

An Advocate's Guide to Building Stronger Labor Standards Enforcement



Building Block 1: Essential Labor Standards Enforcement Powers

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The Center for Innovation in Worker Organization (CIWO) at Rutgers University is a think and do tank that works to shift the balance of power towards greater economic and social equality. CIWO's Strengthening Labor Standards Enforcement program works with state and local government agencies and worker and community organizations to improve the enforcement of labor standards laws. CIWO, in partnership with the Center for Law and Social Policy (CLASP), has created a [Labor Standards Enforcement Toolbox](#) comprised of papers covering various enforcement topics to help labor standards enforcement agencies maximize their effectiveness.

This paper is the first in CIWO's new series, ***An Advocate's Guide to Building Stronger Labor Standards Enforcement***, aimed at providing worker advocates with strategies for leveraging labor standards enforcement to ensure hard fought worker protections are realized. Additional briefs in this series will be posted to CIWO's [website](#) as they are available.

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Introduction

Federal gridlock, dysfunction, and recent policy changes have increased the focus of worker protection advocacy on state and local governments. As important as the shift in labor policy to the subnational level is, the effectiveness of new or amended laws that aim to improve working conditions are contingent on a crucial, but often overlooked factor: enforcement. All too often, compromise to achieve new statutory rights has come at the cost of strong enforcement powers in the laws. In order for new and existing policies to be wielded by and on behalf of workers in ways that yield substantial improvements in workplace conditions and worker power, the attention, effort, and political will that is deployed to pass substantive rights must be also be harnessed to ensure agencies charged with enforcing those rights have the power and resources to do so effectively.

It can be difficult to organize around specific enforcement powers because their importance may be unclear until the agency commences enforcement or runs into a new challenge in a particular case. Therefore, this paper sets out to provide a guide for advocates on essential statutory powers administrative agencies need to robustly enforce labor standards laws. Using real life examples that contrast strong and inadequate statutory language, this paper provides advocates with information as to how legal provisions or omissions can restrict or bolster fundamental enforcement powers.¹ Notably, this paper focuses only on the most basic enforcement powers, which serve as a foundation on which more aggressive powers can be added.

This guide can be used as a checklist for advocates as they work to pass new laws or as a guide for determining whether existing laws need to be amended to increase the enforcement capacity of a state or local agency. Likewise, if new labor standards laws rely on the enforcement mechanisms of older wage and hour laws, assessing the earlier laws to ensure they include essential enforcement powers is crucial. Where advocates recognize the laws on the books include weaknesses like those represented in the inadequate statutory language discussed below, the law should be amended to replace the deficiencies with provisions akin to the examples of strong statutory language or the model language.²

¹The examples provided below do not account for case law or overlap between laws. For example, it is possible that enforcement powers under a minimum wage law are more limited, while a wage theft law covering minimum wage violations has more robust powers that can be used when investigating minimum wage violations. Additionally, rules or regulations are not covered below, but they too can further restrict or expand on enforcement powers and thus should be considered when analyzing the tools available or potentially available to an agency.

² Model language for each power is available at the end of each section. Model language for all powers and additional footnotes regarding powers outside the scope of this paper are provided in the Appendix.

Power to Investigate

The most fundamental power labor standards enforcement agencies need is the ability to investigate. Without the power to investigate, the agency cannot look for or establish facts, including whether a violation occurred, which workers were impacted, and which remedies are owed. Similarly, unnecessary restrictions on the power to investigate can render the agency significantly less effective at upholding workers' rights.

Strong Statutory Language

- **Extensive Power to Investigate** - San Francisco's Minimum Wage Ordinance gives the Office of Labor Standards Enforcement (OLSE) broad and robust investigative authority:

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. [San Francisco Admin. Code § 12R.7\(c\)\(1\)](#).

Significantly, OLSE's ability to investigate persons other than those defined as an "Employer" helps ensure OLSE has the authority to investigate non-employers that may be responsible for retaliation, which can be perpetrated by an "Employer or any other party." See [San Francisco Admin. Code § 12R.6](#).

- **Sufficient Statute of Limitations with Tolling** - Statutes of limitations (SOLs) determine the period of time that an alleged violation is actionable. Where violations have been ongoing for a long time, short SOLs can limit the agency's power to investigate by restricting the amount of time an agency can look back to remedy violations. Likewise, in situations where workers are unaware of their rights, short SOLs can preclude agencies from acting on a complaint where the employee learned after the fact that an employment practice was illegal. SOLs should give agencies at least three years to commence an investigation from the date of the alleged violation,³ and applicable SOLs for civil actions should toll, or pause the running of the SOL, during an agency investigation.⁴

³ Some jurisdictions provide substantially longer SOLs than three years. For example, New York State's Payment of Wages law creates a six-year SOL that includes tolling during an agency investigation. See [N.Y. Lab. § 198\(3\)](#).

⁴ Importantly, the amount of time employers are legally required to maintain records should at least mirror the SOL to preserve documentary evidence in case of an investigation or lawsuit. For more information on records requirements, see [below](#).

Seattle's Paid Sick and Safe Time ordinance includes a three-year SOL and tolling:

The Agency's investigation must commence within three years of the alleged violation. To the extent permitted by law, the applicable statute of limitations for civil actions is tolled during any investigation under this Chapter 14.16 and any administrative enforcement proceeding under this Chapter 14.16 based upon the same facts. [Seattle Municipal Code § 14.16.070\(c\)](#).

Inadequate Statutory Language

- **No Power to Investigate** - Conversely, under a wage theft ordinance passed in Pinellas County, Florida, complaints must be filed with the Pinellas County Office of Human Rights (PCOHR), but the ordinance does not give the agency the power to investigate. The statutory language provides:

It is the policy of the County to encourage mediation of the charges. **The PCOHR will work with the parties in an attempt to mediate a complaint.... If mediation is declined or is unsuccessful, the PCOHR shall schedule a quasi-judicial hearing**, as soon as practicable, before a special magistrate that it deems to be qualified to hear wage theft matters and will notify the parties regarding hearing information.

For any employer to fail to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation,⁵ shall be wage theft; and such a violation shall entitle an employee, **upon a finding by a special magistrate appointed by the County or by a court of competent jurisdiction that an employer is found to have unlawfully failed to pay wages**, to receive up to three times the amount of back wages. [Pinellas Co. Code § § 70-306-307](#).⁶

Under the Pinellas County ordinance, PCOHR's primary role is to mediate conciliations between a complainant and an employer. However, without the

⁵ Note, payment of wages within a "reasonable time" as stated here is a weak requirement itself as it does not provide employers or employees with an explicit timeline for when wages must be paid. Such vagueness renders it more difficult for employers to know their obligations and for employees to know their rights.

⁶ Emphasis of statutory language throughout this paper was added by the author.

benefit of an investigation, PCOHR cannot ensure a settlement is fair, which – given the power and resource imbalance between employers and workers – is more likely to disadvantage workers who may feel pressured to agree to settle for anything, even when it is less than what they are owed. What’s more, if the issue is not conciliated, the matter goes to a quasi-judicial hearing. Unlike other agencies that are not just parties to hearings after they have established a violation through their investigations but are also responsible for proving the violation occurred at hearing,⁷ under the Pinellas County law, the parties to a hearing are the complainant and the employer. Each party is responsible for submitting evidence, cross-examining witnesses, and obtaining the issuance of subpoenas. See [Pinellas Co. Code § 70-307\(h\)\(2\)](#). This process puts low wage workers at a distinct disadvantage as workers do not have the investigative findings of a neutral party as a basis for proving their cases, and attorneys tend to be disinclined to take up cases where the payoff is low.

- **Power to Investigate Limited by Amount Owed** - The Wyoming Department of Workforce Services faces another investigatory obstacle. The agency’s authority to investigate is arguably restricted such that it is only empowered to accept claims for limited amounts of money.⁸ As Wyoming’s enforcement is complaint-based only,⁹ the agency cannot circumvent the cap on claims through proactive investigations. Accordingly, the agency’s ability to fully address egregious or high dollar violations is significantly limited:

The department is hereby empowered to take claims for unpaid wages under the provisions of W.S. 27-4-101 and 27-4-104. The department in taking a claim for unpaid wages as provided for in this act **is not to exceed the sum of five hundred dollars (\$500.00) or two (2) months**

⁷ See e.g. Seattle Municipal Code [14.19.090\(A\)](#):

Contested hearings shall be conducted pursuant to the procedures for hearing contested cases contained in [Section 3.02.090](#) and the rules adopted by the Hearing Examiner for hearing contested cases. The review shall be conducted de novo and the Director shall have the burden of proving by a preponderance of the evidence that the violation or violations occurred. Upon establishing such proof, the remedies and penalties imposed by the Director shall be upheld unless it is shown that the Director abused discretion....

⁸ In a phone call with the author, an investigator from the Labor Standards Office of the Department of Workforce Services clarified that in practice the Office will investigate claims over the cap but can only require the employer to pay up to \$500 or two-months wages. After the investigation, a worker can use the decision and file a private lawsuit to recover the remainder owed. While this practice helps workers recover at least a portion of what they are owed and provides evidence for a lawsuit, this bifurcated process is likely to create barriers for low wage workers to fully remedying violations.

⁹ Fine, Janice, Gregory Lyon, and Jenn Round. 2019. “Segmented Labor Federalism and the State of Subnational Labor Standards Enforcement in the U.S.” Under review, last modified June 6, 2019.

wages, whichever is the greater, per employee per wage claim. [Wyo. Stat. § 27-4-502](#).

- **Power to Investigate Limited by FLSA** - North Carolina provides yet another way in which the agency's power to investigate is significantly curbed as its laws exempt employees covered by the FLSA from most of its labor standards protections:

[Minimum Wage, Overtime, Youth Employment and Record Keeping provisions] do not apply to: (1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act. [N.C. Gen. Stat. § 95-25.14\(a\)\(1\)](#).

The FLSA covers the vast majority of employees in the country.¹⁰ This exemption, then, drastically limits the number of workers over which North Carolina's Wage and Hour Bureau has jurisdiction. While the agency may "gather facts as are essential to determine whether or not the employer is covered," where the agency knows or has determined the exemption applies, it has no further power to investigate or address violations. See [N.C. Gen. Stat. § 95-25.15\(a\)](#).

- **Power to Investigate Limited by Short Statute of Limitations** – Delaware's Wage Payment and Collection and Minimum Wage acts do not include a SOL. Instead, the Office of Labor Law Enforcement is limited by a one-year SOL for Courts and Judicial Procedures:

No action for recovery upon a claim for wages, salary, or overtime for work, labor or personal services performed, or for damages (actual, compensatory or punitive, liquidated or otherwise), or for interest or penalties resulting from the failure to pay any such claim, or for any other benefits arising from such work, labor or personal services performed or in connection with any such action, shall be brought after the expiration of 1 year from the accruing of the cause of action on which such action is based. [10 Del Code Ann. § 8111](#).

¹⁰ According to the Congressional Research Service, 84% of the U.S. labor force is covered by the FLSA. David Bradley, *Federal Minimum Wage: In Brief*, Congressional Research Service (2017), <https://fas.org/sgp/crs/misc/R43089.pdf>.

As the Office does not have the power to issue an administrative order or citation and must rather file a civil action to remedy violations established by an investigation, the SOL for civil actions effectively means the Office must not only initiate but conclude its investigation and file a civil action within a year of the violation. See [19 Del. Ann. Code §§ 903\(c\); 911\(b\); 1111\(c\); 1113\(b\)](#). Due to this restriction, the Office will not accept complaints in which the alleged violation occurred more than nine months prior to the complaint¹¹ to give the Office at least three months to complete its investigation.¹² Such short timelines are likely to disproportionately impact vulnerable workers who are unaware of their rights or who delay complaining because of fear of retaliation or the employer's empty promises to pay.

Model Language: Power to Investigate

The Agency has broad authority to take appropriate steps to enforce this Chapter. The Agency shall have the power to investigate any possible violations of this Chapter by any Employer or other person.

The Agency's investigation must commence within [three, four, five, six] years of the alleged violation. To the extent permitted by law, the applicable statute of limitations for civil actions is tolled during any investigation under this Chapter and any administrative enforcement proceeding under this Chapter based upon the same facts until the Director's [citation/order] becomes final, or where the Director does not issue [a citation/an order], until the date on which the Director notifies the complainant that the investigation has concluded.

¹¹ This restriction is included on the Office of Labor Law Enforcement's [Wage Claim Form](#) and was confirmed in a phone call with the author on 9/11/19.

¹² Note, three months is a very short time to complete a robust investigation and in most cases would preclude company-wide investigations or investigations into more complex issues like joint employment.

Power to Conduct Company-Wide Investigations

Labor standards violations tend to impact multiple employees. For example, rarely does a minimum wage violation affect only a single worker. Some employers may pay every hourly employee below the minimum wage, while other employers' violations may impact all entry-level employees in low wage positions. Indeed, how widespread the violations reach should be a key element in all high priority labor standards investigations.

Despite this, laws in some jurisdictions restrict agencies' power to investigate such that they can only investigate allegations brought by a complainant. This prevents agencies from determining whether and how many other employees are impacted by the alleged violations. Without the power to investigate company-wide to determine the scope of the violations, agencies will struggle to adequately address violations or drive broader deterrence effects necessary to drive compliance across an industry. Similarly, labor standards violations disproportionately affect society's lowest paid and most vulnerable workers, but these workers are not filing complaints at a rate anywhere close to the number of violations they experience.¹³ As a result, statutory restrictions that allow only for narrow investigations into whether the complainant's rights were violated tend to favor workers who are able and willing to contact and interact with government agencies.

Strong Statutory Language

- **Broad Investigative Power** - Alaska's Wage and Hour Act provides broad authority to investigate such that it is clear the Wage and Hour Administration has the power conduct a company-wide investigation:

The director, or an authorized representative of the director, shall (1) investigate and ascertain the wages and related conditions and standards of employment of **any employee** in the state.... [AK Stat 23.10.080](#).

- **Timelines to Gauge Capacity** - With respect to a statutory timeline for investigations, there may be circumstances in which it makes sense from an accountability perspective to advocate for a goal or measurement regarding the length of an agency's investigations. For example, in Seattle, an ordinance regulating the Office of Labor Standards Fund states:

¹³ Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45:3 Pol. & Soc'y 359 (2017).

Funding for enforcement should consider the level of resources needed to fulfill the goal of completing investigations within 180 days, taking into account the rate of successful completion of cases within 180 days during the previous year. The total funding required to maintain the current level of activity for all three elements shall be known as the minimum annual contribution. The minimum annual contribution for that year shall be reflected in the proposed City budget submitted by the Mayor to the City Council for the following year. Additionally, the Director may make further recommendations to the Mayor and the Council including, but not limited to, staffing, funding, and program design. [Seattle Municipal Code 3.15.007\(B\)](#).

This law uses a 180-day measurement to gauge investigator capacity to help determine the amount of funding needed to ensure the agency has the resources to robustly fulfill its mandate.¹⁴ However, the language does not require the agency to complete investigations within a set timeframe, a requirement that, as discussed [below](#), could interfere with OLS's ability to take on complex, company-wide investigations.

[Inadequate Statutory Language](#)

- **Written Consent Required** – Obtaining signed consent from every employee who may be potentially impacted by the alleged violation before initiating an investigation is virtually impossible in most cases, especially where vulnerable workers are involved. Accordingly, such a mandate effectively eliminates the power to conduct company-wide investigations.¹⁵

Virginia's Department of Labor and Industry (DOLI) is restricted by such a provision, which states:

The Commissioner...with the **written and signed consent of an employee**, may institute proceedings on behalf of an employee to enforce compliance with this section, and to collect any moneys

¹⁴ The 180-day measurement could be strengthened by adding a measurement or goal as to how many investigations per year the agency – or, alternatively, each investigator – should conduct or initiate. This addition would help avoid a potential loophole in Seattle's law wherein investigators' caseloads are kept excessively low in order to meet the 180-day goal.

¹⁵ Also of note, as DOLI needs an employee's written consent to act, it does not have the power to conduct directed investigations, which are discussed more [below](#).

unlawfully withheld from such employee which shall be paid to the employee entitled thereto. [Code of VA § 40.1-29\(F\)](#).

This provision precludes DOLI from initiating an investigation without the written and signed consent from each employee on whose behalf DOLI is acting. Likewise, this provision has been interpreted such that if, in the course of investigating a duly signed complaint, the agency finds the rights of other employees have been violated, it cannot act to address the additional violations unless the other impacted employees provide written, signed consent.

- **Short Timeline to Resolve Investigations** - Short statutory timelines for resolving complaints can render it impracticable for agencies to conduct company-wide investigations, especially in more complex cases (e.g. where there are no payroll records or there is a possibility of joint employer liability).

Washington State's wage payment law includes a 60-day timeline to finalize investigations, which is so short, it renders it nearly impossible for the agency to complete even simple company-wide investigations:

Unless otherwise resolved, the department shall issue either a citation and notice of assessment or a determination of compliance no later than sixty days after the date on which the department received the wage complaint. [RCW 49.48.083\(1\)](#).¹⁶

Notably, even statutory deadlines that give agencies more time than Washington has to complete investigations may hinder robust enforcement. Investigations of fissured workplaces tend to be more complicated and time-consuming as they often require determinations regarding issues like joint employment, employee misclassification, and successor liability. These are highly technical questions that require more factfinding and legal analysis than, for instance, a simple wage case in which the sole issue is whether an employer paid employees the required hourly wage. Thus, statutory timelines may undermine agencies' discretion and the incentive to invest more time and resources in high priority cases. Similarly, short timelines combined with high caseloads may put pressure on investigators to close the case before completing

¹⁶ Note, RCW 49.48.083(1) does permit LNI to extend the 60-day time period by providing advance written notice to the employee and the employer setting forth good cause for an extension and specifying the duration of the extension. While such an extension could provide an avenue for company-wide investigations in some cases, such timelines should be altogether avoided.

a thorough investigation when the violation is not obvious, even where further probing could establish that a violation occurred.

Model Language: Power to Conduct Company-Wide Investigations

The Director or their designees may initiate investigations, including individual and company-wide investigations, to determine the extent to which any potential Employer or other person is complying with this Chapter.

Power to Initiate Directed Investigations

Research analyzing FLSA violations and complaints established little overlap between industries with the highest violations and those with the highest rates of complaints.¹⁷ A complaints-based model, then, results in a glaring enforcement gap as few investigations are triggered in many of the industries in which enforcement is most needed. To address this, agencies need the power to proactively investigate employers in sectors that are not adequately addressed by complaints alone. Statutory language requiring a complaint or – as in Virginia’s case, noted [above](#) – written and signed consent in order to investigate are common statutory impediments to directed investigations.

Strong Statutory Language

- **Explicit Power to Initiate Directed Investigations** - Seattle’s labor standards ordinances expressly create the power to initiate directed investigations, and specifically allow for directed investigations in industries that have high rates of violations or that employ vulnerable workers:

The Agency shall have the power to investigate any violations of this Chapter 14.19 by any respondent. The Agency may initiate an investigation pursuant to rules issued by the Director including, but not limited to, situations when the Director has reason to believe that a violation has occurred or will occur, or when circumstances show that violations are likely to occur within a class of businesses because the workforce contains significant numbers of workers who are vulnerable to violations of this Chapter 14.19 or the workforce is unlikely to volunteer information regarding such violations. An investigation may also be initiated through the receipt by the Agency of a report or complaint filed by an employee or any other person. See e.g. [Seattle Municipal Code § 14.19.070\(a\)](#).

Generally, where a statute grants the agency broad, robust investigative powers, the power to initiate a directed investigation is included, even if it is not affirmatively named.¹⁸ However, expressly articulating the power can help combat a common non-statutory obstacle to directed investigations: the political

¹⁷ David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, *Comparative Labor Law and Policy Journal* 27(1): 59-92 (2005).

¹⁸ For example, San Francisco’s power to investigate under its minimum wage law, included [above](#), is broad enough to allow the agency to initiate directed investigations.

influence of the business community. In other words, statutory language like Seattle's can help to institutionalize the authority to initiate directed investigations, which may help preserve this power in the face of changing politics or administrations.

Inadequate Statutory Language

- **Complaint Required** - While a statutory requirement that a complaint be filed by an employee before an agency can initiate an investigation clearly interferes with the power to conduct directed investigations, the complaint requirement may not be explicit in the law. Where the agency's investigative power is framed in the law such that investigations are only linked to complaints, that a complaint is needed before an agency can act may be implied. For example, the enforcement section of Wyoming's wage law states:

The department is hereby empowered to take claims for unpaid wages under the provisions of W.S. 27-4-101 and 27-4-104....Upon receipt of a written claim for unpaid wages, the department shall process, investigate and determine the validity of the claim. [Wyo. Stat. §§ 27-4-502 & 504.](#)

As the department's powers are drafted narrowly to allow for taking claims and investigations are not mentioned except in relation to those claims, the law has been interpreted to limit the agency's investigative powers such that it cannot act without a written claim.¹⁹ In other words, the agency does not have the power to initiate directed investigations.

- **Complaint Required** - Similarly, investigations under Michigan's Payment of Wages and Fringe Benefits law are also tied to complaints. The statutory language has been interpreted to require a complaint before the agency can launch an investigation:²⁰

(1) An employee who believes that his or her employer has violated this act may file a written complaint with the department within 12 months after the alleged violation. A complaint filed under section 13(2) shall be filed within 30 days after the alleged violation occurs. Bilingual complaint forms shall be provided by the department in those areas where substantial numbers of non-English speaking employees are employed.

¹⁹ Fine, Lyon, Round, *supra* note 9.

²⁰ *Id.*

(2) Within a reasonable time after a complaint is filed the department shall notify the employer and investigate the claim and shall attempt to informally resolve the dispute. [MI Comp L § 408.481\(11\)\(1\)](#).

Model Language: Power to Initiate Directed Investigations

An investigation may be initiated by the Director or their designees following the receipt of a report or complaint filed by an employee or other person, or without a complaint. The Director may, in their discretion, initiate an investigation of any Employer, including, but not limited to, when the Director has reason to believe that a violation has occurred or will occur, or when circumstances show that violations are likely to occur within a class of businesses because the workforce contains significant numbers of workers who are vulnerable to violations of this Chapter or the workforce is unlikely to volunteer information regarding such violations.

Power to Triage Complaints

Triage is a system for sorting complaints into different treatment categories to efficiently manage them. Categories are then treated with enforcement actions that match the priority of the complaint. The lower the priority of the treatment category, the fewer resources the agency will spend on the complaint. As most agencies will receive far more complaints than they have resources to effectively handle, agencies need the power to triage so they can use resources previously spent on non-priority complaints to address the forces driving noncompliance.²¹ Indeed, most agencies will not have the resources necessary to take on directed investigations without a triage system.

Notably, not all enforcement powers need to be expressly provided for by law. Statutes provide agencies with varying degrees of discretion that may allow for the use of tools without explicitly naming them. The power to triage is one such example as it is a power that typically is not prescribed by law, but rather falls under procedural discretion. The key for assessing whether an agency has the power to triage, then, is to determine whether and to what extent the statute limits procedural discretion.

Strong Statutory Language

- **Ample Discretion to Triage** – New York State’s Payment of Wages law expressly provides the agency with discretion as to when and how to act, including whether to investigate and remedy allegations under the Payment of Wages law, which provides the Department of Labor with flexibility to triage complaints:

Nothing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies [between employers and employees relating to this article, or article five, seven, nineteen or nineteen A of this chapter], or to take assignments of wage claims, or to institute criminal prosecutions for any violation under this article or article five, seven, nineteen or nineteen-A of this chapter, but he or she shall be deemed vested with discretion in such matters. [N.Y. Lab. § 196\(2\)](#).

Inadequate Statutory Language

- **Mandate to Investigate Every Complaint** – One statutory requirement that generally restricts agency discretion such that triage is precluded is a mandate

²¹ For more information on the importance of triaging complaints and strategies for doing so, see Jenn Round, *Tool 1: Complaints, Intake, and Triage* (2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_complaintsintakeandtriage.pdf.

to investigate every complaint. For example, Washington state’s wage payment law requires:

If an employee files a wage complaint with the department, the department **shall investigate** the wage complaint. Unless otherwise resolved, the department shall issue either a citation and notice of assessment or a determination of compliance no later than sixty days after the date on which the department received the wage complaint. [RCW 49.48.083\(1\)](#).

Washington’s mandate to investigate impedes the agency’s power to triage complaints by taking other less resource-intensive enforcement actions off the table; thus, precluding the use of referrals, pre-investigatory mediation, phone calls, or letters in lieu of an investigation to address nonpriority complaints.²²

²² Significantly, forced arbitration is a growing trend. The number of workers subject to forced arbitration continues to increase. The Center for Popular Democracy and the Economic Policy Institute estimate that by 2024, 80% of private sector, nonunion workers will be precluded by forced arbitration clauses from filing civil actions to enforce their workplace rights (see [below](#) for model private right of action language). See Hamaji, Kate; Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz, and Margaret Poydock, *Unchecked Corporate Power: Forced arbitration, the enforcement crisis, and how workers are fighting back* (2019) <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

One effect of the rise in forced arbitration is that agencies may be the only means available to workers outside of private arbitration to address labor standards violations, thus rendering the need for robust administrative enforcement even more urgent. Of course, an important aspect of robust enforcement is the power to triage complaints. Though somewhat of a catch-22 situation, there are multiple strategies advocates can pursue that preserve the agency’s discretion to triage complaints while accounting for the pressure added by the growing forced arbitration conundrum. First, advocates can push agencies to consider whether workers can realistically pursue civil actions as part of the triage process. Where complainants are subject to forced arbitration should be a consideration for agencies as they determine how to prioritize and treat complaints.

Additionally, as triage is inherently linked to agency resources, advocates can back laws similar to [Seattle’s statute](#) that uses a 180-day timeline to gauge agency capacity. However, instead of measuring the length of investigations, the law can use the number of complaints in which the agency did not have the capacity to initiate an enforcement action to evaluate whether the agency needs increased funding to fulfill its mandate. This approach would help hold those with the budgetary power accountable to better ensure the agency is reasonably resourced without compromising the agency’s enforcement powers. Model language for such a statute could read:

By [date relevant to FY] of each year, the Director of the [agency] shall certify to the [executive] and [legislature] the funding needed for the following year to maintain each of the following elements of the operations and activities of the [agency]:

1. Enforcement activities, including but not limited to the investigation of complaints and directed investigations;
2. Outreach to employers; and
3. Outreach to employees.

Model Language: Power to Triage Complaints

The Agency has sole discretion to decide whether to investigate a complaint or otherwise pursue a possible violation of this Chapter.

In determining the funding required to sustain these activities, annual inflationary adjustments and increases in the staffing, overhead, and infrastructure costs will be taken into account for each of these elements. Funding for enforcement should consider the level of resources needed to fulfill the goal of protecting the rights of vulnerable workers, taking into account the number of complaints made by vulnerable workers, including low wage workers and workers who cannot effectively exercise their private rights of action, in which the agency declined to initiate an enforcement action during the previous year. The total funding required to maintain the current level of activity for all three elements shall be known as the minimum annual contribution. The minimum annual contribution for that year shall be reflected in the proposed [State/City] budget submitted by the [executive] to the [legislature] for the following year. Additionally, the Director may make further recommendations to the [executive] and the [legislature] including, but not limited to, staffing, funding, and program design.

Finally, advocates can organize to help pass whistleblower enforcement laws wherein if an agency declines to investigate and resolve a worker complaint, the worker can sue on behalf of the state and all impacted workers for penalties. Thereafter, where a court finds the employer violated the law, the court will impose a penalty, the majority of which goes to the agency, while a portion goes to the complainant and other aggrieved workers. Currently, California has such a law, the Private Attorneys General Act, and similar bills have been introduced in six additional states. For an in-depth discussion of this approach, see *id.* at 14 to 20.

Power to Compel Information

The power to compel information provides agencies with the ability to access the information they need to establish facts and make legal determinations. While cooperative employers may provide information voluntarily, bad faith employers are more likely to ignore agency requests. Thus, agencies often need leverage when investigating egregious violations committed against vulnerable workers. Likewise, some institutions that have information relevant to an investigation (e.g. payroll companies) may be unable or unwilling to produce information without being legally required to do so.

The power to compel can take different forms. Stronger powers to compel include the ability to issue subpoenas for testimony and documents, warrants, and/or orders of entry allowing access to a business or the place where work is performed, all of which should be expressly provided for in the labor standards laws. However, tools like subpoenas, which must be executed in accordance with due process, tend to involve procedures that are more resource-intensive and time-consuming. Thus, agencies also need authority to gain access to witnesses, businesses, and information without a subpoena so that subpoenas will only be needed in a limited number of investigations in which the employer refuses or objects to providing such information. Laws that omit or otherwise limit these powers increase enforcement obstacles, especially when agencies are dealing with bad actors.

Strong Statutory Language

- **Ability to Compel with and without Subpoenas** - West Virginia has robust powers to compel. The agency has the ability to inspect places of business and compel witness testimony and the production of documents without a subpoena, as well as the power to issue subpoenas that are expressly enforceable by a court.²³ Additionally, West Virginia has the power to take affidavits and depositions during the investigation, both of which involve providing evidence sworn as true, which can be especially helpful when investigating a case that is likely to end up at hearing or in court:

(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

²³ Some jurisdictions have the power to subpoena, but the subpoenas may not be enforceable by a court when an employer fails to comply. This renders the subpoena an empty threat, which could ultimately make the agency look weak, or otherwise dissuade the agency from using its subpoena power.

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. [W. Va. Code § 21-5-11](#).

- **Access to Records Onsite and Leverage When the Employer Refuses -** California also has strong powers to compel. California's labor laws requiring that every employer allow it entry into places of business or where the work is performed to secure any necessary information:

Every person employing labor in this state shall:

(b) Allow any member of the commission or the employees of the Division of Labor Standards Enforcement free access to the place of business or employment of the person to secure any information or make any investigation that they are authorized by this chapter to ascertain or make. [CA Lab. Code § 1174\(b\)](#)

The law also includes statutory leverage to incentivize the production of documents by precluding employers from using as evidence information that they did not produce upon written request to contest the agency's citation. Further, it requires that employers keep payroll records at the business or place of employment, which ensures employers cannot rely on the excuse that they do not have the payroll records on hand if an investigator conducts a site visit:²⁴

²⁴ Of course, where the employer has reason to hide the records during the investigation and at hearing - e.g. the records demonstrate violations – this provision by itself is weak leverage. *But* see CA Lab. Code § 1175, which makes it a misdemeanor to willfully provide or fail to keep such records.

(a) Any employer, or other person or entity, who may be liable for a violation of any provision of this code **shall be precluded from introducing as evidence, in an administrative proceeding contesting a citation or writ proceeding under Section 558 or 1197.1, books, documents, or records, as specified in subdivision (b), that are not provided pursuant to a duly served written request by the Labor Commissioner** under this section within the time the Labor Commissioner requests those books, documents, or records be produced, pursuant to either of the following:

(1) When the Labor Commissioner provides for no less than 15 days to respond, subject to the exceptions under subdivision (c), (d), (e), or (g).

(2) When the Labor Commissioner provides for less than 15 days to respond, subject to the exceptions under subdivision (c) or (e), if the Labor Commissioner, in his or her discretion, determines that circumstances exist that make it necessary to require a shorter period of production for the Labor Commissioner to conduct a complete investigation. In this instance, a statement indicating that determination of necessity shall be included with the written request from the Labor Commissioner.

(b) **The books, documents, or records to which this section applies are payroll, time, and employment records that are required to be maintained at the place of employment or at a central location within the state by the employer**, including, but not limited to, under Sections 226, 247.5, 1174, 2052, and 2673, and Section 6 or 7 ("Records") of any order of the Industrial Welfare Commission.

(c) Subdivision (a) shall not apply in the event that the person or entity subject to the written request by the Labor Commissioner for the production of books, documents, or records opposes such a request in court, prior to the issuance of any citation under Section 558 or 1197.1, and a court determines that the books, documents, or records are not required to be produced. [CA Lab. Code § 1174.1 \(a\)-\(c\)](#).

- **Rebuttable Presumption of Violation where Records Requirement Violated**
– An agency's ability to compel records is closely linked to legal requirements mandating employers maintain accurate records relevant to employers'

substantive violations under the statute.²⁵ Some employers, especially those acting in bad faith, may be incentivized to flout recordkeeping requirements to avoid documenting noncompliance, or otherwise falsify or destroy records when they learn of an investigation. One helpful enforcement power that can help discourage such behaviors is a rebuttable presumption that the employer violated the law where they failed to turnover or maintain records.

Minneapolis's Paid Time Off and Accrued Sick Time ordinance includes this power:

(c) The department shall have access to the records required by this article, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this article, including, but not limited to, inspections of books and records, interviewing employees and former employees, and investigating alleged violations of this article.

(d) If an employer **fails to create and retain adequate records or does not allow the department reasonable access to the records** and an issue arises as to an alleged violation of an employee's rights under this article, **it shall be presumed that the employer has violated this article, absent clear and convincing evidence otherwise.**²⁶ [Minneapolis Code of Ordinances §§ 40.430\(c\)-\(d\)](#).

Minneapolis's ordinance is particularly strong on this issue as the presumption of a violation must be rebutted by clear and convincing evidence, a more rigorous standard than preponderance of the evidence, which is commonly required to

²⁵ Thus, it is important that recordkeeping requirements oblige employers to maintain all information the agency needs to determine compliance. For example, a minimum wage law should require the employer keep records of the name, occupation, rate/s of pay, and contact information for each employee; the amount paid each pay period at straight-time and overtime rates to each employee, including any tips, deductions, or additions; hours worked each day and each workweek by each employee; and dates of payments and pay periods.

²⁶ While outside the scope of this paper, another subsection under this provision of Minneapolis's ordinance allows employees to access and inspect records, an important right - especially where employers are not required to proactively provide notification of pay or leave information - as it offers employees the ability to obtain information necessary to determine whether their substantive rights have been violated. The Minneapolis ordinance states:

An employer must allow an employee to inspect records required by this article and relating to that employee at a reasonable time and place. [Minneapolis Code of Ordinances § 40.430\(b\)](#).

prove labor standards violations.²⁷ Thus, where an employee credibly alleges a violation and an employer fails to maintain or provide access to adequate payroll records, the employer must demonstrate it is highly probable they are in compliance, a difficult task without payroll records.

Inadequate Statutory Language

- **Preliminary Negotiation Required** - While some jurisdictions simply omit powers to compel - an issue that should be remedied by amending the law to include such powers - Maryland's wage and hour laws provide an example of a different type of limitation. Maryland's Division of Labor and Industry has the power to issue subpoenas to obtain documents and witness testimony, but only after it has attempted to negotiate with the employer:

(b) Evidence. --

(1) In an investigation under this subtitle, the Commissioner shall try to negotiate with an employer to obtain the testimony or documentary evidence that is needed to determine whether a violation exists.

(2) If the Commissioner is unable to obtain evidence by negotiation, the Commissioner may issue a subpoena for the attendance of a witness to testify or the production of documentary evidence that relates to the subject matter of the complaint. [MD Lab & Emp Code § 3-408](#).

The requirement to negotiate for information needed to determine whether an employer is in compliance opens the door for employers to object to the type, format, and scope of information requested by the agency. The process of going back and forth regarding a foundational step in the investigation has the potential to delay the investigation from the outset. It also provides an opportunity for the employer to argue the agency's effort at negotiation was in bad faith or otherwise inadequate to justify issuance of a subpoena. Such a requirement should be avoided.

Model Language: Power to Compel Information

The Director or their designees, in accordance with due process, shall have power to enter and inspect places of business or employment; inspect and make copies of papers, books, accounts, records, payrolls, and documents; question

²⁷ Clear and convincing evidence requires the employer to show that it is substantially more likely than not that they are in compliance whereas preponderance of the evidence requires only the party with the burden – which, without a presumption, is typically the employee or the agency in labor standards cases – prove there is greater than 50% chance the claim is true. See [Colorado v. New Mexico, 467 U.S. 310 \(1984\)](#).

witnesses in private; administer oaths and examine witnesses under oath; issue subpoenas to compel the attendance and testimony of witnesses and the production of papers, books, accounts, records, payrolls, and documents; take depositions and affidavits; and investigate any such facts, conditions, practices or matters as the Director or their designees may deem appropriate to determine whether a violation occurred.

In case of failure of any potential employer or other person to comply with any subpoena lawfully issued, or on the refusal of any witness to testify to any matter regarding which they may be lawfully interrogated, it shall be the duty of the court, on application by the Director, to compel obedience by initiating 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.

To aid in the enforcement of this Chapter, any potential employer or other person employing labor in this jurisdiction shall:

- (1) Allow the Director or their designees free access to the place of business or employment of the person to secure any information or make any investigation that they are authorized by this Chapter to ascertain or make; and
- (2) Be precluded from introducing as evidence in an administrative proceeding contesting a citation or order books, documents, testimony, or other evidence that are not provided to the Director or their designees pursuant to the procedures and timelines outlined in [citation].

An employer shall create and retain records documenting [include records relevant to substantive rights created by law].

- 1) Such records shall be retained for a period of not less than three (3) years from the date such hours were worked.
- 2) If an employer fails to create and retain adequate records or does not allow the Director or their designees reasonable access to the records and an issue arises as to an alleged violation of an employee's rights under this article related to such records it shall be presumed that the employer has violated this article, absent clear and convincing evidence otherwise.

The Power to Remedy Violations for All Impacted Workers

The process for remedying violations after an investigation has been completed varies. Generally, if the case is not settled, agencies have either: 1) the power to issue an administrative citation or order requiring the violator pay the amounts determined by the agency;²⁸ or 2) the power to file a civil action in an effort to obtain a civil judgment that requires the violator to remedy the violations established by the investigation. Regardless of the legal mechanism ordering the employer to rectify the violations, the ability to conduct company-wide or directed investigations will mean little if the agency does not have the ability to compel the employer to remedy the violations against all affected persons as established by the agency's investigation.

Strong Statutory Language

- **Consent to Recover Explicitly Not Required** – Provisions limiting company-wide remedies may stem from the requirement that each impacted worker give consent or assign their claim to the agency in order for the agency to recover for each worker. Making the recovery of back wages and other damages contingent on written consent or wage assignments inhibits agencies from fully remedying widespread violations.

California has authority to remedy violations for all affected workers under its labor laws. The below provisions allow the agency to issue an administrative citation for violations and to collect wages and benefits due to impacted workers without an assignment or workers' consent:²⁹

If, upon inspection or investigation, the Labor Commissioner determines that a person has paid or caused to be paid a wage less than the

²⁸ Once an administrative citation or civil judgment has been issued and the violator fails to pay, the case moves to the collections and judgment enforcement stage. Enforcement of an administrative citation or order generally requires that the agency has the power to file a civil action to enforce the administrative order and compel payment through the courts. Through a civil action, the agency can obtain a civil judgment, which, if not paid, provides for the use of collections tools, like liens and levies, available for other unpaid civil judgments. For more information about collections and a discussion of various statutory collections powers outside the scope of this paper, see Jenn Round, *Tool 3: Collections* (2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_collections.pdf.

²⁹ A separate provision gives California the power to recover unpaid minimum wages and overtime compensation through a civil action without the consent of the affected workers. See [CA Lab. Code § 1193.6\(a\)](#). Notably, California also has another unique collection power to expedite the collections process. Where the agency issues an administrative order, and the employer fails to appeal and comply with the order, the agency needs only to file the administrative order with the superior court. By filing it in court, the administrative order is immediately converted into a judgment with the same force and effect as a civil judgment. This power saves the agency time and resources as it does not have to prove its case in a civil suit, thus allowing the agency to initiate a collections action available per a civil judgment promptly after the investigation is concluded. The law states:

minimum under applicable law, the Labor Commissioner may issue a citation to the person in violation. [CA Lab. Code § 1197.1\(b\)](#).

The Labor Commissioner, after investigation and upon determination that wages or monetary benefits are due and unpaid to any worker in the State of California, may collect such wages or benefits on behalf of the worker without assignment of such wages or benefits to the commissioner. [CA Lab. Code § 96.7](#).

Inadequate Statutory Language

- **Assignment Required** – Unlike jurisdictions like California in which the agency has the power to issue a citation or order to remedy violations established by an administrative investigation, where Pennsylvania’s Department of Labor and Industry (DLI) determines wages are due, the only option for DLI (aside from settling the matter) is to pursue recovery through a civil action. However, DLI is limited because it cannot remedy violations through a civil action unless an impacted party assigns their wage claims to the agency. Thus, even where DLI has found a violation, unless the employer voluntarily pays, it can only file suit to remedy the violations for those employees who assigned their claims to the agency.

Minimum Wage Act:

...**At the request of any employe (sic) paid less than the minimum wage** to which such employe was entitled under this act and regulations issued thereunder, **the secretary may take an assignment of such wage claim, in trust for the assigning worker and may bring any legal action necessary to collect such claim**, and the employer shall be required to pay the cost and such reasonable attorney's fees as may be allowed by the court. [Title 43 P.S. Labor § 333.113](#).

(d) If no notice of appeal of the order, decision, or award is filed within the period set forth in subdivision (a), the order, decision, or award shall, in the absence of fraud, be deemed the final order.

(e) The Labor Commissioner shall file, within 10 days of the order becoming final pursuant to subdivision (d), a certified copy of the final order with the clerk of the superior court of the appropriate county unless a settlement has been reached by the parties and approved by the Labor Commissioner. Judgment shall be entered immediately by the court clerk in conformity therewith. **The judgment so entered has the same force and effect as, and is subject to all of the provisions of law relating to, a judgment in a civil action, and may be enforced in the same manner as any other judgment of the court in which it is entered.** Enforcement of the judgment shall receive court priority. [Cal. Lab. Code § 98.2\(d\)-\(e\)](#).

Wage Payment and Collection Law:

If the secretary determines that wages due have not been paid and that such unpaid wages constitute an enforceable claim, **the secretary shall, upon the request of the employe, labor organization or party to whom any type of wages is payable, take an assignment in trust, from the requesting party of such claim for wages...and may bring any legal action necessary to collect such claim**, subject to the right by the employer to set-off or counter-claim against the assigning party. Upon any such assignment, the secretary shall have the power to settle and adjust any such claim to the same extent as might the assigning party. [Title 43 P.S. Labor § 260.9a\(e\)](#).

Such requirements may limit the number of highly vulnerable workers for whom the agency can recover. Just as vulnerable workers face barriers to filing a complaint, they are likely to experience similar obstacles in assigning wage claims. In a company-wide investigation, the identity of the complainant need not be disclosed as the administrative enforcement process generally does not reveal which workers participated in the investigation and remedies are pursued by the agency for all injured employees.³⁰ By requiring written consent or an assignment, however, workers are forced to out themselves and their participation in the enforcement action to the employer. Thus, such requirements may mean that those workers most in need of an agency's enforcement efforts are least likely to recover the money they are owed.³¹ What's more, the process of tracking down and obtaining assignments from every affected employee requires resources and time, and, if attempted, could prolong the enforcement process such that employees have to wait even longer for the money they are owed.

- **No Administrative Order or Civil Action** – South Carolina's Payment of Wages law is even more limiting as the statute does not include the power to issue an

³⁰ For model language and more information on maintaining the confidentiality of complainants and other witnesses, see footnote 42.

³¹ Aside from increasing barriers for vulnerable workers, such statutory requirements may also mean agencies must decide whether they can justify investigating potential violations against all employees, where the agency will be unable to recover for those who have not made an assignment. Accordingly, the assignment requirement may also disincentivize both directed and complaint-based company-wide investigations.

administrative citation/order or file a civil action to recover money for workers. Instead, where an investigation establishes a violation, the law allows only impacted employees – but not the agency – to file a civil action to recover wages. The law goes on to require the Department of Labor, Licensing and Regulation to bring a collections action but only for civil penalties payable to the State’s general fund. In effect, this means the agency does not have the power to require an employer to remedy violations established in an investigation for any worker.

In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 **the employee may recover in a civil action** an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due. [S.C. Code Ann. § 41-10-80\(C\)](#).

In each case where a civil penalty assessed under subsection (A) or (B) of Section 41-10-80 is not paid within sixty days the Director of the **Department of Labor, Licensing, and Regulation or his designee shall bring an action against the assessed employer for collection of the penalty. Any amounts collected must be turned over to the State Treasurer for deposit in the general fund** of the State. [S.C. Code Ann. § 41-10-90](#).

Model Language: Power to Remedy Violations for All Impacted Workers

An employer or other person found to be in violation of this Chapter shall be liable for full payment of unpaid wages or compensation due to each aggrieved person, plus interest, [liquidated damages/fines] payable to the aggrieved persons, fines and civil penalties payable to the Agency, and other equitable relief. Interest shall accrue from the date the unpaid wages were first due at [X] percent per annum.

In all investigations where the investigation has not been settled and in which a violation is found, the Director or their designees shall issue a [citation/order] to the violating Employer or person identifying the violation or violations and specifying the amounts due under this Chapter for each violation, including the payment of any unpaid wages or compensation for all aggrieved persons,

interest, [liquidated damages/fines] payable to the aggrieved persons, any applicable fines or civil penalties, and other equitable relief pursuant to [Section X]. If the violation is ongoing when the Agency opens an investigation, the Director shall order payment of amounts that accrue after the investigation was opened until the date the violation ceases or the date the Director's [citation/order] is final.

If a violator fails to comply with any final [citation/order] issued by the Director or [the appellate body] for which all appeal rights have been exhausted, the Agency or the [Attorney General, City Attorney, etc.] may, with or without the consent of the aggrieved persons, commence and prosecute a civil action to recover unpaid wages or compensation, including interest, equitable relief and [liquidate damages/fines payable to the employees] thereon owing to any aggrieved person under this Chapter or relevant citation or order. In addition to these wages or compensation, interest, and [liquidated damages/fines payable to aggrieved persons], the Agency shall be awarded applicable fines and civil penalties, and reasonable attorney's fees and costs of suit.

Power to Assess Significant Damages, Fines, and/or Penalties

Agencies need tools for addressing various employers' motives for noncompliance. Where an employer is financially motivated to violate labor standards laws, agencies need the power to require employers pay liquidated or other damages to all impacted employees on top of back wages and interest, as well as fines and/or civil penalties. These tools help ensure the price of violating substantially outweighs the cost of compliance. Thus, meager powers to award damages and penalties undermine agencies' potential to affect broad, sustained compliance.

Strong Statutory Language

- **Daily Penalties Payable to Workers and the Agency** - In lieu of liquidated damages, laws in some jurisdictions provide daily damages to workers. For example, San Francisco's Office of Labor Standards Enforcement (OLSE) has the power to require violators pay \$50 *per day* that the violation (willful or not) continued *to each impacted employee*:

Where the Agency...determines that a violation has occurred, it may order any appropriate relief including, but not limited to, reinstatement, the payment of any back wages unlawfully withheld, **and the payment of an additional sum as an administrative penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued.** A violation for unlawfully withholding wages shall be deemed to continue from the date immediately following the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2 of the California Labor Code, to the date immediately preceding the date the wages are paid in full.³² [San Francisco Admin. Code § 12R.7\(c\)\(2\)](#).

Depending on the number of impacted persons and the duration of the violation, this remedy scheme may result in higher penalties and greater deterrence than liquidated damages. Such language also has the benefit of incentivizing prompt corrective actions to limit the number of days that violations are ongoing. What's more, daily penalties provide a monetary remedy to employees who experienced a violation that did not result in lost wages, a

³² Note, San Francisco's law goes on to require interest be awarded in any administrative or civil action brought for nonpayment of wages at the rate defined by state law. See [San Francisco Admin. Code § 12R.7\(e\)](#).

consideration that may be particularly important under fair workweek or paid sick leave laws.³³

San Francisco also has the power to assess an additional \$50 fine *per employee per day* that is payable to the City:

In order to compensate the City for the costs of investigating and remedying the violation, the Agency may also order the violating Employer or person to pay to the City a sum of not more than **\$50 for each day and for each Employee or person as to whom the violation occurred or continued**. Such funds shall be allocated to the Agency and shall be used to offset the costs of implementing and enforcing this Chapter. [San Francisco Admin. Code § 12R.7\(c\)\(2\)](#).

These penalties are in addition to administrative penalties ranging from \$500 to \$1,000 for specific violations of the minimum wage law, which increase cumulatively by 50% for each subsequent violation of the same provision within a three-year period, a power aimed at obtaining sustained compliance. See [San Francisco Admin. Code § 12R.16](#). These combined powers to assess penalties for impacted persons and fines and penalties to the agency give OLSE many options to increase deterrence and ratchet up the cost of noncompliance.

Strong Statutory Language

- **Robust Penalties and Liquidated Damages** - Under the Arkansas Minimum Wage Law, the Arkansas Department of Labor (ADOL) has a robust penalty power with respect to willful violations. The requirement that the violations be *willful* in order to assess a penalty does create an additional hurdle to assessing penalties as willfulness must be established during the investigation. Where willfulness is not found penalties are precluded. Ideally, then, agencies should have the power to assess penalties, fines, damages for any violation, not just the

³³ Note, however, that some such laws do allow for liquidated damages in situations outside of lost wages. For example, Seattle's Paid Sick and Safe Time ordinance allows the agency to assess liquidated damages based on unpaid *compensation*, rather than unpaid wages. Seattle Municipal Code § 14.16.060(B). Compensation is defined to include promised or legislatively required paid leave. Seattle Municipal Code § 14.16.010. Thus, where an employer fails to pay paid sick leave as required, the agency can require liquidated damages based on the amount of paid sick leave owed (liquidated damages, however, still cannot be assessed for violations that did not result in lost compensation, e.g. failure to provide notice of rights or notification of balances). Thus, where liquidated damages are more politically feasible than daily penalties, it is important to carefully frame the basis on which liquidated damages can be assessed.

willful ones.³⁴ Under Arkansas’s Minimum Wage Law, ADOL may assess a penalty of \$50 to \$1,000 *per day* for a host of willful violations, including willfully withholding or falsifying records:

(a)(1) Any employer who willfully hinders or delays the Director of the Department of Labor or his or her authorized representative in the performance of his or her duties in the enforcement of this subchapter, willfully refuses to admit the director or his or her authorized representative to any place of employment, willfully fails to make, keep, and preserve any records as required under the provisions of this subchapter, willfully falsifies any such record, willfully refuses to make the record accessible to the director or his or her authorized representative upon demand, willfully refuses to furnish a sworn statement of the record or any other information required for the proper enforcement of this subchapter to the director or his or her authorized representative upon demand,³⁵ willfully fails to post a summary of this subchapter or a copy of any applicable regulations as required by § 11-4-216, pays or agrees to pay minimum wages at a rate less than the rate applicable under this subchapter, or otherwise willfully violates any provision of this subchapter or of any regulation issued under this subchapter shall be deemed in violation of this subchapter and shall be subject to a civil penalty of not less than fifty dollars (\$50.00) and not more than one thousand dollars (\$1,000) for each violation.

(2) For the purposes of this subsection, each violation shall constitute a separate offense.

³⁴ Those opposed to robust labor standards laws may raise examples that account for a small number of cases in which the employer had a good faith belief it was in compliance (e.g. the employer’s attorney advised it an employee was exempt from overtime and the determination as to whether the exemption applied was objectively a close call) to argue liquidated damages and penalties for all violations is a draconian policy. Where legislators are receptive to this argument, advocates could recommend language that creates an exception to liquidated damages and penalties requirements in situations in which the employer can prove it had a good faith basis for believing it was acting in compliance with the law: New York state’s law includes such a good faith exception:

...the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, **unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law.** [N.Y. Lab. § 198\(1\)\(a\)](#).

This language helps keep the exceptions to liquidated damages narrow as the burden is on the employer to prove good faith rather than on the agency to establish the violation was willful.

³⁵ Note, the willful violations listed up to this point are directly related to the power to compel information. Such penalties provide additional leverage for the agency to obtain information from reluctant employers.

(c) For the purposes of this section, **each day that the violation continues shall constitute a separate offense.** [Ark. Code § 11-4-206\(a\)&\(c\).](#)

ADOL also has the power to order employers pay up to one time the amount owed in back wages to workers as liquidated damages:

(a) (1) Any employer who pays any employee less than the minimum wages, including overtime compensation or compensatory time off as provided by this subchapter, to which the employee is entitled under or by virtue of this subchapter shall:

(A) Pay any applicable civil penalties; and

(B) Be liable to the employee affected for:

(i) The full amount of the wages, less any amount actually paid to the employee by the employer; and

(ii) Costs and such reasonable attorney's fees as may be allowed by the court.

(2) The employee may be awarded an additional amount up to, but not greater than, the amount under subdivision (a)(1)(B)(i) of this section to be paid as liquidated damages.

(d) The Director of the Department of Labor shall have the authority to fully enforce this subchapter.... [Ark. Code § 11-4-218\(a\)&\(d\).](#)

Inadequate Statutory Language

- **Insufficient Penalties and Damages** - By contrast, North Carolina's power to assess damages and penalties is markedly limited. The only penalty North Carolina's Wage and Hour Bureau (WHB) can assess for minimum wage or wage theft noncompliance is for violations of the Wage and Hour Act's (WHA) records-keeping requirements. Under this provision, the maximum amount WHB can assess is \$2,000 per investigation, an amount insufficient to deter future violations:

Any employer who violates the provisions of G.S. 95-25.15(b) or any regulation issued pursuant to G.S. 95-25.15(b), shall be subject to a civil penalty of up to two hundred fifty dollars (\$250.00) per employee with the maximum not to exceed two thousand dollars (\$2,000) per investigation by the Commissioner or the Commissioner's authorized representative. In

determining the amount of the penalty, the Commissioner shall consider each of the following:

(1) The appropriateness of the penalty for the size of the business of the employer charged.

(2) The gravity of the violation.

(3) Whether the violation involves an employee under 18 years of age.

[N.C. Gen. Stat. § 95-25.23A.](#)

WHB's ability to require violators pay liquidated damages is also restricted.

While WHA gives courts the authority to award liquidated damages, WHB is not authorized to award damages to employees beyond back wages and interest through the administrative process:

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.

(a1) In addition to the amounts awarded pursuant to subsection (a) of this section, **the court shall award liquidated damages** in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section. [N.C. Gen. Stat. § 95-25.22\(a\)-\(a1\).](#)

North Carolina's statutory language thus fails to provide WHB with the tools it needs to address the various reasons that employers violate labor standards laws and adequately disincentivize violations.

Model Language: Power to Assess Significant Damages, Fines, and/or Civil Penalties

Damages to Aggrieved Persons:

Liquidated damages to employees: Where the Agency determines that a violation has occurred, it may order any appropriate relief including, but not limited to, reinstatement, the payment of any wages or compensation unlawfully withheld to any aggrieved person, interest, and liquidated damages in an additional amount of up to [one time/two times/three times] the unpaid wages or compensation.

Or

Daily fines to employees: Where the Agency determines that a violation has occurred, it may order any appropriate relief including, but not limited to, reinstatement, the payment of any back wages unlawfully withheld, interest, and the payment of an additional sum as an administrative penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued. A violation shall be deemed to continue from the date immediately following the date that the wages were due to the date immediately preceding the date the wages are paid in full.

Fines and civil penalties to the Agency:

Fixed penalty per employee to the Agency: For a first violation of this Chapter, the Director may assess a civil penalty of up to \$500 per aggrieved party. For a second violation of this Chapter, the Director shall assess a civil penalty of up to \$1,000 per aggrieved party, or an amount equal to five percent of the total amount of unpaid wages, whichever is greater. For a third or any subsequent violation of this Chapter, the Director shall assess a civil penalty of up to \$5,000 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. A violation is a second, third, or subsequent violation if the violating employer or person has been party to one, two, or more than two settlement agreements, respectively, stipulating a violation occurred; and/or one, two, or more than two Director's citations, respectively, have been issued against the employer or person in the ten years preceding the date of the violation, and were either not contested or were upheld by a court; otherwise, it is a first violation

Or

Daily fines per employee to the Agency: The Agency may also order the violating Employer or person to pay to the City a sum of not more than \$50 for each day and for each Employee or person as to whom the violation occurred or continued. Such funds shall be allocated to the [Agency, General Fund, etc.].

Penalty for interfering with an investigation:

Any employer, person, or entity who hinders, prevents, impedes, or interferes with the Director or [administrative appellate body] in the performance of their duties under this Chapter shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000.

Power to Protect Against and Remedy Retaliation

Agencies need the power to investigate and remedy retaliation.³⁶ Fear of retaliation keeps workers from making complaints and cooperating during investigations. When retaliation occurs and goes unaddressed, it results in a chilling effect as an adverse action against one worker sends a message throughout the workforce as to the consequences of reporting a violation or cooperating with an enforcement action. Savvy employers acting in bad faith know that worker participation is critical to enforcement – especially in more difficult cases in which the employer destroyed or failed to maintain accurate documents or submitted falsified records – and so they may use retaliation as a means for preventing agencies from establishing the underlying violations. Without the power to hold employers liable for retaliation agencies are less effective in enforcing laws against the worst violators.³⁷

Strong Statutory Language

- **Robust Definition and Remedies with a Rebuttable Presumption** - When agencies investigate retaliation, they generally must establish: 1) an employee engaged in a protected activity; 2) the employer took an adverse action; and 3) there is a causal connection between the adverse action and protected activity.³⁸ Thus, where the definitions of adverse action or protected activity are too narrow, the agency's power to determine retaliation occurred is hampered.

Arizona's Minimum Wage and Employee Benefits law creates strong retaliation protections, as well as robust powers to enforce and remedy retaliatory acts. Arizona's law specifies a wide array of actions that are included in the definition of retaliation, along with a catchall provision that can be used when a bad faith employer takes a more creative adverse action – for example, blacklisting a former employee or contacting immigration officials – because a person exercised a protected right. Arizona also includes a general statement that protected activities include the exercise of any right guaranteed by the Minimum

³⁶ For a thorough discussion of types of retaliation workers experience, including the particular threats immigrant workers may face, as well as practical strategies and techniques for preventing and remedying retaliation, see Tanya L. Goldman, *Tool 5: Addressing and Preventing Retaliation and Immigration-Based Threats to Workers* (2018) https://www.clasp.org/sites/default/files/publications/2019/04/2019_addressingandpreventingretaliation.pdf.

³⁷ For a comprehensive analysis of retaliation across all 50 states, see Laura Huizar, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation*, National Employment Law Project (2019), <https://www.nelp.org/publication/exposing-wage-theft-without-fear/>.

³⁸ For a detailed analysis of a sample retaliation claim related to immigration status, see Goldman, *supra* note 36, at 8.

Wage and Employee Benefits and Earned Paid Sick Time laws, as well as participating or assisting in an investigation or other matter related to the law:³⁹

(A)(4) "retaliation" shall mean denial of any right guaranteed under article 8 and article 8.1 of this chapter and any threat, discharge, suspension, demotion, reduction of hours, **or any other adverse action** against an employee for the exercise of any right guaranteed herein including any sanctions against an employee who is the recipient of public benefits for rights guaranteed herein. Retaliation shall also include interference with or punishment for in any manner participating in or assisting an investigation, proceeding or hearing under this article.

Retaliation is notoriously difficult to prove. Most often, it is the causal connection between the protected activity and the adverse action that is the hardest to establish. This is because in many jurisdictions, employers have full discretion to take adverse actions against employees for almost any reason. Simultaneously, under many retaliation laws, the burden is on the employee to prove the employer took the action *because* of the employee's protected activity, despite the fact that the employer generally holds most of the evidence to demonstrate its motive for taking the adverse action.

However, Arizona's law offers substantially greater protections by presuming a causal connection where the adverse action is taken within 90 days of a protected activity. In effect, this flips the burden onto the employer who must then prove that the adverse action was, in fact, not taken for a retaliatory reason. For example, if an employee is demoted three weeks after being interviewed as part of an investigation, in Arizona, the demotion is presumed retaliatory –

³⁹ Other jurisdictions provide a general definition of protected activity *and* a list of nonexclusive examples, which helps ensure the definition is interpreted broadly. For example, Seattle's Minimum Wage Ordinance states:

No employer or any other person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this [Chapter 14.19](#). Such rights **include but are not limited** to the right to make inquiries about the rights protected under this [Chapter 14.19](#); the right to inform others about their rights under this [Chapter 14.19](#); the right to inform the person's employer, union, or similar organization, and/or the person's legal counsel or any other person about an alleged violation of this [Chapter 14.19](#); the right to file an oral or written complaint with the Agency or bring a civil action for an alleged violation of this [Chapter 14.19](#); the right to cooperate with the Agency in its investigations of this [Chapter 14.19](#); the right to testify in a proceeding under or related to this [Chapter 14.19](#); the right to refuse to participate in an activity that would result in a violation of city, state, or federal law; and the right to oppose any policy, practice, or act that is unlawful under this [Chapter 14.19](#). [Seattle Municipal Code 14.19.055\(B\)](#).

because it is an adverse action occurring within 90 days of the employee's participation in the investigation, which is a protected activity – and the burden is on the employer to prove the action was taken for a legitimate reason.

Further, Arizona's law requires the employer prove the adverse action – in the above example, the demotion – was taken for a permissible reason by clear and convincing evidence, which is a higher standard of proof than preponderance of the evidence, which as discussed [above](#), is the more common standard used in proving labor standards violations. Flipping the burden onto the employer and using the more rigorous standard renders it more difficult for employers to avoid a finding of retaliation by offering a non-retaliatory reason, e.g. performance issues, as pretext for the adverse action without providing ample support for such a defense. Finally, by prohibiting the employer "or other person" from taking a retaliatory act the law allows the agency to reach outside of the employing entity if another person is involved in executing the harm:

B. No **employer or other person** shall discriminate or subject any person to retaliation for asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their rights. Taking adverse action against a person within **ninety days** of a person's engaging in the foregoing activities **shall raise a presumption that such action was retaliation**, which may be rebutted by **clear and convincing** evidence that such action was taken for other permissible reasons. [Ariz. Rev. Stat. Ann. § 23-364](#).

Just as retaliation can take many different forms, the power to rectify such violations must be similarly diverse to ensure the agency can fully remedy the resulting harm and disincentivize future acts of retaliation. The collateral impact of retaliation can result in greater losses to impacted workers than lost wages. A low wage worker who misses even one paycheck after a retaliatory termination, for instance, may be unable to pay their rent or other bills, which could result in eviction or late fees and/or a reduced credit score, thus increasing the harm of retaliation.⁴⁰ Likewise, retaliation can give rise to emotional anguish for impacted persons, and the laws should also include remedies to compensate for this.

⁴⁰ For a detailed discussion of the wide range of potential costs resulting from retaliation, see Huizar, *supra* note 37, at 13-15.

Arizona law requires retaliating employers pay a daily penalty to the impacted person of not less than \$150 dollars per day. Such daily penalties can help impacted person recoup the direct, indirect, and emotional expenses that stemmed from the retaliation. Notably, that the law provides only the floor for this daily penalty provides the agency with leeway to increase the amount with the egregiousness of the retaliatory act. Further, in addition to back pay and sick time, the law provides the agency with the broad power to order “any other appropriate legal or equitable relief.” This provision could give the agency authority to order the violator pay front pay (i.e. money for lost compensation before or in lieu of reinstatement) or rehire a worker who experienced a retaliatory termination. Likewise, the law includes a civil penalty with a floor of \$250, or \$1,000 for subsequent or willful violations, which also gives the agency ample flexibility to assess a civil penalty equivalent to the severity of the retaliation:

(F) Any employer who violates recordkeeping, posting, or other requirements that the commission may establish under this article shall be **subject to a civil penalty of at least \$250 dollars for a first violation, and at least \$1000 dollars for each subsequent or willful violation** and may, if the commission or court determines appropriate, be subject to special monitoring and inspections.

(G) ...Any employer who retaliates against an employee or other person in violation of this article shall be required to pay the employee an amount set by the commission or a court sufficient to compensate the employee and deter future violations, **but not less than one hundred fifty dollars for each day that the violation continued or until legal judgment is final.** The commission and the courts shall have the authority to order payment of such unpaid wages, unpaid earned sick time, other amounts, and civil penalties and to order any other appropriate legal or equitable relief for violations of this article. Civil penalties shall be retained by the agency that recovered them and used to finance activities to enforce this article. A prevailing plaintiff shall be entitled to reasonable attorney's fees and costs of suit. [Ariz. Rev. Stat. Ann. § 23-364.](#)

In sum, in order for agencies to be fully equipped to address retaliation, retaliation provisions should include a broad definition of what constitutes adverse actions and protected activities, put the burden on the employer to prove adverse actions taken in close temporal proximity to protected activities

are non-retaliatory, and provide a pool of remedies that give the agency the necessary flexibility to fully address the harm.

- **Injunctions** – While remedying retaliation for the aggrieved employee is imperative, such remedies come at the conclusion of the investigation. The chilling effect of ongoing retaliation during an investigation can limit employee cooperation such that investigators cannot establish the true extent or nature of the violations. Thus, to preserve the integrity of the investigation, agencies also need the ability to obtain an injunction to stop ongoing acts they have reason to believe are retaliatory *during* an investigation. Injunctions are orders requiring a person to do or cease from doing something. Temporary or preliminary injunctions are tools used to obtain interim injunctive relief to maintain the status quo pending a final judgment. Agencies can use temporary or preliminary injunctions to require employers to take acts, like temporarily rehiring an employee, until they have been able to fully investigate the matter at hand.

In 2017, California amended its labor laws to bolster the agency’s power by authorizing it to petition a court for injunctive relief where the agency has reasonable cause to believe any person has or is retaliating. Further, the law requires that the court considers the chilling effect when determining whether temporary injunctive relief is necessary, and where the court finds reasonable cause exists to believe that retaliation has occurred it must order injunctive relief. The law goes on to require that temporary injunctive relief remain in effect until the investigation is concluded, at which point the court may order a permanent injunction.

(2) (A) The Labor Commissioner, **during the course of an investigation pursuant to this section, upon finding reasonable cause to believe that any person has engaged in or is engaging in a violation**, may petition the superior court in any county in which the violation in question is alleged to have occurred or in which the person resides or transacts business, for **appropriate temporary or preliminary injunctive relief, or both temporary and preliminary injunctive relief**.

(B) Upon filing of a petition pursuant to this paragraph, the Labor Commissioner shall cause notice of the petition to be served on the person, and the **court shall have jurisdiction to grant temporary injunctive relief as the court determines to be just and proper**.

(C) In addition to any harm resulting directly to an individual from a violation of any law under the jurisdiction of the Labor Commissioner, the **court shall consider the chilling effect on other employees** asserting their rights under those laws in determining if temporary injunctive relief is just and proper.

(D) If an employee has been discharged or faced adverse action for raising a claim of retaliation for asserting rights under any law under the jurisdiction of the Labor Commissioner, **a court shall order appropriate injunctive relief on a showing that reasonable cause exists** to believe that an employee has been discharged or subjected to adverse action for raising a claim of retaliation or asserting rights under any law under the jurisdiction of the Labor Commissioner.

(E) The **temporary injunctive relief shall remain in effect until the Labor Commissioner issues a determination or citations, or until the completion of review** pursuant to subdivision (b) of Section 98.74, whichever period is longer, or at a time certain set by the court. **Afterwards, the court may issue a preliminary or permanent injunction if it is shown to be just and proper.** Any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation. [Cal. Lab. Code § 98.7\(b\)](#).

Inadequate Statutory Language

- **No Power to Investigate or Remedy Retaliation** - Vermont wage laws offer an example of retaliation protections without administrative enforcement. While retaliation is statutorily prohibited in Vermont, the Vermont Department of Labor (VDOL) does not have statutory power to investigate or remedy retaliatory acts. Instead, persons aggrieved by retaliation violations must bring a civil action to enforce their retaliation rights:

(a) An employer shall not discharge or in any other manner retaliate against an employee because:

- (1) the employee lodged a complaint of a violation of this subchapter;
- (2) the employee has cooperated with the Commissioner in an investigation of a violation of this subchapter; or
- (3) the employer believes that the employee may lodge a complaint or cooperate in an investigation of a violation of this subchapter.

(b) Any person aggrieved by a violation of this section may bring an action in the Civil Division of the Superior Court seeking compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or benefits, reinstatement, costs, reasonable attorney's fees, and other appropriate relief. [21 V.S.A. § 348](#); [21 V.S.A § 397](#).

By precluding VDOL from enforcing the retaliation protections and instead requiring impacted persons to litigate the matter, Vermont's law renders it more difficult, costly, and time consuming for workers, particularly those who are low wage and vulnerable, to hold violators accountable.

- **No Prohibition against Retaliation** - Other jurisdictions, including Wyoming, Hawaii, and Nebraska, have labor standards laws that simply do not include retaliation protections. See W.S. 27-4; HRS Chaps. 387-388; Neb. Rev. Stat. Arts. 48-12(a) & (c). Agencies and workers in such states have no power to address situations in which an employer took an adverse action against a worker because they exercised their rights, leaving workers in a perilous position while undermining the effectiveness of the agencies. The broader effect of this legislative omission on overall enforcement is apparent in Wyoming where the agency will not take complaints from workers who are still employed because they are not protected and have no recourse if they are terminated.⁴¹ As Wyoming's enforcement is complaint-based, the resulting enforcement gap is remarkable.

Model Language: Power to Protect Against and Remedy Retaliation

No employer or any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter. No employer or any other person shall take any adverse action against any person because the person has exercised in good faith any rights protected under this Chapter. "Adverse action" means denying a job or promotion, demoting, terminating, failing to rehire after a seasonal interruption of work, threatening, penalizing, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to nonemployee, decreasing or declining to provide additional work hours when

⁴¹ Fine, Lyon, Round, *supra* note 9.

they otherwise would have been offered, scheduling an employee for hours outside of their availability, or otherwise discriminating against any person for any reason prohibited by Section [X]. "Adverse action" for an employee may involve any aspect of employment, including pay, work hours, responsibilities, or other material change in the terms and conditions of employment.

Rights protected under this Chapter include but are not limited to the right to make inquiries about the rights protected under this Chapter; the right to inform others about their rights under this Chapter; the right to inform the person's employer, union, or similar organization, and/or the person's legal counsel or any other person about an alleged violation of this Chapter; the right to file an oral or written complaint with the Agency or bring a civil action for an alleged violation of this Chapter; the right to cooperate with the Agency in its investigations of this Chapter; the right to testify in a proceeding under or related to this Chapter; the right to refuse to participate in an activity that would result in a violation of city, state or federal law; and the right to oppose any policy, practice, or act that is unlawful under this Chapter.

No employer or any other person shall communicate to a person exercising any right protected in this Section, directly or indirectly, that they will, or might, inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion that they will, or might, report, suspected citizenship or immigration status of an employee or family member of the employee to a federal, state, or local agency because the employee has exercised a right under this Chapter.

It shall be a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of any right protected in this Section. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position. The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

The protections afforded under this Section shall apply to any person who mistakenly but in good faith alleges any violation of this Chapter.

A complaint or other communication by any person triggers the protections of this Section regardless of whether the complaint or communication is in writing or makes explicit reference to this Chapter.

Retaliation remedies

An employer or any other person found to be in violation of [Section X] for retaliation shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid wages plus interest in favor of the aggrieved party under the terms of this Chapter, liquidated damages in an additional amount of up to twice the unpaid wages, and other compensatory damages as are appropriate. The Director also shall order the imposition of a penalty payable to the aggrieved party of up to \$5,000.

Injunctive relief

During the course of an investigation, upon finding reasonable cause to believe that any employer or other person has engaged in or is engaging in retaliation, the Director may petition a court of competent jurisdiction, for appropriate temporary and/or preliminary injunctive relief.

Upon filing of a petition pursuant to this paragraph, the Director shall cause notice of the petition to be served on the employer or other person, and the court shall have jurisdiction to grant temporary injunctive relief as the court determines to be just and proper. In addition to any harm resulting directly to an individual from a violation of any law under the jurisdiction of the Director, the court shall consider the chilling effect on other employees asserting their rights under those laws in determining if temporary injunctive relief is just and proper.

A court shall order appropriate injunctive relief on a showing that reasonable cause exists to believe that an employee or other person has been discharged or subjected to adverse action for raising a claim of retaliation or asserting rights under any law under the jurisdiction of the Director.

The temporary injunctive relief shall remain in effect until the Director issues a determination or citations, or until the completion of an appeal, whichever period is longer, or at a time certain set by the court. Afterwards, the court may issue a preliminary or permanent injunction if it is shown to be just and proper. Any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.

Conclusion

Major legislative wins that increase worker protections and power must be accompanied by fundamental enforcement powers in order for the underlying rights to be realized. As advocates work to pass laws offering new rights or amend existing laws to increase protections, strong investigative, remedial, and punitive authority needed to effectively enforce the laws must be considered as imperative as the substantive rights.

Appendix: Model Statutory Enforcement Language

The below language compiles language from statutes, rules, and regulations to provide clear, streamlined provisions in accordance with the strong statutory language discussed above.

Power to Investigate

The Agency has broad authority to take appropriate steps to enforce this Chapter. The Agency shall have the power to investigate any possible violations of this Chapter by any Employer or other person.

The Agency's investigation must commence within [three, four, five, six] years of the alleged violation. To the extent permitted by law, the applicable statute of limitations for civil actions is tolled during any investigation under this Chapter and any administrative enforcement proceeding under this Chapter based upon the same facts until a Director's [citation/order] becomes final, or where the Director does not issue [a citation/an order], until the date on which the Director notifies the complainant that the investigation has concluded.

Power to Conduct Company-Wide Investigations

The Director or their designees may initiate investigations, including individual and company-wide investigations, to determine the extent to which any potential Employer or other person is complying with this Chapter.

Power to Conduct Directed Investigations

An investigation may be initiated by the Director or their designees following the receipt of a report or complaint filed by an employee or other person,⁴² or without a complaint. The Director may, in their discretion, initiate an investigation of any potential Employer or other person, including, but not limited to, when the Director has reason to believe that a violation has occurred or will occur, or when circumstances show that violations are likely to occur within a class of businesses

⁴² While outside the scope of this paper, the power to keep confidential identifying information about complainants and witnesses can help prevent retaliation and incentivize complaints and worker cooperation during investigations. For more information, see Goldman, *supra* note 36 at 10. Model language for such a power includes:

An employee or other person may report to the Agency any suspected violation of this Chapter. The Agency shall encourage reporting by keeping confidential, to the maximum extent permitted by applicable laws, the name and other information that in the judgment of the Director or their designees would tend to identify persons who have requested confidentiality and who have reported an alleged violation, furnished information to the agency regarding an alleged violation, or have cooperated in an investigation. However, with the authorization of such person, the Agency may disclose the employee's or person's name and identifying information as necessary to enforce this Chapter, or for other appropriate purposes.

because the workforce contains significant numbers of workers who are vulnerable to violations of this Chapter or the workforce is unlikely to volunteer information regarding such violations.

Power to Triage

The Agency has sole discretion to decide whether to investigate a complaint or otherwise pursue a possible violation of this Chapter.

Power to Compel

The Director or their designees, in accordance with due process, shall have power to enter and inspect places of business or employment; inspect and make copies of papers, books, accounts, records, payrolls, and documents; question witnesses in private; administer oaths and examine witnesses under oath; issue subpoenas to compel the attendance and testimony of witnesses and the production of papers, books, accounts, records, payrolls, and documents; take depositions and affidavits; and investigate any such facts, conditions, practices or matters as the Director or their designees may deem appropriate to determine whether a violation occurred.

In case of failure of any potential Employer or other person to comply with any subpoena lawfully issued, or on the refusal of any witness to testify to any matter regarding which they may be lawfully interrogated, it shall be the duty of the court, on application by the Director, to compel obedience by initiating 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.

To aid in the enforcement of this Chapter, any potential Employer or other person employing labor in this jurisdiction shall:

Allow the Director or their designees free access to the place of business or employment of the person to secure any information or make any investigation that they are authorized by this Chapter to ascertain or make.

Be precluded from introducing as evidence in an administrative proceeding contesting a citation or order books, documents, testimony, or other evidence that are not provided to the Director or their designees pursuant to the procedures and timelines outlined in [citation].

An Employer shall create and retain records documenting [include records relevant to substantive rights created by law].

Such records shall be retained for a period of not less than three (3) years from the date such hours were worked.

If an Employer fails to create and retain adequate records or does not allow the Director or their designees reasonable access to the records and an issue arises as to an alleged violation of an employee's rights under this article related to such records, it shall be presumed that the Employer has violated this article, absent clear and convincing evidence otherwise.

Power to Remedy Violations for All Impacted Workers

An Employer or other person found to be in violation of this Chapter shall be liable for full payment of unpaid wages or compensation due to each aggrieved person, plus interest, [liquidated damages/fines] payable to the aggrieved persons, fines and civil penalties payable to the Agency, and other equitable relief. Interest shall accrue from the date the unpaid wages were first due at [X] percent per annum.

In all investigations where the investigation has not been settled and in which a violation is found, the Director or their designees shall issue a [citation/order] to the violating Employer or person identifying the violation or violations and specifying the amounts due under this Chapter for each violation, including the payment of any unpaid wages or compensation for all aggrieved persons, [liquidated damages/fines] payable to the aggrieved persons, any applicable fines or civil penalties, and other equitable relief pursuant to [Section X]. If the violation is ongoing when the Agency opens an investigation, the Director shall order payment of amounts that accrue after the investigation was opened until the date the violation ceases or the date the Director's [citation/order] is final.

If a violator fails to comply with any final [citation/order] issued by the Director or [the appellate body] for which all appeal rights have been exhausted, the Agency or the [Attorney General, City Attorney, etc.] may, with or without the consent of the aggrieved persons, commence and prosecute a civil action to recover unpaid wages or compensation, including interest, equitable relief and [liquidated damages/fines payable to the employees] thereon owing to any aggrieved person under this Chapter or relevant citation or order. In addition to these wages or compensation, interest, and

[liquidated damages/fines payable to aggrieved persons], the Agency shall be awarded applicable fines and civil penalties, and reasonable attorney's fees and costs of suit.⁴³

Power to Assess Significant Damages, Fines, and/or Civil Penalties

Damages to Aggrieved Persons:

Liquidated damages: Where the Agency determines that a violation has occurred, it may order any appropriate relief including, but not limited to, reinstatement, the payment of any wages or compensation unlawfully withheld to any aggrieved person, interest, and liquidated damages in an additional amount of up to [one time/two times/three times] the unpaid wages or compensation.

Or

Daily fines: Where the Agency determines that a violation has occurred, it may order any appropriate relief including, but not limited to, reinstatement, the payment of any back wages unlawfully withheld, interest, and the payment of an additional sum as an administrative penalty in the amount of \$50 to each Employee or person whose rights under this Chapter were violated for each day that the violation occurred or continued. A violation shall be deemed to continue from the date immediately following the date that the wages were due to the date immediately preceding the date the wages are paid in full.

Fines and civil penalties to the Agency:

Fixed penalty per employee: For a first violation of this Chapter, the Director may assess a civil penalty of up to \$500 per aggrieved party. For a second violation of this Chapter, the Director shall assess a civil penalty of up to \$1,000 per aggrieved party, or an amount equal to five percent of the total amount of

⁴³ Private rights of action, though separate from administrative enforcement powers and outside the scope of this paper, are important as they provide alternative avenues for seeking redress. Model statutory language for private rights of action includes:

Any person or class of persons that suffers financial injury as a result of a violation of this Chapter or is the subject of prohibited retaliation under [Section X], may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter and, upon prevailing, may be awarded reasonable attorney fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation: the payment of any unpaid wages or compensation plus interest due to the person and liquidated damages in an additional amount of up to [one times/two times/three times] the unpaid wages; and a penalty payable to any aggrieved party of up to \$5000 if the aggrieved party was subject to prohibited retaliation. Interest shall accrue from the date the unpaid wages were first due at [X] percent per annum. Investigation by [agency] shall not be a prerequisite to nor a bar against a person bringing a civil action under this Section.

unpaid wages, whichever is greater. For a third or any subsequent violation of this Chapter, the Director shall assess a civil penalty of up to \$5,000 per aggrieved party, or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. A violation is a second, third, or subsequent violation if the violating Employer or person has been party to one, two, or more than two settlement agreements, respectively, stipulating a violation occurred; and/or one, two, or more than two Director's citations, respectively, have been issued against the employer or person in the ten years preceding the date of the violation, and were either not contested or were upheld by a court; otherwise, it is a first violation.

Or

Daily fines per employee: The Agency may also order the violating Employer or person to pay to the City a sum of not more than \$50 for each day and for each Employee or person as to whom the violation occurred or continued. Such funds shall be allocated to the [Agency, General Fund, etc.].

Penalty for interfering with an investigation:

Any employer, person, or entity who hinders, prevents, impedes, or interferes with the Director or [administrative appellate body] in the performance of their duties under this Chapter shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000.⁴⁴

⁴⁴ Laws in some jurisdictions classify various violations of labor standards laws – including impeding investigations – as crimes. For example, New Jersey's Wage and Hour law creates criminal liability punishable by fines and/or imprisonment for any violation of the act, while specifically naming willfully hindering enforcement and various acts that interfere with the agency's investigations as criminal offenses:

Any employer who willfully hinders or delays the commissioner, the director or their authorized representatives in the performance of his duties in the enforcement of this act, or fails to make, keep, and preserve any records as required under the provisions of this act, or falsifies any such record, or refuses to make any such record accessible to the commissioner, the director or their authorized representatives upon demand, or refuses to furnish a sworn statement of such record or any other information required for the proper enforcement of this act to the commissioner, the director or their authorized representatives upon demand, or pays or agrees to pay wages at a rate less than the rate applicable under this act or any wage order issued pursuant thereto, or otherwise violates any provision of this act or of any regulation or order issued under this act shall be guilty of a disorderly persons offense and shall, upon conviction for a first violation, be punished by a fine of not less than \$100 nor more than \$1,000 or by imprisonment for not less than 10 nor more than 90 days or by both the fine and imprisonment and, upon conviction for a second or subsequent violation, be punished by a fine of not less than \$500 nor more than \$1,000 or by imprisonment for not less than 10 nor more than 100 days or by both the fine and imprisonment. Each week, in any day of which an employee is paid less than the rate applicable to him under this act or under a minimum fair wage order, and each employee so paid, shall constitute a separate offense. [N.J.S.A. § 34:11-56a22](#).

Power to Protect Against and Remedy Retaliation

No employer or any other person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter. No employer or any other person shall take any adverse action against any person because the person has exercised in good faith any rights protected under this Chapter. "Adverse action" means denying a job or promotion, demoting, terminating, failing to rehire after a seasonal interruption of work, threatening, penalizing, engaging in unfair immigration-related practices, filing a false report with a government agency, changing an employee's status to nonemployee, decreasing or declining to provide additional work hours when they otherwise would have been offered, scheduling an employee for hours outside of their availability, or otherwise discriminating against any person for any reason prohibited by Section [X]. "Adverse action" for an employee may involve any aspect of employment, including pay, work hours, responsibilities, or other material change in the terms and conditions of employment.

Rights protected under this Chapter include but are not limited to the right to make inquiries about the rights protected under this Chapter; the right to inform others about their rights under this Chapter; the right to inform the person's employer, union, or similar organization, and/or the person's legal counsel or any other person about an alleged violation of this Chapter; the right to file an oral or written complaint with the Agency or bring a civil action for an alleged violation of this Chapter; the right to cooperate with the Agency in its investigations of this Chapter; the right to testify in a proceeding under or related to this Chapter; the right to refuse to participate in an activity that would result in a violation of city, state or federal law; and the right to oppose any policy, practice, or act that is unlawful under this Chapter.

No employer or any other person shall communicate to a person exercising any right protected in this Section, directly or indirectly, that they will, or might, inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion that they will, or might, report, suspected citizenship or immigration status of an employee or family member of the employee to a federal, state, or local agency because the employee has exercised a right under this Chapter.

Criminal liability can be used as leverage to induce cooperation with the investigation, and a conviction can send a message to other bad actors that the jurisdiction takes violations and interfering with agencies' investigations seriously. However, the administrative agency's role in a criminal proceeding often is limited to making the referral to prosecutors. Thus, for criminal liability to be meaningful, agencies need to have solid working relationships with prosecutors and procedures for making such referrals to ensure they are appropriately processed and prioritized.

It shall be a rebuttable presumption of retaliation if an employer or any other person takes an adverse action against a person within 90 days of the person's exercise of any right protected in this Section. However, in the case of seasonal work that ended before the close of the 90-day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position. The employer may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

The protections afforded under this Section shall apply to any person who mistakenly but in good faith alleges any violation of this Chapter.

A complaint or other communication by any person triggers the protections of this Section regardless of whether the complaint or communication is in writing or makes explicit reference to this Chapter.

Retaliation remedies

An employer or any other person found to be in violation of [Section X] for retaliation shall be subject to any appropriate relief at law or equity including, but not limited to reinstatement of the aggrieved party, front pay in lieu of reinstatement with full payment of unpaid wages plus interest in favor of the aggrieved party under the terms of this Chapter, liquidated damages in an additional amount of up to twice the unpaid wages, and other compensatory damages as are appropriate. The Director also shall order the imposition of a penalty payable to the aggrieved party of up to \$5,000.

Injunctive relief

During the course of an investigation, upon finding reasonable cause to believe that any employer or other person has engaged in or is engaging in retaliation, the Director may petition a court of competent jurisdiction, for appropriate temporary and/or preliminary injunctive relief.

Upon filing of a petition pursuant to this paragraph, the Director shall cause notice of the petition to be served on the employer or other person, and the court shall have jurisdiction to grant temporary injunctive relief as the court determines to be just and proper. In addition to any harm resulting directly to an individual from a violation of any law under the jurisdiction of the Director, the court shall consider the chilling effect on other employees asserting their rights under those laws in determining if temporary injunctive relief is just and proper.

A court shall order appropriate injunctive relief on a showing that reasonable cause exists to believe that an employee or other person has been discharged or subjected to adverse action for raising a claim of retaliation or asserting rights under any law under the jurisdiction of the Director.

The temporary injunctive relief shall remain in effect until the Director issues a determination or citations, or until the completion of an appeal, whichever period is longer, or at a time certain set by the court. Afterwards, the court may issue a preliminary or permanent injunction if it is shown to be just and proper. Any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.