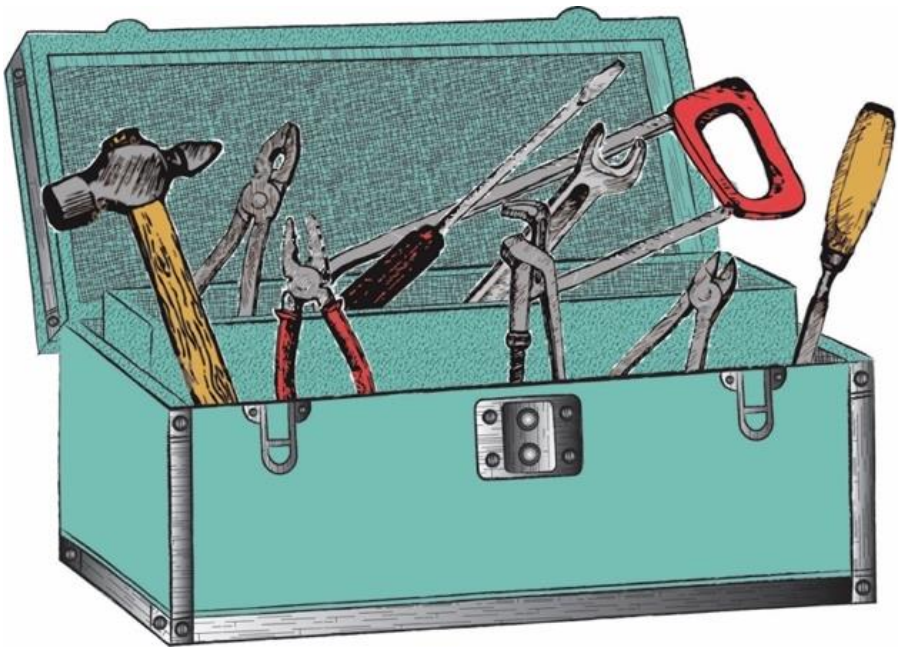
The Labor Standards Enforcement Toolbox



Tool 8: A Baker's Dozen of Essential Enforcement Powers

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ESSENTIAL ENFORCEMENT POWERS

As the number of state and local labor standards laws across the country grows, so too does the range of enforcement powers available to the agencies charged with enforcing these protections. Where agencies have insufficient tools for ensuring compliance with labor standards protections, their ability to robustly enforce the laws is undermined.

There are 13 essential powers agencies need to maximize their effectiveness. The following summaries of each power and examples from agencies across the United States can be used to help agencies and other engaged stakeholders to evaluate gaps and opportunities in their own laws and practices. Notably, a number of these tools and techniques can be incorporated without amending laws or regulations, while others may require legislative action. After reviewing this summary of powers, refer to the companion paper, Tool 9: Assessing and Maximizing Labor Standards Enforcement Powers, for next steps.

1. Power to Say No to Complaints and Provide Referrals

Agencies should have, and use, discretion to choose which complaints to prioritize and investigate. Without this ability, an agency is compelled to investigate every matter that comes through its door, which may prevent it from having the resources and bandwidth to act proactively with its own investigations, and often forces an agency to focus resources in industries with higher paid workers and lower rates of violation.

Of course, if the agency has the power to say no, it will want to develop priorities outlining which investigations it will pursue and which it will narrow or refer elsewhere. To learn more about the strategies agencies can use to prioritize when to say no, review this paper focused on triage.[i] The right balance of enforcement priorities varies by jurisdiction but generally triage systems prioritize complaints when employees have incomes below a certain level and are due at least a threshold amount (say one week of pay), issues are company-wide or allege retaliation, current employees are involved or someone is alleging retaliation, and violations are widespread in the industry.

For many agencies, there is a need to regularly evaluate and adjust priorities as the economy, complaints, directed investigations, and the enforcement environment shift. For example, if under the agency's current priorities, the agency cannot timely investigate all high priority investigations, the agency may decide to narrow priorities so it investigates violations impacting 15 or more employees. If another agency finds it can respond to all complaints and pursue a hearty directed investigation program, it may broaden enforcement priorities to serve more employees who complain. Generally, priorities will allow an agency to refer higher-income employees to attorneys, the court, or community organizations for support. By implementing enforcement priorities and adjusting them as circumstances change, the agency can have effective outcomes in each investigation and save resources to operate more strategically.

Often, the power to say no lies in the silence of the law, which means many agencies that habitually investigate every complaint could start saying no and making referrals as a matter of practice. Less frequently, the law explicitly requires an agency to investigate each complaint, so a change would require legislative action. Even then, there may be practical ways an agency can narrow the definition of "complaint" in practice, raising the bar for what amounts to a complaint, leading to fewer complaints and investigations. For example, the agency could require a signed complaint form, complete intake interview, and receipt of supporting documentation before calling a matter a "complaint." The agency could still opt to initiate an investigation based on information that does not amount to a "complaint" under its directed investigation program but would not be required to when the matter is not a priority.

Many essential powers are only effective with additional tools. The power to say no essentially calls for enforcement prioritization. A key piece of enforcement prioritization involves less resource-intensive enforcement for lower-priority matters: alternative enforcement tools.

2. Power to Use Alternative Enforcement Tools

As an agency starts to follow enforcement priorities, it will say no to some complaints and choose not to pursue others as investigations. Alternative enforcement tools are an option when a complaint doesn't rise to the priority of an investigation but justifies some action. One example of an alternative tool is to send a firm letter explaining the requirements of the law, repercussions for failing to follow the law, and what the agency may do if the employer continues to violate. The letter could be effective in cases where employers have failed to provide notice of rights, such as a paid sick and safe time policy, notice of employment information, and other violations when there is little or no economic harm to employees. The agency's practice could be to follow up every five or 10 letters to verify compliance. Such letters are especially helpful for an agency that does not have much capacity for outreach and education. They can be an enforcement and education tool, a small touch in the employer community to alert employers to the agency's reach and the potential of an investigation, bringing more employers into awareness of and compliance with the laws.

Sample Letter: Seattle

Dear EMPLOYER:
The Seattle Office of Labor Standards enforces municipal laws involving labor standards, which include:

- (list laws and citations)

Workplace Poster

We have received information that indicates EMPLOYER may not be providing a workplace poster with notice of employees' rights under the ordinance(s) in violation of the above-listed ordinances. The ordinances require employers to display the workplace poster in English and in the employees' primary languages in a conspicuous and accessible place at any workplace or jobsite where employees work.

Enclosed you will find the 2020 poster, as well as the Minimum Wage and Wage Theft, Paid Sick and Safe Time, Fair Chance Employment, and Secure Scheduling facts sheets.

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It is in your interest to take steps to ensure that you are following all of Seattle's Labor Standards Ordinances. If you find any violations, you should immediately correct the practice and reimburse employees any back wages owed. You should also retain the documentation demonstrating any such actions. If OLS investigates EMPLOYER in the future, OLS will consider any actions the company took to remedy the violations.

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Instead of investigating these allegations through a formal investigation, we would like to provide EMPLOYER with an opportunity to come into full compliance with the Ordinances. OLS requests EMPLOYER to come into compliance with the Ordinances by [Insert 10 day date]. OLS reserves the right to pursue enforcement of this matter and may follow up with you directly to ensure this issue has been remedied.

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If you have questions about how to comply with the ordinances enforced by our office, please contact our Business Engagement Specialists at PHONE or EMAIL. Additionally, you can find Seattle's Labor Standards Ordinances and our administrative rules on our website at www.seattle.gov/laborstandards.[ii]

When the matter involves more monetary harm to employees but still is not a priority for an investigation, the agency may use the letter shown above and add on a requirement that, in 30 days, the employer submits proof of compliance with the relevant ordinances and proof of back-pay plus interest if the employer was out of compliance.

If the allegation is severe but limited to one person, such as a last paycheck or retaliatory termination, the agency may reach out to the employer by phone upon receiving the complaint, to see if the employer may rapidly enter into a settlement and resolve the matter in lieu of completing an investigation.

Each agency will have different tools that are effective in its jurisdiction; the key is to use few to no resources on matters that do not meet enforcement priorities, investigate and resolve complaints that meet priorities, and save sufficient resources for intentional, proactive, strategic enforcement to reach the most vulnerable employees and have the greatest impact on employer compliance.

3. *Power to Initiate Directed and Complaint-Based Company-Wide Investigations*

A third power which makes an agency more effective is the ability to proactively initiate and expand investigations. With the right balance in an agency's use of enforcement priorities, investigation, and alternative enforcement tools, the agency can create space for more proactivity.

Directed, Company-Wide Investigations

One aspect of this power is the ability to initiate directed, company-wide investigations in industries that employ low wage workers and where data indicates violations are rife. This means strategically selecting employers in certain industries and conducting a complete investigation of the entire workplace under every relevant law the agency has the power to enforce. Which law is relevant depends on the reasons for selecting the specific employers and the strategy involved in the proactive enforcement effort. Read more about how to select an industry for enforcement here.[iii]

Depending on the laws empowering the agency to initiate investigations, commencing directed investigations may require no legislative change but instead involve a shift in practice. If the laws are silent on whether an agency may initiate a directed investigation, the agency could start the practice or, in an abundance of caution, write the ability to initiate directed investigations into the agency's administrative rules. If the law requires a complaint before the agency initiates an investigation, the change to the law may involve broadening the language limiting the agency to investigate in response to a complaint to allow the agency to initiate an investigation when it has reason to believe a violation has occurred.

Strong Statutory Powers: Massachusetts and San Francisco

In Massachusetts, the law is silent about complaints or directed investigations but provides broad authority to the attorney general to investigate, stating:

> The commissioner or the attorney general, or their authorized representatives, shall have full power and authority:
>
> 1. To investigate and ascertain the wages of persons employed in any occupation in the commonwealth;

> 2. To enter the place of business or employment of any employer of persons in any occupation, other than domestic service in the home of the employer, for the purpose of examining, inspecting and making a transcript of any and all books, registers, pay-rolls, and other records of any employer of persons that in any way appertain to or have a bearing upon the question of wages of any such persons and for the purpose of ascertaining whether the orders of the commissioner or the attorney general have been and are being complied with; and
> 3. To require from such employer full and correct statements in writing when the commissioner or the attorney general, or their authorized representatives, deem necessary, of the wages paid to all persons in his employ, such statements to be under oath or accompanied by a written declaration that they are made under the penalties of perjury.[iv]

In San Francisco, the law also provides broad enforcement powers:

> The Agency is authorized to take appropriate steps to enforce this Chapter. The Agency may investigate any possible violations of this Chapter by an Employer or other person. Where the Agency has reason to believe that a violation has occurred, it may order any appropriate temporary or interim relief to mitigate the violation or maintain the status quo pending completion of a full investigation or hearing.[v]

Both examples permit the agencies to initiate investigations apart from complaints in any instance. Other jurisdictions' laws explicitly state that the agencies have authority to investigate an employer operating in an industry with a high risk of violations employing a workforce that is unlikely to come forward to complain. Based on the environment in each jurisdiction, an appropriate law could be general or specific but bring the agency to the same end: the power to initiate investigations without complaints and self-determine the scope of the investigation.

Company-Wide Investigations in Response to a Complaint

Distinct from initiating a directed investigation is the essential power to conduct a company-wide investigation in response to a complaint. An investigation of a single-employee complaint without expanding the investigation to all impacted employees overlooks other employees who have experienced the violation and gives employers a significant pass. To truly deter employers from future violations, noncompliance must cost the employer: at a minimum back wages and interest for every employee; ideally an agency also starts to draw on liquidated damages, penalties to employees, and civil penalties and fines to the Agency. Expanding complaints to company-wide investigations allows an agency to remedy a violation for all employees and is more likely to create a culture of compliance with labor standards laws.

If an agency's resources are tight, the agency might need to balance when to pursue a company-wide investigation with where the complaint falls in the agency's priorities. The agency can limit some lower-priority complaints to individual investigations or use other tools to resolve the issues as outlined above. As it considers when to investigate company-wide in response to a complaint, the agency should use a prioritization method to reach the most vulnerable employees and create a ripple effect throughout the industry. Higher-risk industries are the ideal focal-point of an agency's resources, so expanding complaints to all employees impacted by a violation in a high-risk industry is an easy yes. In cases of employees who fear retaliation, a company-wide investigation protects the employee's anonymity, lending the employee a sense of safety in the investigation.

Often, an agency's own practice limits it from conducting a company-wide investigation in response to a complaint. Thus, the power lies in shifting the practice: expanding the investigation to remedy the violation for each impacted worker. Some laws require all employees to agree to participate in the investigation; a company-wide investigation in those instances may require organizing the employees to come onboard with the investigation or amending the law so the agency can effectively use its time to remedy the wrong more broadly.

By moving toward directed investigations and company-wide investigations in response to priority complaints, the agency can build more powerful investigations, leading to larger outcomes which expand the agency's positive impact in the jurisdiction.

STRONG STATUTORY POWERS: VIRGINIA

Virginia's Department of Labor and Industry (DOLI) already had the power to investigate allegations of non-payment of wages. Thanks to new laws, DOLI can now expand these investigations. During a non-payment of wages investigation for a specific employee, should DOLI suspect other employees have also not been properly paid, DOLI can expand the investigation to include those employees. And if violations are found, DOLI can initiate proceedings on behalf of the aggrieved employees.[vi]

4. Holding All Employers Accountable

In addition to being equipped to focus its resources on the investigations that fall within its priorities, an agency needs the power to effectively name the entities and people responsible for the violations to ensure a greater likelihood of recovering damages. A broad definition of "employer" can provide such authority.

With broad naming power, an agency is more likely to be able to hold multiple entities accountable, which will enable it to identify a responsible party with the requisite financial resources and hold them responsible for remedying the wrong and implementing the changes necessary to prevent future violations. This strategy will render the agency more effective at recovering the amounts due through collections against individuals or larger entities. Moreover, as workplaces become more fissured, an agency can establish widespread compliance with labor standards by enforcing the laws against the businesses at the top of the chain.

Strong Statutory Powers: Washington

Washington State includes a catch-all definition of employer, stating, "'Employer' includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee."[vii]

This allows the State to name individuals responsible for the wrong, joint employers, or even the franchisor in a case of a franchise, depending on the franchisor's resources and level of involvement with the alleged violation.

5. Power to Compel Information

As an agency starts to name employers more broadly and focus investigations on higher priorities, it may encounter more employers who are not forthcoming. Not all employers are willing to come forward with information in response to an investigation. Without information from employers, the agency must rely on employees to determine remedies due. That does not limit an investigation if the agency can easily access employees to get an accurate estimate of damages due through employee testimony and records. However, if the agency does not know who worked for the employer during the relevant period or if employees are hesitant to come forward, which is likely if they are more vulnerable, an employer's silence may limit the agency's effectiveness in the investigation.

Whether an employer overlooks pieces of the agency's request for information or completely disregards it, there are various tools an agency can use to complete the investigation despite the employer's incomplete or absent response. These tools include setting mandatory deadlines, drawing from penalties and fines to enforce deadlines, and issuing and enforcing subpoenas.

Power to Set Mandatory Deadlines

The first aspect of an agency's power to compel information is its ability to set mandatory deadlines. The deadlines may exist within a statue, a rule, or at the investigator's discretion. If composing a law or rule, the power ideally allows an agency to request all relevant records and testimony, sets a short timeframe for the employer to respond, and provides the agency with discretion to extend the timeline only when good cause supports the decision and when the response will still arrive in a timely manner.

Also essential to this power is detail-oriented enforcement. When an employer provides an incomplete response or is slow to respond, the power to set deadlines, coupled with an organized investigator and a clear office-wide policy, are essential and sufficient to move the investigation along in many circumstances. By calendaring the due date for the response, promptly reviewing it, and following up to notify the employer of outstanding documents, the investigator progresses toward timely receipt of information necessary to the investigation. As well, the agency can develop a universal policy explaining what circumstances amount to "good cause" for giving an employer more time to respond, how much time is acceptable, and when to start drawing from other tools. This way, investigators operate with the same standards and timelines when considering requests for extensions, moving investigations along at a similar rate.

Another tool at the investigators' disposal in many jurisdictions is telephonic and even in-person communication. Too often, agencies default to email communications, which can be effective for many investigations. However, when faced with a nonresponsive employer, a phone call followed by a site visit often demonstrates to the employer that the investigator is willing to take strides to advance the investigation and will not cease the investigation until it is complete.

STRONG STATUTORY POWERS: NEW YORK CITY

If the law leaves space for administrative rules to create a power to set deadlines, New York City's rules are a model:

> (b) Whether it was issued in person, via mail, or, on written consent of the employer, email, an employer must respond to a written request for information or records by providing the Office with true, accurate, and contemporaneously-made records or information within the following timeframes, except as provided in subdivision (c) of this section, subdivision (c) of section 20-924 of the Code, section 7-213 of this title or other applicable law:
>
> (1) For an initial request for information or records, the employer shall
>
> i. Within ten (10) days of the date that the request for information was received by the employer provide the following information, if applicable:
>
> A. the employer's correct legal name and business form;

B. the employer's trade name or DBA;
C. the names and addresses of other businesses associated with the employer;
D. the employer's Federal Employer Identification Number;
E. the employer's addresses where business is conducted;
F. the employer's headquarters and principal place of business addresses;
G. the name, phone number, email address, and mailing address of the owners, officers, directors, principals, members, partners and/or stockholders of more than 10 percent of the outstanding stock of the employer business and their titles;
H. the name, phone number, email address, and mailing address of the individuals who have operational control over the business;
I. the name, phone number, email address, and mailing address of the individuals who supervise employees;
J. the name and contact information of the individual who the office should contact regarding an investigation of the business and an affirmation granting authority to act; and

ii. Within fourteen (14) days of the date of that the initial request for information or records was received, provide the remaining information or records requested in that initial request.

(2) For all requests for information or records after the initial request, an employer must respond within the timeframe prescribed by the Office in the request, which shall not exceed fourteen (14) days from the date that the request was received by the employer, unless a longer timeframe has been agreed to by the Office.

(3) Upon good cause shown, the Director may extend response timeframes required pursuant to this subdivision.[viii]

Such language provides a narrow timeline for basic Information, a bit more time for more detailed information, and allows the agency to extend the timeline when good cause supports the decision. The agency's practice could focus on training investigators to keep information coming to the agency in a timely manner, when to allow extensions to the deadline, and what to do when an employer does not comply with requests in spite of attempts to communicate on the phone and in-person.

Assessing Penalties

If the employer continues to delay or fail to respond to mandatory deadlines followed by clear communication and an in-person visit, a power to assess penalties and fines may

bring the investigation back on track. The basis for this power varies but is available where the agency has discretion to draw from a pool of penalties and fines upon employer delay. Some agencies have the power to find a specific violation in the event of an employer's interference in the investigation and assess a sum of money due to the agency if the employer interferes.

Here too, the agency is wise to develop a policy, so investigators act consistently. The point at which the agency begins to impose penalties can be different depending on the investigation and circumstances but generally involves repeated missed deadlines with no attempt to correct the missteps as the investigation progresses. At that point, the investigator may alert the employer that the agency will start to draw from overall fines and penalties, impose a specific fine for the missed deadline, or, depending on the law, move toward finding a violation for interference, which carries its own remedy.

Leverage with Penalties

One response to an employer who misses two consecutive deadlines without good cause is to provide the following notice:

> You [EMPLOYER NAME] have failed to meet two deadlines, [DATE 1 and DATE 2], to provide requested information to Agency Dynamic. You have until [DATE FIVE DAYS FROM TODAY] to provide all information requested, listed below. If you fail to provide all requested information, Agency A will increase fines and penalties by 10% for each day after [DATE FIVE DAYS FROM TODAY] it has not received all information. In an investigation of an employer of a similar size with similar allegations, total potential penalties were $500,000. This means that, for each day the requested information is late, penalties could increase by $50,000, to a total of $500,000 in penalties at [DATE 15 DAYS FROM TODAY]. This amount is in addition to wages and interest due to employees.

Importantly, in such a notice, the investigator will want to state the maximum amount of fines and penalties, which may be a range depending on the total remedy due at the end of the investigation, so the employer realizes the economic impact of a 10% per day increase. If the investigator is uncertain about what the range could be, it may look to a completed investigation which involved similar allegations and employer-size and cite the range of possible penalties based on that investigation. This step often curbs the employer's delay in the matter.

STRONG STATUTORY POWER: NEW YORK CITY

Also powerful when faced with delay is a law or rule empowering an agency to issue a notice of violation and assess an enumerated penalty in the face of delay, as New York City does in its administrative rules:

> (e) The Office may issue a notice of violation to an employer who fails to provide true and accurate information or records requested by the Office in connection with an investigation.
>
> (f) An employer who fails to timely and fully respond to the request for information or records that is the subject of a notice of violation issued under subdivision (e) of this section on or before the first scheduled appearance date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the Office's investigation. [ix]

Subpoena

The next step, if organization and monetary consequences fall short of engaging the employer, is a subpoena or threat of it. Broad subpoena power would allow the agency to compel documents and testimony and enforce the subpoena in court with real consequences to the employer for failing to comply. The subpoena process must comply with due process and may require modifications to the laws. Notably, a subpoena may also involve some administrative burden. While the option for a subpoena is important, it is equally important that the agency has power to visit the business, interview employees, and access documents without a subpoena or other legal procedure.

STRONG STATUTORY POWER: WEST VIRGINIA

If a change in the law is necessary to obtain powers to compel evidence or subpoena, West Virginia's law is an example of robust powers, permitting it to inspect places of business, compel witness testimony, and issue enforceable subpoenas when those powers fall short. Its power to take affidavits and depositions during an investigation is helpful to investigations that do not settle because that evidence is sworn as true. The language, which might serve as a model for legislative change, provides:

> (a) The commissioner shall enforce and administer the provisions of this article in accordance with chapter twenty-nine-a of this code. The commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they may deem appropriate, to determine whether any person, firm or corporation has violated any provision of this article, or any rule or regulation issued hereunder or which may aid in the enforcement of the provisions of this article.

> (b) The commissioner or his authorized representatives shall have power to administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses, and the production of papers, books, accounts, records, payrolls, documents and testimony, and to take depositions and affidavits in any proceeding before said commissioner.
>
> (c) In case of failure of any person to comply with any subpoena lawfully issued, or on the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, it shall be the duty of the circuit court, on application by the commissioner, to compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.[x]

The benefit of broad language is that it can apply not only to employers but also to third parties such as payroll providers, who are often the best and most accessible source of information as long as they know the agency has the authority to request and receive the information, which a subpoena makes clear.

STRONG STATUTORY POWER: SAN FRANCISCO

The San Francisco Office of Labor Standards Enforcement's (OLSE) Paid Sick Leave Rules set a strict bar for employers who fail to reply to a Notice of Preliminary Determination, which OLSE sends upon a preliminary determination of a violation:

> Failure to Respond: If the employer fails to respond to the NOPD within 15 days of service of the NOPD, OLSE may issue a DOV [Determination of a Violation].[xi]

The regulation gives OLSE power to proceed with its findings when faced with a nonresponsive employer. Essentially, an employer who fails to respond to the NOPD settles for a determination based on the evidence OLSE uses to come to the NOPD and loses an opportunity to settle the matter or present additional evidence contesting the NOPD.

An agency is well-equipped if it starts with attention to deadlines by investigators and consistent consideration of requests for extension. Over time, the agency can incorporate more tools by process or law, ranging from showing up at businesses, imposing penalties for delay, issuing subpoenas for records and testimony, to moving along with the investigation. Although the need for an enforceable subpoena may not arise in many instances, it will be essential to enforce against the most severe violators with total disregard for the laws.

6. *Inherent Powers in Settlement*

When used at the right point in the investigation for the right reasons, the power to settle and incorporate a range of terms into a settlement agreement will compensate employees for violations and help to ensure future compliance. Settlements are a contract entered into between the employer and the jurisdiction to resolve a potential law violation. Parties may opt to settle even when the agency is not certain a violation occurred because settlement can shorten the length and depth of the investigation, saving resources for the employer, employees, and agency. Often, an attorney's fees may be more costly to the employer than paying to resolve the alleged wrong, so an employer may find that it is in their best interest to settle even if they believe there was no violation. An agency may decide that, in lieu of a painstakingly accurate accounting of back wages due at the end of each investigation, it can save time by approximating a remedy for each employee, which will allow the agency to complete more investigations and focus efforts on the most egregious violators. Since settlement agreements are a contract, and all parties have authority to enter contracts, even a law which is silent about settlement may leave room for the agency to settle.

As noted throughout this paper, an agency can harness its creativity, without rewriting legislation or rules, to expand its powers. This is especially true in settlement agreements, because laws are often silent about what an agency may include in such contracts.

Getting Money to Employees

When the Seattle Office of Labor Standards finds a violation of a law that results in only civil penalties and/or fines payable to the City, the enforcement team uses settlement terms to encourage compliance and get money to workers. This practice could apply in a few scenarios, including the following:

Example 1: The agency found violations but there are no records to quantify amounts due to employees and employees are not engaging in the investigation.

Example 2: The violations involve notice of rights or notification of paid sick and safe time balance, which did not result in a loss of wages to workers but did violate their rights.

Under the Seattle Municipal Code, in both scenarios if the matter progresses to a finding, no back wages would go to workers. The agency could recover fines and civil penalties which would be paid to the government. However, by settling the matters, the agency can order any fines and civil penalties to be paid to workers. Often, if an agency can evaluate

what powers lie in the silences of the law, it can more effectively arrive at a better outcome for aggrieved workers.

Other Optional Terms

The power to settle allows an agency to think expansively about how best to remedy violations – with the objective of increasing compliance with labor standards and, in-so-doing, improving the lives of workers. Terms that are not explicitly authorized in the law but an agency may access in settlement include: back wages, interest, admitting to a violation, precluding retaliation and even stating a remedy for it if the jurisdiction's laws do not, terms necessary for compliance, proof of compliance, liquidated damages, mandatory education and training and press. This paper takes a deeper dive into the nuances of settlement and offers ideas where the options seem limited.[xii]

Include Terms for Workers

Also key to creativity within settlements is collaborating with community partners to incorporate terms that workers have requested, even if those terms are not directly relevant to the investigation. As stated, because the matter is settling, there is often room for terms that might not be permissible in an adversarial resolution to an investigation. Importantly, the terms need to be specific unless they are simply symbolic. If the terms involve a policy, draft an actual copy of the policy and include it as an attachment to the settlement agreement. Community partners can help the agency craft a settlement that empowers workers even more than the laws within the jurisdiction do.

Terms for workers could include:

- Additional sick or safe leave protections
- Opportunities for training and advancement
- Dispute resolution protocol
- Telecommute policy
- Policies that would add value for workers

7. Power to Remedy Retaliation

All enforcement agencies confront vulnerable workers' reluctance to come forward to report a violation, but those that lack protections or remedies for retaliation face even greater hurdles. The risk of retaliation may increase when the agency names employers broadly, drawing more respondents into an investigation. Protection against retaliation empowers community organizations and employees to participate in labor standards enforcement. The strongest powers to address retaliation allow an agency to hold anyone, including the employer and others, liable for retaliation against a person who exercises a protected activity, be it an employee or another person. Assessing severe penalties for retaliation, ranging from back and front pay with interest and liquidated damages to civil penalties and fines assignable to employees and the agency, will give this

protection teeth, either discouraging an employer from retaliating or making it severely costly to retaliate.

Once an agency has the power, it may further prevent retaliation by informing employers from the outset of every investigation that retaliation is unlawful and carries severe remedies. In its notice of investigation, the agency could include the language of the law prohibiting retaliation so employers understand what constitutes retaliation and the consequences for engaging in it. Learn more about protections against retaliation here.[xiii]

Strong Statutory Power: New York City

Effective laws state that retaliation is unlawful, define what acts constitute retaliation, and outline a remedy. In New York City, the Earned Sick and Safe Time Act includes a retaliation section precluding the employer from "engag[ing] in retaliation or threaten[Ing] retaliation against an employee for exercising or attempting to exercise any right provided pursuant to this chapter, or interfer[Ing] with any investigation, proceeding or hearing pursuant to this chapter."[xiv] Importantly, the law protects a person's attempt to exercise their rights in good faith, even if they were mistaken about the particulars and did not actually qualify for a benefit under the ordinance.

New York City further outlines the protection in its definitions section, defining "retaliation" broadly: "'Retaliation' shall mean any threat, discipline, discharge, demotion, suspension, reduction in employee hours, or any other adverse employment action against any employee for exercising or attempting to exercise any right guaranteed under this chapter."[xv] Coupled with a broad definition of employer, this protection will address most attempts to interfere with a person's exercise of protected rights.

New York City's prohibition is rendered more powerful with the remedies for retaliation: "[f]or each instance of unlawful retaliation not including discharge from employment: full compensation including wages and benefits lost, five hundred dollars and equitable relief as appropriate and . . . for each instance of unlawful discharge from employment: full compensation including wages and benefits lost, two thousand five hundred dollars and equitable relief, including reinstatement, as appropriate. "[xvi] Moreover, the ordinance permits a civil penalty of $500 per violation.

Nondisclosure

Another measure to mitigate retaliation is the power to permit employees to request non-disclosure, which means that even when the agency receives a public disclosure request, it does not have to disclose the employee's name or identifying information. With this protection, an employer will not know who communicated with the agency so is less likely

to retaliate against employees. The nondisclosure power may be found in the labor standards law or the relevant public disclosure laws. Regardless, the agency will want to consult with counsel to understand any limits to non-disclosure, as well as any practices or procedures that may be needed to ensure adherence to public disclosure laws in the particular jurisdiction.

Often, it is necessary to use powers jointly. In the case of a complainant's request for nondisclosure, if the complaint otherwise meets enforcement priorities, the agency will want to pair the power of nondisclosure with the power to initiate a company-wide investigation so the agency does not tip the employer off to who approached the agency and fully protects the complainant's identity.

Coupled with an opportunity for a witness to request nondisclosure, the power to address retaliation and assess a substantial remedy in the case of retaliation will provide a safety net for vulnerable workers to engage in an investigation.

8. Increased Remedies to Workers

Another way to encourage workers to engage in an investigation is to assure that they receive significant remedies. As well, many employers are more likely to come on board with paying wages in a timely manner when they learn it is more costly to violate the laws. Strong powers to remedy violations include the ability to assess interest, liquidated damages, penalties, fines, and civil penalties and the option to draw from the different pools of remedies depending on the circumstances of each investigation. In practice, the agency can increase the portion of liquidated damages, penalties, fine, and civil penalties it charges to the employer based on the severity of the violations. Similarly, a robust law would require an agency to assess penalties and fines in the case of a subsequent violation.

It is important to make noncompliance cost the employer; and to make it cost even more for severe violators. To give an agency flexibility when records do not exist or evidence of the precise remedy is sparse, broad language in the law may allow the agency to assign the pool of penalties and fines to workers in a settlement or a finding of a violation. If the law is silent as to this potential re-assignment of money in settlement, consider whether it is within the agency's discretion to do so in a contract.

Strong Statutory Power: Los Angeles

The Office of Wage Standards of Los Angeles is empowered by laws which provide the agency flexibility to impose severe costs on employers who do not pay wages or sick leave as the law requires:

> Every Employer who violates this article, or any portion thereof, shall be liable to the Employee whose rights were violated for any and all relief, including, but

not limited to, the payment to each Employee of wages unlawfully withheld, Sick Time Benefits unlawfully withheld and an additional penalty of up to $120 per day that each of the violations occurred or continued.[xvii]

In cases of retaliation, the law orders reinstatement plus treble wages, sick time benefits, and penalties.[xviii] Employees benefit from the daily penalty structure. Employers are further deterred from continued violations because there are additional amounts due to Los Angeles for each violation:

- A penalty of $50 per day that wages or sick time benefits were withheld
- An administrative fine to the City of up to $500 for failure to:
  - Post notice of the ordinances
  - Allow access to payroll records
  - Maintain or retain payroll records for four years
  - Allow access for inspection of books and records or to interview employees
  - Provide employer's name, address, and telephone number in writing
  - Cooperate with the Division's investigation
  - Post Notice of Correction to employees
- Up to $1000 per employee for retaliation

Under the remedy structure, each day a violation exists constitutes a separate and distinct violation carrying additional penalties and fines.[xix] Thus, as the violation continues it becomes more costly. Moreover, the law is harsh on subsequent violators, allowing administrative fines to be twice the maximum fine allowed when accessed within 3 years of a fine under the same provision under a Notice of Correction; this doubling is cumulative.[xx]

9. Impact Non-Compliant Employers' Ability to Operate

Businesses are ultimately compelled to comply with the laws and compensate workers for violations when they learn they will be unable to operate without paying the amounts they owe at the end of an investigation. The power to suspend the licenses that businesses need to operate can be an effective means to compel compliance. Typically, an agency can access this power by assessing licensing requirements and forming relationships and developing protocols with other agencies within their jurisdictions. An agency can usually find a license that will carry some weight to the employer, whether it be a business, liquor, or health license. Targeting a license that is not simply symbolic but one that the business truly needs to generate a profit will provide the agency with maximum leverage.

Stop work orders are another effective way to encourage employers to quickly comply with the agency orders to pay employees and come into compliance with laws. If work stops moving, the employer stops making money, which is more costly over time than the cost associated with paying what is owed to employees and the agency.

Strong Statutory Power: New Jersey

Model language from New Jersey provides:

> a. If an employer fails to comply with a final determination of the commissioner or a judgment of a court, including a small claims court, made under the provisions of State wage and hour laws or of section 10 of P.L.1999, c.90 (C.2C:40-2), to pay an employee any wages owed or damages awarded within ten days of the time that the determination or judgement requires the payment, the commissioner may do either or both of the following:
>
> (1) issue, in the manner provided in subsection of section 2 of P.L.2009, c.194 (C.34:1A-1.12), a written determination directing any appropriate agency to suspend one or more licenses held by the employer or any successor firm of the employer until the employer complies with the determination or judgement; or
>
> (2) issue a stop work order against the violators requiring the cessation of all business operations of the violator. The stop work order may only be issued against the individual or entity found to be in violation, and only as to the specific place of business or employment for which the violation exists. The stop work order shall be effective when served upon the violator or at a place of business or employment by posting a copy of the stop work order in a conspicuous location at the place of business[.] The stop work order shall remain in effect until the commissioner issues an order releasing the stop work order upon a finding that the violation has been corrected. As a condition of release of a stop work order under this section, the commissioner may require the employer against whom the stop work order had been issued to file with the department periodic reports for a probationary period of two years.
>
> b. Stop work orders and any penalties imposed under a stop work order against a corporation, partnership, or sole proprietorship shall be effective against any successor entity that has one or more of the same principals or officers as the corporation, partnership, or sole proprietorship against which the stop work order was issued and that is engaged in the same or equivalent trade or

> c. Any employee affected by a stop work order issued pursuant to this section shall be paid by the employer for the first ten days of work lost because of the stop work.[xxi]

Strong Statutory Power and Partnerships: San Francisco

Enforcement entities in San Francisco added a license revocation provision after a survey of San Francisco restaurant workers in Chinatown found that 50% of workers were not paid the minimum wage.[xxii] In San Francisco, if an employer does not promptly comply with remedies ordered, the law empowers the San Francisco Office of Labor Standards Enforcement (OLSE) to:

> take any appropriate enforcement action to secure compliance, including initiating a civil action . . . requesting that City agencies or departments revoke or suspend any registration certificates, permits or licenses held or requested by the Employer or person until such time as the violation is remedied. All City agencies and departments shall cooperate with revocation or suspension requests from the Agency.[xxiii]

Together with the Department of Public Health (SFDPH), OLSE developed a protocol. When an employer does not pay its obligations, the agency contacts the SFDPH and the two collaborate to revoke the health license such that the employer can no longer operate.[xxiv] SFDPH requires new food operators to acknowledge their responsibilities under labor laws as a condition of obtaining a restaurant permit. The agencies are considering adding compliance monitoring for labor standards to current food safety monitoring, maximizing the reach of the city's contacts with each employer.

Once relationships are established, agencies have opportunities to find efficiencies and assign responsibilities based on their respective powers. Agencies could evaluate their laws to see if the remedies are general enough to allow license revocation and brainstorm a list of partner agencies to effectuate the revocations. They should consider whether they need an edit to the law or rules and gather support from community and elected officials to make it happen. If the law already provides for a stop work order, the Agency could start to implement it when there is an opportunity. Of course, necessary enforcement powers vary by employer and investigation. The license revocation and stop work order tactics are only effective when the business is still in operation, wants to continue operating, and is operating in compliance with licensing laws. For employers that are out of business or skirt many laws, other tools mentioned below and in this paper will be necessary to collect.

10. Collections

While license revocation may help with collections in some instances, each industry, employer and investigation may necessitate different tools. Thus, a comprehensive collection approach is essential for the agency to have the agility it needs. Successful collections dictate an agency's ability to enforce the laws against the least compliant employers. Even with limited capacity, an agency can push beyond its standard course to recover money for workers. Notably, when assessing its collections powers, agencies should look to debtor laws in addition the powers found in labor standards laws to ensure they are leveraging all collection tools at their disposal.[xxv]

Counter to standard operating procedures today, collection efforts must begin early in the investigation so that the agency can name all possible entities responsible for the actions taken—including individuals, contractors, franchisors and parent companies. During the investigation, if the agency detects that the employer is moving or selling assets, it might follow California Division of Labor Standards Enforcement's (DLSE) guidance and file a lawsuit alleging fraudulent claim, bulk sale, or another legal theory within the agency's jurisdiction.[xxvi] If the laws permit it, the agency may draw from wage liens, wage bonds, or wage pools to recover money due to employees.[xxvii]

Post judgment collections tools often lie in debtor laws and include sending demand letters, converting the final finding into a court order that the employer pay employees and the agency, and asking the court to set a hearing for the employer to appear in court to declare their assets or have a warrant issued for their arrest. Once the agency is meeting in person with the employer, the power to require the employer declare all assets before the court and seize any assets immediately, including cash from the employer, can be effective. Powers allowing agencies to find bank account numbers to garnish the same day, and, with a sheriff, go to tap all tills to recover money are additional means for collecting. Any small step toward stronger collections will help to recover wages for the most vulnerable workers, improve agency collection rates and encourage the agency to continue to diversify collection tools.

11. Media

Most agencies have the power to proactively shape their reputation and share their accomplishments via media. Instead of staying quiet or getting caught up in a cycle of reacting to bad press, agencies can take the reins on messaging to the public. Issuing a press release on a case with a large impact on employers, as California's Labor Commissioner does here,[xxviii] can vastly impact employer compliance in the industry.

A dynamic press strategy includes the following:

- Remove confidentiality for the employer from the table in negotiations—name the violator
- Regularly share the outcomes of investigations resulting in violations

- When partnering with community organizations in investigations, create a press strategy; communicate throughout the investigation to message consistently
- Develop a relationship with a local reporter who reports on employment rights
- When the agency has a strong story with a lot of money at stake, and the investigation could have nationwide implications, ask the reporter to run it
- Give the reporter access to workers when possible
- Embed stories from workers into press releases (with worker consent)

If an agency is not permitted to publish outcomes, or does not have the resources, the agency may make the case with leadership as to why press is needed. In the interim, it can collaborate with community organizations to do the press on significant cases. Agencies should consider working with partner organizations to publish stories about investigations resolved through co-enforcement. Agencies can list violators or publish summaries of matters they have resolved on their website, to deter potential violators and show the public that it is important to comply with labor standards. See Seattle OLS's or the Department of Labor's website for examples. Such efforts are worthwhile: a study about the Occupational Safety and Health Administration's press strategy found that one press release outlining the consequences of a violation can deter 88% more employers in the same industry within a 5-kilometer radius and lead to compliance improvements up to 50 kilometers away.[xxix]

12. Appeals

Inevitably, some employers will not agree with the outcome of the investigation and will want an opportunity to challenge the agency's decision. Ideally, the agency has tools to preclude employers from using frivolous appeals to circumvent the administrative investigation or to buy more time to hide assets and avoid payment. This could be accomplished where the reviewing body can reverse the agency's decision as to the outcome and the remedy only if the agency abuses its discretion. As well, the power to preclude the employer from presenting evidence on appeal that it refused to provide in response to a request from the agency during the investigation, such as employee rosters, payroll records, time clock records, and records of sick and safe leave use, can disincentivize employers from withholding information when demanded during the investigation. Jurisdictions such as California, San Francisco, and Minneapolis have diverse yet strong examples of appeal powers.

Strong Statutory Appeal Power: California

The California Labor Commissioner curbs frivolous appeals and ensures the employer will pay in case of an unsuccessful appeal by requiring an appeal bond:

> As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a

licensed surety or a cash deposit with the court in the amount of the order, decision, or award.[xxx]

Strong Statutory Appeal Power: San Francisco and Minneapolis

In different ways, the administrative rules in San Francisco and Minneapolis limit employers from presenting most new information on appeal.

In its Paid Sick Leave Ordinance rules, San Francisco provides:

> Absent good cause, an employer may not present evidence at a hearing [on appeal] that it failed to provide to OLSE in response to a request before the issuance of a DOV [determination of violation].[xxxi]

Minneapolis's Minimum Wage Rules also limit a party's power on appeal:

> A party may not produce new information for the purpose of challenging the Department's findings or an administrative fine if the information was previously available yet not submitted.[xxxii] [xxxiii]

13. Co-Enforcement

An important power which an Agency can integrate through its process is co-enforcement. Co-enforcement is a partnership which starts when unions, worker centers, and community-based non-profit organizations partner with agencies to educate workers about their rights and patrol labor markets to find employers who are noncompliant with labor laws.[xxxiv] Organizations enhance the power of regulators to respond to and prevent violations by leading with their commitment to the wholesome understanding of workers from a racial, ethnic, linguistic, and cultural perspective.[xxxv]

Co-enforcement can increase an agency's effectiveness and capacity in various ways, including:

1. Educating agencies about the innerworkings of industry structures, employment practices and the root causes of violations,
2. Providing agencies with workers' real-life perspectives about violations,
3. Acting as countervailing powers to employers during investigations, and
4. Continuing to pressure employers to comply post-investigation.

California's Division of Labor Standards Enforcement has embraced co-enforcement. The state agency relies on carwasheros for their knowledge of the industry and relationship with workers to better target their enforcement efforts, while the carwasheros rely on the agency's legal powers to recover money for workers. (Read more about the model here.[xxxvi]) Similarly, formal partnerships like those the San Francisco OLSE has with

community partners can expand an agency's reach immensely, broadening the agency's capacity to educate the public about the laws and to acquire information about what is happening for vulnerable workers in industries with high rates of violation. Community organizations play a powerful role in making agencies aware of the existence and extent of violations while keeping workers informed and engaged throughout the enforcement process.

Creative Use of Power: Seattle

Co-enforcement at the intake phase can help connect agencies to vulnerable workers who are hesitant to complain to government officials and conserve agency resources.

In Seattle, the Office of Labor Standards has been expanding its capacity by relying on community organizations to conduct intake. The agency will then follow up on the intake only when it needs to round out the information received. This process avoids duplication of efforts and demonstrates the agency's trust that the organization is acting in good faith and the investigation will uncover any inconsistency. Seattle trains its partner community organizations and explains what information is necessary, so organizations can take an active role and help the agency maximize its resources. Seattle's grants with community organizations ensure fair payment for the community organizations' work.

CONCLUSION

Each agency operates with distinct laws and circumstances unique to their jurisdiction. If the ideas within this paper seem overwhelming or out of reach, you are not alone. Each step toward more powers is making your agency more strategic and thus more effective. No one expects an agency to have the baker's dozen of enforcement powers in the blink of an eye. Instead, be realistic yet optimistic. If you are energized and motivated by the ideas in this paper, ride that momentum. Whichever camp you are in, when you are ready, turn to the assessment of your agency's powers and use of them in Tool 9: Assessing and Maximizing Labor Standards Enforcement Powers for support evaluating your powers and creating a plan to use and incorporate more.

[i] Jenn Round, *Tool 1: Complaints, Intake, and Triage*, August 2018. Available at: https://www.clasp.org/sites/default/files/publications/2018/09/2018_complaintsintakeandtriage.pdf
[ii] Seattle Office of Labor Standards.
[iii] Tanya L. Goldman, *Tool 4: Introduction to Strategic Enforcement*, August 2018. Available at: https://www.clasp.org/sites/default/files/publications/2018/09/2018_introductiontostrategicenforcement.pdf
[iv] Mass. Gen. Law Ch. 151, Sec. 3.
[v] San Francisco Administrative Code, Chapter 12R.7.c.1.
[vi] https://www.forbes.com/sites/tomspiggle/2020/06/08/how-virginias-new-non-compete-and-wage-laws-help-employees/#3877b7417634
[vii] Revised Code of Washington 49.46.010(4).
[viii] Rules of the City of New York, §7-109.
[ix] Rules of the City of New York, §7-109.
[x] W. Va. Code § 21-5-11.
[xi] San Francisco Paid Sick Leave Ordinance Rule 12, 2018.
[xii] Cailin Dejillas, *Tool 6: Negotiations and Settlement Agreements*, June 2019. Available at: https://www.clasp.org/sites/default/files/publications/2019/07/2019_negotiationsandsettlementagreements.pdf
[xiii] Tanya L. Goldman, *Tool 5: Addressing and Preventing Retaliation and Immigration-Based Threats to Workers*, April 2019. Available at: https://www.clasp.org/sites/default/files/publications/2019/04/2019_addressingandpreventingretaliation.pdf
[xiv] New York City Administrative Code, §20-918.
[xv] New York City Administrative Code, §20-912.
[xvi] New York City Administrative Code, §20-924.
[xvii] Los Angeles Municipal Code § 188.07.
[xviii] *Id*.
[xix] *Id*.
[xx] *Id*.
[xxi] N.J. Rev. Stat. §34:11-58.1.
[xxii] Chinese Progressive Association. Check, please! Health and working conditions in San Francisco Chinatown restaurants. San Francisco: CPA; 2010.
[xxiii] San Francisco Administrative Code, Chapter 12R.7.c.2.
[xxiv] Rajiv Bhatia, MD, MPH, Megan Gaydos, MPH, Karen Yu, MPH, REHS, June and Weintraub, ScD, Protecting Labor Rights: Roles for Public Health, Public Health Reports, Volume 128, 2013 Supplement 3. Available at: https://journals.sagepub.com/doi/pdf/10.1177/00333549131286S307.
[xxv] http://www.wagejustice.org/legal-strategies, last visited October 25, 2019.
[xxvi] Matthew Sirolly, Attorney, California DLSE, last updated July 2017.
[xxvii] NELP, *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft*, 2011 at 113 – 123. Available at: https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJustice2011.pdf.
[xxviii] https://www.dir.ca.gov/DIRNews/2020/2020-15.html
[xxix] Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, October 2018. Available at: https://econ.ucsb.edu/docs/default-source/default-document-library/regulation-by-shaming-deterrence-effects-of-publicizing-violations-of-workplace-safety-and-health-laws.pdf?sfvrsn=0
[xxx] CA Labor Code § 98.2 (2017); This bond requirement applies when an employer appeals to Superior Court after an internal agency review of the matter. The standard of review is de novo.
[xxxi] San Francisco Office of Labor Standards Enforcement Paid Sick Leave Rule 14, 2018.
[xxxii] Rules Implementing the Minneapolis Municipal Minimum Wage Ordinance, Rule 6. Appeal.

[xxxiii] The rule includes a provision that hearing office may still take testimony at its discretion, which could mean the hearing officer would consider information that was available but not provided to the agency during the investigation.

[xxxiv] Fine, Janice (2018) "New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward," University of Chicago Legal Forum: Vol. 2017 , Article 7, page 146. Available at:https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/7

[xxxv] Fine, Janice at 152.

[xxxvi] Cailin Dejillas and Jenn Round, Tool 7: Sharing Information with Community Organizations, September 2019. Available at: https://www.clasp.org/sites/default/files/publications/2019/09/2019_sharinginformation.pdf