

# **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 Ches 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.

## Acknowledgments

The author thanks Mackenzie Bouverat, Daniel Perez, and Nikita Rumsey for research assistance, Lora Engdahl for editing assistance, and numerous worker advocates and DA and AG government lawyers for their insights. The author also thanks the Bernard and Anne Spitzer Charitable Trust and the Justice Catalyst for their support.

## 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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