicated that his agency might review underlying minimum wage or overtime violations if relevant, but "if we got a complaint of that nature, we would be looking to refer to the Department of Revenue if they're not reporting or the Employment Department if unemployment taxes aren't being paid."

***"Maura McCann (NY) noted that "off-the-books situations that don't necessarily involve wage theft" are "really tax theft."***

Agencies that have multiple jurisdictions under one roof are well positioned to use a variety of tools to respond to the cash economy. Rhonda Gerharz (AK) said her agency looks to see if there is a failure to provide workers compensation insurance. According to Mark Ryan (RI), his agency takes the position that "wages paid in cash that have been documented by the employee and employer on a ledger sheet are treated as wages for the purpose of determining if a misclassification violation has occurred." Similarly, Ivan Bayci (MI) suggested that if "a claimant submits a proof of payment [it will lead] to an investigation in which an unemployment claim can be established."

Some labor standards agencies have protocols to follow when workers report that they have been paid cash wages, that allow the agencies to enforce the laws vigorously despite the absence of records; they rely upon worker testimony, additional witness corroboration, and other sources of evidence. Still, the agencies' jurisdictions provide them with the authority to pursue minimum wage or failure-to-pay violations, but the inherent nature of a system that purposely has little or no documentation is sometimes a barrier to thorough investigations for agencies with limited resources and more straightforward cases to handle. Furthermore, the enforcement of the larger and more consequential violation, i.e., tax avoidance, is typically in the hands of a separate state division, not the labor standards enforcement agency. "The state departments of revenue, unemployment and workers' compensation all need to be at the vanguard of enforcement in this new cash wage business model," concluded representatives from the Massachusetts Attorney General's Office.

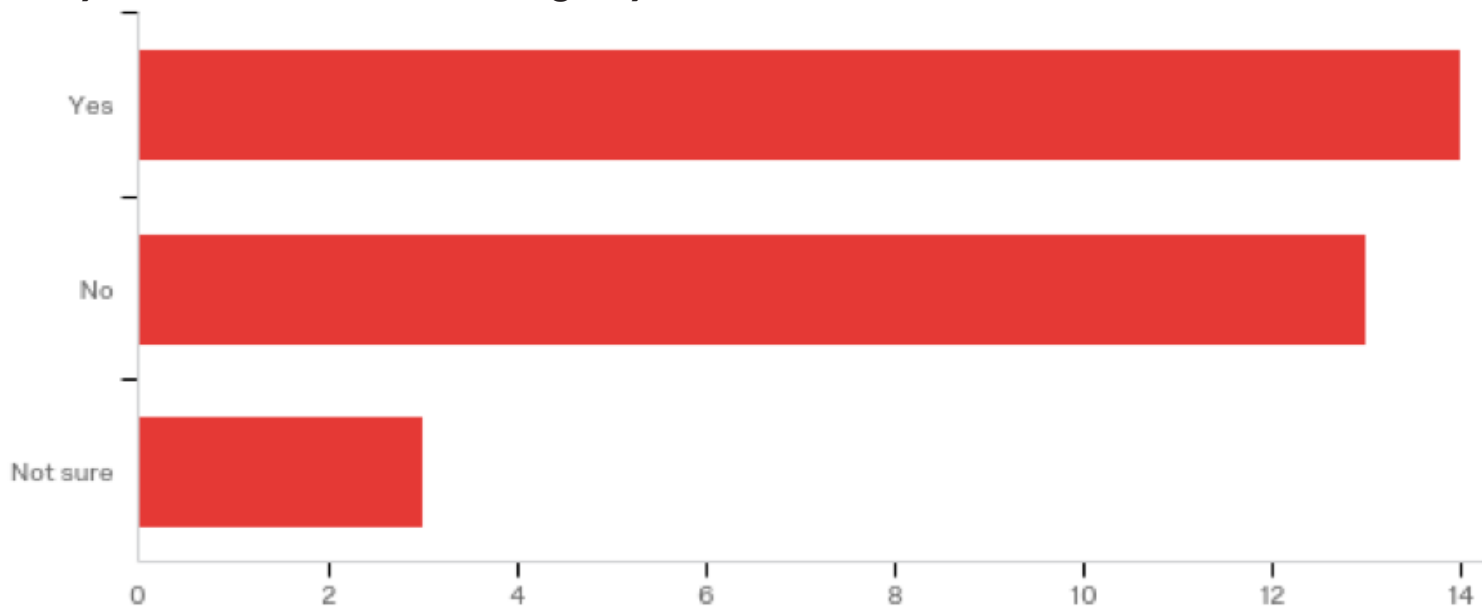
A number of states have formed joint state task forces to monitor and address misclassification and payroll

# TASK FORCES

fraud. Assembling staff from multiple agencies that are charged with regulating the assorted forms of wage theft -- wage and hour violations, income and unemployment tax avoidance, insurance fraud -- allows for a larger pool of inspectors to work collectively on investigations of common targets. A 2016 National Employment Law Project (NELP) policy brief suggested that at least nineteen states had established an inter-agency task force or a study commission, although it should be noted that not all of these involved ongoing, indefinite working collaborations.<sup>26</sup> Our survey showed that just under one half of the respondents reported having some form of a combined agency structure.

Given the number of agencies that have potential jurisdiction over the issue of misclassification, some of these task forces may include up to a dozen different agencies. In New York state, the original body was established in 2007. "The agencies involved include the Department of Labor (Unemployment Insurance and Labor Standards), the Workers Compensation Board Fraud Inspector General, the state Attorney General, the Comptroller, and Tax and Finance," reported Milan Bhatt (NY). In 2016, it was expanded to other agencies, including, for example, the State Liquor Authority, which may seem like an unlikely bedfellow, but which possesses the ability to impose licensing consequences for violations in the restaurant and other industries.<sup>27</sup> "It's sharing information, exchanging tips, turning things into misclassification joint investigations that ordinarily would've just stayed in their separate arenas," concurred Maura McCann (NY). The ability to aggregate resources allows for increased strategic planning as well as field operations. "We get very involved in strategy, how to catch an employer who might be doing something widespread," said McCann. "We'll do joint sweeps in all industries." The relevant agencies in New York meet on a regular basis, cross-train their investigators, and conduct joint sweeps. For instance, New York set up a Nail Salon Task Force that flagged cases for multi-agency collective action.

## Does your state have a combined agency structure?



In smaller states with fewer staff, a task force can prove the old adage that the whole is greater than the sum of its parts. Collaboration can lead to increased efficiencies in government operations and help avoid the inefficiencies that occur when a government agency intervenes in a workplace but addresses only one of many existing and related violations. Michele Small described the operation in New Hampshire. “The task force met with the different agencies and developed an on-line form for complaints. [The Department of] Labor manages the site and triages the complaints...[then] other agencies will pursue the company as well. All information is shared via the web site and by sharing the actual inspection reports.”

Like any other facet of public policy, however, inter-agency task forces can be impacted by political transitions. For example, the Massachusetts Task Force on the Underground Economy established in 2008 was highly effective, but has become less active as a result of a change in gubernatorial administrations. For this reason, it is critical that task forces involve collaboration among civil service career staff, not just political appointees, and that changes, such as routine methods for inter-agency referrals, are integrated into ongoing agency operations.

## **Community Partnerships**

In an era of limited public resources, many state enforcement agencies have developed cooperative working relationships with non-governmental organizations that have an interest in addressing issues of payroll fraud and misclassification. Many unions, particularly in the building trades, have appealed to lawmakers and agency leaders to help clean up construction and other sectors that are facing a growing problem of unscrupulous employer behavior. Worker centers around the country have sought assistance as they advocate for fair treatment of low wage and immigrant workers. Legally compliant employers, concerned about their ability to compete with firms that avoid tax and insurance obligations, welcome heightened enforcement activity as a means of establishing a level playing field. These outside groups are often the best sources of reliable information about serious violations and can assist investigations by serving as a bridge between the government agency and workers on the ground, as well as by helping to gather initial information and documents related to potential violations. In addition, unions, workers centers, and employers know their industries’ internal structures and dynamics; that familiarity can provide valuable context for investigators or agencies attempting to develop a comprehensive strategy to change employer practices or simply resolve an individual or group complaint.

“Our partnerships with advocacy organizations are a fundamental dimension of the Task Force’s efforts,” commented Milan Bhatt (NY). Ricky Masarrachia (LA) reported that “contractors, the business community, and unions supply us with all the tips and leads we can handle,” and his colleague Renita Williams (LA) concurred, citing “the anonymous tips that we received not only from employers but by union officials who saw their members being affected by taxes not being properly withheld.” According to Robert Asaro-Angelo (NJ), the construction unions “do a great job of letting all of our elected officials know what a problem it is because

# TASK FORCES

they're seeing it every day. Every business representative, every organizer sees that it's taking jobs away from their members."

The Massachusetts AG Office's Fair Labor Division has two sets of regular meetings with worker stakeholders: with the Fair Wage Campaign (immigrant worker centers and legal services offices) and with their Labor Advisory Council (comprised primarily of labor leaders). At these meetings, they discuss cases, trends, challenges, new approaches, priorities, etc. Representatives from the Massachusetts Attorney General's Office also emphasized the value of working closely with the business community: "We have a standing meeting with a group of non-union construction industry folks to hear from them and for us to talk about our enforcement. These are the most responsible employers who are frustrated because they can't compete. Often the feedback is for us to take enforcement action against irresponsible contractors so they can compete on a level playing field. We're committed to working with responsible businesses."

The Massachusetts Attorney General's Office is just one of the many agencies around the country that has conducted routine and ongoing outreach to immigrant communities, but reaching those workers has been made more difficult as a result of increased and aggressive federal immigration enforcement and the resulting apprehension in immigrant communities about cooperation with any public authorities. This challenge has existed even when agencies have been clear that they do not collaborate with Immigration and Customs Enforcement (ICE). Resa Spaziani (CT) described the ups and downs of her agency's ability to assist immigrant workers: "When we first started, workers would think we were Immigration and run from us. Once they learned we were actually there to help them get their wages we had a huge turnaround where the undocumented worker was not afraid to come to us." But in the current environment, she continued, "all of a sudden we're not getting those complaints." It is crucial that labor enforcement agencies take steps to ensure that the rights of all workers, including immigrant workers, are enforced and respected.

While a number of task forces started during the time period from 2009-2011, there has been renewed interest in this approach. At least six states started new task forces since the beginning of 2018 (Colorado, Michigan, Montana, New Jersey, Virginia, and Wisconsin).

Based on the information provided in the surveys and follow-up conversations, an effective task force should go beyond simply meeting, issuing legislative recommendation or conducting studies. Rather, it should ensure routine and ongoing integration of operational activities among the agencies involved. Patricia Smith, former Solicitor of the United States Department of Labor and

former Commissioner of Labor in New York State, recently testified regarding best practices for multi-agency task forces.<sup>28</sup>

Her recommendations were consistent with our respondents' input:

- 1. To the extent legally possible, engage in interagency coordinated enforcement.**
- 2. Whether or not interagency coordinated enforcement is adopted, engage in data sharing and systematic referrals to appropriate agencies.**
- 3. Establish a public outreach infrastructure including a dedicated hotline, website, and email address. A robust press strategy is an important component to public outreach.**
- 4. Provide interagency cross training and joint education and require frequent meetings between partner agencies that assures information about possible misclassification is appropriately shared.**
- 5. Make criminal referrals in appropriate cases.**
- 6. Require reports to the legislature or the governor for transparency and accountability.**

Smith also recommended reviewing the first Report of the Joint Enforcement Task Force on Employee Misclassification in New York<sup>29</sup> to understand the actions taken to get New York's task force, the first in the country, under way.

## ADMINISTRATIVE ISSUES

### Job Titles / Staffing Levels

Most agencies use primarily investigators to combat misclassification; 83% reported that the most common job titles for staff engaged in this work was investigators. Attorneys and auditors were also frequently-used job titles. As noted in the previous section, agencies often work within severe resource constraints. Although some large states, like California and New York, have enforcement staff numbering well into the hundreds, a 2018 report in Politico found that seven states had no investigators whose responsibilities included minimum wage and overtime, and most states had fewer than 10 on staff.<sup>30</sup> Arkansas is one of those states. Lindsay Moore (AR) stated, as of 2014, his agency had ten staffers and two attorneys. Those numbers have since been reduced to five and one. As a result, “we used to do 400-450 wage and hour cases. It’s now running around 250. Collections are about half of what I was finding, and there’s a case backlog of about six months.”

### Training

Most agencies reported that they have staff training on enforcement related to misclassification (83%), with a mix of on-the-job and more formal training programs. For example, the Massachusetts Attorney General’s Office, Fair Labor Division, offers a “robust program for our investigators, support staff and new attorneys.” The training includes provision of written materials and use of PowerPoint presentations, and covers the range of laws enforced by the division, including wage and hour laws, earned sick time, child labor, prevailing wage, and other laws.

Alaska (for workers’ compensation fraud) and New Jersey (for wage and hour) both have more of an on-the-job training approach, although New Jersey is in the process of further development. According to Ron Marino (NJ), “we have a field manual for new staff when they are hired. We’re in the process of coordinating right now with Employer Accounts to get training on the ABC test so all our people will be schooled in that. And we’re also in the process, as far as misclassification is concerned, of putting together a manual for them specifically as to how they can do job site inspections and what they look for record inspections and things of that nature.”

In Oregon, there is training for every new staffer that comes on board, on all of the regulations the department enforces, as well as continual exchanges of information between staff and managers.

Lindsay Moore (AR) reported that his agency has trained investigators in better interviewing techniques. “When I came in, 60% of cases went to legal division for hearing, because the staff was so ill prepared that they would lose.” Cases were not sufficiently developed to hold up through the legal process. Now, “we’ve been successful. 98% of cases don’t get forwarded to legal anymore – we settle them within the division.”

Investigators and others enforcing unemployment insurance laws often receive more uniform training than those enforcing wage and hour laws. Federal requirements regarding training related to unemployment insurance enforcement ensure more formalized and robust trainings for investigators and auditors probing misclassification in this context. In New Jersey, new auditors go through a comprehensive training program, with a three-inch thick manual of procedures dictated by the U.S. Department of Labor. In addition, Mindy Gensler (NJ) reported that: “In the audit side, we have a monthly training for our auditors by their immediate supervisors. We have a yearly workshop...and we just started a voluntary training session every second Thursday of the month with our auditors dealing with any changes, any court cases that came up, any difficulties that they’re having in some of their cases

# ADMINISTRATIVE ISSUES

that come in to try and get help. So they're constantly getting trained.... USDOL gives us instructions. They give us what is called a TPS review. We have to meet these 9 tests that the USDOL requires us to do. So it is mandatory for every auditor to learn these tests to be able to pass our audits that USDOL conducts."

## Language abilities

Given the composition of the low-wage workforce, it is critical for agencies to have the ability to communicate with workers from a wide range of national origins. Some agencies emphasized the importance of having staff with language abilities in order to be able to do their jobs effectively. Two thirds of the agencies reported having at least one Spanish-speaker, and a variety of other languages were listed as well, including Portuguese, Vietnamese, Korean, Haitian Creole, Mandarin, and Cantonese. Some agencies conduct language access training for staff, to ensure that they know about the various resources, such as telephonic translation services, that may be available.

## Tip lines

Most agencies surveyed have a telephonic tip line and/or can receive complaints via the internet; however, only nine of them could report with certainty that they routinely collected data regarding incoming complaints through these sources.

## Technology

Twenty-two of the agencies have not developed specialized technology or data analysis tools to detect or target their misclassification efforts, beyond the general case management systems used for all of their case work.. Of the agencies that did use such tools, two reported using particular software programs (called Discovery and AWARE); one conducts a review of tax-related documents, one is comparing 1099-misc data with current or new independent contractor exemption certificate applicants, and another sorts complaints and enforcement on Excel spreadsheet. Several agencies reported that they are actively in the process of addressing this gap. Ricky Masarrachia (LA) reports that his agency is developing "new software that will have built-in analytics that will minimize the physical and manual processes that a tax agent has to go through" which should "allow more time to be able to address more businesses and be able to do more audits." Lindsay Moore (AR) also indicated that his agency is implementing a new complaint system which would process information before case assignment, and which would allow wage and hour complaints to be filled out online, which has improved their "ability to get better information and take action."



## OUTREACH AND USE OF THE MEDIA

In their role as members of the executive branch of state government, labor standards enforcement agency leaders have the opportunity to use the authority and credibility of their offices to reach out to a variety of constituencies impacted by the issue of misclassification. Many agencies regularly conduct public education about legal requirements, to employer associations, worker organizations, and others. A more limited number proactively publicize results of their enforcement.

Most of the agencies we surveyed make significant efforts to educate and inform. Our respondents all reported a regular regimen of public speaking to business associations, unions, community organizations, immigrant advocacy groups, workers centers, lawyers, accountants, human resource professionals, religious groups, police departments, and the general public. When she was California Labor Commissioner, Julie Su (who is currently the Secretary of the California Labor and Workforce Development Agency) launched a "Wage Theft is a Crime" campaign in 2014 that included a new website in English and Spanish, posters on bus sides and bus shelters, and multilingual radio ads about wage theft and the right to report cases to the Labor Commissioner.<sup>31</sup>

"Our focus has been on pro-active education to prevent unsafe practices as well as uninsured injuries," reported Rhonda Gerharz (AK). "Just letting people know that they don't get to deem someone an independent contractor at will goes a long way. It is a common misconception here that you can make someone an independent contractor simply by issuing a 1099. My favorite thing to do is give presentations to business associations. For instance, we had a huge problem with master guides and assistant guides in our hunting and fishing industries where assistant guides were often treated as independent contractors even though their own laws say they're employees. We saw a reduction in that practice after given a presentation to the professional hunting guides association."

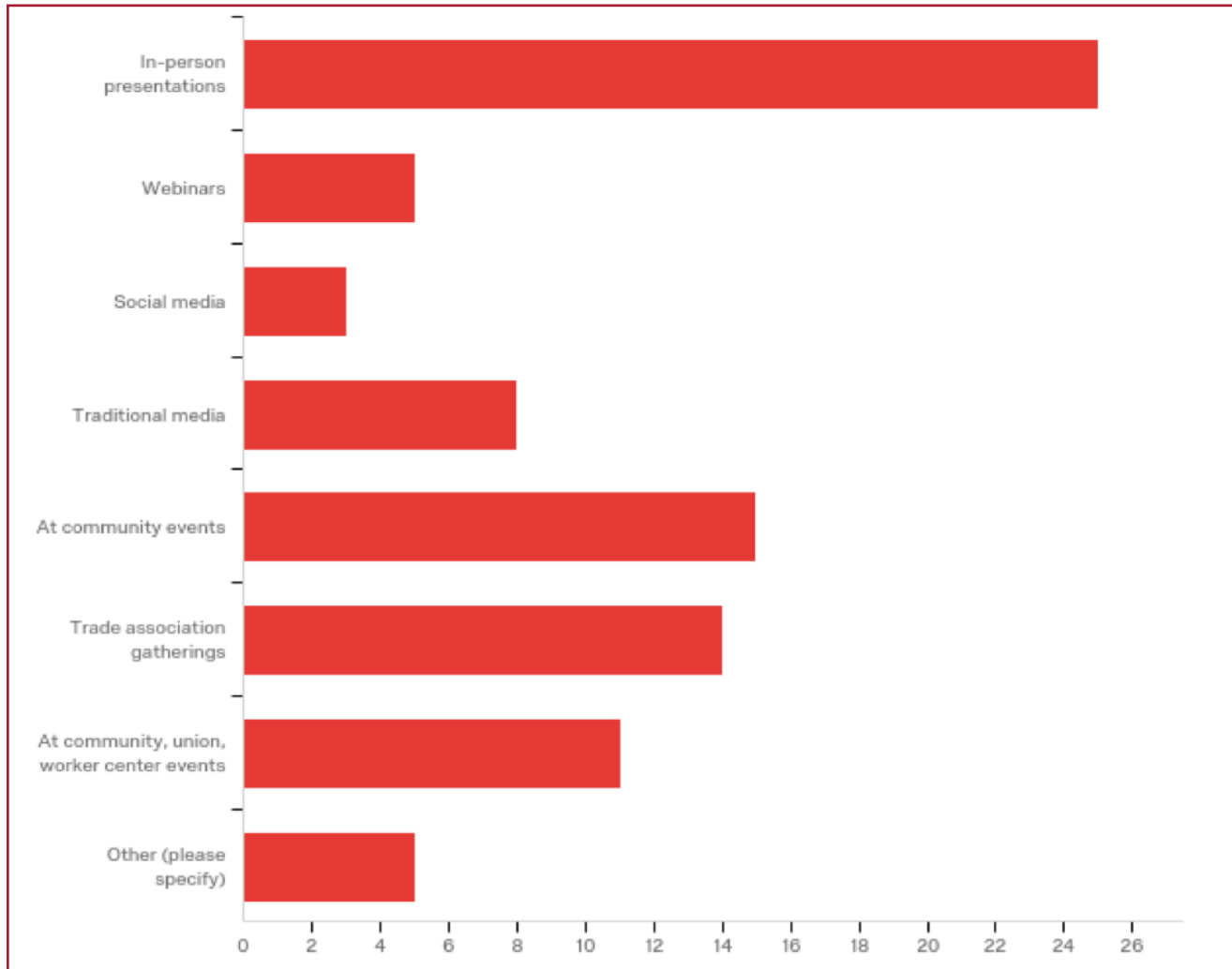
***We're never going to catch every bad employer by just knocking on every door... They need to have a fear of breaking the law by seeing somebody else doing what they're doing, and going to jail or getting severe fines or penalties***

Renita Williams (LA) said that her agency had "spoken at virtually every human resource society chapter, both public and private" in Louisiana. The outreach has presumably been effective. "In the past," confirmed Ricky Masarrachia (LA), "you really had to argue with accountants and CPAs because they thought the use of independent contractors was a good business model and that's the advice they gave their clients." Masarracchia suggested that the efforts of continuing education along with a system of regular audits had paid off: "Our relationship has had almost a 180 degree turn. Now we actually host the Louisiana CPA Society annual meeting at our administrative offices."

Outreach also provides the opportunity for enforcement agencies to explain their understanding of the definitions of independent contractor versus employee, and how they intend to enforce the law. Such efforts can provide helpful clarification, particularly in light of the debate in the business, legal, and political communities over these definitions.

Commissioner Rob Asaro-Angelo (NJ) noted the need for outreach to help businesses, especially smaller businesses, understand the applicable legal standards, adding, “I feel some empathy for those who misclassify because that’s the way everybody else does it in that industry.”

## Forms of Outreach



Some agencies augment their speaking programs with a high-profile media posture – using the bully pulpit to drive compliance through press releases, publications, and the use of social media. The Massachusetts Attorney General’s Office strongly recommended the value of regular announcements of convictions, settlements, and other significant agency activity. “We’ve spent a lot of time building up our press distribution list, including second-language ethnic media that we know are interested. But then we also resend releases to our community partners and unions, and encourage them to retweet or reshare the information.” Shari Purves-Reiter (WA) reported that her agency has rewritten its website to educate both employees and employers and makes extensive use of social media. States that have joint task forces frequently issue annual reports, summarizing their actions as well as calculating lost wages and revenues collected. Zack Fields (AK) reported that his state’s Labor Commissioner uses the agency’s monthly economic research magazine to discuss labor rights enforcement and policy issues.

# OUTREACH

For all of the attempts to be pro-active and use education as a vehicle to forestall misclassification, our respondents recognized that deterrence requires both carrots and sticks. “We’re never going to catch every bad employer by just knocking on every door,” insisted Commissioner Angelo (NJ). “They need to have a fear of breaking the law by seeing somebody else doing what they’re doing, and going to jail or getting severe fines or penalties.” The logic of deterrence rests on an understanding of the law breakers’ business model. In many cases, it is a straightforward financial decision based on calculating whether the benefits of violating the law outweigh the chances of being caught and suffering potential penalties. In other cases, additional considerations come into play.

The importance of publicizing cases in which employers have paid a steep price for labor standard violations is critical in impacting future behavior by those employers and their colleagues. In a recent study, Duke University researcher Matthew Johnson analyzed the effect of the Occupational Safety and Health Administration’s (OSHA) practice since 2009 of issuing press releases about facilities found to be in violation of safety and health regulations. Johnson determined that the attendant publicity prompted other similar facilities to substantially improve their compliance.<sup>32</sup>

This approach is likely equally relevant in the world of labor standards enforcement. Publicity makes employers aware of their obligations and potential consequences for noncompliance; it has a reputational impact that can drive deterrence by similarly situated firms and helps alert workers to potential violations. In addition, even when joint employment is difficult to establish, higher level companies may want to avoid association with contractors or subcontractors with a known history of violations, and at times, negative publicity can serve as motivation for interventions by the parent company to prompt resolution of violations by the lower-tier firms.

***“Our focus has been on pro-active education to prevent unsafe practices as well as uninsured injuries,” suggested Rhonda Gerharz (AK). “Just letting people know that they don’t get to deem someone an independent contractor at will goes a long way.”***

# MEASURING RESULTS

## MEASURING RESULTS AND ENSURING FUTURE COMPLIANCE

Agencies use varied methods to measure the results of their enforcement activities. The metric most commonly used by labor standards agencies is the amount of money recovered for workers. Twenty-three of the agencies surveyed measure back wages collected, while a significant number also measured the unemployment taxes and workers' compensation penalties collected. "Collections are really how we measure our results," said Resa Spaziani (CT).

Other states also measure office activities, procedures, and efficiency. Rhonda Gerharz (AK) said, "We have an interactive statistics log where we track everything in all of our active cases. Did they settle? Did they go to hearing? What was the penalty amount? We have a separate tracking system for uninsured injuries, public inquiries, compliance checks, tips from the public, on-site visits, etc." She also reported that since her agency became more proactive, she had observed a decrease in uninsured injury reporting. States with multi-agency task forces may have annual reports that provide an opportunity for yearly reporting on key issues. For example, the Washington annual report to the legislature on the underground economy includes "the number of unregistered employers that have been found, the amount of assessments that have been made...And we also do our own performance measures within each division to identify assessments, penalties assessed, unregistered employers, all those things as well." Steve Beaty (WA).

New York tracks "the total number of sweeps, the total number of cases, misclassification cases and how many workers were impacted by those cases. The extent that we were able to recover revenue and bring it back to the state." said Milan Bhatt (NY).

Oregon tracks case handling: "We want to make sure we're doing everything as efficiently as we can," said Gerhard Tauebel (OR), adding, "Of course we also want to see that what we're doing has some kind of effect. But I think gauging the effectiveness is probably much harder than just kind of knowing how we're doing things and how well our processes are working."

This observation identifies a critical missing element in labor standards enforcement: the development of appropriate ways to measure effectiveness in driving compliance and deterring violations, either specific deterrence (of the particular employer investigated) or general deterrence (of similarly-situated employers or of the overall employer community).

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# MEASURING RESULTS

One way to assess specific deterrence is to conduct ongoing monitoring, an on-site revisit/follow-up inspection, or at least in-office reviews or audits of employer payroll and other documents subsequent to resolution of an investigation. Employer compliance suggests effective enforcement, while employer noncompliance suggests that changes are needed. Ongoing monitoring, revisits, or reviews can relatively definitively answer the question: has the agency's intervention led to lasting change in that specific employer's practices?

Ten agencies reported that they conduct revisits or reviews either routinely or on occasion. However, agencies do not seem to use the results of such revisits more broadly as a way to assess agency effectiveness generally. Rather, they use them primarily to confirm ongoing compliance by that particular employer.

New York officials noted certain readily identifiable measures of compliance as well. For example, a recent state initiative focused on improving labor standards at nail salons requires salons to obtain a bond to cover wage underpayments or similar liabilities, and Milan Bhatt (NY) reported "pretty universal" compliance with the bond requirements since they came into effect. His colleague Maura McCann also noted that the state's Construction Industry Fair Play Act required employers to post notices of workers' rights under the law; incidents of failure to post has dropped dramatically over time.

Many officials interviewed recounted anecdotal and informal ways they assessed the impact of agency action. "We keep track of our public inquiries and there's lots of gratitude expressed for explaining the high liability risk, not only for personally not having insurance and for potentially misclassifying employee labor, but for also contracting with anybody who does not have Workers' Comp," said Rhonda Gerharz (AK). Steve Beaty (WA) noted that there was a greater impact when there was outreach to the media.

## **Ensuring Future Compliance**

As noted above, some agencies use revisits, reviews, or ongoing monitoring as a method of ensuring future compliance by employers who have been found to have violated the law. For example, Arkansas and New Jersey both have relatively informal processes for conducting revisits to ensure compliance.

Resa Spaziani (CT) said that her agency does not currently have any automatic method of triggering inquiries about employer compliance after a stop work order is lifted, but she noted this as a goal after an upcoming computer system upgrade. Ultimately, though, she said deterring violations and ensuring future compliance would be difficult: "We've had some very big cases and some very big wins, but they just find another way to cheat."

Some states use terms of settlement agreements to drive future compliance. For example, Oregon uses suspended penalties and ongoing monitoring:

# MEASURING RESULTS

“In some of these settlements that we’re talking about, we may say, ‘Well, the penalties for this would be X amount of dollars. We agree to waive half of those or a percentage of those on condition that you remain compliant the next three years and we’ll monitor you during that period of time.’ That seems a pretty strong incentive, I guess, for an employer to at least for a period of time get into the practice of actually making sure that they are complying with the wage and hour regulations. And hopefully during that period of time they will see that it’s not that difficult to do to accomplish that, and even after that agreement expires they will continue in those practices,” said Gerhard Taubel (OR).

In Louisiana, settlements require the employer to admit that it has misclassified the worker, enabling stiffer penalties in the event of future misclassification. The agency then conducts a “desk audit” a year later. “We’re looking at the companies that we audited, we’re making sure that their payroll has increased, the number of workers has increased as per the original audit.” If expected changes have not occurred, “then we follow up with that other audit. And that’s when we’re able to assess those monetary penalties,” says Ricky Masarrachia (LA). One state includes compliance measures in settlement agreements; for example, requiring the employer to agree not to use independent contractors except in limited circumstances, and another state provides notice that future violations will result in escalated enforcement, including more severe penalties and, for public contractors, debarment. Some state laws allow for increased penalties for repeat violations. Some agencies also share violation information with other relevant sister agencies within the state, to ensure more thorough future compliance. One state monitors monthly lists of cancelled or expired workers’ compensation policies as a way to flag potential violations.

## Metrics

In the survey and interviews, agency officials identified several key areas for development, such as legislative reforms. In addition, several missing pieces, or areas for improvement, emerged based on an overview of the information gathered.

One major gap in labor standards and misclassification enforcement is the shortfall in meaningful measurements of success. The commonly used metric of wages collected has the virtue of being readily available and easily comprehensible, and it unquestionably indicates something: generally, agencies that are ineffective at enforcement do not collect significant money for workers. However, this number is limited in that it does not indicate the deterrent impact of enforcement, either on the specific employer or on other employers in that industry. The goal of enforcement is ultimately to create a culture of compliance and to deter violations, and counting the dollars collected does not indicate whether this goal has been met. Consistently high annual collections from within the same industry may indicate, for example, that violations persist and that firms in the industry consider payment of restitution a cost of doing business.

# MEASURING RESULTS

Some research exists suggesting other ways to measure impact: for example, David Weil analyzed the impacts of prior investigations in a geographic area on the behavior of workplaces subsequently investigated in that same area. He examined, for example, whether a fast food outlet behaves differently if many other nearby fast food restaurants were investigated than if that were not the case, and found that prior investigations do have a significant deterrent impact.<sup>32</sup> (See, <https://www.dol.gov/whd/resources/strategicenforcement.pdf>. Pp. 49-57.)

With regard to misclassification in particular (as opposed to enforcement generally), agencies could use information from unemployment tax filings to assess effectiveness: for example, if there is a sweep or concerted effort to enforce within a given industry and/or geographical region, does that result in a noticeable increase in the number of employees reported on tax reporting forms for unemployment insurance? Or any increase in the number of employees or amount of remuneration reported to workers' compensation carriers? Figuring out effective methods of measuring impact is critical to enforcement and fighting misclassification; therefore, focused attention on metrics would be appropriate.

## Information sharing among states

Another area for development is in information sharing and collaboration among states. Several agency officials noted this gap, which is especially problematic in relation to neighboring states: "if an individual employer is misclassifying workers in Pennsylvania and they also come across the border, we really should be aware of that so we can evaluate to see whether or not that individual is also misclassifying employees in the state of New

Jersey." said Ron Marino (NJ). John Monahan (NJ) added, "a lot of companies come from outside of the state of New Jersey and if we go on a site and we do get to interview them, we don't see them the next day or the next week. They're gone. They've gone back to wherever they come from. So that makes it a

*"We've had some very big cases and some very big wins, but they just find another way to cheat." – Resa Spaziani (CT)*

little difficult on us as far as enforcing the statutes concerned for out-of-state contractors."

## Additional areas for development

Some states have powers in the statutes that they have not routinely been utilizing to improve collections or compliance. For example, New Jersey has a law allowing the Labor Commissioner to do a repeat audit a year after an initial violation, and order a license suspension or revocation if the conduct persists; the agency is

# MEASURING RESULTS

currently exploring making use of this statute. Other states may have licensing consequences that could be imposed upon violators, representing more untapped potential.

In addition, many states do not seem to be utilizing the full potential of settlement agreements to ensure future compliance. Few states reported using ongoing monitoring or injunctive/remedial measures (aside from payment of back wages) as part of their routine resolution of investigations.

Finally, collecting money owed is an ongoing challenge for many agencies.<sup>33</sup> Often there are more robust remedies available—such as tax liens—in relation to unemployment insurance liability than for back wages. One state noted that tax liens are subject to varied and progressive collection efforts up to wage garnishment, tax intercept, and bank account levies. Wisconsin has a law allowing workers to place a lien on an employer's property in order to enforce wage law protections and other states, such as New York, have pending bills proposing similar remedies.<sup>34</sup>

Agencies reported a range of methods for trying to collect money owed: referring the debt to the state attorney general's office, docketing a judgment (and seizing any assets that can be found), withholding of progress payments (for public contractors). One state has a full-time loan/collections officer to collect workers' compensation penalties. Another state contracts with a collection agency when they cannot collect the money themselves. Two states noted the importance of individual liability in enabling effective collections. Identifying new ways to swiftly collect money owed would be valuable for increasing agencies' impact.



## GIG ECONOMY

The laws that state agencies are mandated to enforce were, for the most part, written and enacted in the last century. The past few decades have seen a tumultuous transformation of the world of work that has prompted some to question the continued relevance of existing labor laws for the realities of the contemporary workforce. These changes in the workplace create challenges for enforcement agencies. The Massachusetts Attorney General's Office noted that the "current enforcement statutes are, to some extent, built on an outdated employment model that contemplates direct employment relationships. This can sometimes result in problems identifying who is statutorily responsible when enforcing the laws."

A significant majority of American workers still work as full-time employees subject to all the rules and regulations governing that employment status. But there has been an evolution into "alternative work arrangements," a broadly defined category that includes independent contractors, freelancers, temp agency workers, on-call workers, contract workers, and other contingent forms of work. Studies assessing the size of these shifting work categories vary widely. The Bureau of Labor Statistics (BLS) estimated that in 2017, 3.8 percent of U.S. workers held contingent (or temporary) jobs, and also estimated that 6.9 percent of the workforce that year was in "alternative work arrangements," including independent contractors, on-call workers, temporary help agency workers, and similar arrangements. Economists Larry Katz and Alan Krueger estimated that the percentage of workers in alternative work arrangements rose from 10.7 % in 2005 to 15.8 % in 2015, although they subsequently walked back their initial estimates. When part-time employees are included in these calculations, the U.S. Government Accounting Office concluded that alternative work arrangements increased from 35.3 to 40.4 % of employment from 2006 to 2010. And when very broadly defined forays into contingent work are factored in, a recent Federal Reserve Bank report indicated that 31% of adults engaged in gig work in 2017 (defined as informal paid work activity either as a complement to, or as a substitute for, more traditional and formal work arrangements).<sup>35</sup>

Regardless of the reliability and consistency of the data, there is little doubt that the gig economy is a looming presence and even less doubt that it poses particular problems for enforcement agencies. The central question remains: what constitutes an independent contractor versus an employee in the on-demand economy. "It's still all up in the air and there's nowhere we can look to say that something is wrong," said Maura McCann (NY). "We could wait for complaints to come in and go down that road, but then the courts might not agree and the legislatures aren't really taking a stand."

The company in the innovation economy that has drawn the most scrutiny from public agencies has been Uber, the ride sharing firm that insists all its drivers are independent contractors and, as a result, free from most regulatory constraints. Uber has exerted considerable political influence in efforts to exempt itself from laws generally applicable to employers.<sup>36</sup> However, a few states have taken measures, either proactively or in response to complaints, in the

***"Renita Williams (LA) described a company that came to her agency's attention that offered the drivers a choice of terms of employment, i.e., to be hired as an independent contractor or as an employee. "It's the nature of work that determines it," noted Williams, "it's not what the worker chooses."***

time period since Uber and Lyft began their dramatic growth in cities around the country. In October 2014, the Alaska State Department of Labor and Workforce Development initiated an investigation after Uber established a beachhead in Anchorage. The Department determined Uber drivers were employees but the company did not go to a hearing, according to Rhonda Gerharz (AK). “They just left instead.” Uber settled for a penalty of \$78,000 for unpaid workers compensation insurance but admitted no wrongdoing. In March 2015, Uber simply eliminated its service in Alaska. Two years later, however, said Zack Fields (AK), “Uber and Lyft lobbied the state legislature and got them to pass a law stating that the drivers were independent contractors.” As in many other states around the country, Uber relied on its political resources and growing popularity to define “transportation network drivers” as exempt from employee status coverage.<sup>37</sup>

Other states have also found Uber drivers to be employees in response to claims filed against the company. In June 2015, the California Labor Commissioner found that an Uber driver was an employee of the company, and ordered Uber to reimburse her for business expenses incurred.<sup>38</sup> The same year, the Florida Department of Revenue concluded that an Uber driver was an employee for the purpose of collecting unemployment benefits, although that decision was subsequently overturned in 2017.<sup>39</sup> In October of 2015, Oregon Labor Commissioner Brad Avakian issued an advisory opinion that Uber and Lyft drivers should be considered employees in advance of the submission of any complaints or wage claims.<sup>40</sup> “That was meant to bring attention to this issue,” commented Gerhard Tauebel (OR), “and spur further conversation here in Oregon about the tech companies and these new forms of work and how we would apply the laws.” Most recently, an unemployment insurance case regarding driver status was pending before an appellate court in New York; the company decided not to continue with the appeal.<sup>41</sup>

Similar classification issues have also arisen in the food delivery business. Renita Williams (LA) described a company that came to her agency’s attention that offered the drivers a choice of terms of employment, i.e., to be hired as an independent contractor or as an employee. “It’s the nature of work that determines it,” noted Williams, “it’s not what the worker chooses. But we made a call to settle that one rather than risk losing in court.”

Enforcement agencies recognize that Uber and its allies have demonstrated significant political power in all those states where transportation network drivers have been deemed by legislatures and courts to be exempt from employment regulations. There is also the mystique of the information economy as the harbinger of the future, which causes hesitation regarding strong enforcement approaches. Some of the agencies we surveyed expressed concern about aggressive enforcement strategies fueling the perception of quashing innovation.

Despite these obstacles to action, many of our respondents see the expansion of independent contractors in these new occupations as a violation of existing labor laws. Commissioner Angelo (NJ) summarized a common perspective: “The gig economy can be a euphemism for exploiting workers. If folks are legitimate 1099 workers or independent contractors or freelancers, I’m happy to support them. But basically, it’s a way for employers to free themselves of their responsibilities to workers.”

# CONCLUSION

## CONCLUSION

This report is a survey of current policies and approaches of state labor standards enforcement agencies. Our goal has been to summarize best practices and lessons learned as outlined by respondents and also to complement their comments with our own views and recommendations.

As an overall perspective, we believe that adopting a strategic enforcement orientation will best serve the needs of working people in communities across the country. We recognize that, in some states, there may be statutory and/or institutional barriers that prevent a full adoption of strategic enforcement, but we believe agencies should prioritize which industries to focus on based on a comprehensive analysis of a given jurisdiction, which workplaces to target within selected industries, and which regulatory tools are most effective. Responding exclusively to complaints as they come in the door is less likely to produce broadly effective enforcement / deterrence results.

*“As an overall perspective, we believe that adopting a strategic enforcement orientation will best serve the needs of working people in communities across the country.”*

The following recommendations constitute a check list of action steps that can help drive a strategic enforcement approach:

- **Collaborate with relevant governmental agencies** Establish an inter-agency task force or other method for routine, ongoing collaboration. States that have adopted ongoing inter-agency task forces have generally found that the sum of the parts is greater than the whole.
- **Break down silos** In many states, individual agencies often operate in silos, each with its own internal culture and methods of carrying out its mission. Because most misclassification and payroll fraud violations consist of multiple infractions – wage and hour, unemployment, tax and insurance fraud – enforcement will be that much more effective if the appropriate agencies share information and strategies.
- **Create cross-referral systems** Even without the establishment of a formalized task force, at the very least, there should be regular meetings among the relevant agencies, as well as a process for cross-referrals among agencies when they find instances of misclassification. It is inefficient for an agency to intervene in a given workplace, find violations, and take no steps to alert sister agencies about likely related violations.
- **Jointly select targets** A more effective approach toward misclassification would involve even greater collaboration, including joint strategic selection of targets, joint field investigations, and collective identification of trends and of needed legislation.
- **Coordinate cross-agency sweeps** One advantage of inter-agency cooperation is the ability to draw on broader resources. In those states that conduct sweeps of targeted industries, the capacity to cover more work sites is enhanced by incorporating staff from several agencies with multiple fields of expertise. In addition, in states that

allow the issuance of stop work orders, assembling a team of enforcement agents armed with the power to shut down irresponsible businesses can have a timely deterrent effect.

- **Engage with stakeholders** Engage in extensive external engagement: with stakeholders (including worker and employer organizations) and also the media.
- **Collaborate with non-governmental organizations.** In order to reach vulnerable workers and address egregious violations, agencies should collaborate extensively with non-governmental organizations, such as unions, advocacy groups, worker centers, and high-road employer groups. These groups are committed to supporting and aiding agency accomplishments, and agencies benefit from accepting outside organizations as partners in the mission to protect workers' right. While it is important to negotiate an appropriate relationship, partners can play a crucial role as sources of information unavailable to agency staff and as conduits to workers, among other things.
- **Use the office for educational outreach** and as a bully pulpit. When agency leaders regularly meet with employer and trade associations, unions, worker centers, community organizations, and other stakeholders, they can articulate the agency agenda, present the rationale for enforcement priorities, and outline their interpretation of their state's labor laws. For example, unambiguous and pro-active public explanations of the relevant definitions of what constitutes an employee vs. an independent contractor can clarify guidelines for those employers who want to "play by the rules" and serve as a warning for others who may seek to skirt the law. Outreach is also critical in educating workers about their rights.
- **Publicize policies and outcomes in the media** The educational outreach of the bully pulpit should be accompanied by a consistent media strategy that publicizes agency policies and the results of agency investigations. The impact of an agency action against a violator is amplified when the results are made public and can serve as a deterrent for the broader employer community. Again, publicity also helps inform workers about their rights and about resources available to them.

## **Adjust internal operations to meet the challenge of misclassification.**

- **Train staff on misclassification** Ensure adequate formal and ongoing training of agency staff on statutory authority, industry analysis, and enforcement techniques.
- **Develop an agency language access plan and make every effort to hire multi-lingual staff** Many of the most egregious violations take place in low-wage industries with a largely immigrant workforce. Agencies must expand language capacity to serve these communities. This will require development of a language access plan, and the hiring of staff who speak commonly-used languages.
- **Develop a strategy for addressing violations in the cash economy** As many violating employers have shifted from misclassifying workers as independent contractors to a system of under-the-table cash payments, it is critical that agencies develop a strategy to address this form of compensation. Having inter-agency cooperation is helpful in certain of these cases, where there is no wage and hour violation but tax and insurance violations exist.
- **Adapt strategies for the gig economy** Similarly, the emergence of the gig economy demands a comprehensive and consistent enforcement approach. This is a new challenge in that agencies will have to navigate the constantly shifting and uncertain political and judicial shoals of what constitutes legal employment in on-demand jobs.

# CONCLUSION

- Evaluate outcomes Agencies should measure results and find ways to track ongoing compliance and deterrence.
- Measure results Every agency should have a meaningful and consistent method of measuring results, ideally not limited only to the metric of lost wages recovered. An effective agency should find ways to determine if its work is serving to deter violators and ensure lawful working conditions.
- Track compliance Agencies need systems of tracking future compliance of past violators. Revisit or monitoring programs for former violators would help ensure future compliance as well as help assess the effectiveness of past enforcement.
- Update relevant laws Statewide adoption of the ABC test for determining employee status would lead to greater compliance, and benefit workers, employers, and enforcers alike. The test would provide a more clear and comprehensible method for all parties to determine status, in contrast to the plethora of overlapping yet distinct tests that exist in many states. Other helpful legislative measures identified by respondents include laws creating joint employment in a fissured workplace, laws imposing individual liability, statutes enabling the issuance of stop work orders, and laws allowing for criminal prosecution of egregious violators.

## NOTES

1. Some of the studies documenting trends in misclassification include:
  - “Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification.” U.S. Government Accountability Office, 2006. (<https://www.gao.gov/new.items/d06656.pdf>)
  - “Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention.” U.S. Government Accountability Office, 2009. (<https://www.gao.gov/assets/300/293679.pdf>)
  - “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries.” ([http://www.faircontracting.org/wp-content/uploads/2012/09/icm\\_imposes-huge-costs1.pdf](http://www.faircontracting.org/wp-content/uploads/2012/09/icm_imposes-huge-costs1.pdf))
  - <https://blog.pgcgroup.com/the-rise-and-risks-of-ic-misclassification>
  - “Lots of Employees Get Misclassified as Contractors. Here’s Why It Matters.” (<https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters>)

- <https://www.epi.org/publication/independent-contractor-misclassification/>
- 2. There are a number of state-based reports estimating the social and economic costs of misclassification on revenues, including studies covering California, Colorado, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, and Tennessee.
- 3. <https://www.dol.gov/whd/state/statecoordination.htm>
- 4. <https://www.dol.gov/whd/paid/>
- 5. <https://www.nytimes.com/2019/05/14/business/economy/nlr-uber-drivers-contractors.html>
- 6. [https://www.dol.gov/whd/opinion/FLSA/2019/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf)
- 7. <https://www.detroitnews.com/story/news/politics/2019/04/22/nessel-creates-unit-crack-down-payroll-fraud/3541002002/>
- 8. [https://dwd.wisconsin.gov/dwd/newsreleases/2019/190415\\_joint\\_taskforce\\_creation.htm](https://dwd.wisconsin.gov/dwd/newsreleases/2019/190415_joint_taskforce_creation.htm)
- 9. <http://cor.mt.gov/Publications/Article/on-tax-day-governor-bullock-creates-task-force-to-ensure-montanans-receive-fair-pay>
- 10. [https://govt.westlaw.com/nycrr/Document/4f087894cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/4f087894cd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))
- 11. [https://www.michigan.gov/documents/uia/IRSFactorTest\\_503194\\_7.pdf](https://www.michigan.gov/documents/uia/IRSFactorTest_503194_7.pdf)
- 12. <https://www.dol.gov/whd/regs/compliance/whdfs13.htm>;
- 13. <https://law.justia.com/codes/new-jersey/2009/title-43/43-21/43-21-19>
- 14. <https://law.justia.com/cases/california/supreme-court/2018/s222732.html>
- 15. New York State Construc on Industry Fair Play Act: N.Y. 2010 N.Y. ALS 418 ; New York State Commercial Goods Transporta on Industry Fair Play Act: N.Y. Lab. Law § 826–862e.
- 16. <https://law.justia.com/codes/alaska/2017/title-28/chapter-23/section-28.23.080/>; <http://www.akleg.gov/PDF/30/Bills/HB0079Z.PDF>
- 17. <https://codes.findlaw.com/ak/title-23-labor-and-workers-compensation/ak-st-sect-23-30-250.html>
- 18. <https://law.onecle.com/california/labor/226.8.html>
- 19. <http://legislature.maine.gov/statutes/26/title26sec591-A.html>
- 20. [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=LAB&sectionNum=2810.3](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=2810.3).
- 21. <https://www.latimes.com/business/la-fi-cheesecake-factory-20180611-story.html>
- 22. <https://law.justia.com/codes/district-of-columbia/2015/division-v/title-32/chapter-13/subchapter-i/section-32-1303/>
- 23. Between 1978 and 2008, the number of US Labor Department Wage and Hour

Division (WHD) inspectors dropped from 1343 to 709 at the same time as the number of establishments covered by the Fair Labor Standards Act increased by 112%. Similar staffing cutbacks occurred in state agencies facing budget shortfalls. When resources had been adequate at federal and state agencies, there was a sufficient number of inspectors to

establish a street presence, regularly patrolling businesses on their watch. Employers in areas with ample regulatory staffing knew there might be periodic policing of their workplaces and that knowledge tended to discourage labor standards violations. As funding for inspectors dwindled, many agencies responded by pulling remaining staff off the streets and into their home offices. By 2004, 78% of all inspections by the WHD of the US Department of Labor were generated by complaints. In many cases, employers were freed from apprehensions about authorities routinely looking over their shoulders. In addition, the relocation of personnel off the street produced an internal cultural change that reinforced the complaint-based model

of enforcement. Investigators worked at their desks, developing a triage system to handle incoming reports about violations from workers in a random variety of workplaces.

Janice Fine and Jennifer Gordon. 2010. Strengthening Labor Standards through Partnerships with Workers' Organizations. *Politics and Society*. Vol 38, No. 4. David Weil and Amanda Pyles. 2005. Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace. *Comparative Labor Law & Policy Journal*. Vol. 27. No. 1

24. Weil and Pyles 2005; Fine and Gordon 2010.
25. <https://www.ctdol.state.ct.us/wgwkstnd/StopWork/Section31-76a.htm>
26. NELP Policy Brief from May 2016 by Sarah Leberstein and Catherine Ruckelshaus, "Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it." Located at <https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>
27. [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EWTFReport\\_27.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EWTFReport_27.pdf)
28. <https://s27147.pcdn.co/wp-content/uploads/Testimony-NELP-M-Patricia-Smith-New-Jersey-Misclassification-Task-Force-December-2018.pdf>.
29. [https://iiifc.org/images/pdf/employee\\_classification/NY%20Task%20Force%20Feb.2008.pdf](https://iiifc.org/images/pdf/employee_classification/NY%20Task%20Force%20Feb.2008.pdf).
30. <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>
31. <https://wagetheftisacrime.com/>
32. Matthew Johnson, "Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws," Unpublished manuscript.
33. <https://www.nelp.org/wp-content/uploads/2015/03/Hollow-Victories-Unpaid-Wages-Report.pdf>
34. <https://www.nysenate.gov/legislation/bills/2019/s2844>
35. Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, September 2016; Lawrence Katz and Allan Krueger, The Rise and Nature of Alternative Work

Arrangements in the United States, 1995-2016, January 2019;

Federal Reserve Bank, Report on the Economic Well-Being of U.S. Households in 2017, May 22, 2018;

<https://www.epi.org/press/workers-were-more-likely-to-have-standard-work-arrangements-in-2017-than-in-2005/>

Robert Kuttner, John Schmitt, Heidi Shierholz, & David Weil, "The Future of Real Jobs: A Prospect Roundtable, " The American Prospect, May 14, 2019.

36. Resources about states that have passed legislation exempting Uber and Lyft from employment status:

- <http://www.forworkingfamilies.org/sites/pwf/files/publications/Uber%20State%20Interference%20Jan%202018.pdf>
- <https://onlabor.org/state-tnc-and-mc-legislation-preemption-and-employment-status-of-drivers/>

37. <https://nelp.org/publication/uber-state-interference/>

38. <https://www.scribd.com/doc/268911290/Uber-vs-Berwick>

39. <https://www.miamiherald.com/news/local/community/miami-dade/article130050824.html>

40. [https://www.oregon.gov/boli/SiteAssets/pages/press/10\\_14\\_15\\_BOLI%20issues%20Advisory%20Opinion%20on%20Employment%20Status%20of%20Uber%20Drivers.pdf](https://www.oregon.gov/boli/SiteAssets/pages/press/10_14_15_BOLI%20issues%20Advisory%20Opinion%20on%20Employment%20Status%20of%20Uber%20Drivers.pdf)

41. Link to Unemployment Insurance Appeal Board decision:

<https://www.documentcloud.org/documents/4613843-Uber-AB-Decision-Redacted.html>

Article about decision: <https://www.forbes.com/sites/janetwburns/2018/07/20/new-york-gives-uber-drivers-unemployment-rights-in-blow-to-non-employee-model/#199f28cf42c2>

Agency staff from the following states participated in the online survey: Alaska, Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Virginia, Washington, Washington D.C., Wisconsin

Staff from the following states took part in phone interviews: Alaska, Arkansas, Connecticut, Louisiana, Massachusetts, New Jersey, New York, Oregon, Washington

Some of the respondents have since retired or taken other positions.





**MCAMW Testimony SB838 FAV.pdf**

Uploaded by: Roger Manno

Position: FAV



Re: SB 838 / HB 1261 - WORKPLACE FRAUD AND PREVAILING WAGE - VIOLATIONS - PENALTIES AND REFERRALS - FAVORABLE

Dear Chair Griffith and honorable members of the Senate Finance Committee:

On behalf of the Mechanical Contractors Association of Metropolitan Washington (MCAMW), I write today to express our strong support for SB 838 and to request a favorable committee report. The MCAMW represents approximately 200 construction contractors, some 10,000 workers, and 1,000 working apprentices. Our economic footprint throughout the region is substantial, generating some \$2 billion in annual revenue, and some \$500 million in state, federal and local taxes each and every year.

For the last 96 years, we have worked to expand the circle of construction and workforce training excellence throughout Maryland. Our success has never been guaranteed, and we take nothing for granted. As long as our contractors can compete on a level playing field, free from unscrupulous actors who cheat workers, government, and the taxpayers, we believe that our core values of hard work and attention to details will serve our members and the residents of Maryland for many years to come.

SB838 addresses the vile practices of wage theft and misclassification, which rob workers of their wages, dignity and upward mobility. The legislation also addresses these practices from the perspective of underlying frauds – tax fraud, payroll fraud, workers compensation fraud, and insurance fraud. These frauds are existing crimes in Maryland but are not fully investigated and prosecuted because wage violations are “siloes” at the Department of Labor, in many cases, never to be investigated and prosecuted by the respected branches of government with that specific jurisdiction: the Comptroller and the Department of Justice. While, as drafted, this legislation does not specifically call for referrals to the Department of Justice, it does require some referrals to the Comptroller, in particularly clear and egregious cases.

For those reasons, MCAMW supports this legislation as a necessary and important first step in addressing the broader issues related to wage theft and the myriad of underlying criminal frauds against workers, state government, and the taxpayers. We ask for a favorable committee report.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Bello", is written in a cursive style.

Thomas L. Bello  
Executive Vice President

**Roger Manno Testimony SB838 HB1261 FAV.pdf**

Uploaded by: Roger Manno

Position: FAV

SB 838 / HB 1261

Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals

FAVORABLE

Dear Chair Griffith and members of the Senate Finance Committee:

I hope this finds you well.

On behalf of UA Steamfitters Local 602, UA Plumbers & Gasfitters Local 5, and the Mechanical Contractors Association of Metropolitan Washington, please accept this testimony in support of SB838 / HB1261, legislation which addresses Wage Theft and wage-related tax and insurance frauds.

This bill primarily addresses a grotesque dissonance between the classifications of victims detailed in the Labor and Employment Article and the Tax-General Article of the Maryland statutes.

Under the Labor and Employment Article, if the victim of Misclassification is a *human being worker*, the maximum statutory penalties for the most egregious economic injury, one that was done willfully (intentionally denying proper wages, Unemployment Insurance, Workers Compensation Insurance, Overtime, paid leave under Maryland's Time to Care Act and Healthy Working Families Act, legal holidays, protections against illegal employment discrimination, and both retirement and health care benefits) are nominal civil fines of no more than \$5,000.

However, in that same scenario, but under the Tax-General Article, if the victim is the *State of Maryland* who is fraudulently denied the appropriate payroll withholdings – Income Tax, Unemployment Insurance, and Workers Compensation Insurance – the penalties are criminal misdemeanors up to \$10,000 and 5 years in prison, with additional criminal penalties of \$5,000 and 18 months in prison.

This divergence in penalties between Wage Theft and Payroll Fraud, and between human being victims and the State of Maryland, for the same willful act, makes little sense. Both acts are egregious, and both should be similarly charged and prosecuted, if the *mens rea* element of intent can be proven. Senate Bill 838 begins to align these penalties across the two statutes by elevating penalties for Wage Theft for Misclassification to a misdemeanor with comparatively nominal potential imprisonment, and fines up to \$5,000.

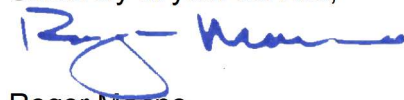
Prosecuting Wage Theft as a criminal act is common among states, with many states also prosecuting the underlying frauds as felonies. Doing so recognizes the pernicious nature of these willful acts, and also underscores the vulnerability of the worker victims, who tend to be women and people of color. For example, a 2017 study by David Cooper and Teresa Kroeger released by the Economic Policy Institute entitled “Employers steal billions from workers’ paychecks each year” revealed that women are more likely than men to be victims of wage violations by 55.1 percent to 46.6 percent, while workers of color are more likely to be victims wage violations than white workers, with Hispanic workers being the largest victim group, followed by Black workers.<sup>1</sup>

In addition to harmonizing the statutes among victims of the same willful act, SB838 / HB1261 also increases the efficiency of inter-agency cooperation and collaboration in investigations and prosecutions by cross referencing the statutes and requiring referrals of Wage Theft cases from the Department of Labor to the Comptroller. This is a key point of the bill, since Wage Theft is a civil offense within the Labor and Employment Article of the Maryland statutes, while Income Tax fraud and Payroll Tax fraud are existing criminal violations (misdemeanors) within the Tax-General Article of the Maryland Statute. This loophole in the statute effectively allows for Wage Theft cases to be dispensed with civilly at the Department of Labor, without necessarily ever getting to the underlying fraud charges, which are currently criminal acts under the Tax-General Article, but are not prosecuted unless referrals are made from Department of Labor to the Comptroller.

In closing, SB838 / HB1261 holistically addresses one of the most vicious and pervasive practices in the workforce sector, Wage Theft / Misclassification, and allows for a more efficient and methodical approach to prosecuting existing related criminal frauds against the State of Maryland and the taxpayers.

For these reasons, I respectfully ask for a favorable committee report.

Sincerely at your service,



Roger Manno

**Roger P. Manno, Principal | Manno & Associates LLC**

Attorney | Lobbyist | Maryland Senator (Ret.)

Admitted to practice law in MD and DC

c 202.425.3523 | o 888.422.0131 | e rmanno@mannoandassociates.com

[www.mannoAndAssociates.com](http://www.mannoAndAssociates.com)

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<sup>1</sup> David Cooper and Teresa Kroeger, “Employers steal billions from workers’ paychecks each year,” *Economic Policy Institute*, May 10, 2017

# **UA Plumbers & Gasfitters Local 5 SB838 FAV.pdf**

Uploaded by: Roger Manno

Position: FAV



# PLUMBERS LOCAL UNION NO. 5

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

4755 Walden Ln. Lanham, MD 20706 • 301-899-7861 (T) • 301-899-7868 (F)



SB 838 / HB 1261

## Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals FAVORABLE

Dear Chair Griffith and members of the Senate Finance Committee:

As Business Manager/Financial Secretary Treasurer of UA Plumbers & Gasfitters Local 5, I write today to ask the committee for a favorable report of SB838 / HB 1261, and to thank Senators Kramer, Augustine, Beidle, Gile, Klausmeier, McCray, Muse, Salling, and Waldstreicher for your sponsorship.

The UA Plumbers & Gasfitters Local 5 have been installing, maintaining and servicing the waste, water & gas systems in the Washington D.C. area since 1890. We represent some 1,800 of the most highly-skilled construction workers to be found anywhere, including over 300 apprentices, which provide the workforce excellence across some 65 signatory construction contractors throughout the Washington, DC Metropolitan area.

We support SB 838 / HB 1261 because it significantly improves enforcement and prosecution of extremely heinous violations against government and the taxpayers – payroll fraud, tax fraud, and insurance fraud – and two of the most egregious social and economic justice exploitations that there is: wage theft and Misclassification of workers.

The practice of Misclassification robs workers of their status and their wages by treating them and the value of their work as less than the law requires. It is both classist, in that it stifles economic mobility for workers trying to provide for their family and move up the economic ladder, and in many cases, it is patently racist, in that it tends to target specific sectors of the construction trades where large numbers of workers of color are employed.

Within each and every instance of Misclassification and wage theft are also underlying instances of payroll fraud, tax fraud, and insurance fraud, in that the underreporting or misreporting of earnings constitutes under collection of workers' compensation withholdings, unemployment insurance withholdings, and federal FICA withholdings.

As drafted, SB 838 / HB 1261 begin to address this issue by making willful Misclassification a misdemeanor offense, and requiring referrals of wage theft cases from the Department of Labor to the Comptroller. This is necessary because wage theft is a civil offense with the Labor and Employment Article of the Maryland statutes, while tax and payroll fraud are criminal violations (misdemeanors) within the Tax General Article of the Maryland Statute. This is an oversight and a loophole in the statute. By appropriately cross referencing jurisdictions from both these two sections of the Maryland statutes, Maryland can begin to reign in these heinous acts, as many other states have already done.

For those reasons, we ask for a favorable committee report.

Sincerely,

Terriea "T" Smalls  
Business Manager / Financial Secretary Treasurer

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Terriea "T" L. Smalls  
Business Mgr. / Financial Sec-Treas.

James L. "Lou" Spencer  
Asst. Business Manager

Anthony A. Solis  
Business Rep. and Organizer

Micheal S. Canales, Jr.  
Business Rep. and Organizer



**UA Steamfitters 602 Testimony SB838 FAV.pdf**

Uploaded by: Roger Manno

Position: FAV

# Journeyman Pipe Fitters and Apprentices



## Local Union No. 602

8700 ASHWOOD DRIVE • 2<sup>ND</sup> FLOOR • CAPITOL HEIGHTS, MD 20743

TELEPHONE: (301) 333-2356 • FAX: (301) 333-1730  
AFFILIATED WITH AFL-CIO

### WORKPLACE FRAUD AND PREVAILING WAGE - VIOLATIONS - PENALTIES AND REFERRALS

#### FAVORABLE

Dear Chair Griffith and honorable members of the Senate Finance Committee:

As Business Manager/Financial Secretary Treasurer of UA Steamfitters Local 602, please accept this letter in strong support of *SB 838 / HB 1261 - Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals*, which addresses the pervasive acts of Misclassification, wage theft, tax fraud, payroll fraud and insurance fraud

The UA Steamfitters Local 602 represents some 4,900 Journeymen, 1100 Apprentices, and 205 signatory Mechanical Construction and Service Contractors in the Heating, Air Conditioning, Refrigeration and Process Piping Industry throughout the Washington, DC Metropolitan area. Our economic and workforce footprint is enormous, including having performed some 7,231,500 work hours in 2020 alone. We understand how to make Maryland work, because it's what we do, each and every day.

Our work is a business-labor partnership, and our contractor affiliates, represented by the Mechanical Contractors Association of Metro Washington (MCAMW), is a powerful driver of local economies throughout the region, generating some \$2 BILLION in annual revenue, and some \$500 MILLION in state, federal and local taxes each and every year.

This legislation addresses the pernicious practice of Misclassification, and its inevitable underlying practices of wage theft, tax fraud, payroll fraud and insurance fraud. These practices run rampant in most states, including in Maryland, where few investigative tools are available, and fewer resources are deployed to address the practices.

Misclassification, whether intentional or unintentional, wrongly classifies workers as independent contractors, or worse, paid entirely off the books, when, in fact, those workers are employees. This practice occurs across all workforce sectors, but is particularly rampant in the construction industry.

Within each instance of misclassification, exists multiple instances of wage and hour violations, including violations of minimum wage laws, overtime laws, prevailing wage laws, and so on. Importantly, by definition, each violation also constitutes payroll fraud, tax fraud, and insurance fraud, including underreporting, misreporting, or under collection of workers' compensation withholding, unemployment insurance withholdings, and federal FICA withholding. These are problematic for the workers themselves, for state and federal government and taxpayers who are being deprived of revenues, and for law abiding businesses who are at a competitive disadvantage.

Senate Bill 838 begins to address this problem holistically, as other states have, by appropriately elevating willful acts of Misclassification to a misdemeanor, while requiring referrals from Department of Labor to the Comptroller, for enforcement of the underlying tax fraud, and payroll fraud that are baked-in to each and every act of Misclassification. In addition, this committee should also require mandatory referrals to the Maryland Attorney General and the Maryland Insurance Commission. And while the United States Department of Labor's Wage and Hour Division, the Maryland Department of Labor's Division of Unemployment Insurance, and the Maryland Department of Labor's Division of Labor and Industry are parties to a 2022 MOU to improve collaborative information sharing and to some extent prosecutorial resources, this committee should require mandatory referrals to the US Department of Labor and the US Department of Justice for willful violations of federal law.

For these reasons, we ask for a favorable committee report.

Sincerely,

Chris Madello  
Business Manager and Financial Secretary / Treasurer  
UA Steamfitters Local 602

**SB 838 - HB 1261 3.1.2023.pdf**

Uploaded by: Terreia Smalls

Position: FAV



# PLUMBERS LOCAL UNION NO. 5

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

4755 Walden Ln. Lanham, MD 20706 • 301-899-7861 (T) • 301-899-7868 (F)



SB 838 / HB 1261

## Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals FAVORABLE

Dear Chair Griffith and members of the Senate Finance Committee:

As Business Manager/Financial Secretary Treasurer of UA Plumbers & Gasfitters Local 5, I write today to ask the committee for a favorable report of SB838 / HB 1261, and to thank Senators Kramer, Augustine, Beidle, Gile, Klausmeier, McCray, Muse, Salling, and Waldstreicher for your sponsorship.

The UA Plumbers & Gasfitters Local 5 have been installing, maintaining and servicing the waste, water & gas systems in the Washington D.C. area since 1890. We represent some 1,800 of the most highly-skilled construction workers to be found anywhere, including over 300 apprentices, which provide the workforce excellence across some 65 signatory construction contractors throughout the Washington, DC Metropolitan area.

We support SB 838 / HB 1261 because it significantly improves enforcement and prosecution of extremely heinous violations against government and the taxpayers – payroll fraud, tax fraud, and insurance fraud – and two of the most egregious social and economic justice exploitations that there is: wage theft and Misclassification of workers.

The practice of Misclassification robs workers of their status and their wages by treating them and the value of their work as less than the law requires. It is both classist, in that it stifles economic mobility for workers trying to provide for their family and move up the economic ladder, and in many cases, it is patently racist, in that it tends to target specific sectors of the construction trades where large numbers of workers of color are employed.

Within each and every instance of Misclassification and wage theft are also underlying instances of payroll fraud, tax fraud, and insurance fraud, in that the underreporting or misreporting of earnings constitutes under collection of workers' compensation withholdings, unemployment insurance withholdings, and federal FICA withholdings.

As drafted, SB 838 / HB 1261 begin to address this issue by making willful Misclassification a misdemeanor offense, and requiring referrals of wage theft cases from the Department of Labor to the Comptroller. This is necessary because wage theft is a civil offense with the Labor and Employment Article of the Maryland statutes, while tax and payroll fraud are criminal violations (misdemeanors) within the Tax General Article of the Maryland Statute. This is an oversight and a loophole in the statute. By appropriately cross referencing jurisdictions from both these two sections of the Maryland statutes, Maryland can begin to reign in these heinous acts, as many other states have already done.

For those reasons, we ask for a favorable committee report.

Sincerely,

Terriea "T" Smalls  
Business Manager / Financial Secretary Treasurer

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Terriea "T" L. Smalls  
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James L. "Lou" Spencer  
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Anthony A. Solis  
Business Rep. and Organizer

Micheal S. Canales, Jr.  
Business Rep. and Organizer

# **SB838\_Favorable\_MCAMW.pdf**

Uploaded by: Thomas Bello

Position: FAV



Re: SB 838 / HB 1261 - WORKPLACE FRAUD AND PREVAILING WAGE - VIOLATIONS - PENALTIES AND REFERRALS - FAVORABLE

Dear Chair Griffith and honorable members of the Senate Finance Committee:

On behalf of the Mechanical Contractors Association of Metropolitan Washington (MCAMW), I write today to express our strong support for SB 838 and to request a favorable committee report. The MCAMW represents approximately 200 construction contractors, some 10,000 workers, and 1,000 working apprentices. Our economic footprint throughout the region is substantial, generating some \$2 billion in annual revenue, and some \$500 million in state, federal and local taxes each and every year.

For the last 96 years, we have worked to expand the circle of construction and workforce training excellence throughout Maryland. Our success has never been guaranteed, and we take nothing for granted. As long as our contractors can compete on a level playing field, free from unscrupulous actors who cheat workers, government, and the taxpayers, we believe that our core values of hard work and attention to details will serve our members and the residents of Maryland for many years to come.

SB838 addresses the vile practices of wage theft and misclassification, which rob workers of their wages, dignity and upward mobility. The legislation also addresses these practices from the perspective of underlying frauds – tax fraud, payroll fraud, workers compensation fraud, and insurance fraud. These frauds are existing crimes in Maryland but are not fully investigated and prosecuted because wage violations are “siloes” at the Department of Labor, in many cases, never to be investigated and prosecuted by the respected branches of government with that specific jurisdiction: the Comptroller and the Department of Justice. While, as drafted, this legislation does not specifically call for referrals to the Department of Justice, it does require some referrals to the Comptroller, in particularly clear and egregious cases.

For those reasons, MCAMW supports this legislation as a necessary and important first step in addressing the broader issues related to wage theft and the myriad of underlying criminal frauds against workers, state government, and the taxpayers. We ask for a favorable committee report.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Bello", is written in a cursive style.

Thomas L. Bello  
Executive Vice President

**SB 838.pdf**

Uploaded by: Tom Clark

Position: FAV



# International Brotherhood of Electrical Workers

JOSEPH F. DABBS: Business Manager • THOMAS C. MYERS: President • RICHARD D. WILKINSON: Vice President  
CHRISTOPHER M. CASH: Financial Secretary • RICHARD G. MURPHY: Recording Secretary • PAULO C. HENRIQUES: Treasurer



## TESTIMONY IN SUPPORT OF SB 838 WORKPLACE FRAUD & PREVAILING WAGE-VIOLATIONS-PENALATIES March 2, 2023

TO: Hon. Melony Griffith, Chair and members of the Senate Finance Committee

From: Tom Clark, Political Director, International Brotherhood of Electrical Workers, Local 26

Madam Chair and members of the Committee, please join with me and the working people of Maryland in **support of SB 838**. Workplace fraud is widespread in our state and this piece of legislation not only helps some of our most vulnerable citizens, but it clearly states the penalties and includes evasion of taxes among them.

Imagine a state funded project that pays Marylanders the market rate (quite often called prevailing wage). Now imagine an electrical contractor trying to avoid paying their employees the prescribed rate, yet proclaiming to the state they are paying these Marylanders correct. These unscrupulous contractors will be stealing from the worker, as well as the state. Unfortunately, the electricians, carpenters, plumbers and bricklayers that our effected, are quite often minorities and those that speak little English. It's time we stand up for these workers and allow them to work without be taken advantage of and receive the "market rate" in order to feed their family and live the American dream. It is also time to rid this area of contractors that feed off our citizens and avoid paying taxes The Comptroller and her office is in full support of penalizing those who commit tax fraud while underpaying Maryland citizens. We hope the Maryland Senate follows suit and condemns this practice of workplace fraud and supports this bill can easily rectify this practice.

I ask that you enthusiastically look upon **SB 838** as a solution to a problem. Keep the Maryland working people at the top of your mind and give this bill a **favorable report**. Thank you





# **SB 838 - Workplace Fraud and Prevailing Wage - Vio**

Uploaded by: William Yull

Position: FAV



## Maryland Chapter National Electrical Contractors Association

Phone: (410) 590-1189

1743 Dorsey Road, Suite 104-105  
Hanover, MD 21076

Fax: (410) 590-1198

March 1, 2023

**FAVORABLE**: SB0838 Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals

Dear Chair Griffith and members of the Senate Finance Committee:

On behalf of the Maryland Chapter of the National Electrical Contractors Association (NECA), I write today to express our strong support for Senate Bill 838 which would establish criminal penalties to employers knowingly failing to properly classify individuals as employees and contractors and subcontractors knowingly violating State prevailing wage laws.

Maryland NECA represents 75 construction contractors, some 2,000 workers and over 400 working apprentices. NECA represents electrical contracting firms that employ highly skilled electricians for field construction work, and provide those employees with high-value wages, family medical care, retirement plans, and continuing education through workforce development and apprenticeship training programs.

Maryland NECA strongly supports Senate Bill 838 because one of the many challenges that law abiding and ethical contractors face when bidding prevailing wage contracts are the actions of unscrupulous contractors and subcontractors that purposefully misclassify workers.

The purpose of prevailing wage in the State of Maryland is to provide good wages and benefits to its citizens, remove race and gender pay gaps, promote quality work funded by taxpayer dollars, and level the playing field for high-road employers. However, too often in the construction industry, low-road contractors circumvent the laws by purposefully misclassifying their employees as independent contractors. By doing so, these low-road employers reduce their costs by not paying unemployment insurance taxes, payroll taxes, as well as workers' compensation insurance. Workers who are misclassified are also denied benefits that employers typically provide to employees such as overtime, paid sick or vacation days, health insurance, and retirement benefits.

By misclassifying their employees and lowering their costs, low-road contractors are able to provide a better price in the bidding process ultimately helping them procure the work, and in turn, denying the ethical contractor who bid the job correctly to be awarded the project.

While worker misclassification exists in every occupation, it seems to be a rampant issue in the construction industry. Senate Bill 838 is critical for the members of NECA and all law-abiding contractors by holding unscrupulous contractors accountable for breaking the prevailing wage laws. But most importantly, Senate Bill 838 protects the men and women who are being misclassified and whose wages, benefits, and well-being are undermined by unethical employers. For these reasons, Maryland NECA supports Senate Bill 838 and asks for a **FAVORABLE** report.

Sincerely,

William Yull  
Executive Director  
Maryland Chapter, NECA

**SB 838 - Unfavorable - MHLA.pdf**

Uploaded by: Amy Rohrer

Position: UNF

**MHLA**  
Maryland Hotel  
Lodging Association

**SB 838 – Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals**  
**Senate Finance Committee**  
**March 2, 2023**  
**Position: Oppose**

Dear Chair Griffith and Members of the Committee:

As the sole statewide trade association dedicated to advocacy for Maryland’s lodging industry, with more than 25,000 employees at 750 hotels, we urge an unfavorable report on SB 838.

The proposed bill would establish certain criminal penalties for employers knowingly failing to properly classify individuals as employees.

Our members support and follow the current regulation and due diligence in this regard is necessary. However, in the event of a charge against an employer who is found guilty, we feel the proposed criminal penalty – *a misdemeanor subject to a fine not to exceed \$5,000 or imprisonment not exceeding 60 days or both for each employee who was not properly categorized* - is excessively harsh. We are of the opinion that the current civil penalty of up to \$5,000 for each employee who was misclassified is more appropriate if the existing regulation is not properly followed.

The Maryland Hotel Lodging Association respectfully requests an Unfavorable Report on SB 838.

# **SB 838\_Workplace Fraud and Prevailing Wage\_Violati**

Uploaded by: Andrew Griffin

Position: UNF



**MARYLAND**  
Chamber of Commerce

**LEGISLATIVE POSITION:**

**Unfavorable**

**Senate Bill 838**

**Workplace Fraud and Prevailing Wage - Violations - Penalties and Referrals**

**Senate Finance Committee**

**Thursday, March 2, 2023**

Dear Chairwoman Griffith and members of the committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 6,400 members and federated partners working to develop and promote strong public policy that ensures sustained economic health and growth for Maryland businesses, employees, and families.

Senate Bill 838 establishes additional criminal penalties for employers who knowingly misclassify an individual under the Workplace Fraud Act. The legislation also creates new criminal penalties for contractors and subcontractors who have been found to knowingly violate the State Prevailing Wage Law.

The Maryland Chamber was a vocal and active participant in the discussions and debate regarding the Workplace Fraud Act of 2009. During the 2009 Legislative Session the Chamber worked alongside the Maryland Department of Labor (MDDOL) to address areas of concern to the business community. The Chamber condemns companies that knowingly misclassify individuals as independent contractors when they clearly work as “employees” of such companies. When companies do this, they do not simply harm the individuals who are misclassified, but the law-abiding businesses who pay for the higher costs associated with properly classifying employees such as wages, benefits, and taxes.

However, dealing with those that break the law does require new penalties potentially sending managers and business owners to jail over employee misclassification. Further, the Chamber is certain this legislation is unnecessary as provisions already exist in statute providing MDDOL authority to appropriately address intentional misclassification of employees and levy substantial fines on those bad actors found to be in violation of Maryland’s worker classification laws.

For these reasons, the Maryland Chamber of Commerce respectfully requests an **Unfavorable Report** on SB 838.

MDCHAMBER.ORG

60 West Street, Suite 100, Annapolis 21401 | 410-269-0642

# **SB 838\_LOO\_Workplace Fraud and Prevailing Wage-Vio**

Uploaded by: Kevin O'Keeffe

Position: UNF



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8751 Freestate Drive  
Suite 250  
Laurel, MD 20723

March 2, 2023

To: Members of the Senate Finance Committee

From: Independent Electrical Contractors (IEC) Chesapeake

Re: Oppose Senate Bill 838 – Workplace Fraud and Prevailing Wage-Violations-Penalties and Referrals

Independent Electrical Contractors (IEC) Chesapeake opposes Senate Bill (SB) 838 and requests an unfavorable report.

IEC Chesapeake opposes Senate Bill 838 because the proposed penalties of a \$5,000 fine and a maximum of sixty days imprisonment for violations of the Workplace Fraud Act or the Maryland Prevailing Wage Law Bill 895 are excessive. Contractors face many challenges in running their businesses. A \$5,000 fine and possible imprisonment for the violations in Senate Bill 838 seem disproportionately high.

Thank you for your consideration. If you have any questions, please contact Grant Shmelzer, Executive Director of IEC Chesapeake, at 1-301-621-9545, extension 114 or at [gshmelzer@iec-chesapeake.com](mailto:gshmelzer@iec-chesapeake.com) or Kevin O’Keeffe at 410-382-7844 or at [kevin@kokeeffelaw.com](mailto:kevin@kokeeffelaw.com).

### **About Us**

Independent Electrical Contractors (IEC) Chesapeake represents members throughout Delaware, Maryland, Virginia, West Virginia, and Washington, D.C. Our headquarters are located in Laurel, Maryland. IEC Chesapeake has an extensive apprenticeship program for training electricians. In addition, IEC Chesapeake promotes green economic growth by providing education and working with contractor members, industry partners, government policy makers and inspectors to increase the use of renewable energy.





**SB 838\_MAA\_UNF.pdf**

Uploaded by: Rachel Clark

Position: UNF

CHAIRMAN:  
Jeff Graf  
VICE CHAIRMAN  
David Slaughter

**MARYLAND ASPHALT ASSOCIATION**



TREASURER:  
Paul Bramble  
SECRETARY:  
Curtis Hall  
PRESIDENT:  
G. Marshall Klinefelter

March 1, 2023

Senator Griffith, Chair  
Finance Committee  
3 East Miller Senate Office Building  
Annapolis, MD 21401

**RE: House Bill 838 – UNFAVORABLE – Workplace Fraud and Prevailing Wage – Violations – Penalties and Referrals**

Dear Chair Griffith and Members of the Committee:

The Maryland Asphalt Association (MAA) is comprised of 19 producer members representing more than 48 production facilities, 25 contractor members, 25 consulting engineer firms and 41 other associate members. MAA works proactively with regulatory agencies to represent the interests of the asphalt industry both in the writing and interpretation of state and federal regulations that may affect our members. We also advocate for adequate state and federal funding for Maryland's multimodal transportation system.

Senate Bill 838 would establish criminal penalties for employers who fail to properly clarify an individual under the Workplace Fraud Act. Criminal penalties will also apply for contractors and subcontractors who are found to have knowingly violated the State Prevailing Wage Law. These criminal charges will be a misdemeanor and could be subject to a fine or imprisonment. The charge could be up to \$5,000 and the imprisonment could be for a period of 60 days.

This bill is overreaching and onerous, yet again on Maryland's employers. Although this bill requires the violation to have been done knowingly, it is still a great risk when employees could be subject to new criminal charges. Unfortunately, our criminal justice system is not perfect, and we believe that this bill could result in criminal charges from a benign error. Our members already follow regulations that require clear definitions, and could be held liable in civil court for violating these statutes. Because of this, not only is this bill duplicative, but the risk it poses is simply unnecessary.

We appreciate you taking the time to consider our request for an UNFAVORABLE report on Senate Bill 838.

Sincerely,

Marshall Klinefelter  
President  
Maryland Asphalt Association

**SB 838\_MTBMA\_UNF.pdf**

Uploaded by: Rachel Clark

Position: UNF



March 1, 2023

Senator Griffith, Chair  
Finance Committee  
3 East Miller Senate Office Building  
Annapolis, MD 21401

**RE: House Bill 838 – UNFAVORABLE – Workplace Fraud and Prevailing Wage – Violations – Penalties and Referrals**

Dear Chair Griffith and Members of the Committee:

The Maryland Transportation Builders and Materials Association (MTBMA) has been and continues to serve as the voice for Maryland's construction transportation industry since 1932. Our association is comprised of 200 members. MTBMA encourages, develops, and protects the prestige of the transportation construction and materials industry in Maryland by establishing and maintaining respected relationships with federal, state, and local public officials. We proactively work with regulatory agencies and governing bodies to represent the interests of the transportation industry and advocate for adequate state and federal funding for Maryland's multimodal transportation system.

Senate Bill 838 would establish criminal penalties for employers who fail to properly clarify an individual under the Workplace Fraud Act. Criminal penalties will also apply for contractors and subcontractors who are found to have knowingly violated the State Prevailing Wage Law. These criminal charges will be a misdemeanor and could be subject to a fine or imprisonment. The charge could be up to \$5,000 and the imprisonment could be for a period of 60 days.

This bill is overreaching and onerous, yet again on Maryland's employers. Although this bill requires the violation to have been done knowingly, it is still a great risk when employees could be subject to new criminal charges. Unfortunately, our criminal justice system is not perfect, and we believe that this bill could result in criminal charges from a benign error. Our members already follow regulations that require clear definitions, and could be held liable in civil court for violating these statutes. Because of this, not only is this bill duplicative, but the risk it poses is simply unnecessary.

We appreciate you taking the time to consider our request for an UNFAVORABLE report on Senate Bill 838.

Thank you,

Michael Sakata  
President and CEO  
Maryland Transportation Builders and Materials Association