

# Regulating Wage Theft

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**ABSTRACT.** Wage theft costs workers billions of dollars each year. At a time when the federal government is rolling back workers' rights, it is essential to consider how state and local laws can address the problem. As this Article explains, these pernicious practices seemingly continue unabated, despite a recent wave of state and local laws to curtail wage theft.

This Article provides the first comprehensive analysis of state and local anti-wage theft laws. We compiled 130 state and local anti-wage theft laws enacted over the past decade and offer an original typology of the most common anti-wage theft regulatory strategies. Our evaluation of these laws shows that they are unlikely to meaningfully reduce wage theft. Specifically, our typology reveals that many of the most popular anti-wage theft strategies involve authorizing worker complaints, creating or enhancing penalties, or mandating employers to disclose information to workers about their wage-related rights. Lessons learned about these conventional regulatory strategies from other contexts raise serious questions about whether these state and local laws can be successful.

Rather than concede defeat, this Article contends that there are useful insights to be drawn from the typology and analysis. It concludes by recognizing promising regulatory innovations, identifying new collaborative approaches to enhance agency enforcement, and looking beyond regulation to nongovernmental strategies.

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INTRODUCTION

The opening months of the Trump Administration were full of bad news for low-wage workers. Among other things, the Administration announced it would abandon rules that sought to ensure that service workers would get their tips, help workers more easily recover minimum and overtime wages from employers, and drastically increase the number of workers entitled to overtime pay.<sup>1</sup> It also put in place a hiring freeze that reduced the staff of the federal agency tasked with protecting workers' wages.<sup>2</sup>

State and local laws could help to lessen the blow. Over the preceding decade, energized worker movements have driven states and localities to promote the rights of low-wage workers.<sup>3</sup> Across the country, they have enacted laws seeking to protect workers from misclassification as independent contractors, increase the minimum wage, and address wage theft.<sup>4</sup>

Wage theft causes workers to lose billions of dollars each year.<sup>5</sup> Stories abound of low-wage workers and their families who struggle to keep a roof over their heads or to pay for food or medicine because an employer failed to pay their wages.<sup>6</sup> Beyond individual workers, wage theft increases the poverty rate and costs the government millions of dollars annually in lost tax revenue.<sup>7</sup>

To respond to the wage theft crisis, energized worker movements have prompted states and localities to enact anti-wage theft laws. We present the first comprehensive survey and critical analysis of state and local laws enacted over roughly the past decade. We compiled 140 state and local laws, including 70 state laws and 70 local ordinances, overwhelmingly enacted in Democratic-

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<sup>1</sup> Ben Penn, *Labor Dept. Ditches Data Showing Bosses Could Skim Workers' Tips*, BLOOMBERG LAW DAILY LABOR REPORT (Feb. 1, 2018, 5:01 AM), <https://bna.com/daily-labor-report/labor-dept-ditches-data-on-worker-tips-retained-by-businesses>; Juliet Eilperin, *The Trump Administration Just Changed its Overtime Guidance — and Business Cheers*, WASH. POST, Jan. 8, 2018, [https://www.washingtonpost.com/politics/the-trump-administration-just-changed-its-overtime-guidance--and-business-cheers/2018/01/08/f00d3ee4-f4a6-11e7-beb6-c8d48830e54d\\_story.html?utm\\_term=.90632aa1f8df](https://www.washingtonpost.com/politics/the-trump-administration-just-changed-its-overtime-guidance--and-business-cheers/2018/01/08/f00d3ee4-f4a6-11e7-beb6-c8d48830e54d_story.html?utm_term=.90632aa1f8df); Julia Horowitz, *Trump Administration Backs Away from Obama Overtime Rule*, CNN MONEY (Jun. 30, 2017, 5:24 PM), <https://money.cnn.com/2017/06/30/news/trump-labor-department-obama-overtime-rules/index.html>.

<sup>2</sup> Jessica Kwong, *Trump Slashed Staffing in All Cabinet Departments Except Three, Reversing Obama Hiring Expansion*, NEWSWEEK (Dec. 31, 2017, 2:40 PM), <https://www.newsweek.com/trump-slashed-staffing-all-cabinet-departments-except-three-reversing-obama-767047>.

<sup>3</sup> While worker movements are diverse across the country, they are often comprised of workers, advocates from workers centers, community based organizations, or legal nonprofits, and unions. *See infra* notes 84-85.

<sup>4</sup> NAT'L EMPLOYMENT LAW PROJECT, WINNING WAGE JUSTICE 83-97 (2011).

<sup>5</sup> DAVID COOPER & THERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 1 (2017).

<sup>6</sup> *See, e.g.*, Steven Greenhouse, *More Workers Are Claiming Wage Theft*, N.Y. TIMES, Aug. 31, 2014, <https://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html>.

<sup>7</sup> *See infra* notes 28-30.

leaning jurisdictions. Given that states and localities responded in diverse ways to the problem of wage theft, we created a typology of the 22 most common regulatory strategies for the purposes of comparison. The most common strategies fall into five categories that: (1) authorize worker complaints; (2) create or enhance penalties; (3) regulate information; (4) strengthen anti-retaliation protections; and (5) expand employer liability.

This article questions whether these ambitious and hard-won state and local anti-wage theft laws will make a meaningful difference. Our analysis reveals that many of the most common anti-wage theft regulatory strategies, such as those authorizing worker complaints, creating or enhancing penalties, and requiring information disclosures, may fail to significantly reduce wage theft. The efficacy of worker complaints strategies is questionable because of the multiple barriers that exist for low-wage workers to name, blame, and claim wage theft against their employers.<sup>8</sup> Creating or enhancing penalties on the books will also do little to deter wage theft if agencies lack the resources or political will to engage in enforcement or employers fail to understand how to comply.<sup>9</sup> Further, the success of information disclosure strategies that require employers to post notices or provide mandatory disclosures about wage-related rights and information are limited because they fail to take into account how low-wage workers may process or use such information.<sup>10</sup>

Anti-wage theft laws thus illustrate the more general critiques of the familiar and conventional strategies by which regulation seeks to solve social problems. Rights-claiming strategies, for example, rely on harmed individuals to file a complaint. Law and society scholarship, however, repeatedly documents how such rights-claiming may be “easier to bear for those who have many forms and volumes of capital” but become “a heavier, often disabling burden that reinscribes disadvantage for those with less.”<sup>11</sup> New governance scholarship too critiques the “command and control” model of regulation that sets rigid standards of conduct and punishment as ineffective for governmental agencies

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<sup>8</sup> William L.F. Felstiner, Richard L. Abel, Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 636 (1981); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 60 COMP. LAB. L. & POL’Y J. 59, 70 (2006); Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1088 (2014); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnership with Workers’ Organizations*, 38 POL. & SOC’Y 552 (2010).

<sup>9</sup> David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL’Y J. 125 (2006) [hereinafter Weil, *Crafting a Progressive Workplace Regulatory Policy*]; Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. (forthcoming 2018); but see Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance, Perspectives on Politics*, 14 PERSPECTIVES ON POL. 324 (2016) (finding that enhanced penalties correlated with increased compliance with the minimum wage).

<sup>10</sup> Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 487–89 (2016) [hereinafter Alexander, *Workplace Information-Forcing*].

<sup>11</sup> Susan Silbey, *After Legal Consciousness*, 1 ANNU. REV. L. SOC. SCI. 323, 353 (2005). Claire B. Wofford, *The Effect of Gender and Relational Distance on Plaintiff Decision Making in the Litigation Process*, L. & SOC’Y REV. 966, 968–69 (2017).

with insufficient resources to compel diverse regulated entities into compliance.<sup>12</sup> For information disclosures, such as those requiring financial disclosure, product labeling, or toxic pollution reporting, behavioral law and economics scholarship has cast doubt on their ability to fix harmful market information asymmetries based on the faulty assumptions about how people make sense of information.<sup>13</sup> In other words, regulations born out of hope and optimism can often result in regulatory failure.<sup>14</sup>

We do not, however, conclude that state and local regulation should be ruled out for combatting wage theft. Given the current hostile federal climate, local advocacy may hold the most promise for addressing issues confronting low-wage workers. Movements, often with workers in the lead, are driving this state and local reform. Challenging the imbalance of power between employers and workers, these movements can empower low-wage workers while providing them with an opportunity to tangibly address their subordination by more powerful employers.<sup>15</sup>

Rather, we assert that this incredible momentum can be harnessed to think differently about regulatory strategies. First, we found a handful of less common anti-wage theft strategies that are more likely to be successful at facilitating rights-claiming, holding employers responsible, and fixing information deficits because they avoid the erroneous assumptions underlying conventional regulatory strategies about the behavior of employers and workers. Second, worker movements can push agencies to reconceive of their approach and make existing anti-wage theft strategies more effective, by differentiating between employers and increasing cooperation with employer networks and worker organizations. Finally, anti-wage theft legislation is unlikely to be enacted in certain jurisdictions or will have an insubstantial impact in places where it will not be robustly implemented or enforced. Particularly in those places, the work

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<sup>12</sup> Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1074 (2005) [hereinafter Lobel, *Interlocking Regulatory*]; Jason M. Solomon, *Law & Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 822 (2008). While there is no one definition of “command and control” regulation, it usually involves the state setting rules or standards for private actors and enforcing those rules through inspections or sometimes with the help of private attorneys general. *Id.* at 821-22; see also James E. Krier & Richard B. Stewart, *Using Economic Analysis in Teaching Environmental Law: The Example of Common Law Rules*, 1 UCLA J. ENVTL. L. & POL’Y 13, 15 n.3 (1980) (defining command and control as a “regulatory approach [that] typically proceeds by imposing rigid standards of conduct . . . backed up by sanctions designed to assure full compliance with such standards”).

<sup>13</sup> Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090 (2007); David Weil, Archon Fung, Mary Graham, Elena Fagotto, *The Effectiveness of Regulatory Disclosure Policies*, 25 J. Policy Analysis & Mgmt. 155, 156 (2006); Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 147-148 (2006); Christine Jolls & Cass R. Sunstein, *Debiasing through Law*, 35 J. LEGAL STUDIES 199, 216 (2006).

<sup>14</sup> ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 68 (2011).

<sup>15</sup> See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384-85 (1988).

to support, create, or expand nongovernmental advocacy that involves worker or consumer organizing to fight wage theft becomes more significant.

This Article starts with a brief overview of wage theft in Part I. In particular, it describes the moral and economic crisis of wage theft and the likely causes for the epidemic.<sup>16</sup> In Part II, we summarize our findings from reviewing all of the wage theft laws passed by states and localities from 2005 through 2017, based on the activist movements that have responded to the crisis. By creating a typology, we categorize the most common anti-wage theft strategies contained within these laws. Part III then analyzes how these common strategies may fare given what we know about regulatory failure. The picture is mostly disappointing in that many of these common strategies are known to be prone to failure in other contexts.<sup>17</sup> At the same time, we identify several promising anti-wage theft strategies that avoid the problematic assumptions associated with these failed strategies. Given the potential disappointment of many anti-wage theft laws, we conclude in Part IV with some thoughts about how agencies can change their approach to avoid the pitfalls of regulatory failure. As not all local jurisdictions will be able to either enact or succeed with anti-wage theft regulatory strategies, we also look briefly beyond regulation to the possibility of nongovernmental advocacy.

## I. THE CRISIS OF WAGE THEFT

### A. *The Wage Theft Problem*

Wage theft is a serious moral and economic problem that impacts workers, communities, and the broader economy.<sup>18</sup> It is the illegal non-payment or underpayment of wages in violation of wage and hour or contract law.<sup>19</sup> Wage theft can take many forms, including: (1) paying less than the minimum, promised, or overtime wage; (2) taking unauthorized deductions from a worker's

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<sup>16</sup> While more highly-paid professional workers also suffer from wage theft, we focus this paper on low-wage workers who are disproportionately impacted by wage theft.

<sup>17</sup> We focused on the goal of reducing wage theft. Other legitimate perspectives might view compensating victims or increasing access to justice as ways to meaningfully address wage theft.

<sup>18</sup> Wage theft is not a term without controversy. Since wage theft can include a violation of civil law that does not require a showing on intentionality, some contend that the term is misleading because it encompasses non-criminal acts. See, e.g., Daniel Schwartz, "*Wage Theft*": *The Trendy Phrase that May Not Mean What You Think it Means*, Connecticut Employment Law Blog (Apr. 23, 2014), <https://www.ctemploymentlawblog.com/2014/04/articles/wage-theft-the-trendy-phrase-that-runs-amok/>.

<sup>19</sup> Wage and hour law is the body of federal, state, and local law that establishes and regulates wage requirements. The federal wage and hour law is the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201-209.

pay;<sup>20</sup> or (3) failing to pay for all hours worked.<sup>21</sup> Because wage and hour or contract law can also regulate the payment of promised wages, wage theft encompasses more than just the failure to the pay minimum wage.<sup>22</sup> Employers use various tactics to commit wage theft, which can cause workers to be confused about whether they are, in fact, receiving lawful wages.<sup>23</sup>

For low-wage workers, the population that suffers the brunt of wage theft, the harms are especially troubling. Even when paid properly, full-time minimum wage earners receive pay as low as \$15,080 annually<sup>24</sup> – an amount below the federal poverty guideline for a household of a single parent and child.<sup>25</sup> For individuals and families already struggling to make ends meet, a withheld or reduced paycheck can result in a missed rent or child support payment, the inability to buy gas or bus fare to get to school or work, and food insecurity.<sup>26</sup> Wage theft can have psychological and emotional impacts too, resulting in feelings of anger, anxiety, and powerlessness.<sup>27</sup>

Unsurprisingly, wage theft results in increased poverty rates. An Employment Policy Institute (EPI) study from 2017 found that workers who experience minimum wage violations are more than three times as likely to live in poverty as someone chosen at random in the eligible workforce.<sup>28</sup> A 2011 US Department of Labor (DOL) study found that minimum wage violations

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<sup>20</sup> Deductions can include an employer keeping tips or requiring workers to pay out of pocket for work-related items, such as gas, equipment rental, uniforms, or other supplies necessary to perform the job.

<sup>21</sup> KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 23-39 (2011) (providing a comprehensive description of the ways employers commit wage theft).

<sup>22</sup> *Id.* at 8-15 (2011).

<sup>23</sup> These tactics range from paying a daily or weekly wage, which can confuse workers about their proper hourly rates and right to overtime pay, to requiring workers to work outside of the hours recorded on their timesheets. *See id.* at 23-29.

<sup>24</sup> This number is based on the federal minimum wage of \$7.25 per an hour and a weekly schedule of 40 hours.

<sup>25</sup> OFFICE OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP'T OF HEALTH & HUMAN. SERVICES, <https://aspe.hhs.gov/poverty-guidelines> (last visited July 18, 2018) (noting the 2018 guideline of \$16,460 for a two-person household).

<sup>26</sup> Marianne Levine, *Behind the Minimum Wage Fight, A Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 6:51 AM), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> (providing that low-wage workers may face hardships such as eviction or hunger when deprived of wages that they are owed after only *one* paycheck).

<sup>27</sup> FABIOLA SANTIAGO ET AL., HEALTH IMPACT ASSESSMENT OF THE PROPOSED LOS ANGELES WAGE THEFT ORDINANCE 27-29 (2014) (explaining that wage theft compromises the physical, mental, social, and socio-emotional health of low-wage workers by subjecting them to an inability to afford healthcare or medications, thus preventing them from treating chronic health conditions, inducing a negative outlook on life and self-denigration, and disrupting their family units, leading strain between parents and children, divorce between spouses, and feelings of guilt).

<sup>28</sup> COOPER & KROEGER, *supra* note 5, at 14.

decreased family income to below the poverty line for anywhere from 7,000 to 41,000 families in California and 8,000 to 26,000 families in New York.<sup>29</sup>

Further, wage theft hurts state and local economies. The same 2011 DOL study, which focused on New York and California, found that wage theft annually cost the federal government \$113 million in federal income taxes and \$238 million in payroll taxes, as well as \$8 million (NY) and \$14 million (CA) in state taxes.<sup>30</sup> Wage theft places downward pressure on wages for similarly skilled workers in the same industries.<sup>31</sup> At the same time, it creates unfair competition for law-abiding employers who struggle to compete with unscrupulous businesses that commit wage theft.<sup>32</sup> Overall, underpaid workers also have less money to spend as consumers, which has negative implications for local economies.<sup>33</sup>

### B. *The Epidemic of Wage Theft*

While it is difficult to measure the exact scope of wage theft, recent studies consistently indicate that the problem is rampant, particularly among low-wage workers. EPI most recently estimated that 2.4 million workers in the ten most populous states lose \$8 billion annually to federal or state minimum wage violations.<sup>34</sup> The percentage of minimum-wage eligible workers experiencing violations within each state varied, ranging from 9.4% to 24.9%.<sup>35</sup> For 2013, Daniel Galvin found that the national rate of federal or state minimum wage violations averaged 16.9%, which translated into an average earned hourly wage of \$5.92 for those experiencing violations (as opposed to the average minimum wage of \$7.68).<sup>36</sup> The 2011 DOL study found that workers who suffered wage theft, as a percentage of their income, lost anywhere from 37.2% to 70.9%.<sup>37</sup>

The Broken Laws Study, which directly surveyed workers, found that wage theft was pervasive among low-wage workers in New York City, Chicago, and

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<sup>29</sup> EASTERN RESEARCH GROUP, INC., *THE SOCIAL AND ECONOMIC EFFECTS OF WAGE VIOLATIONS: ESTIMATES FOR CALIFORNIA AND NEW YORK* 48 (2014) (covering fiscal year 2011).

<sup>30</sup> *Id.*

<sup>31</sup> COOPER & KROEGER, *supra* note 5, at 30.

<sup>32</sup> Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 96, 103 (2012) (“[E]thical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs than their dishonest competitors who are increasing profits by violating the law”); Martin Moylan, *Wage Theft Hits Lowest Paid Workers Hardest*, MPR NEWS (March 14, 2016), <https://www.mprnews.org/story/2016/03/11/wage-theft-hits-lowest-paid-workers> (describing how intense bidding competitions in some industries—in which the lowest bid usually wins—puts “tremendous pressure on [the companies] to cut corners, to not pay the full amount of wages owed”).

<sup>33</sup> See Antonio Avalos & Sean Alley, *The Economic Impact of the Earned Income Tax Credit (EITC) in California*, 2 CAL. J. POLITICS & POL’Y 1, 8-10 (2010) (studying how EITC payments boosts spending in the local economy).

<sup>34</sup> COOPER & KROEGER, *supra* note 5, at 2.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Galvin, *supra* note 9, at 324, 330-31.

<sup>37</sup> EASTERN RESEARCH GROUP, *supra* note 29, at 43.



Los Angeles.<sup>38</sup> This study surveyed 4,387 low-wage workers, finding that more than two-thirds of those surveyed had experienced a pay violation in the past workweek.<sup>39</sup> The study also found the following: (1) 1 in 4 surveyed workers (26%) was paid below the minimum wage in a given work week; (2) 76% of those who worked overtime were not paid the required time and a half; (3) 70% did not get any pay at all for work performed outside their regular shift (“off-the-clock work”); and (4) nearly one-third (30%) of tipped workers were not paid the tipped worker minimum wage.<sup>40</sup>

In particular, wage theft disproportionately impacts low-wage workers in certain industries.<sup>41</sup> Those occupations most impacted by wage theft include construction workers, fast food workers, caregivers for children and the elderly, factory workers, landscapers, restaurant staff, cashiers, and office clerks.<sup>42</sup> Overall, studies have found that the highest levels of wage theft occur in the leisure and hospitality industry, particularly among those who work in food and beverage services.<sup>43</sup> A 2011 study of working conditions for restaurant workers in eight regions across the country found that 46.3% of those surveyed had experienced overtime violations.<sup>44</sup> The national study of domestic workers that focused on nannies, housecleaners, and caregivers, revealed that nearly one-quarter of survey respondents were paid less than the minimum wage.<sup>45</sup> For day laborers, who can work a variety of temporary jobs in construction, landscaping, or cleaning services, a national study found that almost half of those surveyed had experienced wage theft in just the prior two months.<sup>46</sup>

Finally, while wage theft impacts everyone,<sup>47</sup> it disproportionately impacts the young, less educated, women, and workers of color.<sup>48</sup> Although more than three quarters of those impacted by wage theft are U.S. citizens, foreign-born workers, who are not otherwise naturalized, suffer a higher incidence of wage

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<sup>38</sup> ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2* (2009) [hereinafter BERNHARDT ET AL., *BROKEN LAWS*].

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 2-3.

<sup>41</sup> COOPER & KROEGER, *supra* note 5, at 8.

<sup>42</sup> *Id.* at 25; ANNETTE BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 28 (2009); EASTERN RESEARCH GROUP, *supra* note 29, at 34.

<sup>43</sup> COOPER & KROEGER, *supra* note 5, at 25, 33; EASTERN RESEARCH GROUP, *supra* note 29, at 33.

<sup>44</sup> REST. OPPORTUNITIES CTR. UNITED, *BEHIND THE KITCHEN DOOR: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY 2* (2011).

<sup>45</sup> LINDA BURNHAM & NIK THEODORE, *HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 18* (2012).

<sup>46</sup> ABEL VALENZUELA, ET. AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES ii* (2006). Studies in New Jersey, Texas, and Cleveland, confirm rampant wage theft among day laborers. *See, e.g.*, SETON HALL UNIV. SCH. OF LAW, *ALL WORK AND NO PAY: DAY LABORERS, WAGE THEFT AND WORKPLACE JUSTICE IN NEW JERSEY 2* (2011); WORKERS DEF. PROJECT, *BUILDING AUSTIN, BUILDING INJUSTICE: WORKING CONDITIONS IN AUSTIN’S CONSTRUCTION INDUSTRY II* (2009); DANIEL KERR & CHRIS DOLE, *CHALLENGING EXPLOITATION AND ABUSE: A STUDY OF THE DAY LABOR INDUSTRY IN CLEVELAND 16* (2001).

<sup>47</sup> COOPER & KROEGER, *supra* note 5, at 16.

<sup>48</sup> *Id.* at 15-22.

theft.<sup>49</sup> The Broken Laws study, for example, found that female undocumented workers had a 47.4% rate of minimum wage violations compared to the 16.1% for US born female workers.<sup>50</sup> Female undocumented workers also outpaced their male undocumented counterparts, who had minimum wage violations at the rate of 29.5%.<sup>51</sup>

### C. *The Causes of Wage Theft*

Many factors converge to set the stage for wage theft. Employers have been driven by competitive pressures, government has promoted deregulation of the workplace, and unions and civil society have been unable to contain unlawful employer practices.<sup>52</sup> Scholars have written on the diminishing rights of workers resulting from the practice of employers subcontracting and outsourcing work, the decline of organized labor, and the increased privatization of workers' rights.<sup>53</sup> While the larger causes of eroding labor standards are outside of the scope of this Article, we use this section to more narrowly focus on why wage theft occurs.

First, there is simply insufficient enforcement. Most responsible governmental agencies do not sufficiently enforce the laws allowing employers to act with impunity. The agencies may lack motivation or resources to enforce the existing wage and hour laws.<sup>54</sup> A 2018 study found that six states lacked a single investigator to investigate minimum wage violations.<sup>55</sup> Of the remaining states, 26 had no more than ten investigators.<sup>56</sup> Employers too may cut corners by deliberately underpaying workers while also undercapitalizing their business, in order to economically survive.<sup>57</sup> As a result, these employers may either be judgment proof should a worker want to sue for their unpaid wages or quickly dissolve their businesses in the face of legal action.<sup>58</sup> A California study, for example, showed that employers who refused to settle claims and later became

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<sup>49</sup> *Id.* at 20.

<sup>50</sup> ANNETTE BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 43.

<sup>51</sup> *Id.* at 43.

<sup>52</sup> Annette Bernhardt et al., *An Introduction to the "Gloves-off Economy,"* in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 1, 2 (Annette Bernhardt et al. eds., 2008) [hereinafter Bernhardt et al., *The Gloves-Off Economy*].

<sup>53</sup> See, e.g., Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET* 37-42 (Annette Bernhardt et al., eds., 2008) (discussing the restructuring of the workplace); BOBO, *supra* note 21 (noting the decline of unions); Clyde B. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. EMPLOYMENT & LABOR L. 685, 733-34 (2004) (discussing the privatization of rights through arbitration agreements).

<sup>54</sup> NAT'L EMP'T LAW PROJECT, *WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT* 41, 44 (2001); BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 52.

<sup>55</sup> Levine, *supra* note 26.

<sup>56</sup> *Id.*

<sup>57</sup> EUNICE HYUNHYE CHO ET AL., *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS* 13 (2013).

<sup>58</sup> NAT'L EMP'T LAW PROJECT, *supra* note 54, at 111.

subject to court judgments for wage theft “were more likely than not to have suspended, forfeited, cancelled, or dissolved business status within a year of the wage claim.”<sup>59</sup>

Second, employers may engage in wage theft because they correctly believe that workers will not make claims about unpaid wages. Workers may not complain because there are insufficient avenues readily available to file complaints. Workers may also be reluctant to exercise their rights. Given the imbalance of power between employers and workers in the low-wage workplace, employers can dictate the terms and conditions of the job because employers have the option of readily hiring replacement workers.<sup>60</sup> Workers who complain about wage violations may experience retaliation in the form of decreased hours and pay, increased workloads, and termination.<sup>61</sup> Immigrant workers may also be afraid of being reported to immigration authorities if they complain.<sup>62</sup> Those who are willing to complain may want to act but have little access to workers centers, nonprofit attorneys, or private attorneys to assist them with taking legal action.<sup>63</sup> Complaint processes also take a long time so that workers may believe it is not worth their time. As one Arkansas official acknowledged: “[o]ften...by the time the labor standards division is ready to take up a case, the worker is ‘very frustrated with us’ and tells [me] to forget about it.”<sup>64</sup>

Third, wage theft can occur because parties lack adequate information. Many workers simply do not know their rights under the law or may be unaware of how or where to file complaints.<sup>65</sup> Immigrant workers, in particular, may be unfamiliar with US laws and legal processes and therefore unaware of their rights and remedies.<sup>66</sup> Some employers may themselves lack adequate information and not understand their legal obligations.<sup>67</sup> The lack of adequate record keeping by employers can also facilitate wage theft.<sup>68</sup> Employers’ failure

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<sup>59</sup> CHO ET AL., *supra* note 57, at 2.

<sup>60</sup> BOBO, *supra* note 21, at 59 (2011); *see also* Shannon Gleeson & Roberto G. Gonzales, *When Do Papers Matter? An Institutional Analysis of Undocumented Life in the United States*, 50 INT’L MIGRATION 7 (2012) (discussing how workers fear that they will be easily replaced).

<sup>61</sup> ANNETTE BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 24-25.

<sup>62</sup> Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 580 (2010).

<sup>63</sup> NAT’L EMP’T LAW PROJECT, *supra* note 54, at 31 (2001); JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 78 (2006) [hereinafter FINE, *WORKER CENTERS*].

<sup>64</sup> Levine, *supra* note 26.

<sup>65</sup> NAT’L EMP’T LAW PROJECT, *supra* note 54, at 21; FINE, *WORKER CENTERS*, *supra* note 63, at 74-75.

<sup>66</sup> SAN DIEGO STATE U. DEP’T OF SOC. ET AL., *CONFRONTING WAGE THEFT: BARRIERS TO CLAIMING UNPAID WAGES IN SAN DIEGO* 8-10 (2017); NAT’L EMP’T LAW PROJECT, *supra* note 54, at 50; BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 53.

<sup>67</sup> BOBO, *supra* note 21, at 23.

<sup>68</sup> Payroll records are usually required by federal or state wage and hour law. *Id.* at 40; NAT’L EMP’T LAW PROJECT, *supra* note 54, at 99-100.

to keep records that account for workers' hours or pay make it difficult for workers to both recognize and prove wage theft.<sup>69</sup>

Finally, some employers seek to minimize their legal liability by strategically structuring their businesses and thereby creating an environment ripe for wage theft.<sup>70</sup> One widespread form of this phenomenon is called the "fissured workplace."<sup>71</sup> Large corporations, often at the top of the supply chain, seek to shed their role as direct employers, in favor of outsourcing work to smaller companies, contractors, or temp agencies.<sup>72</sup> By keeping workers at arm's length, the employer may more easily evade legal liability or keep their true identity and place of business hidden so that workers will have difficulty holding them liable for wage theft.<sup>73</sup> The smaller companies, contractors, or temp agencies may be undercapitalized or fly-by-night operations that cannot be held accountable.<sup>74</sup> These larger employers, however, are ultimately responsible for driving wage theft as they exert downward pressure on subcontractors to reduce labor costs.<sup>75</sup>

## II. RECENT WAVE OF ANTI-WAGE THEFT LEGISLATION

### A. *The Success of Worker Movements*

Over roughly the past decade, worker movements have sought to address the wage theft crisis by passing state and local laws. We compiled all of these laws: a total of 140, including 70 state laws and 70 local ordinances, enacted by 24 states and 56 localities from 2005 to 2018 (Figure 1).

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<sup>69</sup> Without such records, employers sometimes even go so far as to deny that they ever employed the worker.

<sup>70</sup> Another widespread phenomenon is employers misclassifying workers as independent contractors and treating them as though they are non-employees and thus outside the protection of the law.

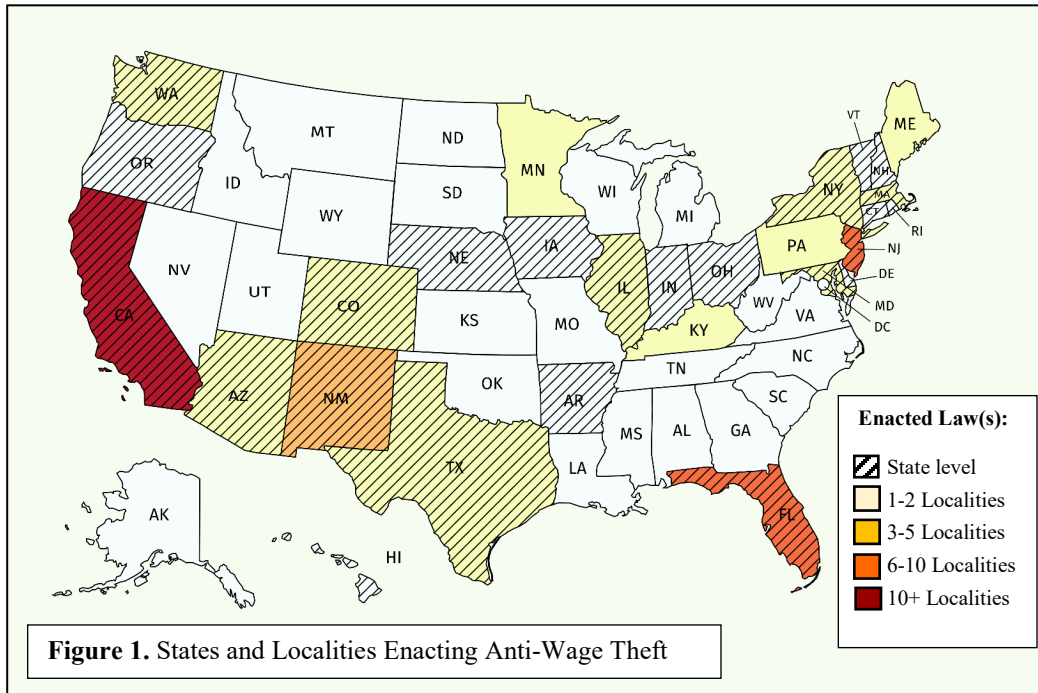
<sup>71</sup> DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 9-10 (2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [hereinafter WEIL, IMPROVING WORKPLACE CONDITIONS].

<sup>72</sup> NAT'L EMP'T LAW PROJECT, *supra* note 54, at 83-84; FINE, WORKER CENTERS, *supra* note 63, at 101-102.

<sup>73</sup> Cooper & Kroeger, *supra* note 5 (explaining that "unscrupulous employers" will often use the "fissured nature" of the employer-employee relationship to avoid responsibility when those employees wish to bring claims regarding mistreatment).

<sup>74</sup> CHO ET AL., *supra* note 57, at 8-12.

<sup>75</sup> David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. RELATIONS REV. 33, 44 (2011) [hereinafter Weil, *Enforcing Labour Standards in Fissured Workplaces*].



We identified all state and local anti-wage theft laws enacted from January 1, 2005, to December 31, 2017, by various methods.<sup>76</sup> Such methods included referring to sources that had cataloged anti-wage theft laws,<sup>77</sup> examining media accounts by using Google and Lexis, speaking with 29 workers centers and state and local departments of labor,<sup>78</sup> and running searches on Westlaw, American Legal Publishing, and the Municipal Code Corporation, for all the states and the 30 most populous cities.<sup>79</sup> Our definition of anti-wage theft laws included any law that regulates the payment of wages or information related to the payment of wages.<sup>80</sup> Because the aim was to collect laws that explicitly address wage theft, we excluded laws that solely increase the minimum wage rate, address the misclassification of workers as independent contractors, or require paid sick leave.<sup>81</sup>

<sup>76</sup> Starting in 2005, the public began discussing “wage theft.” NIK THEODORE, THE MOVEMENT TO END WAGE THEFT: A REPORT TO THE DISCOUNT FOUNDATION 22 (2011) (noting that the term “wage theft” first began to appear in news articles in 2005). We found that a larger number of anti-wage theft laws were enacted beginning in 2005. While we searched comprehensively, our compilation may not be exhaustive of all state and local laws enacted during this time period.

<sup>77</sup> NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 54; TIA KOONZE, MIRANDA DIETZ, & ANNETTE BERNHARDT, ENFORCING CITY MINIMUM WAGE LAWS IN CALIFORNIA: BEST PRACTICES AND CITY-STATE PARTNERSHIPS (Oct. 2015); Galvin, *supra* note 9, at 324.

<sup>78</sup> List is on file with the authors.

<sup>79</sup> On Westlaw, the search phrases included “unpaid wage,” “wage claim,” “wage complaint,” or “payment /s wage,” or “underpayment /s wage” or “wage /s theft” in the labor statutes. On American Legal Publishing and the Municipal Code Corporation, the search phrase was “wage.” The 30 most populous cities and their corresponding counties were determined by number of residents using U.S. Census data.

<sup>80</sup> These laws are sometimes focused on a particular subset of workers, such as domestic workers, day laborers, or “temp” workers.

<sup>81</sup> Other laws that were excluded if they: (1) made only technical revisions to the law and did not fundamentally change the enforcement regime; (2) would be considered pro-employer

During this period of time, worker movements have expended substantial resources to engage in state and local level advocacy with good results. Local reform has the potential to provide impacted workers with more direct access to the government and can more readily allow for experimentation.<sup>82</sup> Given the movement across the country to increase the minimum wage, a number of the anti-wage theft laws we identified are laws that seek to increase the minimum wage.<sup>83</sup> Low-wage workers have directly led many of these efforts, along with the participation of community-based organizations, workers centers, legal services agencies, and unions. In DC, for example, the Wage Theft Coalition, which included nonprofits, unions, service providers, worker centers, and community organizations, led the campaign to get an anti-wage theft law enacted.<sup>84</sup> Like in DC, coalitions across the country have had success in enacting laws to address wage theft.<sup>85</sup>

We found that political conditions may influence whether worker movements can succeed in passing an anti-wage theft law as most of the laws examined were enacted in jurisdictions that lean Democratic.<sup>86</sup> For those states enacting anti-wage theft legislation, a solid majority (67%) of the jurisdictions lean Democratic.<sup>87</sup> For localities enacting anti-wage theft legislation, the overwhelming majority (96%) of jurisdictions lean Democratic.<sup>88</sup> Another study, in examining anti-wage theft laws at the state level from 2004 to 2012, found that movement strength and political conditions predicted the success of

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provisions; (3) exclusively governed work performed pursuant to city contracts; or (4) were subsequently repealed, preempted by state statute, or otherwise invalidated.

<sup>82</sup> Localities that sit in states that disagree with such anti-wage theft laws may seek to preempt them. MARNI VON WILPERT, CITY GOVERNMENTS ARE RAISING STANDARDS FOR WORKING PEOPLE—AND STATE LEGISLATORS ARE LOWERING THEM BACK DOWN (Aug. 26, 2017). Some localities are fighting back, however, by claiming impermissible infringement on their home-rule powers or raising constitutional violations. *See, e.g., City of Dayton v. State of Ohio*, No. 2015-1549, 87 N.E.3d 176, 186 (Ohio 2017) (finding that the state law seeking to preempt the city ordinances related to traffic cameras violates municipal home-rule authority); Amended Complaint, *Lewis v. Bentley*, No. 16-cv-00690-RDP (N.D. Ga. filed June 30, 2016), ECF No. 18, *appeal filed*, Notice of Transmittal (N.D. Ga. issued Mar. 3, 2017) (challenging state preemption of a municipal minimum wage ordinance as discriminatory on the basis of race).

<sup>83</sup> Minimum Wage Tracker, Economic Policy Institute (Jul. 12, 2018), <https://www.epi.org/minimum-wage-tracker/>; *see, e.g., SAN DIEGO, CAL., MUN. CODE* §§ 39.0107-0116 (2016), <http://docs.sandiego.gov/municode/MuniCodeChapter03/Ch03Art09Division01.pdf>.

<sup>84</sup> THE CENTER FOR POPULAR DEMOCRACY, A PRACTICAL GUIDE FOR COMBATTING WAGE THEFT: LESSONS FROM THE FIELD 17 (2017).

<sup>85</sup> *See, e.g., THEODORE, supra* note 76, at 15-16 (describing efforts by Casa Latina in Seattle and the Washington State Labor Council to reform laws in Seattle and Washington); KIM BOBO, *supra* note 21, at 220 (2011) (describing the coalition that pushed the Miami-Dade County anti-wage theft ordinance).

<sup>86</sup> While we recognize the limitations of this approach, we defined a jurisdiction to be “leaning Democratic” by whether the majority had voted for Hilary Clinton in the 2016 presidential election.

<sup>87</sup> In our study, there were 24 states that enacted anti-wage theft laws, 16 in jurisdictions that lean Democratic.

<sup>88</sup> In our study, there were 56 localities that enacted anti-wage theft laws, 54 in jurisdictions that lean Democratic.

enacting anti-wage theft laws at the state level.<sup>89</sup> In particular, they found that political conditions could trump or diminish movement strength.<sup>90</sup> While we cannot say with certainty that a Democratic-leaning jurisdiction is a precondition to getting anti-wage theft laws enacted, this finding raises questions about the feasibility, particularly in less progressive local jurisdictions, of getting such laws enacted in the future.

### B. *The Most Common Anti-Wage Theft Strategies*

The 140 anti-wage theft laws varied in approach and scope. The more comprehensive laws have variations of the following components:

- A process for workers to complain in court or with an administrative agency.
- A prohibition against retaliating.
- Authority for an agency or court to determine whether wage theft occurred and order payment of damages.
- Authority for an agency or court to find multiple employers jointly liable.
- Requirements that employers keep or provide information (e.g., post a notice about workers' rights, keep payroll records).

Based on these core components, we developed a typology (Table 1). The overall categories are: (1) authorizing worker complaints; (2) strengthening anti-retaliation provisions; (3) creating or enhancing penalties; (4) expanding employer liability; and (5) regulating information. Within each of these categories, we noted the 22 most common anti-wage theft strategies employed by state and local laws.<sup>91</sup>

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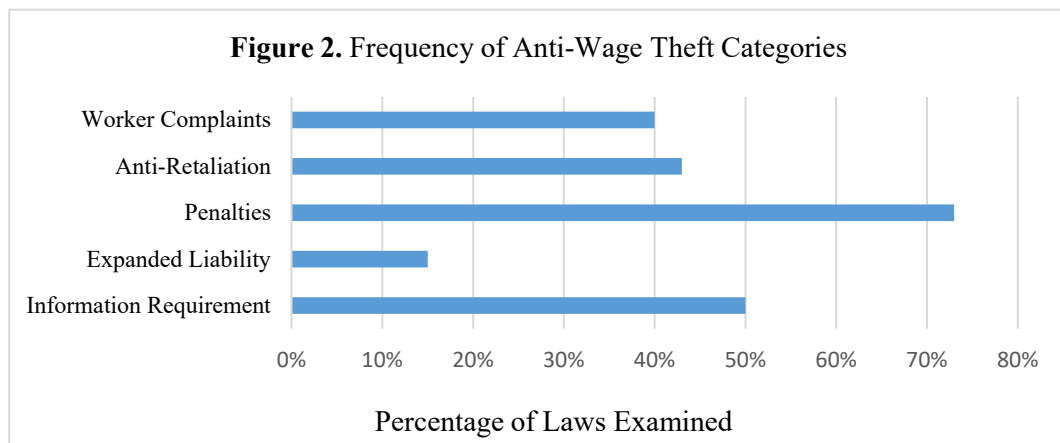
<sup>89</sup> Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community-Labor Coalitions Win Victories in State Houses?* 52 URBAN AFF. REV. 780, 797 (2015). Doussard and Gamal studied anti-wage theft laws enacted at the state level from 2004 to 2012, but had a broader definition of what laws addressed wage theft.

<sup>90</sup> *Id.* at 797. Doussard and Gamal note that while some states that are “hostile to the interests of worker” enacted bills, such bills were extremely limited. *Id.* at 800. We similarly note that a good number of the state laws we examined in in Republican-leaning jurisdictions do not utilize many anti-wage theft strategies. *See, e.g.*, NEB. REV. STAT. ANN. §§ 48-1201-1209 and §§ 48-1228-1234 (West 2017).

<sup>91</sup> A variety of miscellaneous strategies occurred less frequently and thus were not included. Some examples of these less frequently utilized strategies include: (1) stop work orders; (2) increasing the jurisdictional limits of the agencies authorized to enforce wage theft laws; and (3) encouraging mediation.

<b>Table 1. Typology of Anti-Wage Theft Strategies</b>				
<b>Worker Complaints</b>	<b>Anti-Retaliation</b>	<b>Penalties</b>	<b>Expanded Liability</b>	<b>Information Requirements</b>
Private Right of Action	Prohibiting Retaliation	Civil	Broader Definition of Employer	Mandatory Disclosures
Administrative Process	Confidential Complaint	License Revocation	Succesor Liability	Employer Recordkeeping
Increases or Tolls Statute of Limitations	Burden Shifting	Negative Publicity	Joint and Several Liability	Posters
		Criminal		Burden Shifting
		Lien		Agency Data Collection or Reporting
		Bond		Worker Education
				Employer Education

The extent to which these new laws employ each category of strategies varied, with penalties being the most popular and expanded liability being the least common (Figure 2).





Within the 140 newly enacted laws,<sup>92</sup> we determined the frequency of each of the 22 anti-wage theft strategies.<sup>93</sup> We provide a more detailed picture below.

### 1. *Worker Complaints*

A little less than half (40%) of the laws examined facilitate or authorize workers to sue in court or initiate an administrative enforcement process.<sup>94</sup> Of these laws, the breakdown between different kinds of worker complaint strategies are:

43%	Permits Private Right of Action
41%	Permits Administrative Complaint Process
16%	Increases or Tolls Statute of Limitations

Almost half of the worker complaint strategies consist of creating a private right of action. A little more than a third create an administrative system in which workers, or others acting on their behalf, can file their claims to be investigated or adjudicated by the agency.<sup>95</sup> A number of the laws have both private rights of action and administrative complaint processes so workers can choose between them.<sup>96</sup>

Further, a smaller handful (16%) of worker complaint strategies seek to increase the ability of workers to file or maintain a worker complaint by extending or tolling the statute of limitations. Most of these laws toll the statute of limitations while workers' complaints are pending with an administrative agency.<sup>97</sup> This tolling allows for workers to preserve their full claims if they choose to thereafter file court complaints. Only a few of these laws increase the overall statute of limitations for filing a worker complaint.<sup>98</sup>

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<sup>92</sup> Because our research was focused solely on newly enacted laws, our data does not include laws already in place prior to 2005. However, where those preexisting laws were subsequently amended by laws enacted from 2005-2018, we did include those amendments.

<sup>93</sup> During the period studied, some jurisdictions enacted a single comprehensive law that adopted many strategies at once while others passed several laws and made reforms in a more piecemeal fashion. As we found it significant that these jurisdictions enacted laws to create or strengthen these strategies, we counted each strategy separately.

<sup>94</sup> We only counted those laws that either authorized worker complaints or explicitly set forth that regulations would be promulgated to create an administrative process. Thus, if an agency created a process for worker complaints purely through regulation, it would not be captured by our data.

<sup>95</sup> See, e.g., N.M. STAT. ANN. §§ 50-15-1 to 50-15-7 (2016) (providing that a state agency shall investigate complaints and enforce the Day Laborer Act).

<sup>96</sup> See, e.g., COLO. REV. STAT. §§ 8-4-101, 8-4-109, 8-4-111, 8-4-113, 8-4-118 (2016) (providing that a worker can bring an administrative complaint for wages up to \$7500 or file a civil suit in court).

<sup>97</sup> See, e.g., MASS. STAT. ANN. 149 § 150 (West 2017) (permitting tolling of the statute of limitations while agency complaint is pending).

<sup>98</sup> See, e.g., N.H. REV. STAT. ANN. § 275:51(V) (West 2017) (extending the statute of limitations from 18 to 36 months).

## 2. Anti-Retaliation

A little less than half (43%) of the laws create or strengthen protections for workers or others who take action against wage theft. Of these laws, the breakdown between different kinds of anti-retaliation strategies are:

55%	Prohibits Retaliation
23%	Permits Confidential Complaint
22%	Burden Shifting for Firing Worker

A little more than half of anti-retaliation strategies address employer retaliation by prohibiting retaliation against workers who have voiced or filed complaints.<sup>99</sup> Some of these laws also provide that workers may seek monetary penalties for retaliation through an administrative agency or a court.<sup>100</sup> A number of laws also extend the prohibition against retaliation beyond the employer to include others acting on the employer's behalf.<sup>101</sup> Other laws protect individuals helping to enforce the anti-wage theft law by, for example, testifying on behalf of an aggrieved worker or educating workers about their rights.<sup>102</sup>

A little less than a quarter of anti-retaliation strategies involve a process where workers can file complaints confidentially, although many of these laws permit disclosure if necessary to investigate or resolve a complaint.<sup>103</sup> Finally, a similar amount use burden shifting so that workers who are fired within 90 or 120 days after having raised a complaint have a rebuttable presumption that the firing was illegal retaliation.<sup>104</sup> A couple of laws alternatively shift the burden by prohibiting the firing of a worker within 120 days after the worker has raised a complaint without clear and convincing evidence that the discharge is warranted.<sup>105</sup>

## 3. Penalties

A little less than three-quarters (73%) of the laws examined create or enhance penalties by authorizing an administrative agency or court to impose

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<sup>99</sup> These jurisdictions, for example, protect the voicing of complaints: N.Y. LAB. LAW § 861-f (McKinney 2018); SEATTLE, WASH., CODE § 14.20.035 (2014); and D.C. CODE. ANN. § 32-1311 (West 2016).

<sup>100</sup> See, e.g., ARIZ. REV. STAT. §§ 23-362 to 264 (2016) (providing that workers may recover damages including interest, double unpaid wages, and attorney fees and costs).

<sup>101</sup> See, e.g., TACOMA, WASH., CODE § 18.20.090 (2018).

<sup>102</sup> See, e.g., MILPITAS, CAL. CODE § III-31-8.00 (2017).

<sup>103</sup> See, e.g., D.C. Code. Ann. § 32-1306 (a-1) (West 2016); N.Y. LAB. LAW § 196-a (McKinney 2018).

<sup>104</sup> See, e.g., PALO ALTO, CAL., CODE § 4.62.070(b) (2017).

<sup>105</sup> See, e.g., SAN MATEO, CAL., CODE § 5.92.050(d)(1) (2017).

penalties when it finds that an employer committed wage theft.<sup>106</sup> Of these laws, the breakdown between the different kinds of penalty strategies are:

47%	Civil
22%	License Revocation
11%	Negative Publicity
10%	Criminal
5%	Lien
4%	Bond

Civil penalties authorize the court or an administrative agency to impose monetary penalties against an employer. We found that roughly half of the strategies involving penalties create or enhance civil penalties. Most laws calculate civil penalties based on the amount of wages owed (e.g., an equivalent amount to wages owed), although a few have alternate formulas.<sup>107</sup> For the most part, these penalties are to be paid to the worker, although sometimes a portion go to the administrative agency.<sup>108</sup> For willful violations by repeat offenders, some laws authorize the imposition of higher civil penalties.<sup>109</sup> In addition, some civil penalties include the prevailing worker's attorney's fees, costs, or the cost of administrative enforcement.<sup>110</sup>

License revocation penalties authorize the non-issuance, suspension, or revocation of the license of an employer that committed wage theft. A little less than a quarter of the strategies involving penalties provide for license revocation, ranging from a general business license to more specific licenses necessary to operate the employer's business, such as a land use permit.<sup>111</sup> The authority for license revocation most commonly lies with the agency that is in charge of issuing such licenses.<sup>112</sup>

Negative publicity penalties (11%) require some kind of reporting to the public about employers who have committed wage theft. The location for

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<sup>106</sup> See Irene Lurie, *Enforcement of the State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 426 (2016) (describing how some agencies have to refer the wage theft case to a court in order to get penalties issued against an employer).

<sup>107</sup> See, e.g., COLO. REV. STAT. §§ 8-4-109 to 8-4-110 (2012) (providing that civil penalties are calculated with a "daily earnings penalty" for an employer's failure to pay wages within 14 days of demand and a 50% greater penalty for willful violations).

<sup>108</sup> See, e.g., 820 ILL. COMP. STAT. 105/12 (2008) (providing that where an employer is found liable and acted willfully, repeatedly, or recklessly, that employer must pay up to 20% of the wages owed to the employee to the agency).

<sup>109</sup> See, e.g., WASH. REV. CODE ANN. § 49.48.125(1) (West 2017).

<sup>110</sup> See, e.g., ST. PETERSBURG, FLA., CODE §§ 15-42 and 15-45(b) (2017).

<sup>111</sup> See e.g., 820 ILL. COMP. STAT. ANN..175/70 (West 2018) (revoking day or temporary labor agency registration); OAKLAND, CAL., CODE § 5.92.050 (2017) (regarding approval of land use permits).

<sup>112</sup> See, e.g., HAW. REV. STAT. § 387-6 (2016) (providing that the state's Permit or License Official may deny an applicant's permit, license, or registration if that applicant is in the Wage Theft Adjudication Database).

sharing such information varies, from agency websites to notices posted at the employer's place of business.<sup>113</sup>

Only a small minority (10%) of the strategies involving penalties authorizes criminal charges against an employer. These laws define wage theft as a misdemeanor or felony with accompanying fines or jail time.<sup>114</sup> Criminal penalties are often reserved for repeat offenders.<sup>115</sup>

Lien penalties authorize the filing of a lien or levy against the employer's property for wages or penalties owed.<sup>116</sup> Only a handful of the strategies involving penalties (5%) penalize employers by authorizing a lien against their personal or real property.

Bond penalties require employers to post a bond (4%). Such bonds may be required for all employers in high-risk industries who must obtain specialized licensing or more specifically as penalties for employers who have committed wage theft.<sup>117</sup>

#### 4. Expanded Liability

A small minority (15%) of the laws examined contain strategies to expand the scope of employers liable for the same unpaid wages. Of them, the breakdown between the different kinds of expanded liability strategies are:

38%	Broader Definition of Employer
34%	Successor Liability
28%	Joint and Several Liability

Expanded liability strategies seek to address challenges of regulating the fissured workplace and authorize workers to seek their wages from multiple joint employers.<sup>118</sup> A little more than a third hold entities directly liable for a worker's wages if they "use" or "subcontract" the services of that worker's direct employer.<sup>119</sup> Another third permit workers who were employed by companies that have either dissolved or disappeared to hold successor entities with a similar

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<sup>113</sup> In New York, the agency can post information about employers who have committed an "egregious violation" of the wage theft law. N.Y. LAB. LAW § 219-c(3) (McKinney 2018). In San Francisco, the employer itself is required to post a notice if it fails to comply with an order to pay back wages or penalties. SAN FRANCISCO, CAL., CODE § 12R.7(f) (2017).

<sup>114</sup> See, e.g., CONN. GEN. STAT. §§ 31-288, 31-69(a), 31-76(a) (2016) (providing that an employer's failure to pay legally-required or promised wages is a Class D felony).

<sup>115</sup> See, e.g., D.C. CODE ANN. § 32-1307(a) (West 2016).

<sup>116</sup> See, e.g., MD. CODE ANN., Lab. & Empl. §§ 3-1101-3-1110 (West 2017).

<sup>117</sup> See, e.g., BERKELEY, CAL., CODE § 13.104.060 (2016).

<sup>118</sup> Employers are joint employers when both employers employ the employee, making both jointly and severally liable for the payment of wages.

<sup>119</sup> In Oregon, for example, "[a]ny person who uses the services of a labor contractor" can be held "personally and jointly and severally liable" for the wages of the contractor's workers. OR. REV. STAT. ANN. §§ 658.405; 658.465 (West 2017). In California, general contractors can be held liable for nonpayment of wages by subcontractors, although not for penalties and liquidated damages. CAL. LAB. CODE § 218.7 (West 2017).

operation liable for wage theft.<sup>120</sup> Finally, a little more than a quarter authorize administrative agencies or courts more generally to find joint and several liability among multiple employers.<sup>121</sup>

### 5. Information Requirements

Half (50%) of the laws regulate information in order to increase awareness about wage and hour laws and transparency about wage-related rights or an employer's payment of wages. Of these laws, the breakdown between the different kinds of information requirements are:

23%	Mandatory Disclosures
21%	Employer Recordkeeping
19%	Posters
12%	Burden Shifting for Lack of Records
10%	Agency Data Collection or Reporting
10%	Worker Education
4%	Employer Education

A little less than half of the information strategies require employers to make disclosures to workers. A little less than a quarter of these disclosures require employers to make extensive mandatory disclosures directly to workers at the time of hire, such as the employee's specific pay rate and hours worked each pay period, the employer's name and address, or instructions on how to file an administrative wage complaint.<sup>122</sup> Similarly, about a fifth of information strategies require that employers post a poster at the worksite about the rights of workers under the anti-wage theft law.<sup>123</sup> A good portion of these posting requirements specify that information must be provided in languages other than English.<sup>124</sup> Under some laws, the failure of employers to post or provide information to workers subject employers to a penalty.<sup>125</sup>

A little less than a quarter of information strategies create or enhance employers' recordkeeping requirements. In particular, employers are required to record and retain information, such as employees' hours, pay rates, and pay, and

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<sup>120</sup> See, e.g., L.A. COUNTY CODE §§ 8.101.010-8.101.180 (2016) (creating successor liability where, at the time of the conveyance of the business, the successor had knowledge of the wage theft and the amount of the Wage Enforcement Order).

<sup>121</sup> See, e.g., CAL. LAB. CODE §§ 96.8, 98, 238.1-238.5, 538.1 (Deering 2016) (creating joint liability for entities who contract for service in the property services and long-term care industries).

<sup>122</sup> See, e.g., SEATTLE, WASH., CODE § 14.20.0325(D) (2014); OR. REV. STAT. ANN. § 658.440(1)(f) (West 2017).

<sup>123</sup> See, e.g., FLA. STAT. § 448.109 (2012) (requiring employers to hang posters in the workplace regarding employees' minimum wage rights).

<sup>124</sup> See, e.g., FLAGSTAFF, ARIZ., CODE § 15-01-001-0004(A) (2017) (requiring postings in English, Spanish, and any language spoken by at least 5% of the employees at the workplace or job site).

<sup>125</sup> See, e.g., ARIZ. REV. STAT. ANN. § 23-364(B) (West 2016).

may be penalized for failing to do so.<sup>126</sup> A smaller percentage (12%) of these strategies include a rebuttable presumption that wage theft occurred where the employer fails to maintain or provide access to required records.<sup>127</sup>

A small percentage (10%) of information strategies require state or local agencies to either report about their enforcement system (such as the occurrences of wage theft or implementation of the anti-wage theft law by the agency) or collect information directly from employers about their payroll.<sup>128</sup> A similarly smaller portion of information strategies direct state and local agencies to educate workers (10%) or employers (4%).<sup>129</sup>

### III. LIMITATIONS OF COMMON ANTI-WAGE THEFT STRATEGIES

Given the incredible momentum that exists to change state and local policies to address wage theft and the seriousness of the problem, it is critical to examine whether the anti-wage theft strategies being advanced by these laws are likely to succeed. Using our typology, we examine the underlying assumptions of how the anti-wage theft strategies are supposed to operate in practice. Many of the most common anti-wage theft strategies resemble popular and failed regulatory strategies in other contexts, such as rights claiming, command and control enforcement, and information disclosure. Through our analysis, we conclude that such strategies are unlikely to achieve the goal of significantly reducing wage theft. At the same time, we note several less common anti-wage theft strategies that may be more successful in directly addressing some of the problematic assumptions in popular regulatory strategies.

#### A. *Rights-Claiming Strategies*

A little less than half of the laws either provide workers with the ability to file a complaint with an administrative agency or the courts, or facilitate the filing of such complaints by extending or tolling the statute of limitations. Despite the popular notion that people litigate too readily, most do not pursue legal grievances.<sup>130</sup> Sociolegal scholars have extensively studied rights-claiming strategies and argued that whether an individual files a complaint “depend[s] on the individual’s location in the social hierarchy,” with members from more marginalized groups less likely to seek remedy through the legal system.<sup>131</sup> We question the extent to which the strategy of worker complaints will be successful because it similarly relies on the assumption that workers,

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<sup>126</sup> See, e.g., OR. REV. STAT. §§ 652.409, 652.610, 652.750 (2016) (requiring employers to maintain time and pay records for three years after an employee’s termination).

<sup>127</sup> See, e.g., BROWARD COUNTY, FLA., CODE § 20½-8 (2017).

<sup>128</sup> See, e.g., OR. REV. STAT. § 658.405 (2016) (requiring employers to submit certified copies of payroll records).

<sup>129</sup> See, e.g., MASS. GEN. LAWS ANN. CH. 149, § 190(O) (West 2017) (requiring education of domestic workers and their employers, including distribution of model employment agreements).

<sup>130</sup> Wofford, *supra* note 11, at 968.

<sup>131</sup> *Id.* at 968.

particularly the less educated, women, workers of color, and immigrants,<sup>132</sup> will file wage theft complaints.

Any regulatory strategy premised on worker complaints assumes that aggrieved parties will engage in the “naming, blaming, and claiming.”<sup>133</sup> Tangible traits such as income, education, and knowledge of the legal system shape whether individuals view their injury as a legal grievance and whether they should take legal action to resolve the problem.<sup>134</sup> In examining the right of individuals to bring a claim under Title VII, scholars have found a widespread failure to confront discrimination publicly “driven largely by an accurate perception that the costs of such responses will likely outweigh the benefits.”<sup>135</sup> Empirical studies have revealed, for example, that EEOC complaints comprise just 1% of those who felt that they had suffered discrimination.<sup>136</sup> Such studies of Title VII have led some to conclude that the complaint based model for civil rights enforcement has largely failed.<sup>137</sup>

In the context of wage-related laws, scholars and advocates have similarly critiqued the strategy of worker complaints.<sup>138</sup> It is hard to get workers to “name” wage theft because they often do not understand that it is happening. This “naming” assumption has been powerfully questioned by Charlotte Alexander and Arthi Prasad in their analysis of the data from the Broken Laws study. They found that only one-third of low-wage workers identified having a wage problem while higher rates of them were found to actually have a wage theft problem (26% had not been paid minimum wage and 76% were owed overtime).<sup>139</sup> In general, over half these workers (59%) did not know their minimum wage or overtime rights.<sup>140</sup> The low-wage workforce faces particular challenges given the higher incidence of individuals who may not be familiar with US laws or lack high levels of education.<sup>141</sup> Understanding whether wage

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<sup>132</sup> See, e.g., Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL’Y J. 111, 118-20 (2017).

<sup>133</sup> Felstiner, *supra* note 8, at 631.

<sup>134</sup> Wofford, *supra* note 11, at 967–68.

<sup>135</sup> Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 900 (2008).

<sup>136</sup> Laura Beth Neilsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 704-5 (2005).

<sup>137</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 447 (2007).

<sup>138</sup> KOONZE ET AL., *supra* note 77, at 12-13; DIEGO RONDÓN ICHIKAWA & REBECCA SMITH, DELIVERING \$15: COMMUNITY-CENTERED WAGE AND HOUSE ENFORCEMENT IN SEATTLE 4-7 (2014); Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L.J. 813, 820 (2013); David Weil, *A Strategic Approach to Labour Inspection*, 147 INT’L LAB. R. 349, 356 (2008) [Weil, *A Strategic Approach to Labour Inspection*].

<sup>139</sup> Alexander & Prasad, *supra* note 8, at 1085.

<sup>140</sup> *Id.* at 1093 (citing other studies showing lack of knowledge about the law).

<sup>141</sup> *Id.* at 1088 (finding for every year of education a worker was more likely to have identified a workplace problem); see also Gregory Acs, *A Profile of Low Wage Workers*, UNITED STATES DEPARTMENT OF LABOR OFFICE OF THE SECRETARY, Table 6, available at <https://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/lowwage/>

theft has occurred is often complex. For example, it may not be immediately clear to a worker whether they should have been paid for time spent taking ten-minute breaks at work or whether they received the proper rate of overtime pay when paid a daily or weekly rate.<sup>142</sup> Due to rampant misclassification, a worker may also be classified as an independent contractor, incorrectly believing they are not entitled to the protections of the wage and hour laws afforded to employees.<sup>143</sup> It is unsurprising, therefore, that wage theft is often hard for workers to identify.

Even presuming that workers recognize that wage theft is occurring, there can be difficulty in “blaming” the correct employers. There are several practical barriers that arise. The fissured workplace makes it harder for workers to blame the correct parties responsible for their wage theft.<sup>144</sup> Workers may not even know for whom they exactly work, much less have knowledge about the entities at the top of the supply chain.<sup>145</sup> A study of temporary staffing workers found that they sometimes lacked key information about their employers, such as the names of the staffing agency or the host employer.<sup>146</sup> Some subsets of jobs, such as day laborer jobs, are particularly informal with workers being picked up on a street corner or in a parking lot.<sup>147</sup> In these situations, aggrieved workers may not have the information needed to assign blame to the contractor that picked them up, much less the larger entity that used the contractor for the project.<sup>148</sup> With respect to fly-by-night employers, it may be difficult for workers to uncover the existence of the new successor entity at a new location that comprises essentially the same employer. Some workers may recognize

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section3.htm (showing that in 1997, only 35.5 percent of low-wage workers and 28.5 percent of low-wage/low-income workers had more than twelve years of schooling).

<sup>142</sup> A worker, for example, can be paid on a piece rate basis of \$100 per day, 6 days per week, for a total of \$600. The worker might fairly believe that she is getting more than minimum wage (\$7.25/hour x 40 = \$290) and overtime (\$10.88/hour x 20 hours = \$217.60), which is incorrect. In fact, she is not receiving overtime as her overtime wages would be calculated by first establishing her regular rate of pay of \$10 (\$600/60 hours = \$10/hour) and requiring the employer to pay the overtime premium for hours worked over 40 (\$15/hour x 20 hours = \$300). Layered on top of this analysis is the threshold question of whether the worker’s job places her in a statutory category where she is, in fact, eligible for overtime.

<sup>143</sup> See, e.g., LINDA H. DONAHUE, JAMES RYAN LAMARE, FRED B. KOTLER, *THE COST OF WORKER MISCLASSIFICATION IN NEW YORK STATE* 4-5, Tables 1-7 (2007).

<sup>144</sup> Cooper & Kroeger, *supra* note 5 (explaining that “unscrupulous employers” will often use the “fissured nature” of the employer-employee relationship to avoid responsibility when those employees wish to bring claims regarding mistreatment).

<sup>145</sup> Thomas E. Perez, *The Fair Labor Standards Act at Seventy-Seven: Still “Far-Reaching, Far-Sighted,”* 30 ABA J. LAB. & EMP. L. 299, 303 (2015).

<sup>146</sup> SHELLER CENTER FOR SOCIAL JUSTICE, *PENNSYLVANIA WORKERS IN JEOPARDY: THE HIDDEN PROBLEM OF TEMPORARY EMPLOYMENT* 19-20 (2017).

<sup>147</sup> Stephen Franklin, *A Day in the Life of a Day Laborer*, IN THESE TIMES (Jun. 15, 2017, 3:41 PM),

[http://inthesetimes.com/working/entry/20237/day\\_laborer\\_purgatory\\_waiting\\_in\\_the\\_streets\\_to\\_take\\_a\\_backbreaking\\_job](http://inthesetimes.com/working/entry/20237/day_laborer_purgatory_waiting_in_the_streets_to_take_a_backbreaking_job) (illustrating how a group of day laborers will wait on a street corner for contractors to hire them, often working for those contractors for little to no money and fearing the sometimes-dangerous working conditions).

<sup>148</sup> SETON HALL UNIV. SCH. OF LAW, *IRONBOUND UNDERGROUND: WAGE THEFT & WORKPLACE VIOLATIONS AMONG DAY LABORERS IN NEWARK’S EAST WARD 11* (2010).



wage theft but be reluctant to blame their employer because of personal loyalty or belief that it is one of the inevitable costs of being undocumented.<sup>149</sup>

At the “claiming” stage, unpaid workers do not readily complain. A study by David Weil and Amanda Pyles, in reviewing data from the DOL, Wage and Hour Division from 2001 to 2004, found an abysmally low number of workers complained to DOL about wage and hour violations, approximately 25 out of 100,000 workers.<sup>150</sup> Alexander and Prasad also present evidence that low-wage workers are not likely to complain for a variety of reasons. Of the workers who recognized the problem of wage theft in the Broken Laws study, only 57% complained, with nearly all those complaints being directly to the employer.<sup>151</sup> Only 4% of those who complained opted to complain to the government or file a lawsuit, with 77% unaware of how to complain to the government.<sup>152</sup> Those that knew how to complain chose not to because they doubted the efficacy of taking action, did not want to take the time to engage in a lengthy process, and feared retaliation.<sup>153</sup> Increased use of forced arbitration as a condition of employment is yet another barrier to workers’ enforcement of their wage-related rights and undermines worker complaint strategies.<sup>154</sup>

Although nearly half of worker complaint strategies involved creating a private right of action, we know generally that workers do not bring claims *pro se* and do not have ready access to attorneys.<sup>155</sup> Workers may incorrectly believe that they must have a lawyer to file suit, feel ill-equipped to fill out the required paperwork and comply with court rules, or simply lack the time to take legal action.<sup>156</sup> They also face incredible barriers to obtaining an attorney, particularly for representation regarding smaller wage claims.<sup>157</sup> The resources of nonprofit attorneys are limited and private attorneys are constrained because they need to generate attorney’s fees.<sup>158</sup> Workers may not have the freedom to take time off

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<sup>149</sup> Email from Keith Talbot, Senior Counsel, Legal Services of New Jersey (Dec. 26, 2018, 15:51 CST) (on file with authors).

<sup>150</sup> Weil & Pyles, *supra* note 8, at 70.

<sup>151</sup> Alexander & Prasad, *supra* note 8, at 1089.

<sup>152</sup> *Id.* at 1095.

<sup>153</sup> *Id.* at 1089; SAN DIEGO STATE U. DEP’T OF SOC. ET AL., *supra* note 66; SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES 14-15 (2016).

<sup>154</sup> Nantiya Ruan, *What’s Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103 (2012) (describing the pervasiveness of arbitration mandates in employment relationships, the limits they place on wage related rights, including the right to engage in aggregate claims, and the negative impact on low-wage workers). Forced arbitration provisions can also decrease the statute of limitations period to bring a wage claim.

<sup>155</sup> GLEESON, PRECARIOUS CLAIMS, *supra* note 153, at 95.

<sup>156</sup> Ruan, *supra* note 154, at 1118–19.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; NAT’L EMP’T LAW PROJECT, *supra* note 54, at 31 (2011); JACOB MEYER & ROBERT GREENLEAF, ENFORCEMENT OF STATE WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS 10 (Apr. 2011); Laura Huizar, Staff Attorney, Nat’l Emp. L. Project, Hearing before the Oregon Senate Interim Comm. on Workforce & Gen. Gov’t 4-5 (Jan. 13, 2016).

of work to visit an attorney during regular office hours or to testify in court.<sup>159</sup> There may also be language barriers that restrict a worker's ability to communicate with would-be lawyers or to represent herself.<sup>160</sup> While there are no studies about the frequency with which workers use the private right of action under the anti-wage laws, one study shows that when collective or class action lawsuits are already initiated, workers at the same workplace who are eligible to opt in as plaintiffs do so at an incredibly low rate.<sup>161</sup> Even where unpaid workers overcome these significant barriers and prevail against employers, the difficulty of actually collecting judgments is pervasive.<sup>162</sup>

Finally, worker complaints are also likely not the best way to focus agency resources on the worst employers. Weil and Pyles found that the industries in which workers filed complaints were not those with the highest violations.<sup>163</sup> By examining complaints and compliance under the Fair Labor Standards Act (FLSA) and Occupational Safety and Health Act (OSHA), they found that the complaints filed were imperfectly related to underlying problems or unrelated to industry-level conditions.<sup>164</sup> Worker complaints are also problematic because they are inherently reactive and thus fail to send clear deterrence signals.<sup>165</sup>

We do not conclude, however, that the anti-wage theft strategy of worker complaints is entirely useless. As a matter of increased access to justice, it provides individual workers with a possible way to obtain redress for lost wages. In particular, the administrative complaint mechanism aims to increase access to justice because it is usually designed for *pro se* workers. The strategy of extending or tolling the statute of limitations can further help workers who may have either failed to timely recognize that they were victims of wage theft or had their administrative complaints languish with agencies. Further, a handful of laws try to overcome the “naming, blaming, and claiming” problem by: (1) authorizing coworkers, individuals, or organizations to come forward on behalf of the aggrieved worker; (2) notifying current workers about an ongoing investigation; and (3) contracting with community-based organizations to assist workers with filing complaints.<sup>166</sup> The anti-wage theft strategy of worker

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<sup>159</sup> David Villano, *Work-Life Balance Benefits Low-Wage Workers, Employers*, PACIFIC STANDARD (Sept. 7, 2011), <https://psmag.com/economics/work-life-balance-benefits-low-wage-workers-employers-35733> (explaining that low-wage workers are frequently replaced—with employee turnover rates in some low-paying jobs in excess of 80 percent—when they take time off for personal needs).

<sup>160</sup> Sudha Shetty, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, 2 SEATTLE J. SOC. JUST. 565, 565-66 (2004); Annette Wong, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic and Cultural Differences*, 21 S. CAL. REV. L. & SOC. JUST. 431, 440-41 (2012).

<sup>161</sup> Charlotte S. Alexander, *Would an Opt-In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 446 (2010).

<sup>162</sup> See, e.g., CHO ET AL., *supra* note 57, at 13.

<sup>163</sup> Weil & Pyles, *supra* note 8, at 72-73.

<sup>164</sup> Weil, *A Strategic Approach to Labour Inspection*, *supra* note 138, at 359.

<sup>165</sup> *Id.* at 356, 359-61.

<sup>166</sup> See, e.g., BROWARD COUNTY, FLA., CODE § 20½-4(a)(2)(B) (2017) (authorizing membership-based entities to be the complainant); LOS ANGELES, CAL., CODE § 8.101.090(G)

complaints, therefore, serves some legitimate purposes but is questionable as an overall strategy for significantly reducing wage theft.

### B. *Protecting Workers from Retaliation*

Nearly half of the anti-wage theft laws passed included anti-retaliation provisions. Retaliation in low-wage workplaces is common and “creates a culture of hopelessness and helplessness” that pervades the workplace.<sup>167</sup> For workers who choose to speak up or file complaints about wage theft, most will want to know that they can do so without experiencing retaliation or be promptly reinstated or compensated if retaliation does occur.<sup>168</sup>

Most anti-retaliation strategies involve prohibiting retaliation against workers who voice or file complaints and punishing employers who do it.<sup>169</sup> The problem with such strategies is that they fail to encourage workers to step forward because the anti-retaliation protection triggers only after the employer has engaged in the harmful act of retaliation. For an individual worker who is weighing the option of complaining, the idea that an employer may be punished at some later point for having engaged in retaliation is often not helpful.<sup>170</sup> Even if a court or agency eventually finds that the employer violated an anti-retaliation law and orders back pay damages or reinstatement, it will likely take months or years to arrive at that decision.<sup>171</sup> Further, available studies suggest that penalties for retaliation are rarely imposed.<sup>172</sup> Low-wage workers too frequently lack the savings to be able to cover their expenses should they unexpectedly lose their jobs.<sup>173</sup> They will also likely want assurance of a positive reference if they might be forced to seek another job.<sup>174</sup>

Additionally, proving retaliation can be very difficult.<sup>175</sup> There is usually no definitive proof that the action of the employer was taken as a result of a worker complaint.<sup>176</sup> Frequently the employer can claim many other reasons for

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(2017) (contracting with community based organizations); ST. PETERSBURG, FLA., CODE § 15-43(a)(1) (2017) (helping to file complaints).

<sup>167</sup> RAISE THE FLOOR ALLIANCE & NAT’L ECON. & SOC. RTS. INITIATIVE, CHALLENGING THE BUSINESS OF FEAR 17 (2016) [hereinafter CHALLENGING THE BUSINESS OF FEAR]; *see also supra* notes 60-62.

<sup>168</sup> *Id.* at 28.

<sup>169</sup> *See, e.g.*, VT. STAT. ANN. tit. 21 §§ 342(a), 345, 347-48, 397 (2016) (prohibiting retaliation and providing that an employee may bring a private action for retaliation).

<sup>170</sup> Email from Patricia Kakalec, Attorney, Kakalec Law (Dec. 13, 2018, 13:35 CST) (on file with authors).

<sup>171</sup> SAN DIEGO STATE, *supra* note 58, at 9.

<sup>172</sup> *Id.*; CHALLENGING THE BUSINESS OF FEAR, *supra* note 167, at 26.

<sup>173</sup> Hallett, *supra* note 8.

<sup>174</sup> Ruan, *supra* at 154, at 1120 (stating that many workers will not bring legal actions against their employer out of fear that they will be blacklisted or unable to obtain a positive job reference).

<sup>175</sup> CHALLENGING THE BUSINESS OF FEAR, *supra* note 167, at 25-26.

<sup>176</sup> *Id.* at 23; *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 420 (2004) (describing the difficulty of an after-the-fact enforcement mechanism to address the more complex and subtle discriminatory practices in the workplace) [hereinafter Lobel, *The Renew Deal*].

the firing of the worker given that most employment is “at will” and thus workers can be fired for any non-discriminatory reason.<sup>177</sup> Of the laws that include anti-retaliation provisions, only a minority (22%) seek to address this problem of proof by either shifting the burden to the employer or by simply prohibiting termination within a certain period time absent good cause.

In particular, the strategy of prohibiting retaliation fails to provide undocumented workers with a meaningful remedy against their employer and puts them at risk of further and potentially irrevocable harm. Workers who complain and lack status may be detained and deported.<sup>178</sup> Courts have recognized that reporting undocumented workers to US Immigration and Customs Enforcement (ICE) is a form of illegal retaliation.<sup>179</sup> However, those same courts, when adjudicating wage claims, are largely powerless to protect that worker if she is detained and deported.<sup>180</sup> Undocumented workers are entitled to the protections of the anti-wage theft laws.<sup>181</sup> However, they are generally not entitled to all available remedies if they experience retaliation, including reinstatement or back pay for the period when they were unemployed.<sup>182</sup> In an era of high-profile workplace immigration enforcement actions, therefore, undocumented workers and their concerned co-workers may be more reluctant than ever to come forward with claims of wage theft.<sup>183</sup>

Further, it is questionable whether a prohibition of retaliation on-the-books will actually encourage employers to stop retaliating. In the context of anti-

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<sup>177</sup> Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1518-24 (2016).

<sup>178</sup> REBECCA SMITH & EUNICE HYUNHYE CHO, WORKERS’ RIGHTS ON ICE 4 (2013).

<sup>179</sup> See, e.g., *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp. 2d 1056, 1059 (N.D. Cal. 2002); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071-73 (9th Cir. 2000); *Contreras v. Corinthian Vigor Ins. Brokerage*, 25 F. Supp. 2d 1053, 1058-59 (N.D. Cal. 1998); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987).

<sup>180</sup> Courts may be in a position to provide certification for certain kinds of victim visas but only under circumstances where the actions rise to the level of criminal activity. See, e.g., *Garcia v. Audobon Communities Mgmt., LLC*, No. 08-cv-01291, slip op. at 7 (E.D. La. Apr. 15, 2008) (granting U visa certifications to undocumented plaintiffs based on their criminal exploitation).

<sup>181</sup> See, e.g., *Lucas v. Jerusalem Café*, 721 F.3d 927, 933 (8th Cir. 2013); *Patel v. Quality Inns*, 846 F.2d 700, 705-06 (11th Cir. 1988); *Rutkin v. United States*, 343 U.S. 130, 137 (1952); *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

<sup>182</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-50 (2002); *Veliz v. Rental Service Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1336-1337 (M.D. Fla. 2003); *Hernandez-Cortez v. Hernandez*, No. Civ. A 01-1241-JTM, 2003 WL 22519678, at \*7 (D. Kan. Nov. 4, 2003).

<sup>183</sup> See, e.g., Andrew Selsky, *Activist: Immigration Officers Detain 10 Workers in Oregon*, ASSOCIATED PRESS (Mar. 1, 2017), <https://apnews.com/88fd12ab02124e17968a8068bc85a3dd/Activist-immigration-officers-detain-10-workers-in-Oregon>; Michael Matza, *After ICE Raid at Chesco Mushroom Farm, Anxiety High Among Immigrant Workers*, THE PHILADELPHIA INQUIRER, May 7, 2017; John Burnett & Marisa Peñaloza, *How Kitchen Raids in Buffalo Sent Shock Waves Through Immigrant Rights Community*, NAT’L PUB. RADIO, (Jan. 8, 2017, 8:35 AM), <http://www.npr.org/2017/01/08/508548698/how-kitchen-raids-in-buffalo-sent-shock-waves-through-immigrant-rights-community>.

retaliation protections for whistleblowers, the empirical evidence demonstrates that, despite the statutory protections available, there is “continuing retaliation against whistleblowers.”<sup>184</sup> Once it occurs, retaliation frequently impacts not only the individual worker but the entire workplace.<sup>185</sup> In the context of low-wage workers, employers engage in rampant retaliation.<sup>186</sup> As discussed more fully in the next section, there are multiple reasons why employers do not obey the law that apply equally to this context of anti-retaliation strategies.<sup>187</sup>

Finally, this strategy fails to address what has been referred to as “anticipatory retaliation” – an employer’s ability to engage in retaliatory acts made in anticipation of future employee action.<sup>188</sup> For example, an employer who wants to discourage underpaid workers from filing a lawsuit might tell them that he fired that last worker who tried to take her to court. Or, in response to rumors about workers frustrated by wage theft occurring at their workplace, an employer might preemptively cut the hours of those workers he thinks are most likely to take legal action. This form of employer control appears to be highly effective at deterring workers, particularly low-wage workers, from enforcing their rights.<sup>189</sup> Despite that, the anti-retaliation prohibitions we reviewed fail to directly address anticipatory retaliation. Rather, they purport to protect an employee from retaliation once the worker has already taken certain steps to enforce their wage-related rights.

While the strategy of prohibiting retaliation has challenges, it does offer the possibility of concrete relief for those workers who do come forward. In addition to the innovations of a burden-shifting regime, there are several other innovations that seek to broaden the scope of their protections. A small number of laws expand what is traditionally considered protected activity to include, for example, educating others about their wage-related rights and making informal complaints to the employer.<sup>190</sup> Some laws further expand the scope of coverage by protecting those who help others to enforce their rights and prohibiting retaliatory conduct by anyone, not just the employer.<sup>191</sup>

A minority of the anti-retaliation strategies (24%) permit workers to file confidential complaints, in order to encourage workers to come forward. Workers have expressed strong interest in this innovation.<sup>192</sup> A number of the

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<sup>184</sup> Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMPLOYEE RTS. & EMP. POL’Y J. 1, 16–17 (2007).

<sup>185</sup> CHALLENGING THE BUSINESS OF FEAR *supra* note 167, at 15.

<sup>186</sup> *Id.* at 13 (2016); BERNHARDT ET AL., *BROKEN LAWS*, *supra* note 38, at 3.

<sup>187</sup> See *infra* notes 157–161, 168–173; see also Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMPLOYEE RTS. & EMP. POL’Y J. 1, 19–20 (2007) (noting that even if top management follows the law, supervisory personnel or coworkers may engage in retaliation).

<sup>188</sup> Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and The Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 780–81 (2013).

<sup>189</sup> *Id.* at 781, 785.

<sup>190</sup> See, e.g., LAS MILIPITAS, CAL., CODE § III-31-8.00 (2017).

<sup>191</sup> See, e.g., MINNEAPOLIS, MINN., CODE § 40.440 (2017).

<sup>192</sup> CHALLENGING THE BUSINESS OF FEAR *supra* note 167, at 35 (finding 79% of workers surveyed wanted an anonymous way to report workplace problems to the government.)

confidentiality provisions, however, have limitations; some provide for the eventual disclosure of worker information in the later stages of the complaint process<sup>193</sup> while others only permit disclosure with the worker's advance consent.<sup>194</sup> Even if agencies have no intention of disclosing the name of complainants, workers may still fear having such complaints traced back to them.<sup>195</sup> For example, workers in small workplaces or unique circumstances may be readily identified by the employer regardless of whether confidential complaints are permitted. Whether confidentiality provisions actually encourage worker action and deter retaliation are subjects for future research.

### C. *Enforcing Penalties*

Over three-quarters of the anti-wage theft laws involve the strategy of penalties. Such penalties include civil penalties (to the wage theft victim or the government), criminal prosecution, business or other license revocation, filing of liens or levies, negative publicity, and the requirement of bonds. The problem with penalties is that they rely on command and control strategies that are often ineffective at changing the behavior of the regulated entities.<sup>196</sup> Without a sufficient threat of real enforcement that will cost the employer, penalties will fail to create real deterrence.<sup>197</sup> The rigid setting of one-size-fits-all standards backed up by penalties can also fail to take into account how employers' conduct can deviate from the ways in which economic models expect the rational actor to behave.<sup>198</sup> These concepts lead us to question whether the strategy of enhancing penalties on the books will prove successful in obtaining compliance from employers and thereby reducing wage theft.

Studies raise the question of how much increasing penalties can impact employer behavior in the absence of robust enforcement. In a study of the minimum wage law, Orley Ashenfelter and Daniel Smith argued that the rational employer would assess the "benefits and costs" of complying with the law based

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<sup>193</sup> See, e.g., Ark. Code Ann. § 11-4-220(c) (West) ("The name of any employee identified in a claim shall be kept confidential until the director issues an administrative complaint or the director is ordered to release the information by order of a court of competent jurisdiction.").

<sup>194</sup> See, e.g., Ariz. Rev. Stat. Ann. § 23-364 ("The name of any employee identified in a complaint to the commission shall be kept confidential as long as possible. Where the commission determines that an employee's name must be disclosed in order to investigate a complaint further, it may so do only with the employee's consent.").

<sup>195</sup> KEVIN BANKS, EMPLOYMENT STANDARDS COMPLAINT RESOLUTION, COMPLIANCE AND ENFORCEMENT: A REVIEW OF THE LITERATURE ON ACCESS AND EFFECTIVENESS 35 (2016).

<sup>196</sup> Solomon, *supra* note 12, at 822; Michael Waterstone, *supra* note 137, at 487-88; Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 305 (1999).

<sup>197</sup> Orly Lobel, *Interlocking Regulatory*, *supra* note 12, at 1097-98.

<sup>198</sup> Daniel A. Farber, *supra* note 195, at 305; see generally Lobel, *The Renew Deal*, *supra* note 176, at 448 (drawing on psychological analysis, behavioral law and economics has introduced the understanding that individual preferences are endogenous, a function of experience and existing collective norms).

on the likelihood of an investigation together with the costs of penalties.<sup>199</sup> Studies in other contexts, however, suggest that the probability of detection plays an even greater role in deterring law-breaking than the severity of punishment.<sup>200</sup> For example, in the criminal context, solely enhancing sanctions does not result in more successfully deterring crime.<sup>201</sup> “Deterrence falls off rapidly (and nonlinearly) with lower probabilities of enforcement, and higher penalties are insufficient to counteract these losses.”<sup>202</sup> The lack of consistent enforcement, for example, may alter the social norms associated with illegal activity, such as wage theft, where individuals decide to take a “sporting chance” to evade detection and pay sub-minimum wages.<sup>203</sup> Enforcement failings may also build the image of a failed agency, which undercuts its reputation and credibility to act effectively against errant operators.<sup>204</sup> While one study has found some correlation between increasing penalties and decreasing minimum wage violations, it did not take into account the corresponding role of enforcement.<sup>205</sup> Other studies of workplace laws have found that inspections and the actual imposition of penalties are correlated with changing employer behavior.<sup>206</sup>

One reason for inadequate enforcement of anti-wage theft strategies is simply insufficient agency resources. In the context of workplace enforcement, most agencies lack adequate staff.<sup>207</sup> A few laws attempt to address this issue by having wage theft violators pay for the costs of enforcement or creating a self-funding mechanism through the collection of penalties.<sup>208</sup> Enforcement can take

<sup>199</sup> Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. OF POL. ECON. 333, 335-36 (1979).

<sup>200</sup> Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 380 (1997).

<sup>201</sup> Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 189 (2003).

<sup>202</sup> Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U.L. REV. 655, 659 (2006); see also Paul Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. L. STUD. 173, 183-84 (2004).

<sup>203</sup> Cheng, *supra* note 202, at 661; Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2237-38 (2013).

<sup>204</sup> BALDWIN ET AL., *supra* note 14, at 71.

<sup>205</sup> Galvin, *supra* note 9, at 341 (concluding that given one state’s increased penalties failing to lead to a decrease in minimum wage violations means that “treble damages are not, by themselves, sufficient to deter noncompliance with minimum wage laws; enforcement of the policy is critical as well”).

<sup>206</sup> See, e.g., SYSTEMS RESEARCH & APPLICATIONS CORP., REDUCING RECIDIVISM: EVALUATION OF GOALS, MEASURES, AND COMPLIANCE TOOLS, AND OPTIONS FOR IMPROVEMENT 7 (Jan. 31, 2008) (finding imposition of civil monetary penalties by DOL in prior investigations is associated with reduced probability of noncompliance); Wayne B. Gray & John M. Mendeloff, *The Declining Effects of OSHA Inspections on Manufacturing Injuries, 1979-1998*, 58 INDUS. & LAB. RELATIONS. REV. 571, 586 (2005) (hypothesizing that no penalties imposed after an OSHA inspection provided a “clean bill of health, which reduced attention by managers to safety issues”).

<sup>207</sup> See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 330 (2005) [hereinafter Estlund, *Rebuilding*]; MEYER & GREENLEAF, *supra* note 158, at 19-23; Lurie, *supra* note 106, at 431-33.

<sup>208</sup> See, e.g., MINNEAPOLIS, MINN., CODE § 40.410(b)(3) (2017).

a lot of resources, for example, because employers can be hard to locate or non-responsive, particularly with fly-by-night and undercapitalized operations. Agencies may prematurely dismiss an unpaid worker's complaint or fail to conduct an adequate investigation because they cannot follow-up with employers or do the in depth investigation needed.<sup>209</sup> Further, understaffed agencies often solely rely on worker complaints to trigger enforcement.<sup>210</sup> As described in the worker complaints section, there are many reasons why such complaints are insufficient as the primary mechanism for driving enforcement. Jurisdictions, therefore, that rely either exclusively or heavily on worker complaints to trigger agency action will likely not see the robust enforcement needed to prevent employers from violating the law.

Further, inadequate enforcement may also be caused by an agency's lack of expertise or will to impose penalties. Certain agencies may not have the expertise to enforce the anti-wage theft laws because they are not normally in the business of protecting workers or may tend to identify with employers. Some enhanced penalties involve enforcement by non-labor related agencies, such as police departments, district attorneys, and licensing divisions.<sup>211</sup> The availability of criminal prosecution, for example, has largely not resulted in the imposition of criminal penalties because of the reluctance by some local police or district attorneys in various jurisdictions to take on wage theft, who may not view it as part of their job or may be reluctant to impose criminal charges against businesses.<sup>212</sup> Where prosecutors are elected rather than appointed, they too may be reluctant to prosecute local businesses – particularly popular or influential ones – fearing that such action will harm their chances of reelection.<sup>213</sup>

In addition, the imposition of monetary penalties or liens may be compromised by the failure of agency officials or judges to investigate thoroughly, understand the facts, or use their authority to impose penalties. Many of the mechanics of how wage theft occurs raise complex factual questions, such as issues related to deductions, overtime, and tip pooling.<sup>214</sup> If employer records are insufficient, these complex factual questions can take time to sort out and create barriers to completing an investigation. Agencies and courts may also not be aggressive in their use of penalties against employers and

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<sup>209</sup> Marianne Levine, *supra* note 26.

<sup>210</sup> MEYER & GREENLEAF, *supra* note 158, at 26.

<sup>211</sup> Several jurisdictions have licensing revocation systems that do not provide for either a complaint or investigation mechanism. *See, e.g.*, SOMERVILLE MASS., CODE § 9-31 (2017); NEWARK, N.J., CODE §§ 8:32-2-8:32-5 (2017). In the same vein, a few laws that criminalize wage theft do not specify any mechanism for how prosecutors will learn about wage theft.

<sup>212</sup> Hallett, *supra* note 9; *but see* Huizar, *supra* note 158 (discussing a few local jurisdictions that have robustly used criminal prosecution). California, in particular, has a different system where they have a separate Criminal Investigation Unit, with sworn police officers, within the Bureau of Field Enforcement. JULIE A. SU, CAL. LABOR COMM'R, 2015-2016 FISCAL YEAR REPORT ON THE EFFECTIVENESS OF THE BUREAU OF FIELD ENFORCEMENT 10-11 (2016).

<sup>213</sup> Immigrant workers too may fear going to a police department given the connection in some jurisdictions given the connection in some jurisdictions between local law enforcement and ICE. Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 657-58 (2014).

<sup>214</sup> *See supra* note 142.



exercise discretion, as permitted by most laws, to waive or reduce the imposition of such penalties. In Arkansas, for example, the agency responsible for enforcing the state wage laws has had a policy of only imposing liquidated damages where the employer is a repeat violator – a requirement not included in the law.<sup>215</sup> Like prosecutors, agency officials too may fear the negative political consequences, such as cuts in future agency funding from enforcing the law too vigorously against businesses.<sup>216</sup> At the end of the day, therefore, agencies and courts may simply not impose penalties.

For penalties to create deterrence, employers must understand when their behavior is illegal.<sup>217</sup> Some employers may not be aware that they are out of compliance. An employer may be understandably confused given the complexity of the law.<sup>218</sup> While ignorance of the law is never an excuse, the reality is that large employers with human resources departments and access to legal counsel may readily understand how to act legally while less sophisticated employers may not. Further, the under enforcement of laws creates “vagueness in practice,” because without concrete examples of enforcement against regulated entities, some employers may become confused about what, in fact, is an illegal activity.<sup>219</sup>

Finally, employers may not act rationally in response to penalty strategies because they may be more strongly influenced by social norms. Multiple scholars have argued that the economic model of the rational choice actor does not capture how individuals may make irrational decisions.<sup>220</sup> Even with some level of enforcement, individuals may engage in illegal activity based on heuristics that underestimate their chances of getting caught.<sup>221</sup> Individuals and corporations are known to violate the law based on the “signal of noncompliant behavior by peers [which] is often taken as a cheap source of information (to put it charitably, a sort of vetting) about the degree of a law’s enforcement.”<sup>222</sup> As certain industries predicate their business models on wage theft, therefore, an employer may intentionally or negligently violate the law because it is the social norm within the industry.<sup>223</sup> Such norms can take precedence over what the law

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<sup>215</sup> Nantiya Ruan, *supra* note 154, at 1111 (providing that because the FLSA only allows for liquidated damages and no punitive damages, non-compliance is encouraged, as it is cheaper than the “expected costs of the mandated wage”).

<sup>216</sup> Talbot, *supra* note 149.

<sup>217</sup> Robinson & Darley, *supra* note 202, at 175–76.

<sup>218</sup> See *supra* note 142.

<sup>219</sup> Cheng, *supra* note 202, at 660.

<sup>220</sup> See, e.g., Christine Jolls, Cass R. Sunstein, & Richard Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1476–77 (1988); Dan M. Kahan, *supra* note 155, at 350.

<sup>221</sup> Jolls et al., *supra* note 220, at 1477–78.

<sup>222</sup> Huang, *supra* note 203, at 2231.

<sup>223</sup> Ruan, *supra* note 154, at 1110 (explaining that wage theft is rampant in low-wage, frontline industries); Abel Valenzuela Jr. & Edwin Melendez, *Day Labor in New York: Findings from the NYDL Survey*, RESEARCHGATE (2003) (explaining that in 2003, almost all of New York’s day laborers reported experiencing abuse such as non-payment of wages or incomplete payment of wages); U.S. Gen. Accounting Office, *Labor’s Efforts to Enforce Protections for Day Laborers Could Benefit From Better Data and Guidance*, PUB. NO. 02-925, at 14, 14-15

actually requires and shape employers' decisions about wages and working conditions.<sup>224</sup>

Non-civil penalties, such as criminal prosecution, license revocation, or posting of bonds, are still among the minority of strategies for imposing penalties against employers. They do, however, present a way to up the ante against non-compliant employers by creating harsher consequences for wage theft. As discussed in the next Part, the effective use of penalty strategies will require agencies to depart from the rigid command and control model to a more flexible approach that considers the diversity of employers.

#### D. *Liability for Multiple Employers*

A small minority (15%) of the anti-wage theft laws uses the strategy of expanded liability. These strategies are designed to hold more than a single employer accountable for wage theft in order to address the fissured workplace or the disappearing or undercapitalized employer. The more common strategy involves creating direct liability for multiple employers. Other strategies involve having the law more generally recognize "joint and several liability" among employers or authorizing the imposition of liability against successor entities.

These strategies are problematic to the extent they rely on rights-claiming strategies for correctly "blaming" the right employers. Given the fissured workplace, a worker's ability to correctly blame their multiple employers can no longer be taken for granted.<sup>225</sup>

In order for expanded liability strategies to be successful, therefore, agency personnel would need the motivation, resources or expertise to independently investigate what other individuals or entities could be held liable.<sup>226</sup> While it is often easiest to find liability against the low-level contractor who most obviously employs the worker, holding the larger employer accountable can have a greater impact because those entities "located at higher levels of industry structures" often drive noncompliance and have the ability to curb it.<sup>227</sup> Without such specific support of an advocate or agency personnel, however, an expanded liability strategy that relies solely on workers to "blame" their multiple employers will ultimately fail in holding multiple or larger employers higher up the supply chain accountable for wage theft.

Further, agencies or courts can have difficulty applying the complex legal tests to hold employers higher up the chain liable. A little less than one third of the expanded liability strategies envision that agencies and courts can hold multiple employers liable for wage theft by simply authorizing "joint and several liability." As a practical matter, the agency or court will have to correctly apply

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(2002), <http://www.gao.gov/new.items/d02925.pdf> (explaining that the day laborer workforce is prone to workplace abuses such as wage theft).

<sup>224</sup> Bernhardt et al., *The Gloves Off Economy*, *supra* note 52, at 2.

<sup>225</sup> See *supra* notes 71-72.

<sup>226</sup> An advocate or attorney could be helpful in this regard but many workers fail to find such help. See *supra* note 63.

<sup>227</sup> Weil, *Enforcing Labour Standards in Fissured Workplaces*, *supra* note 75, at 44 (2011); Perez, *supra* note 145, at 303.

a highly politicized and confusing legal doctrine of “joint employment” to hold multiple employers liable for wage theft. The doctrine focuses on an “economic reality” test, which examines the relationship between the worker and putative employer but has “detoured into a quagmire of factors.”<sup>228</sup> Courts considering the issue have sometimes disagreed about the essential approach.<sup>229</sup> DOL too has changed its own interpretation with the change in administration by withdrawing its earlier 2016 guidance in 2017.<sup>230</sup> Franchisor employers are lobbying state legislatures to enact “shield laws” to shield themselves from joint employment liability.<sup>231</sup> The current landscape, therefore, makes it a struggle to “navigate the expansive and shifting regulatory, judicial and legislative definitions that determine joint employment liability.”<sup>232</sup> As any strategy for expanding liability must be implemented and enforced by the agencies and courts, the question becomes whether they can effectively do so in order to hold multiple employers responsible. While courts are normally in the business of interpreting law, it is less clear whether agency officials, who are more often tasked with determining the question of joint employment, will have the legal competency – or the will – to apply the law correctly.<sup>233</sup>

At the same time, confusion about the joint employment doctrine also makes it difficult for employers to understand whether their behavior is illegal. As discussed in the enhanced penalties section, deterrence requires that employers understand how to comply with the law. Yet strategies that generally expand liability by recognizing “joint and several liability” do not provide clear guidance on who exactly is liable. Under the confusion of the joint employment doctrine, it is easy for employers to incorrectly believe that the law does not apply to them.

In contrast, expanded liability strategies that create direct or successor liability circumvent some of these problems by explicitly defining who is an

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<sup>228</sup> Bruce Goldstein et al., *Enforcing Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Standard of Employment*, 46 UCLA L. REV. 983, 1055 (1999).

<sup>229</sup> Hall v. DIRECTV, LLC, 846 F.3d 757, 770 n.9 (4th Cir. 2017) (discussing the confused state of FLSA joint employment case law).

<sup>230</sup> Press Release, U.S. Dep’t of Labor, U.S. Sec’y of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (Jun. 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607>.

<sup>231</sup> Marni von Wilpert, *States with Joint-Employer Shield Laws Are Protecting Wealthy Corporate Franchisers at the Expense of Franchisees and Workers*, ECONOMIC POLICY INSTITUTE (Feb. 13, 2018), <https://www.epi.org/publication/states-with-joint-employer-shield-laws-are-protecting-wealthy-corporate-franchisers-at-the-expense-of-franchisees-and-workers/>.

<sup>232</sup> Nina K. Markey, *Continuing Uncertainty for Employers Seeking to Navigate Joint Employment Liability*, THE LEGAL INTELLIGENCER (Nov. 14, 2017), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/11/14/continuing-uncertainty-for-employers-seeking-to-navigate-joint-employment-liability/?sreturn=20180205093005>.

<sup>233</sup> Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1110 (2015); see also Scott Burris et al., *Law in Public Health Systems and Services Research*, in PUBLIC HEALTH LAW RESEARCH: THEORY AND METHODS 80 (Scott Burris & Alexander C. Wagenaar, eds., 2013) (citing literature noting the importance of public health regulators to exhibit competency in the use of legal authority and appreciation of its boundaries).

employer. In Oregon, for example, the direct liability strategy is more clear about which individuals or entities will be held liable for wages: “[a]ny person who uses the services” of a labor contractor.<sup>234</sup> Previous studies have shown that when employers higher up the supply chain are clearly held accountable, they can help monitor wage theft that is occurring further down the subcontracting chain.<sup>235</sup> Successor liability strategies too explicitly define employers to include successor entities or corporate officials to address the case of the undercapitalized or disappearing employers. Jurisdictions, therefore, that explicitly define liability have a higher likelihood of success because they more clearly signal to employers when they will be held liable as joint employers.

#### E. Informing Workers and Employers

Half of the anti-wage theft laws reviewed include information requirements – a broad set of mandates that require employers, government actors, and sometimes both, to provide, collect, or share information with either their workers or the public.

Of the information requirements, nearly half involve the strategy of information disclosures. Nineteen percent (19%) require postings by the employer regarding wage-related rights while roughly a quarter require employers to mandatorily disclose wage-related rights or other relevant information, such as the employer’s name, address, and phone number or the worker’s pay rate, usually at the time of hiring. The idea behind this strategy is that it can protect the recipients of the information to make better and more informed choices while making those who disclose behave more honestly and diligently.<sup>236</sup> As such regulation has become increasingly common, scholars have critiqued the ability of disclosure schemes to accomplish these regulatory goals.<sup>237</sup> They question whether such disclosures are effective because they rely on a belief that individuals are rational self-governing actors who are able to process and use the information wisely.<sup>238</sup>

In particular, information disclosures cannot be effective if workers do not understand the information provided. The way in which information is provided

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<sup>234</sup> See *supra* note 119.

<sup>235</sup> Weil, *Crafting a Progressive Workplace Regulatory Policy*, *supra* note 9, at 141-43 (recounting the success of the DOL program to get garment producers to monitor down the subcontracting chain within the industry).

<sup>236</sup> Ripken, *supra* note 12, at 145-46 (“The disclosure of material information is said to do everything from producing more transparent and efficient markets, to making corporate executives behave more honestly and diligently, to decreasing investor risks and protecting the public interest.”).

<sup>237</sup> Dalley, *supra* note 13, at 1090; Ripken, *supra* note 13, at 146; Lobel, *The Renew Deal*, *supra* note 176, at 454-55; Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 435-36 (2003); but see Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency* 63 STAN. L. REV. 351, 355 (2011) (“Mandatory disclosure can play a useful role both within the wide domain of private ordering and among the many aspects of employment that are subject to mandatory rights or minimum terms.”) [hereinafter Estlund, *Just the Facts*].

<sup>238</sup> Ripken, *supra* note 13, at 146.

may be equally or more important than providing the information itself.<sup>239</sup> Given that some workers may have issues with literacy,<sup>240</sup> information provided to workers should properly reflect their literacy and education levels to maximize its effectiveness.<sup>241</sup> Further, studies show that individuals tend to be more readily persuaded by oral rather than written communications.<sup>242</sup> All anti-wage theft information disclosure strategies, however, involve providing written information to workers. It is unclear whether passively-provided written information will be understood by workers, particularly in application to an individual worker's situation. A poster stating what minimum and overtime wages are, for example, may not help a worker understand whether her being classified as an employee exempt from overtime is proper. Understanding whether or not wage theft is happening requires a more interactive and personalized analysis.<sup>243</sup> Finally, too much information can be another problem.<sup>244</sup> At the time of hiring, workers are often required to fill out and read numerous documents, so that mandatory disclosures can become easily lost within a pile of paperwork.<sup>245</sup> Studies too have shown that a worker's understanding may be more shaped by norms, even in the face of more accurate information.<sup>246</sup> Information disclosures strategies, therefore, run the risk that workers will simply fail to understand the information provided.

Even when equipped with accurate information, workers may not take action to address wage theft. Once workers have processed the new information, "they must decide whether and how to change their behavior based on that information."<sup>247</sup> Workers may not make the expected "rational" choices based on accurate information, such as negotiating or challenging employers who have violated the law or filing a complaint with a governmental agency.<sup>248</sup> As discussed elsewhere, workers are reluctant to claim wage theft for a variety of reasons, such as the belief that such complaints will either be ineffective or result in retaliation.

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<sup>239</sup> Jolls et al., *supra* note 170, at 1534; Weil et al., *supra* note 13, at 161.

<sup>240</sup> See *supra* note 41. Some jurisdictions seek to address the concern of limited English proficient (LEP) workers and require employers to post or provide information in a variety of languages. See *supra* note 100.

<sup>241</sup> Alexander, *Workplace Information-Forcing*, *supra* note 10, at 531.

<sup>242</sup> Dalley, *supra* note 13, at 1114.

<sup>243</sup> See *supra* note 13.

<sup>244</sup> Jolls et al., *supra* note 13, at 214; Troy A. Paredes, *supra* note 237, at 435; Ripken, *supra* note 13, at 147 (2006).

<sup>245</sup> See, e.g., *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995) (noting that employees were required by their new employer to sign documents seventy-five times during a two-hour period without explanation of the documents' contents or sufficient opportunity to read them).

<sup>246</sup> Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. Ill. L. Rev. 447, 495-96 (1999).

<sup>247</sup> Dalley, *supra* note 13, at 1117.

<sup>248</sup> Ripken, *supra* note 13, at 146; Paredes, *supra* note 237, at 436; see also Weil et al., *supra* note 13, at 156 (describing key factors of whether the information will be embedded in the users' decision-making, which include the information's perceived value in achieving users' goals and its compatibility with decision-making routines).

Information disclosures may also fail to produce employer compliance. Employers may either fail to understand how such information applies to their specific business and how to specifically make their pay practices come into legal compliance. They may also have confirmation or self-serving bias, which prevents individuals from accepting information that contradicts their preexisting beliefs or adversely affects their personal interests.<sup>249</sup> Such bias provides a strong motivation for employers to resist accepting that their particular way of doing business is wrong.

Further, an erroneous assumption is that employers will behave more diligently and honestly because they know their pay practices will be “regularly exposed to the light of day.”<sup>250</sup> There are several reasons, however, why this exposure is likely insufficient to motivate employers to comply. The exposure of employer pay practices is limited to workers and not to governmental agencies or the broader public. Many employers believe (correctly) that workers are unlikely to act on such information.<sup>251</sup> Even confronted with information that confirms unlawful behavior, employers may still take the “sporting chance” of not getting caught either because there is an insufficient threat of enforcement or because such pay practices reflect cultural norms within the industry.

Employers too may simply not comply with the posting and mandatory disclosure requirements. Indeed, a study of 239 employers’ compliance with posting requirements found no more than half of the employers posted as required.<sup>252</sup> Another study of restaurants in the Chinatown District of San Francisco found that two thirds had failed to comply with the posting requirements (many who posted had also failed to post in a language other than English even though postings were available in Chinese).<sup>253</sup> Employers willing to violate the substantive provisions of the law are unlikely to comply with the information disclosure requirements.<sup>254</sup> Further, some laws do not provide for any consequences for employers who fail to comply.<sup>255</sup> Even when laws do contain penalties for failure to abide by the information disclosure requirements, employers may not be motivated to comply if the threat of penalties is not sufficiently real.

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<sup>249</sup> Dalley, *supra* note 13, at 1114; Ripken, *supra* note 13, at 174.

<sup>250</sup> Ripken, *supra* note 13, at 152 (stating that one of the goals of disclosure rules is to induce corporate managers to behave more diligently and honestly because they know their actions will be regularly exposed to the light of day).

<sup>251</sup> See *supra* notes 151-53.

<sup>252</sup> Lee Tyner, M. Suzanne Clinton, Jennifer Barger Johnson & John Camey, *Labor Law Posting Compliance: The Impact of Organizational Characteristics*, 18 SOUTHERN L.J. 251, 257 (2008).

<sup>253</sup> Meredith Minkler et al., *Wage Theft as a Neglected Public Health Problem, An Overview and Case Study from San Francisco’s Chinatown District*, 104 AM. J. PUB. HEALTH 1010, 1013 (2014).

<sup>254</sup> In some instances, the failure to comply may be based on an employer not understanding the law well enough to disclose the required information accurately. While many jurisdictions create form posters or disclosures, employers are still required to fill out part of some of these documents and may not do so accurately.

<sup>255</sup> See, e.g., BROWARD COUNTY, FLA., CODE § 20½-8 (2017).

In contrast to the employer-based information disclosure strategies, a small minority of information requirements authorize agencies themselves to perform outreach and education to workers (10%) and employers (4%). Some laws additionally specify that the outreach should be conducted in cooperation with community organizations.<sup>256</sup> As discussed more fully in the next Part, such strategies appear to have more potential than information disclosure strategies because agencies can actively tailor the presentation and format of such information so that it is more readily understood.

Roughly a fifth (21%) of the information requirements involve the strategy of employer recordkeeping of wage-related information.<sup>257</sup> As with information disclosures, the act of requiring employers to keep payroll records does not automatically translate into an employer's voluntary compliance with anti-wage theft laws.<sup>258</sup> Employers may also fail to keep records. In the context of occupational safety and health, for example, one study found that 90 percent of employers failed to comply with the recordkeeping requirements related to workplace injuries mandated by OSHA.<sup>259</sup> When employers do keep records, however, it can be useful for providing agencies or workers with the information needed to establish a case of wage theft.<sup>260</sup> As an employer's failure to keep required records can be an additional barrier to workers seeking to enforce their rights, a small minority (12%) of the information requirements address this problem by using the strategy of burden shifting. If an employer has failed to keep records, the burden shifts from the worker to the employer to establish that they did not commit wage theft.<sup>261</sup> The usefulness of the strategy of employer recordkeeping, like so many other anti-wage theft strategies, rests on the uncertain prerequisites of action by workers or agencies seeking to establish wage theft violations.

Finally, a small minority (10%) of the information requirements mandate varied forms of agency data collection and disclosure. Unlike information strategies that seek to address information asymmetries between workers and employers, these strategies look towards data collection, evaluation, and information transparency to foster agencies that can be more flexibly responsive to input and collaboration.<sup>262</sup> Some laws require the collection of data related to recorded instances of wage theft or agency enforcement activities, which is then

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<sup>256</sup> SAN FRANCISCO, CAL., CODE § 12R.25 (2017).

<sup>257</sup> Federal law has long required collection of this information by covered employers. 29 U.S.C. § 211(c).

<sup>258</sup> See *supra* notes 250-51.

<sup>259</sup> Sara E. Wuellner & David K. Bonauto, *Exploring the Relationship Between Employer Recordkeeping and Underreporting in the BLS Survey of Occupational Injuries and Illnesses*, 57 AM. J. INDUS. MED. 1133, 1139 (2014).

<sup>260</sup> Talbot, *supra* note 149.

<sup>261</sup> Federal law already provides for a similar burden shifting regime where employers fail to comply with the recordkeeping requirements of the FLSA. *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946).

<sup>262</sup> See Solomon, *supra* note 12, at 834 (describing new governance approaches as including public participation, data provision, transparency, benchmarking, and a sharing of best practices).

reported to law-making bodies or the public.<sup>263</sup> A few laws require specialized subsets of employers to provide wage reports directly to the agency.<sup>264</sup> As discussed in the next section, such data collection has the potential to improve the way in which the agency carries out its anti-wage theft strategies.

#### IV. RETHINKING, RECONCEIVING, AND LOOKING BEYOND REGULATION

Despite finding that many of the most common anti-wage theft strategies are limited, we do not conclude that state and local regulation is futile. Governments can do things that individual workers cannot, such as declare the rule of law, provide oversight, and create new rights and mechanisms to enforce them. Low-wage workers have directly led many of the law reform efforts, which is significant not only to their own empowerment but also as a means to increase their political power. Further, individual workers have benefitted from the anti-wage theft strategies in place, including the ability to recover lost wages. State and local regulation, therefore, still holds promise for addressing the rollback of federal workplace protections.

Our analysis of the recent wave of anti-wage theft strategies implies that better choices can be made about what strategies to advocate for while agencies can consider more strategic implementation by reconceiving of the role of government. At the same time, we also recognize the value of strategies that look beyond governmental regulation. For those jurisdictions where state and local regulation becomes impossible because of politics, nongovernmental strategies are potentially promising because they do not rely on government but instead look to workers, unions, worker centers, and community organizations to address wage theft.

##### *A. Promising Anti-Wage Theft Strategies*

In examining the 22 types of anti-wage theft strategies, we found several innovative approaches that are promising because they avoid many of the assumptions embedded in the most common regulatory strategies. These strategies have the potential to address some of the problems with such failed regulatory strategies by facilitating rights claiming, increasing the effectiveness of command and control regulation, and tailoring information requirements to help individuals understand and act on the information provided. While we recognize that political realities may ultimately impact the contents of anti-wage theft laws, we highlight these strategies as a means to focus additional advocacy and research efforts on them.

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<sup>263</sup> See, e.g., S.F. CAL. ADMIN. CODE §§ 12R.5, 12R.7, 12R.16-18 (2016) (providing that agency representatives may access employers' records and may publicly post notice of an employer's failure to comply).

<sup>264</sup> See, e.g., BERKELEY, CAL., ORD. 13.104 (2016) (requiring business owners in the construction industry to provide construction pay transparency reports with information about the contractors and subcontractors).



Several anti-wage theft strategies seek to overcome the traditional regulatory failure of rights claiming associated with worker complaints. They do so by reducing likely barriers to “naming, blaming, and claiming” by expanding who can be a complainant, facilitating processes for workers who may fear retaliation, and shifting the heavy burden of proof traditionally facing employees. For example, authorizing interested community members and organizations to initiate complaints can increase the actors who can bring wage theft to light, including those who are insulated from employer retaliation. As discussed in the next section, agency collaboration with community organizations can help encourage complaints that otherwise would not be brought. Permitting anonymous complaints could make it less risky and thus less threatening for workers and others to file complaints.<sup>265</sup>

Once complaints are filed, the burden shifting required when employers fail to maintain or provide pay-related records makes it easier for workers to prove their unpaid wage claims.<sup>266</sup> Knowing they need not have records to prevail may also encourage more workers to come forward. Employers too may find it harder to fire workers in retaliation where the law prohibits termination without good cause within a certain period of the worker’s protected conduct. The burden shifting and presumption of retaliation when it occurs close in time to protected conduct should also make it easier for workers to prove retaliation. All of these strategies are potentially promising but require further study to truly know whether they are effective in facilitating worker complaints.<sup>267</sup> Even if they do facilitate worker complaints, there is still the ultimate question of whether such complaints will significantly reduce wage theft – particularly if they continue to fail to overlap with the worst and most systemic violators.<sup>268</sup>

Further, several anti-wage theft strategies attempt to improve on the failure of traditional command and control tactics for enforcement because agencies lack the will, resources, or expertise to robustly investigate and penalize employers who have acted illegally. Rather than seek to hold employers accountable after-the-fact, a little-used strategy is to require certain high-risk employers, such as car washes, nail salons, or construction contractors, to provide wage bonds in conjunction with a specialized license to operate their business.<sup>269</sup> Such bonds require employers, who are either repeat violators or in industries with rampant wage theft, to secure a bond as a form of insurance in case of wage theft.<sup>270</sup> Another strategy that seeks to prevent wage theft is

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<sup>265</sup> While not specifically an anti-wage theft strategy, some jurisdictions have passed legislation that prohibits blacklisting and might prove useful in limiting wage-related retaliation. *See e.g.*, WASH. REV. CODE ANN. 49.44.010.

<sup>266</sup> Talbot, *supra* note 149.

<sup>267</sup> Further studies could focus on jurisdictions with such presumptions to research the extent to which burden shifting is actually being used and, if so, whether it has a meaningful impact.

<sup>268</sup> *See supra* notes 163-64.

<sup>269</sup> OR. REV. STAT. ANN. § 658.419 (West 2017); BERKELEY, CAL, CODE § 13.104.060 (2016) (construction); NEW YORK, N.Y., ADMIN. CODE § 20-542 (2017) (car washes).

<sup>270</sup> Wage bonds may be prohibitively expensive for small businesses. It may be necessary to exempt such small businesses or find other ways, such as a local or state tax credit, to assist businesses in purchasing such wage bonds.

requiring employers to submit wage reports to the agency.<sup>271</sup> Self-reporting requirements directly to the agency might encourage voluntary compliance by some employers while such data could help agencies to shortcut the investigatory process, locate non-compliant employers, and more flexibly respond to different kinds of employers.<sup>272</sup>

Other strategies seek to reduce the amount of discretion available to agencies that may lack the will or expertise to engage in robust enforcement. Expanded liability strategies, for example, that more clearly delineate the scope of liability for joint employers arguably make the imposition of such liability against multiple employers more likely.<sup>273</sup> Some enhanced penalty strategies mandate the imposition of penalties upon a finding of wage theft, such that agencies may not discretionarily waive such penalties if wage theft has, in fact, occurred.<sup>274</sup> Finally, some penalty strategies attempt to create a self-funding mechanism, where the costs of enforcement are paid by the employer back to the agency, to provide agencies with additional resources.<sup>275</sup> However, “[s]everal administrators argued against this method of financing, saying that their goal was to obtain restitution from employers, not money for the agency.”<sup>276</sup>

The strategy of data collection and reporting of information by agencies has the promise of helping them overcome ossified command and control regulatory tactics to become more flexible, responsive, and problem-solving oriented. The reporting of data to governing bodies or the public can increase agency accountability, if the reported data helps to assess agency actions.<sup>277</sup> In theory, the data also can be used to better allocate enforcement resources and to adjust the law based on patterns or concerns that emerge.<sup>278</sup> Agencies themselves can use the data to engage in self-evaluation and strategizing that will help them

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<sup>271</sup> See, e.g., BERKELEY, CAL, CODE §13.104.040.

<sup>272</sup> See, e.g., BERKELEY, CAL, CODE §§ 13.104.030 and 13.104.040 (2016); MONTGOMERY CO., MD., art. 11 § 27-69(d); OR. REV. STAT. ANN. § 658.440(1)(i) (West 2017). This strategy assumes that the information being provided to the agency is accurate.

<sup>273</sup> See, e.g., CAL. LAB. CODE § 218.7 (West 2017); O.R.S. § 658.405; Or. Rev. Stat. Ann. § 658.405 (West).

<sup>274</sup> See, e.g., FLAGSTAFF, ARIZ., CODE § 15-01-001-0007(A); LOUISVILLE, KY., CODE § 112.99; OSCEOLA COUNTY, FLA., CODE § 25-6(a)(2) (2017); PINELLAS COUNTY, FLA., CODE art. IV § 70-308(a)(1) (2017). On the flip side, mandatory penalties can result in less flexibility for agencies that want to use the discretion to waive penalties as an inducement to get employers to settle worker complaints more quickly.

<sup>275</sup> See, e.g., ST. PETERSBURG, FLA., CODE § 15-45(b)(2) (2017) (employer found in violation required to pay “administrative costs of processing the claim and all the costs of the hearing.”) Some state agencies have had success with such funding mechanisms. Lurie, *see supra* note 106, at 432.

<sup>276</sup> *Id.*

<sup>277</sup> Solomon, *supra* note 12, at 823 (2008); *see also* Dalley, *supra* note 13, at 1122-1123.

<sup>278</sup> Making better use of data already collected by state agencies, for example data regarding unemployment or workers’ compensation, might prove useful. Information sharing between agencies could help agencies better identify targets for investigation and enforcement of wage laws. ANDREW ELMORE & MUZAFFAR CHISTI, STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS, MIGRATION POLICY INSTITUTE 30-33 (2018).

more effectively tackle the issue of wage theft. Yet while such data collection and reporting strategies are promising, the successful use of data will largely be dependent on whether the data itself reflects useful and accurate information and the ability of the public, lawmakers, or agency personnel to make good use of it.<sup>279</sup>

Finally, there may be other strategies that involve providing information useful to the fight against wage theft instead of relying on the failed strategy of information disclosures. For starters, active forms of communicating information, such as in-person trainings, may be more effective than posters and written disclosures for both employers and workers.<sup>280</sup> Very few information strategies involve outreach and education to either workers or employers.<sup>281</sup> Yet such strategies offer the potential for agencies to create programs that use an active means of providing information, which can be more effective in helping workers understand their rights and employers come into compliance.<sup>282</sup> Further, trainings may provide for concrete tools for workers and employers, such as pre-printed cards or booklets where workers can take relevant notes about the terms and conditions of their jobs or the hours that they have worked or sample industry-specific policies about pay practices.<sup>283</sup> As explained more fully below, information strategies are likely to be more successful if they involve cooperation with employer networks or community organizations that can help tailor such educational strategies to be more accessible, useful, and culturally appropriate to their audiences.<sup>284</sup>

### B. Rethinking Agency Approaches

Rethinking the ways in which agencies traditionally approach anti-wage theft strategies has the potential to make them more effective by reconceiving the role of government and how it might cooperate with workers, communities, and regulated entities. Scholars who have explored “new governance” theory argue that government should enter into non-traditional and potentially collaborative arrangements with workers, worker advocates, or employers to

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<sup>279</sup> An open question is whether the actual data that is being collected, such as the number of complaints filed, the amount of wages recovered, and the budgetary costs expended on the program is ultimately the kind of data that helps to create agency accountability. See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 80, 118 (2012) (discussing how online transparency rules for agencies fail to result in the disclosure of useful information for the public). Political conditions can also prevent accountability even if there is good data disclosure. Tiago Pexioto, *The Uncertain Relationship between Open Data and Accountability: A Response to Yu and Robinson’s the New Ambiguity of Open Government*, 60 UCLA L. REV. DISCOURSE 200, 213 (2013).

<sup>280</sup> See discussion *supra* Section E.

<sup>281</sup> Only 13 states or localities have employed information strategies involving outreach and education.

<sup>282</sup> BOBO, *supra* note 21, at 108-109.

<sup>283</sup> See, e.g., Liz Robbins, *New Weapon in Day Laborers’ Fight Against Wage Theft: A Smartphone App*, N.Y. TIMES, Mar. 1, 2016 (discussing the creation of a new app that allows day laborers to record such information).

<sup>284</sup> See *supra* note 242.

improve regulatory outcomes.<sup>285</sup> These more flexible approaches are intended to help confront the failures of the traditional command and control regime, including the lack of agency staff and resources<sup>286</sup> and any limitations regarding the motivation, competency, and bias of agency staff and leadership.<sup>287</sup> They also seek to address the failures of traditional rights claiming and information strategies. In this section, we briefly review why such approaches are more likely to be productive while recognizing some reservations about successfully executing them.

### 1. *Differentiating Employers*

There are vast differences between large companies with human resources departments, mom and pop businesses inadvertently violating the law, and some of the worst fly-by-night operations and repeat offenders who deliberately build their business model around wage theft. Ian Ayres and John Braithwaite recognized the need for enforcement systems to be responsive to the diversity of the entities they are trying to regulate. They suggested an enforcement system that resembles a pyramid, where the bottom would include more cooperative regulatory measures and the top would involve very real and harsh penalties.<sup>288</sup> The rationale for the pyramid enforcement system is that persuasion is cheap and punishment is expensive.<sup>289</sup> Given the diversity of employers, less resource intensive cooperative mechanisms might be more appropriate for certain kinds of employers while meaningful penalties might be necessary for others.<sup>290</sup> The anti-wage theft laws we examined, with the exception of a handful of laws focused on the day labor, construction, or temporary staffing industries, tend to treat all employers uniformly.<sup>291</sup> While the absence of differential treatment does not necessarily mean that agencies cannot do so upon implementation, it suggests that the default will be the one-size-fits-all use of anti-wage theft strategies.

Large companies, for example, often care about their reputation so that the threat of negative publicity may effectively deter wage theft.<sup>292</sup> Agencies might cooperatively engage with larger companies to find ways to have them self-enforce the downstream subcontractors of franchisees that comprise their

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<sup>285</sup> These collaborative arrangements alternatively been called co-governance, tripartism, or collaborative governance. Estlund, *Rebuilding the Law of the Workplace*, *supra* note 207, at 362-365; Fine & Gordon, *supra* note 8, at 559-60; Lobel, *Interlocking Regulatory*, *supra* note 12, at 1141; Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543, 544-45 (2007); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 5 (1992).

<sup>286</sup> See *supra* notes 47-49.

<sup>287</sup> Weil, *Crafting a Progressive Workplace Regulatory Policy*, *supra* note 8, at 133 (recognizing agencies getting into “ruts” in carrying out enforcement).

<sup>288</sup> AYRES & BRAITHWAITE, *supra* note 285, at 38-39.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 26-27.

<sup>291</sup> See, e.g., OR. REV. STAT. ANN. § 658.405; N.M. Stat. Ann. § 50-15-1.

<sup>292</sup> AYRES & BRAITHWAITE, *supra* note 285, at 22; Weil, *Enforcing Workplace Standards in Fissured Workplaces*, *supra* note 75, at 46-47.

business. David Weil has extensively studied the concept of how to hold “‘lead firms’ (i.e., firms at the top of the industry structure)” accountable, to address some of the problems associated with the fissured workplace.<sup>293</sup> He proposes a cooperative agreement between governmental agencies and top brands focused on specific industries that “could include a commitment by the brand to cascade information through its company-owned properties and outlets, and to its franchisees, as well as a commitment to review employment practices with franchisees when other franchise standards are being reviewed — with the intention that such efforts could be a model for other progressive major brands.”<sup>294</sup>

In fact, he cites DOL’s cooperative agreements in the 1990’s with manufacturers in the garment industry to enter into monitoring arrangements of its subcontractors as a successful example.<sup>295</sup> With those cooperative agreements, DOL used the harsh threat of the “hot goods” provision, which involves preventing the shipment of goods produced in violation of the wage and hour laws, to induce such cooperation.<sup>296</sup> Other threats might include holding employers at the top responsible for enhanced penalties through various joint employment theories. In particular, those anti-wage theft strategies that expand employer liability more directly — which we found in only a minority of anti-wage theft laws — become a much more significant tool for inducing compliance.<sup>297</sup>

Some employers may simply need more assistance to get into compliance.<sup>298</sup> We were generally unable, however, to find many reported examples of robust cooperation between employer groups and state and local agencies with the aim of improving compliance, although there were a few jurisdictions that mandated outreach or education to employers.<sup>299</sup> Yet employer networks — often specific to certain industries — can have a great impact on employer behavior to the extent that employers participate in such networks.<sup>300</sup> Agencies can cooperate with such employer networks to engage in active forms of education and develop industry-specific model policies.

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<sup>293</sup> See generally Weil, *Enforcing Workplace Standards in Fissured Workplaces*, *supra* note 75, at 33; WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, *supra* note 71, at 79.

<sup>294</sup> WEIL, IMPROVING WORKPLACE CONDITIONS, *supra* note 71, at 78.

<sup>295</sup> David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & L. REL. REV. 238, 255 (2005).

<sup>296</sup> *Id.* at 244.

<sup>297</sup> See *supra* notes 185-186.

<sup>298</sup> See, e.g., Weil, *Crafting a Progressive Workplace Regulatory Policy*, *supra* note 9, at 138; Fine & Gordon, *supra* note 8, at 555.

<sup>299</sup> See, e.g., FLAGSTAFF, ARIZ., CODE § 15-01-001-0007(F) (2017); SEATTLE, WASH., MUN. CODE, § 3.15.000(A) (2017).

<sup>300</sup> Weil, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, *supra* note 71, at 57; AYRES & BRAITHWAITE, *supra* note 285, at 39; see also Chris Fuchs, *Lawsuit Filed by Nail Salon Trade Groups Against New York State Dismissed*, NBC NEWS (Dec. 9, 2015 2:48 PM) (noting employer networks for the nail salon industry), <https://www.nbcnews.com/news/asian-america/lawsuit-filed-nail-salon-trade-groups-against-new-york-state-n477156>.

Those employers whose business model is built on wage theft may not care about complying with the law or negative publicity, as long as they are able to continue violating the law with impunity. These employers may be more likely to be deterred if there is a credible threat of severe penalties, such as shutting down their business or facing criminal charges. This implies that a variety of strategies beyond civil penalties are needed. In New York, for example, after a news article exposed rampant wage theft within the nail salon industry, Governor Cuomo organized a task force and focused its investigation on the industry.<sup>301</sup> As part of its enforcement, New York focused on shutting down operations of unlicensed businesses and revoking the licenses of businesses that were substantially out of compliance.<sup>302</sup> In California, the Labor Commissioner charged an owner of a San Diego restaurant with felony grand wage theft by false pretenses.<sup>303</sup> It may be that these strategies need to be coupled with the dissemination of such enforcement information through employer networks to make deterrence truly effective.<sup>304</sup> For employers that operate in multiple jurisdictions, it might help to coordinate and cooperate across local agencies to pool resources.<sup>305</sup> Since the imposition of penalties is resource intensive, agencies should strategically consider targeting those industries that have the highest violations and would be likely responsive to these kinds of strategies. As discussed in the next section, this approach necessarily involves proactively initiating investigations, perhaps in consultation with worker advocacy organizations, rather than relying solely on an enforcement model based on incoming complaints.<sup>306</sup>

## 2. Community Partnerships

Many have advocated for cooperative models of agency enforcement with worker organizations to encourage more strategic enforcement.<sup>307</sup> Agencies that

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<sup>301</sup> Frida Garza, *Recovered Wages: New York's Nail Salons Must Finally Compensate Their Workers for Wage Theft*, QUARTZ (May 9, 2016), <https://qz.com/679127/new-yorks-nail-salons-must-finally-compensate-their-workers-for-wage-theft/>.

<sup>302</sup> Press Release, New York State Governor's Office, Governor Cuomo Introduces Legislation and Comprehensive Plan to Protect Nail Salon Workers and Educate Employers (May 18, 2015), <https://www.governor.ny.gov/news/governor-cuomo-introduces-legislation-and-comprehensive-plan-protect-nail-salon-workers-and>.

<sup>303</sup> Gail Cecchetti Whaley, *California Wage Theft Case Leads to Landmark Criminal Conviction*, HRWATCHDOG (Dec. 21, 2016), <http://hrwatchdog.calchamber.com/2016/12/california-wage-theft-case-landmark-criminal-conviction/>.

<sup>304</sup> WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, *supra* note 71, at 56-57, 74 (noting that holding independent motels accountable for wage theft will not necessarily deter other operators within the same industry because of a lack of "glue"), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

<sup>305</sup> KOONZE ET AL., *supra* note 77, at 13.

<sup>306</sup> Weil, *A Strategic Approach*, *supra* note 138, at 364.

<sup>307</sup> DONALD M. KERWIN & KRISTEN MCCABE, LABOR STANDARDS ENFORCEMENT AND LOW-WAGE IMMIGRANTS 48 (2011); Julie A. Su, *Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation*, 37 BERKELEY J. EMP. & LAB. L. 143, 153-54 (2016);

devote their enforcement resources exclusively to responding to worker complaints may be less effective at combating wage theft.<sup>308</sup> In contrast, community partnerships can provide agencies with increased on-the-ground information about wage theft and more effective dissemination of legal rights information to worker populations.<sup>309</sup>

Janice Fine and Jennifer Gordon have argued that worker organizations can play a “co-enforcement” role in enforcing workplace standards, which would be more effective than an agency driven solely by worker complaints.<sup>310</sup> Several case studies reveal how the integration of worker organizations into agencies can help focus resources on the most common and problematic employers where workers would be unlikely to come forward with worker complaints.<sup>311</sup> Since 2009, San Francisco’s Office of Labor Standards Enforcement (OLSE) has entered into contracts with various community groups to increase the efficacy of San Francisco’s labor laws.<sup>312</sup> Beyond traditional outreach to low-wage and immigrant workers, the contracted community groups also help make referrals, such that approximately 30% of complaints received by OLSE come directly from them.<sup>313</sup> In fiscal year 2013 to 2014, the office collected more in back wages and interest from the cases filed with the help of the groups than from those generated by worker complaints alone.<sup>314</sup>

In California, the Labor Commissioner has relied on “community-based organizations who already have the trust of workers, speak the language of workers, understand how violations occur and are often masked” to give them leads and help to bridge the trust gap between workers and law.<sup>315</sup> One such example includes collaborating with the Maintenance Cooperation Trust Fund (MCTF), a California janitorial nonprofit created through a labor-management partnership that seeks to abolish unfair business practices that harm businesses and workers in the janitorial industry.<sup>316</sup> MCTF has assisted in bringing cases that resulted in millions of unpaid wages for janitors.<sup>317</sup> The benefits of these collaborations come from the organizations’ ability to get information directly

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RONDÓN ICHIKAWA & SMITH, *supra* note 138, at 12-15; THEODORE, *supra* note 65, at 8-14 (2011).

<sup>308</sup> See *supra* notes 163-164.

<sup>309</sup> Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society are Showing the Way Forward*, 2017 U. OF CHI. LEGAL F. 143, 151 (2017) [hereinafter Fine, *New Approaches*].

<sup>310</sup> *Id.* at 146.

<sup>311</sup> Fine & Gordon, *supra* note 8, at 559-60 (2010); see also KERWIN & MCCABE, *supra* note 307, at 12-13; Su, *supra* note 307, at 153-154; THEODORE, *supra* note 76, at 8-14.

<sup>312</sup> THE NAT’L MUN. POL’Y NETWORK, CITY STRATEGIES TO COMBAT WAGE THEFT AND EMPOWER WORKERS 4 (2014).

<sup>313</sup> RONDÓN ICHIKAWA & SMITH, *supra* note 138, at 13.

<sup>314</sup> KOONZE ET AL., *supra* note 77, at 13.

<sup>315</sup> Su, *supra* note 307, at 153.

<sup>316</sup> Fine & Gordon, *supra* note 8, at 565-66.

<sup>317</sup> *Id.* at 565-66 (2010); see also CAL. DEP’T OF INDUS. REL., CALIFORNIA LABOR COMMISSIONER CITE JANITORIAL COMPANIES MORE THAN \$1.5 MILLION FOR MULTIPLE WAGE THEFT VIOLATIONS (May 8, 2014) (noting that MCTF was instrumental in bringing information on a wage theft case that resulted in more than \$1.5 million in violations), <https://www.dir.ca.gov/DIRNews/2014/2014-42.pdf>.

from workers and information that governmental agencies otherwise tend not to have, including more intimate knowledge about industry subcontracting.<sup>318</sup> Community groups can also play a countervailing role when there is political pressure on the agency by employers to keep the agency from issuing real and harsh penalties.<sup>319</sup>

Further, community groups have worked directly with agencies to improve the worker complaint processes while better coordinating and streamlining investigatory processes.<sup>320</sup> The Chicago Area Workers Rights Initiative, for example, is a partnership between the Chicago Interfaith Workers Rights Center and federal and state agencies to improve monitoring and enforcement.<sup>321</sup> Among other things, this partnership devised a uniform complaint for all agencies as a single page form that has all the information that every agency needs, while negotiating a system with agencies where the complaints from the Center moved to the top of the pile.<sup>322</sup> Worker centers can help workers make claims by providing technical expertise for recovering their unpaid wages through the legal system, such as helping workers to present accurate information and complete documents needed by the agency.<sup>323</sup> This technical assistance helps agencies to more efficiently enforce the laws by encouraging workers to come forward and helping them to navigate their filed complaints.

With respect to information requirements, an agency can work with community-based organizations to more proactively ensure that workers understand the information provided.<sup>324</sup> In Seattle, for example, the Office of Labor Standards selected ten different organizations and community partnerships to receive \$1 million in funding to provide outreach, education, and technical assistance to workers.<sup>325</sup> It makes sense that worker organizations will not only have better access to workers within their communities but also that they can engage in more interactive and culturally appropriate forms of education that are more likely to assist workers in understanding their rights.<sup>326</sup>

Community partnerships with agencies can help change agency culture. These partnerships can play a role in motivating, training, and increasing the competency of agency staff.<sup>327</sup> Joint efforts by community groups and agency staff to educate workers within their communities, for example, can not only train agency staff on the particular on-the-ground issues that workers face but also help motivate them by seeing the social cost of wage theft firsthand. Well-publicized success by the agency, stemming from community partnerships, can

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<sup>318</sup> Fine, *New Approaches*, *supra* note 244, at 151-152.

<sup>319</sup> *Id.* at 152.

<sup>320</sup> *Id.* at 154.

<sup>321</sup> FINE, WORKER CENTERS, *supra* note 63, at 82.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Fine, *New Approaches*, *supra* note 309, at 146.

<sup>325</sup> Office of Labor Standards, Seattle, Wash., 2017-2019 Community Outreach and Education Fund (last visited Jul. 28, 2018) <https://www.seattle.gov/laborstandards/outreach/community-fund/2017-2019-community-outreach-and-education-fund>.

<sup>326</sup> Talbot, *supra* note 149.

<sup>327</sup> Email from Sarah Hymowitz, Staff Attorney, Legal Services of New Jersey (Dec. 27, 2018, 13:17 CST) (on file with authors).



motivate agency leadership and staff to continue to employ rigorous enforcement methods for altering the behavior of employers.<sup>328</sup>

### 3. Barriers to Change

There are three challenges to altering the ways in which agencies traditionally approach anti-wage theft strategies. First, there is the question of whether such arrangements should be enumerated within the anti-wage theft law itself. There are a few anti-wage theft laws, for example, that contain explicit cooperation requirements with respect to worker education<sup>329</sup> or community task forces charged with filing and investigating complaints.<sup>330</sup> At the same time, we found instances where such cooperation occurred informally as a result of direct advocacy by nongovernmental organizations with agencies.<sup>331</sup> While the formalization of such agreements can clearly delineate the respective obligations, it can also publicize an arrangement that otherwise would politically fly “under the radar” unopposed.<sup>332</sup> Mandated or pre-set agreements, however, can also fail to produce on-the-ground collaboration.<sup>333</sup> It may be that the question of formalization is less important than the existence of conditions that create an environment ripe for a successful collaboration. Those who have studied public administration describe multiple factors to make collaborative governance successful, such as self-reinforcing interactions among stakeholders, shared motivation, and the capacity for joint action.<sup>334</sup>

Second, the criticism of such cooperative models is that they risk agency capture or the appearance of cooptation of the agency by employers or workers.<sup>335</sup> In the case of employers, the fear is that, cooperation will simply take place of robust enforcement. In particular, it can stand in tension with the principles of accountability because “soft law” or voluntary compliance may simply translate into agencies failing to hold employers accountable. The key

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<sup>328</sup> *Id.*

<sup>329</sup> *See, e.g.,* SAN FRANCISCO, CAL., CODE § 12R.25 (2017); ST. PETERSBURG, FLA., CODE § 15-47(a) (2017).

<sup>330</sup> *See, e.g.,* ST. PETERSBURG, FLA., CODE § 15-47(b) (2017) (appointed official by the Mayor “is authorized to direct proactive investigations of designated industries or employers in response to alleged complaints by employees, residents, organizations, or employers”); N.Y. LAB. LAW § 331 (McKinney 2018) (establishes “Fair Wages Task Force” to inspect, ensure compliance, and implement provisions of the labor law). Other laws simply broaden who is eligible to file a complaint so that it could theoretically include community organizations. *See, e.g.,* LOS ALTOS, CAL., CODE § 3.50.080 (2017) (“An employee or any other person may report to the city in writing any suspected violation of this chapter.”).

<sup>331</sup> *See, e.g.,* FINE, WORKER CENTERS, *supra* note 63, at 84 (2006); THEODORE, *supra* note 76, at 23.

<sup>332</sup> Fine & Gordon, *supra* note 8, at 561; Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOOD HALL L. J. 813, 840-42.

<sup>333</sup> Kirk Emerson & Tina Nabatchi, COLLABORATIVE GOVERNANCE REGIMES 174-75 (2015).

<sup>334</sup> Kirk Emerson, Tina Nabatchi, Stephen Balogh, *An Integrative Framework for Collaborative Governance*, 22 J. PUBLIC ADMIN. RESEARCH & THEORY, 1, 17 (2011).

<sup>335</sup> Solomon, *supra* note 12, at 827.

for successfully cooperating with employers, therefore, is not for the agency to opt for employer cooperation in place of the traditional enforcement approaches, but rather to maintain both approaches simultaneously.<sup>336</sup> Further, past examples of such enforced self-regulation have been more successful when they include worker representatives to assist in monitoring and compliance.<sup>337</sup> In the case of workers, agencies may be attacked for being influenced by worker organizations to become more generally biased against employers.<sup>338</sup> They risk turning the enforcement of wage and hour laws into an even more politicized issue. This risk, therefore, speaks to the need to consider such flexible arrangements with both employers and workers organizations to help negate the idea that the agency is favoring one group over the other.

Third, the challenge with such cooperative approaches is that they simply are not realistic for many jurisdictions. The success of these cooperative arrangements relies on a baseline of anti-wage theft strategies as well as sustained and sufficient agency funding. Agencies should be able to more easily leverage such arrangements with employer networks or worker organizations if they have within their arsenal some of the less common and innovative strategies, such as non-civil penalties or expanded liability based on a broader definition of employer.<sup>339</sup> Beyond the pre-existing legal framework, there needs to be the political willingness of government to make such arrangements possible. Yet not all geographic locations have willing agencies, robust workers organizations, or cooperative employers that can play these roles.<sup>340</sup> Whether such arrangements are formal or informal, they cannot occur without “facilitative leaders” on both sides of the cooperative agreement.<sup>341</sup>

### C. Looking Beyond Regulation

While we do not reject regulation altogether, it is worthwhile to look beyond governmental regulation to address wage theft. In particular, some Republican-leaning jurisdictions that have been left out of the recent wave of anti-wage theft legislation cannot realistically rely on regulation at all. Nongovernmental strategies that rely on worker organizing, therefore, offer a way to address wage theft through direct negotiations, online information sharing, and public shaming.

Workers may directly negotiate with employers through a union or other mechanisms to ensure the proper payment of wages for their work. Unions have stepped up their efforts to help workers who have suffered wage theft.<sup>342</sup> The

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<sup>336</sup> Fine & Gordon, *supra* note 8, at 559, 562; Estlund, *Rebuilding the Law of the Workplace*, *supra* note 207, at 387-388.

<sup>337</sup> Estlund, *Rebuilding the Law of the Workplace*, *supra* note 207, at 350-51; Fine & Gordon, *supra* note 8, at 561.

<sup>338</sup> See Fine & Gordon, *supra* note 8, at 572 (2010) (describing concern about abuse of power by unions).

<sup>339</sup> See *supra* Section IV(A) for a summary.

<sup>340</sup> Fine, *New Approaches*, *supra* note 318, at 152, 174.

<sup>341</sup> Ansell & Gash, *supra* note 285, at 554-55.

<sup>342</sup> BOBO, *supra* note 21, at 95-99.

fissured workplace, however, has made traditional union organizing more difficult as many low-wage workers no longer work in a centralized workplace for a single employer.<sup>343</sup> As a result, other types of worker organizing have flourished through worker centers. Such centers support workers so that they can directly demand their wages from employers.<sup>344</sup> These centers also create opportunities for workers to collectively negotiate set standards for wages and wage payment.<sup>345</sup> Centro Humanitario in Denver, for example, sets the terms and conditions for the hiring of day laborers with employers.<sup>346</sup> In exchange for the services of matching employers with workers, “employers agree to pay each worker directly, at a minimum rate of \$15/hour.”<sup>347</sup> Employers that fail to meet such standards can no longer participate in the program.<sup>348</sup> Worker centers have also helped to support the creation of worker cooperatives, which serve as another mechanism for ensuring that workers are able to set their own working terms and conditions.<sup>349</sup> La Colectiva, a domestic worker collective in California, has a guaranteed hourly wage between \$11 and \$17 per hour, with a three hour minimum, for all of its members.<sup>350</sup>

When there are specific wage theft problems with employers, workers have taken direct action to publicly shame them. Such direct actions involve picketing, protesting, or taking other highly visible action to highlight the issue of workplace exploitation. Workers capture the attention of employers with lively pickets that target foot traffic, impact commercial reputation, and garner media coverage.<sup>351</sup> Direct actions are especially suitable at revealing wage theft by exposing the secrecy that typically accompanies employment relationships in low-wage industries.<sup>352</sup> Domestic Workers United (DWU), for example, has been at the forefront of exposing the privacy of domestic work, such as childcare, housekeeping, or elder care, and engaged in regular gatherings in front of employer homes in demonstrations of shame when those employers fail to pay.<sup>353</sup>

Workers are also increasingly using online forums to share information with other workers about their experiences with employers, including whether they engage in wage theft. The website *contratados.org*, created and maintained by

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<sup>343</sup> Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1739–40 (2018).

<sup>344</sup> BOBO, *supra* note 21, at 109–110; FINE, WORKER CENTERS, *supra* note 63, at 78.

<sup>345</sup> Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 853–54 (2016); VALENZUELA JR. ET AL., *supra* note 46, at 8–9.

<sup>346</sup> Centro Humanitario, Employment

Programs, <http://www.centrohumanitario.org/programs/employment/> (last visited Jul. 24, 2018).

<sup>347</sup> *Id.*

<sup>348</sup> Email from Johnathon Prather, Worker Center Coordinator, Centro Humanitario (Jan. 4, 2019, 10:51 CST) (on file with authors).

<sup>349</sup> FINE, WORKER CENTERS, *supra* note 63, at 78.

<sup>350</sup> Elizabeth J. Kennedy & Michael B. Runnels, *Bringing New Governance Home: The Need for Regulation in the Domestic Workplace*, 81 UMKC L. REV. 899, 911 (2013).

<sup>351</sup> FINE, WORKER CENTERS, *supra* note 63, at 82.

<sup>352</sup> THEODORE, *supra* note 76, at 13.

<sup>353</sup> Eileen Boris & Premilla Nadasen, *Domestic Workers Organize!*, 11 WORKINGUSA: THE J.L. & SOC’Y 413, 427 (2008).

the migrant rights organization Centro de los Derechos del Migrante, shares information about employers for temporary visa workers in the US.<sup>354</sup> It allows workers to post reviews of labor recruiters and employers for whom they have worked, which include information about whether they were paid for all hours worked.<sup>355</sup> Prospective employees can then search for different employers when considering what jobs they might take to come to the US.<sup>356</sup> A smartphone app is under development in New York City for day laborers to rate employers.<sup>357</sup> Workers use online sites like Indeed and Glassdoor to post information about their employment experiences.<sup>358</sup> Like consumer reviews of businesses, these sites potentially provide workers with a platform to publicly review their employers, which can include wage theft.

Worker organizations have also sought to leverage consumer pressure to publicize wage problems. The following examples involve the use of consumer pressure that go beyond addressing the singular issue of wage theft to the broader issue of improving wages and working conditions for workers. The renowned Fair Food Program by the Coalition of Immokalee Workers (CIW) has succeeded in publicly exposing how market mechanics manage to exploit farm workers.<sup>359</sup> They get consumers to pressure well-known businesses at the top of the supply chain. CIW then enters into legally binding agreements with participating buyers, ranging from McDonalds to Trader Joe's, which requires them to commit to pay the "Fair Food Premium" and to suspend purchases from agricultural employers who have failed to abide by fair labor practices.<sup>360</sup> The Milk with Dignity campaign targeted Ben and Jerry's to improve the wages and working conditions of workers in the dairy supply chain in Vermont.<sup>361</sup> In 2015, after organizing actions at Ben & Jerry's shops across the nation, an agreement was signed that included paying a premium to workers and providing for third party monitoring of the code of conduct, which includes receiving worker complaints, addressing grievances, and enforcing consequences for non-

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<sup>354</sup> Contratados, *Do You Have a TN Visa? Know Your Rights!*, CENTRO DE LOS DERECHOS DEL MIGRANTE (last visited Oct. 3, 2018), <https://contratados.org/en/content/do-you-have-tn-visa-know-your-rights>.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> Robbins, *supra* note 283.

<sup>358</sup> See, e.g., Sarpino's Pizzeria Employee Reviews, <https://www.indeed.com/cmp/Sarpino's-Pizzeria/reviews> (last visited Jul. 23, 2018); Company Review, Sitel, <https://www.glassdoor.com/Reviews/Employee-Review-Sitel-RVW16666659.htm> (last visited Jul. 23, 2018); see generally 11 Sites Where You Can Find Employee Reviews, <https://fairygodboss.com/career-topics/employer-review-sites-employee-reviews> (last visited Jul. 23, 2018).

<sup>359</sup> See Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 43-45 (2013).

<sup>360</sup> Coalition of Immokalee Workers, Campaign for Fair Food, <https://ciw-online.org/campaign-for-fair-food/> (last visited Jul. 24, 2018); Fair Food Standards Council, Frequently Asked Questions, <http://www.fairfoodstandards.org/resources/frequently-asked-questions/> (last visited Jul. 24, 2018).

<sup>361</sup> Nat'l Econ. & Soc. Rights Initiative, *Milk with Dignity Campaign (Migrant Justice)* (last visited Oct. 3, 2018), <https://www.nesri.org/programs/milk-with-dignity-campaign-migrant-justice>.

compliance.<sup>362</sup> Restaurant Opportunities Center United (ROC) created a consumers' association called Diners United that seeks to mobilize restaurant diners in support of livable wages and working conditions.<sup>363</sup> Further, it seeks to publicize high road employers through its Restaurants Advancing Industry Standards in Employment (RAISE), which includes restaurant employers committed to raising wages and working conditions for workers.<sup>364</sup>

The ultimate challenge with such nongovernmental advocacy, however, is that there are currently an insufficient number of unions, worker centers, or other nonprofit organizations that exist across the country to engage in this kind of advocacy. Those jurisdictions that are least likely to enact anti-wage theft laws may also be least likely to have a robust worker organization. The question becomes how can nongovernmental strategies work in these places? Information sharing mechanisms provide a potential to reach beyond specific jurisdictions. Consumer pressure too offers a way to hold nationwide businesses at the top of the supply chain accountable, such that efforts can have impacts beyond traditionally progressive jurisdictions. Further, local organizations that recognize the issue of wage theft within their communities may need to seek out support for capacity building and fundraising from more well-established organizations within the state.<sup>365</sup> As nongovernmental advocacy provides a strong counterpoint to wage theft, it suggests that worker movements may want to consider the ways in which strengthening such organizing within and across communities may be more beneficial than getting new anti-wage theft laws enacted.

## CONCLUSION

Low-wage workers will undoubtedly face wage theft and other forms of workplace exploitation for the foreseeable future. Meanwhile, federal enforcement efforts will likely continue to languish in the short term. Given the current climate, addressing workplace rights at the state and local levels continues to be necessary. Yet enacting laws that rely on commonly failed regulatory strategies will likely also result in failure. Instead, we identified several promising possibilities for traction in the protracted fight against wage theft. These include regulatory strategies that: (1) expand the way in which agencies learn about problems, such as through anonymous complaints, community organizations, or wage reports from employers; (2) hold high-risk

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<sup>362</sup> Migrant Justice, Milk with Dignity Campaign (Oct. 3, 2017), <https://migrantjustice.net/milk-with-dignity>.

<sup>363</sup> Consumer Ass'n of ROC United, Diners United, About Us, <http://dinersunited.org/> (last visited Jul. 24, 2018).

<sup>364</sup> Restaurants Advancing Industry Standards in Employment, <http://www.raiserestaurants.org/> (last visited Jul. 24, 2018).

<sup>365</sup> There is generally a need to better fund workers centers or community based organizations. VALENZUELA JR. ET AL., *supra* note 46, at 25; Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 LAW & SOC'Y REV. 669, 689-90 (2009).

employers accountable before wage theft happens, such as through licensing or wage bond requirements; and (3) require interactive educational efforts that are specifically tailored for employers and workers populations. Newly enacted laws too may not always be the answer. Rather, advocating for different approaches by government may more readily reduce wage theft. Government can potentially regulate more effectively if it rejects a one-size-fits-all approach and collaborates with employer networks and worker organizations. Further, nongovernmental solutions may provide a better answer, particularly in places where reform at the state and local level is unlikely. While such efforts are not yet widespread, they provide a window into how workers can use public pressure, by organizing cooperatives, direct actions, online discussions, or consumers, to rebalance the power between employers and workers.