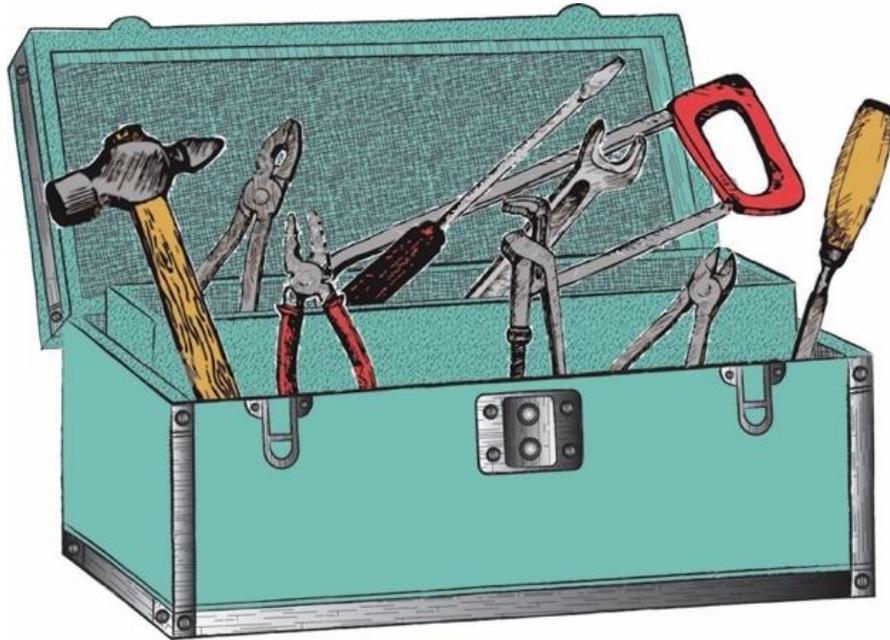


# The Labor Standards Enforcement Toolbox



## Tool 9: Assessing and Maximizing Labor Standards Enforcement Powers

by **Cailin Dejillas**

edited by Janice Fine, Tanya Goldman, and  
Jenn Round

September 2020

## Assessment of Existence and Utilization of Agency Powers

This paper is a companion piece to [Tool 8: A Baker's Dozen of Essential Enforcement Powers](#). Together these papers help the reader identify the enforcement powers of a labor standards agency and consider whether they are being appropriately leveraged to achieve widespread compliance. After identifying gaps in enforcement powers, this paper helps the reader develop a plan to prioritize the use of underutilized powers it already has and begin to obtain other essential powers.

Below is an exercise designed for agencies to evaluate the powers they have and whether each power is being fully utilized. Often, agencies know the laws they enforce forward and backward. However, it is not uncommon for agencies to fall into enforcement patterns that shy away from using all the powers at their disposal. Additionally, some agencies have historically interpreted their powers more narrowly than the laws require and so are unaware of all the powers available to them. As such, this exercise should be completed while reviewing the relevant laws and regulations with a fresh eye to ensure the status quo is not reinforcing old practices or interpretations that may be undermining the agency's effectiveness.

	<b>Under the laws I enforce, my agency <u>has</u> the power to:</b>	<b>Currently, my agency <u>utilizes</u> the power to:</b> If you use the power, indicate how often: always/often (A), sometimes (S), or rarely (R)
<b>Intake Powers:</b> 1. Establish enforcement priorities, e.g. priority industries, employers, types of violations, organization referral, etc. vs. treat every intake the same 2. Refer out/not initiate an investigation b/c intake doesn't meet enforcement priorities (as opposed to taking every complaint) 3. Decide the order in which intakes are initiated depending on priorities (as opposed to filing cases on first come, first serve basis)	<b>Intake Powers:</b> 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/>  Total intake powers: ____	<b>Intake Powers:</b> A   S   R 1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 4. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 5. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 6. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> 7. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>  Total intake powers used: _____

<p>4. Use an assortment of enforcement tools (e.g. demand letter, conciliation, full investigation) depending on the priority level of the intake</p> <p>5. Keep complainants and witnesses confidential</p> <p>6. Name all possible responsible parties as respondents (companies up the chain, joint employers, and individuals)</p> <p>7. Initiate and conduct company-wide investigations (as opposed to individual investigations)</p>		<p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>																																
<p><b>Investigative powers:</b></p> <p>1. Initiate an investigation without a complaint (i.e. directed or proactive investigations)</p> <p>2. Conduct surveillance before initiating an investigation</p> <p>3. Conduct surveillance during an open investigation</p> <p>4. Conduct onsite investigations (without employer's consent)</p> <p>5. Compel records and interviews (w/out a subpoena)</p> <p>6. Subpoena testimony and/or records</p> <p>7. Enforce subpoenas if the party does not comply</p>	<p><b>Investigative powers:</b></p> <p>1. <input type="checkbox"/></p> <p>2. <input type="checkbox"/></p> <p>3. <input type="checkbox"/></p> <p>4. <input type="checkbox"/></p> <p>5. <input type="checkbox"/></p> <p>6. <input type="checkbox"/></p> <p>7. <input type="checkbox"/></p> <p>Total investigative powers: _____</p>	<p><b>Investigative powers:</b></p> <table border="0"> <thead> <tr> <th></th> <th>A</th> <th>S</th> <th>R</th> </tr> </thead> <tbody> <tr><td>1.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>2.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>3.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>4.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>5.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>6.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>7.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> </tbody> </table> <p>Total investigative powers used: _____</p> <p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>		A	S	R	1.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	2.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	3.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	4.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	5.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	6.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	7.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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<p><b>Legal strategies</b></p> <p>1. Burden on the employer to prove a worker is an independent contractor rather than an employee</p> <p>2. Use a rebuttable presumption of a violation if the employer</p>	<p><b>Legal strategies</b></p> <p>1. <input type="checkbox"/></p> <p>2. <input type="checkbox"/></p> <p>3. <input type="checkbox"/></p> <p>4. <input type="checkbox"/></p>	<p><b>Legal strategies</b></p> <table border="0"> <thead> <tr> <th></th> <th>A</th> <th>S</th> <th>R</th> </tr> </thead> <tbody> <tr><td>1.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>2.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>3.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> <tr><td>4.</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> </tbody> </table>		A	S	R	1.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	2.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	3.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	4.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>												
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<p>does not keep or provide records to the agency</p> <ol style="list-style-type: none"> <li>Investigate and hold joint employers accountable</li> <li>Establish strict liability for up-the-chain entities</li> <li>Investigate and find the owners personally liable</li> <li>Investigate and hold successors liable</li> </ol>	<ol style="list-style-type: none"> <li><input type="checkbox"/></li> <li><input type="checkbox"/></li> </ol> <p>Total legal strategies: _____</p>	<ol style="list-style-type: none"> <li><input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li><input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> </ol> <p>Total legal strategies used: _____  Always/often: _____  Sometimes: _____  Rarely: _____</p>																																								
<p><b>Retaliation</b></p> <ol style="list-style-type: none"> <li>Investigate retaliation</li> <li>Use a rebuttable presumption of retaliation if the adverse action occurs within a specified number of days of the protected activity</li> <li>Remedy retaliation with back wages + interest + damages + penalties</li> </ol>	<p><b>Retaliation</b></p> <ol style="list-style-type: none"> <li><input type="checkbox"/></li> <li><input type="checkbox"/></li> <li><input type="checkbox"/></li> </ol> <p>Retaliation powers: _____</p>	<p><b>Retaliation</b></p> <table style="width: 100%; text-align: center;"> <tr> <td></td> <td>A</td> <td>S</td> <td>R</td> </tr> <tr> <td>1.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>2.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>3.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table> <p>Retaliation powers used: _____  Always/often: _____  Sometimes: _____  Rarely: _____</p>		A	S	R	1.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	2.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	3.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																								
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<p><b>Back Wages, Damages, Fines and Penalties</b></p> <ol style="list-style-type: none"> <li>Assess back wages + interest owed without access to reliable payroll docs (e.g. rely solely on worker interviews to determine damages)</li> <li>Assess back wages + interest owed when records are voluminous or difficult to navigate (e.g. use representative evidence)</li> <li>Require full amount of back wages owed</li> <li>Require interest</li> <li>Assess liquidated damages on top of back wages + interest</li> </ol>	<p><b>Back Wages, Damages, Fines and Penalties</b></p> <ol style="list-style-type: none"> <li><input type="checkbox"/></li> </ol>	<p><b>Back Wages, Damages, Fines and Penalties</b></p> <table style="width: 100%; text-align: center;"> <tr> <td></td> <td>A</td> <td>S</td> <td>R</td> </tr> <tr> <td>1.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>2.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>3.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>4.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>5.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>6.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>7.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>8.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>9.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </table>		A	S	R	1.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	2.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	3.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	4.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	5.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	6.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	7.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	8.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	9.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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<p>6. Asses fines and/or civil penalties for violations</p> <p>7. Assess a fine or civil penalty for non-responsiveness or impeding the investigation</p> <p>8. Assess greater damages, fines, and civil penalties against repeat offenders for subsequent violations</p> <p>9. Assess robust penalties and/or other damages for retaliation</p>	<p>Powers re damages, penalties, fines: _____</p>	<p>Powers re damages, penalties, fines used: _____</p> <p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>
<p><b>Settlement Agreements and Citations/Orders</b></p> <p>1. Require compliance monitoring and place the burden on the employer to provide documents proactively at certain deadlines</p> <p>2. Require employer and/or employee trainings</p> <p>3. Craft and enforce terms that address barriers to compliance (e.g. create compliant tip tracking or rest break policy; establish a new process for tracking hours worked, etc.)</p> <p>4. Require the employer to create an internal complaint and investigatory procedure</p> <p>5. Require the employer to hire a compliance officer</p> <p>6. Require the employer to create an employee and/or management handbook that includes an explanation of labor standards rights</p>	<p><b>Settlement Agreements and Citations/Orders</b></p> <p>1. <input type="checkbox"/></p> <p>2. <input type="checkbox"/></p> <p>3. <input type="checkbox"/></p> <p>4. <input type="checkbox"/></p> <p>5. <input type="checkbox"/></p> <p>6. <input type="checkbox"/></p> <p>Settlement and citation powers: _____</p>	<p><b>Settlement Agreements and Citations/Orders</b></p> <p>A S R</p> <p>1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>4. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>5. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>6. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>Settlement and citation powers used: _____</p> <p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>
<p><b>Collections</b></p> <p>1. Suspend, rescind, or not renew business license</p>	<p><b>Collections</b></p> <p>1. <input type="checkbox"/></p>	<p><b>Collections</b></p> <p>A S R</p> <p>1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p>

<ol style="list-style-type: none"> <li>2. Suspend, rescind or not renew other licenses (e.g. department of health license for restaurants, professional license or owner's driver's license)</li> <li>3. Use stop work orders</li> <li>4. Bonds</li> <li>5. Pre-judgment liens (e.g. mechanic's lien)</li> <li>6. Restitution funds or public insurance schemes for unpaid wages</li> <li>7. Levies (till tap, bank accounts, real wages, etc.)</li> <li>8. Liens</li> <li>9. Hot goods authority</li> </ol>	<ol style="list-style-type: none"> <li>2. <input type="checkbox"/></li> <li>3. <input type="checkbox"/></li> <li>4. <input type="checkbox"/></li> <li>5. <input type="checkbox"/></li> <li>6. <input type="checkbox"/></li> <li>7. <input type="checkbox"/></li> <li>8. <input type="checkbox"/></li> <li>9. <input type="checkbox"/></li> </ol> <p>Collections powers: _____</p>	<ol style="list-style-type: none"> <li>2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>4. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>5. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>6. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>7. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>8. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>9. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> </ol> <p>Collections powers used: _____  Always/often: _____  Sometimes: _____  Rarely: _____</p>
<p><b>Appeal</b></p> <ol style="list-style-type: none"> <li>1. Preclude the employer from using records or evidence on appeal or in litigation if it was not provided pursuant to a subpoena</li> <li>2. In order to appeal, the employer must post a bond for the entire amount owed</li> <li>3. Limit the reviewing body's authority to affirm the agency's damage recommendation absent an abuse of discretion</li> </ol>	<p><b>Appeal</b></p> <ol style="list-style-type: none"> <li>1. <input type="checkbox"/></li> <li>2. <input type="checkbox"/></li> <li>3. <input type="checkbox"/></li> </ol> <p>Appeal powers: _____</p>	<p><b>Appeal</b></p> <p style="text-align: center;">A   S   R</p> <ol style="list-style-type: none"> <li>1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> </ol> <p>Appeal powers used: _____  Always/often: _____  Sometimes: _____  Rarely: _____</p>
<p><b>Partnerships</b></p> <ol style="list-style-type: none"> <li>1. Partner with worker or community orgs on outreach, education, and training</li> <li>2. Partner with worker or community orgs on</li> </ol>	<p><b>Partnerships</b></p> <ol style="list-style-type: none"> <li>1. <input type="checkbox"/></li> <li>2. <input type="checkbox"/></li> <li>3. <input type="checkbox"/></li> </ol>	<p><b>Partnerships</b></p> <p style="text-align: center;">A   S   R</p> <ol style="list-style-type: none"> <li>1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> <li>3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></li> </ol>

<p>investigations, including worker outreach and intakes, identification of the workforce, worker interviews, employer research, payroll reconstruction, compliance monitoring, etc.</p> <p>3. Share information with community organizations about open cases</p> <p>4. Provide funding to worker or community orgs to support the partnership</p> <p>5. Partner with other state, local, and federal agencies to ensure coordinated efforts, increase leverage against a noncompliant, employer, etc.</p> <p>6. Refer cases for criminal prosecution</p>	<p>4. <input type="checkbox"/></p> <p>5. <input type="checkbox"/></p> <p>6. <input type="checkbox"/></p> <p>Partnership powers: _____</p>	<p>4. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>5. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>6. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>Partnership powers used: _____</p> <p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>
<p><b>Communication</b></p> <p>1. Issue press releases about investigations</p> <p>2. Publicly name violators and remedies</p> <p>3. Do outreach to employers and/or priority sectors</p>	<p><b>Communication</b></p> <p>1. <input type="checkbox"/></p> <p>2. <input type="checkbox"/></p> <p>3. <input type="checkbox"/></p> <p>Communication powers: _____</p>	<p><b>Communication</b></p> <p>A S R</p> <p>1. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>2. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>3. <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/></p> <p>Communications powers used: _____</p> <p>Always/often: _____</p> <p>Sometimes: _____</p> <p>Rarely: _____</p>
	<p><b>Total powers:</b></p>	<p><b>Total powers used:</b></p> <p><b>Total powers used always/often:</b></p> <p><b>Total powers used sometimes:</b></p> <p><b>Total powers used rarely:</b></p>

## MAXIMIZING EXISTING POWERS

After completing the above evaluation, it is important to identify the reasons the agency may not have been completely utilizing the full complement of its enforcement powers.

For example, an agency may not prioritize complaints because it is unsure how to fairly and appropriately do so. Additionally, an agency may not pursue potential joint employer cases or levies because it does not have internal legal expertise and is lacking the necessary support of its legal advisors who are based in another department. An agency may not assess liquidated damages when it settles an investigation because the statute does not explicitly provide for such damages unless the case goes to court. Each of these challenges call for a different solution requiring varying degrees of time, resources, and collaboration.

Below are some questions to help agencies identify barriers and put together a plan to maximize the use of existing powers:

1. Answer the below questions.
  - What powers does the agency use sometimes or rarely that you know you need to start using more regularly?
  - What powers does the agency have but does not use that you know you need to start using?
  - Are there powers the agency is unsure it has that would bolster your effectiveness?
2. Think about what your agency's biggest enforcement needs and challenges are: Where in the enforcement process do you see recurrent delays or obstacles? Is there a particular enforcement tool that could bring investigations back on course?
3. List the powers you named in Question 1 in order of priority based on the needs and enforcement challenges you listed in Question 2.
4. For each power on your list, answer the following:
  - What challenges have kept the agency from fully using each power in the past?
  - Name at least one solution or strategy per power to address the challenges or barriers you listed, while considering:
    - Do new or additional processes or procedures need to be developed to fully utilize each power?
    - Are there staffing or logistical implications?
      - Can resources be freed up or redirected to address these?
    - Who needs be involved to implement each solution/strategy?
      - Will you need to (re)establish contacts with other departments or agencies?
      - Will you need to engage external community partners or other stakeholders?
  - What is a viable timeline for implementing each solution/strategy you named?

5. Create a realistic plan and timeline for maximizing your agency's use of the powers it has. Be sure to determine who is accountable for each step in the plan and deadlines to stay on track.

## Inter-Agency Collaboration

As an agency increases the use of tools, it may require increased inter-agency collaboration to effectively roll out new powers such as enforcing a subpoena or suspending a restaurant permit. The agency's attorneys or another department within the jurisdiction may be key players in effectuating the powers. Developing transparent relationships that prioritize ongoing communication and collaboration will help the agency to consistently follow through with its pursuit of documents or testimony and impact the employer's ability to operate if they do not remedy the wrongs.

Sometimes, getting to a place of smooth communication and collaboration starts with a steep learning curve but evens out once parties are on the same page. When the U.S. Department of Labor (DOL) started using more enforcement tools, it had to coordinate its approach with the Office of the Solicitor. David Weil, then Administrator of the Wage and Hour Division of DOL, stated, "Committing to using these tools was . . . only the first step: figuring out how to change the way that WHD and the Solicitor's office interacted in the National Office and in the field was a separate, difficult, but essential part of making it happen."<sup>1</sup>

In other instances, the partnership will not require as much work and parties will collaborate easily to achieve their mutual objectives. The Wisconsin Department of Workforce Development successfully collaborates with the State Department of Justice in its use of pre-investigation liens when the amount due is large.<sup>1</sup> The State Department of Justice takes on two to three cases a month and devotes five to six hours per case, filing a lien up front and then collecting once the investigation is complete and appeals are exhausted.<sup>1</sup> The relationship adds power to the lien. The provision within the law is also strong, giving the pre-investigation lien super-priority over almost all other liens; thus, if the employer has no more assets, the Department often recovers money from other lienholders.<sup>1</sup>

## FILLING GAPS

After evaluating the powers the agency has, the agency can shift its focus to filling the gaps left by the powers it is missing. In doing so, it is important for the agency to first

identify what are its most critical and common enforcement challenges and which powers would help mitigate them. It may be that there are several missing enforcement powers that could address one problem, so the agency may want to consider low-hanging fruit most immediately while it works to secure longer-term changes. For example, an agency may receive few complaints from workers still employed with noncompliant employers, find it difficult to engage currently employed workers in an ongoing investigation, and recognize community partners are reluctant to refer vulnerable workers to the agency. The agency may realize that all of these issues are because the laws enforced by the agency lack retaliation protections. To address this, the laws will need to be amended. In the meantime, the agency could explore whether it is able to keep the identity of the complainant confidential under applicable public disclosure laws to provide some protections to current workers facing ongoing violations. Additionally, the agency could begin to build a directed investigation program to proactively initiate investigations in industries with workers who are particularly vulnerable to violations but are unlikely to complain. While the use of these additional powers is no substitute for strong retaliation protections, they can be used as interim measures to provide some safeguards for vulnerable workers while the substantive gap in the law is addressed.

Agencies may utilize the following questions to flesh out a plan for obtaining additional enforcement powers:

1. Answer the below questions.
  - What powers does the agency lack that it needs to obtain?
  - If the power requires legislative changes, is there a way to use the powers or tools already in existence to create interim substitute powers? (e.g. granting nondisclosure, starting company-wide investigations)
  - What other powers could the agency strive to obtain?
2. What critical enforcement challenges does your agency face that existing agency powers cannot address? What aspect of enforcement is most lacking yet critically important for your agency? (e.g. proactive enforcement, obtaining employer records, accessing worker testimony, access to liquidated damages)
3. List the powers you named in Question 1 in order of priority based on the needs and enforcement challenges you listed in Question 2.
4. For each power on your list, answer the following:
  - What challenges have kept the agency from pursuing each power?
  - Name at least one solution or strategy per power to address the challenges of obtaining the new power, and consider:
    - Must the law or a rule be amended to incorporate the power?

- Are there external community partners or other stakeholders that could be engaged to help push legislation through?
- Who needs be involved to implement each solution/strategy?
  - Will you need to (re)establish contacts with other departments or agencies?
  - Would engaging external community partners or other stakeholders facilitate implementation?
- Are there staffing or logistical implications?
  - Can resources be freed up or redirected to address these?
- What is a viable timeline for implementing each solution/strategy you named?

5. Create a realistic plan and timeline for adding to your agency's powers. Be sure to determine who is accountable for each step in the plan and deadlines to stay on track.

## CONCLUSION

As an agency considers how to supplement or better employ its powers, it may be overwhelmed with the task. Stay calm. Progress comes with a plan, consistent action toward a goal, and communication with the involved parties. The journey to obtain more powers is aligned with the journey to become more strategic as an enforcement agency, which is a natural progression as an agency grows.

Once the agency has a plan for better using its current powers and for growing powers it currently does not have, think about how those plans overlap. Is there a way to start building toward the powers the agency does not have while starting to use the powers the agency has not previously used? There may be a non-linear path that feels right for the agency as it sets out to use and obtain powers. As well, when conversations begin, relationships evolve, and workloads shift, you may find an easy path to obtaining a power that previously appeared out of reach.

If as the agency sets out to use and grow powers, it faces obstacles, know that you are not alone. Reaching out to other agencies and learning from their challenges may be comforting and give you ideas about how to proceed.

As circumstances evolve, and at a regular time each year, revisit this assessment of powers. It will affirm your progress and keep you on track to continued dynamic enforcement of labor standards.