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**EDUCATION AND EMPLOYMENT
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Memorandum

FROM: Janice Fine, Ph.D. and Jenn Round, J.D., LL.M., EERC at Rutgers University
TO: White House Worker Empowerment Task Force
RE: Proposed actions to using existing statutory authority that will demonstrably promote worker organizing by taking advantage of all the affordances of the labor standards enforcement regime
DATE: July 30, 2021

I. Public Enforcement Is an Opportunity to Build Worker Voice and Power in Low Wage Industries

The overwhelming majority of today's private sector workers are reliant upon public enforcement as their sole source of workplace protections. We must not leave the power of public enforcement to support worker voice and organization on the table.

Given the high rates of wage theft across the country--which our studies have shown occur disproportionately to workers of color, women, and foreign-born workers¹ public enforcement--carried out strategically--can serve as an entry point for supporting worker organization in high violation industries with the lowest unionization rates. The Biden administration, which has been outspoken about the role of unionization in raising workers into the middle class, must unapologetically seize the opportunity to tap into the affordances of our labor *and* our employment laws to support worker organizing. Strikingly, the total number of investigators employed by the U.S. DOL's Wage and Hour Division (WHD), Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), and the Equal Employment Opportunity Commission (EEOC) combined, falls far below the International Labour Organization's recommended ratio of one investigator for every 10,000 workers, which would be 16,500 investigators for the U.S.'s 165 million workers.²

¹ See e.g. Janice Fine and others, "Maintaining Effective U.S. Labor Standards Enforcement through the Coronavirus Recession" (Washington: Washington Center for Equitable Growth, 2020), available at <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/>.

² International Labour Office, "Strategies and Practice for Labour Inspection" (2006), available at <https://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/esp-3.pdf>; World Bank, "Labor Force Total - United States," (2021) available at <https://data.worldbank.org/indicator/SL.TLF.TOTL.IN?locations=US>. The ILO's recommendation is specific to labor inspectors enforcing "legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters." See Article 3 ILO Convention 81 (1947), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:31222_6:NO. Thus, investigative staff working for the NLRB were not included in this list.

One of the most important lessons of the New Deal is that policy can beget institutions. The NLRA created the scaffolding for lasting labor market institutions embedded in the economy. In establishing a system for worker organizing, dues collection and collective bargaining, it facilitated lasting institutions. As we will discuss in this memo, the FLSA can too.

The Biden Administration offers the best opportunity for progressive regulatory innovation since the New Deal. By learning from the recent policy advancements at the state and local level--the New Labor Federalism--while preserving the most important dimensions of the older, New Deal system,³ the Biden Administration can make great gains in addressing our nation's inequality. Building worker power through enforcement requires inculcating a shared understanding deep within and across key federal agencies that an organized labor market is a more compliant labor market, that it is a legitimate part of the agency's mission to support organization *and* that trusted intermediaries embedded in low-wage worker communities are essential to bringing violations to light.

Advancing worker organizing without federal legislation will require reimagining public enforcement of worker protection laws such that federal agencies commit to stringent, equitable enforcement of federal worker protection laws in which worker representatives from unions, worker organizations, and other community and legal groups are recognized as partners in enforcement *and equally critical*--state and local departments of labor are brought into much stronger and ongoing strategic relationships.

In place of a misinterpretation of what government neutrality is, they must fully embrace the mission of upholding worker rights and look upon opportunities for organizing, embedding worker voice at the workplace and across the sector, and incentivizing and supporting new forms of bargaining as essential to doing so.

Enforcement agencies must recognize the instrumental role of organizations in reaching workers who, for fear of retaliation, will not come forward on their own.

In our many years of conversations with investigators and department leaders, there is often a limited understanding of the variety of means through which worker organizations and unions could augment the work of government inspectors. Most saw worker organizations as a means through which to *disseminate* information to workers but not as a means through which to *gather* it.

There are three main mechanisms through which worker organizations can enhance enforcement: detection of non-compliance, outreach to workers in targeted sectors, collection of evidence to facilitate enforcement actions, and convening strategic partnerships.

First, worker organizations can improve detection of non-compliance by:

- a) providing investigators with specialized knowledge of industry structures, including their range of subcontracting arrangements and employment practices;

³ See Janice Fine and Michael Piore, "Introduction to a Special Issue on the New Labor Federalism," ILR Review, 2021, pp. 1-18, DOI: 10.1177/00197939211032934.

- b) providing inspectors in targeted industries with tips on employers who are not complying with wage and hour and occupational health and safety laws;
- c) teaching investigators and being a resource about specific ethnic communities by relating information on language interpretation, settlement history, key cultural practices, community institutions, neighborhoods, and leaders;
- d) working through worker networks to identify workers employed in targeted firms and industries of interest to inspectors; and
- e) functioning as an early-warning system in terms of problem industries and employers.

Second, worker organizations can use worker outreach to enhance enforcement by:

- a) providing informational visits, training, dissemination, and one-on-one consultation in multiple languages to workers in low-compliance sectors;
- b) offering office hours at centers and local unions where workers who might be intimidated by going to a government office can come to discuss their situations; and
- c) providing safe space, interpretation, and facilitation for inspectors to meet with workers.

Third, worker organizations can collect evidence to facilitate enforcement by:

- a) gathering information about firm practices, encouraging workers to file complaints, and providing technical assistance to them in doing so;
- b) assembling the information necessary to bring cases by gathering from workers testimony and documentation about hours worked, deductions taken, and safety conditions;
- c) building cases through systematic reconstruction when workers lack paystubs by identifying and interviewing each worker, determining which contractor employed them, and establishing the dates and hours worked;
- d) identifying the full scope of the subcontractor's operations;
- e) expanding cases beyond initial complainants by identifying others who have been impacted;
- f) going to worksites, homes, and other locations to speak with workers during times when they are working but inspectors often are not (on nights and weekends); and
- g) providing a means for workers to file concerns anonymously.

The following proposals are designed to refine federal agencies' enforcement models such that they offer the greatest opportunity for cleaning up low wage, high violation industries and supporting the organization of low-wage workers.

A. U.S. Department of Labor's Wage and Hour Division

The primary logic of enforcement that emerged in the early years of the Fair Labor Standards Act (FLSA) was a complaint-based approach to detecting violations, premised on the assumption that workers would come forward and inspections would be triggered by their complaints. However, ample research has demonstrated that workers in industries with the most serious violations are typically most afraid to complain.

Under David Weil, the Wage and Hour Division’s Administrator during the Obama Administration, WHD worked to fill the gap left by complaint-based enforcement by pioneering strategic enforcement, which was based on years of Weil’s academic and applied research. WHD’s strategic enforcement model uses large data sets and sophisticated statistical techniques for identifying low wage, high violation industries and firms to investigate. Focusing on industries including agriculture, food services, retail, and temporary agencies, [WHD has recovered millions of dollars in back wages for thousands of low-wage workers](#). More can and must be done to advance this work.

1. Utilize Enhanced Compliance Agreements to Promote Worker Organizing

Under Weil, WHD negotiated enhanced compliance agreements (ECAs) and voluntary agreements as part of their strategic enforcement efforts with the goal of having “broader and more lasting impacts”.⁴ These agreements included provisions requiring new compliance positions, training for management personnel, mechanisms for internal worker complaints, and/or third-party monitoring systems. WHD should expand the use of such agreements, and in doing so prioritize settlement terms that build organizations and promote worker organizing. There are worker centers, community groups, non-profit legal organizations and employer associations with long experience who could play a role in training and monitoring.

Recommendation: Negotiate for terms in ECAs and voluntary agreements that: 1) provide partner organizations with opportunities to build a formal role in compliance monitoring after the case is closed; and/or 2) require employers to have their employees attend paid know your rights trainings on work time delivered by partner organizations.

2. Change CORPS to Better Facilitate Strategic Partnerships

WHD already has the infrastructure to build meaningful, effective partnerships with unions and worker organizations that could both increase WHD’s enforcement capacity in high violation industries and promote worker organizing. In 2011, WHD created the Community Outreach Resource Specialist (CORPS), a full-time outreach position intended to institutionalize working with community organizations.⁵ As of March 2021, there were CORPS staff based in 56 district offices.

While the CORPS position is primed for facilitating the partnerships necessary to build worker power, changes are needed to fully capitalize on CORPS’s potential. Our prior research has demonstrated that enforcement partnerships are most effective when investigative staff and

⁴ David Weil, 2018, “Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic’s Journey in Organizational Change,” *Journal of Industrial Relations* 60 (3), p. 441, available at <https://www.doi.org/10.1177/0022185618765551>.

⁵ Shannon Gleeson and Xo’chitl Bada, 2019, “Institutionalizing a binational enforcement strategy for migrant worker rights.” *International Journal of Comparative Labour Law and Industrial Relations* 35(2): 255–78. Gleeson and Bada 2019.

worker centers directly engage with each other throughout the life of the enforcement action.⁶ Within WHD, however, CORPS staff are the primary point of contact for community organizations. This structure is problematic as these are stakeholder engagement – not enforcement – positions. The result is CORPS staff add an additional layer between partner organizations and investigators.

Recommendations:

- 1) Evaluate CORPS, especially their work under the Obama Administration, to determine what changes are needed to maximize their effectiveness.
- 2) Instead of serving as the point of contact with partner organizations, CORPS staff should facilitate relationships between enforcement staff and worker organizations directly involved in enforcement actions. CORPS’s focus should be to routinize the flow of information throughout the life of enforcement actions by creating direct lines of communication between investigators and partner organizations.
- 3) Ensure CORPS is working to identify and build relationships with unions and worker organizations in WHD’s priority industries. This will facilitate the identification of more cases in low wage, high violation industries.
- 4) Create a training program for CORPS focused on partnering with worker organizations, strategic enforcement, and information sharing. As part of this program, partner organizations should host sessions for CORPS staff to share insights on relevant issues, including challenges specific to their sector and that organizations face when partnering with federal agencies.

3. Promote Information Sharing with Worker Organizations

WHD investigators continue to expect organizations to share information about alleged violations and to refer workers to the agency, but once the referral is made and the intake is complete, investigators tend to see this as the end of information sharing with the organization until the case is closed. Our research finds that such practices undermine relationships with organizations, hurt their legitimacy with the workers they persuaded to come forward and limit WHD’s effectiveness.

While regulators need to have access to the kind of granular information that community organizations can provide, worker organizations that have actively brought workers forward need to know not just what the regulatory agency is capable of doing and how it functions, but they also need to be kept abreast of how cases are proceeding. This is because a key non-substitutable capability of the organizations is the access to information they have from workers, access that is fundamentally built on trust and the organization’s credibility. When organizations facilitate complaints but receive no information on how the case is proceeding, they lose credibility with the workers they have encouraged to step forward.

Our research indicates investigators’ reluctance to share information regarding open investigations stems from well-intentioned attempts to protect the complainant’s information

⁶ Janice Fine, 2017, “Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Success Where the State Alone Has Failed?” *Politics and Society* 45 (3): 359-88. doi:10.1177/0032329217702603.

under the “informer’s privilege.”⁷ The informer’s privilege is “the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.”⁸ The policy reason for the privilege is “the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.”⁹ Though the privilege originated in criminal matters, the informer's privilege is recognized in FLSA cases where enforcement is dependent on the cooperation and statements given by employees.¹⁰ Thus, DOL may invoke the privilege “to conceal the names of employees who precipitated the suit by filing complaints with the Department of Labor.”¹¹

Though the informer’s privilege is not absolute,¹² it should not impede information sharing with unions or worker organizations. This is because waiver of the privilege occurs “once the identity of the informer has been disclosed *to those who would have cause to resent the communication....*”¹³ Thus, while investigators must be careful not to share information widely or in a manner that could result in the information getting back to the employer, providing information to a partner organization that referred or is otherwise advocating for the workers’ interest in an investigation does not waive the protections afforded by the privilege.¹⁴

Recommendations:

- 1) Train investigators on best practices for information sharing, including legal affordances as well as limits to information sharing, what and how information should be shared, and the need for open, ongoing communication with partners. *As part of this training, WHD investigators should be made to understand the importance of providing the names of consenting workers to the referring partner organization as part of the broader effort to recruit additional workers and build organizations.*

⁷ One former member of WHD leadership indicated that investigators’ reluctance to share information with worker organizations stemmed from an intersection of agency culture and law. Specifically, they stated there is the notion among investigators that once the investigation has been initiated, the conversation with outside organizations is over because the need to keep complainants’ identity confidential has been very narrowly construed.

⁸ Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

⁹ *Id.*

¹⁰ Brock v. On Shore Quality Control Specialists, Inc., 811 F.2d 282, 283 (5th Cir. 1987); Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972); Wirtz v. Robinson & Stephens, Inc., 368 F.2d 114, 115 (5th Cir. 1966); Brennan v. Engineered Products, Inc., 506 F.2d 299, 302 (8th Cir. 1974).

¹¹ Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1072 (9th Cir. 2000).

¹² Courts look to balance “the public's interest in efficient enforcement of the [FLSA], the informer's right to be protected against possible retaliation, and the defendant's need to prepare for trial.” Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 305 (5th Cir. 1972). When “the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” Rovario, 353 U.S. at 60-61. The defendant must provide a credible need for the information, one which outweighs the important policy considerations in favor of maintaining the privilege. See Dole v. Local 1942, Int'l Bhd. of Elec. Workers, AFL-CIO, 870 F.2d 368, 373 (7th Cir. 1989).

¹³ Roviaro, 353 U.S. at 60 (emphasis added).

¹⁴ There are other privileges that may be relevant when sharing information with partner organizations; for example, attorney-client privilege and the deliberative process privilege. WHD investigators should be trained on information sharing policies that ensure such privileges are not inadvertently waived.

- 2) Provide training opportunities for partner organizations that explain WHD's information sharing policies so that partners have a clear understanding of what WHD can and cannot share and when and how communication will occur.

4. Create Strategic Enforcement Industry Teams that Include Unions, Worker Organizations and Legal Non-Profits

During the extended period when federal reform has been blocked, states and local agencies have developed innovative strategies for enforcing worker protection laws. WHD must learn from and incorporate the successes of these agencies and their enforcement partners. One of the most significant examples that WHD should note comes from California. Under the visionary leadership of Julie Su and Lilia Garcia, and with the instrumental support of the Irvine Foundation, California's Labor Commissioner has engaged worker organizations and legal nonprofits as formal partners and gone far beyond any other jurisdiction in the U.S. in reimagining enforcement.

Targeting six low wage, high violation industries, teams are composed of agency staff, legal nonprofits, and worker centers with industry knowledge and connections to vulnerable worker populations. Industry teams meet regularly--typically monthly--to share information about their industry's structure, strategize and coordinate on ongoing investigations, and discuss new complaints to determine whether to initiate enforcement actions. The teams look to target cases that will have widespread impact on their industries. For example, teams may prioritize complaints that involve a high profile employer (e.g. the janitorial team brought a case against the [Cheesecake Factory](#) and its subcontractors resulting in a \$4.5 million citation) or violations that are commonplace in the industry. The role of worker organizations varies case to case, but can range from interviewing workers to identify potential violations, collecting documentary evidence (e.g. paystubs, work calendars), recruiting more workers to participate in the investigation, providing investigators with a map of the worksite, keeping workers unified and engaged throughout the enforcement action, developing a plan with workers in case of employer retaliation, coordinating with the investigator on the investigation strategy, preparing workers for the possibility of testifying if the case goes to court, and implementing press strategies to garner media attention about strategic cases. In some cases, organizations even conduct asset research on the employer to identify means for collecting back wages and other damages.

One investigation conducted by California's residential care industry team clearly demonstrates the complementary capabilities of worker organizations that WHD is currently lacking. In 2016, the Pilipino Worker Center (PWC) referred a case against Adat Shalom Board & Care, Inc. to U.S. DOL's WHD. WHD performed an on-site inspection but did not coordinate or communicate with PWC regarding its efforts. Workers told PWC that because WHD told the employer when and at which facility WHD would conduct the onsite visit the employer had time to move all but one worker to a different facility. When WHD interviewed the remaining worker at the site, the worker corroborated the employer's story that she only worked six hours per day and her timesheet accurately reflected her hours worked. WHD found no violations and the case was closed.

The following year, PWC, a member of California’s residential care team, brought the case to the team to assess whether the complaint was a strategic case they should pursue. Because of PWC’s standing as a trusted community organization, and knowing the worker center would be there to support them through the process, workers who were initially afraid to raise complaints felt more confident in coming forward to pursue their complaint with the agency. The team was able to build a contact list of workers, understand worker schedules to plan for site visits, slowly gain worker trust through off-site interviews, and adjust interview techniques so that workers better understood the information sought.

Given what PWC learned from workers about WHD’s investigation, the team decided to conduct onsite visits at all six of the employer’s facilities at the same time without prior notice. The agency interviewed workers at each facility, which prevented the owners from being present during all of the worker interviews. Investigators also came prepared with onsite copying equipment and cameras so they could capture all the documents and evidence they found at the facilities to prevent the employer from destroying or altering them. After the onsite visits, more workers agreed to cooperate in the investigation. Ultimately, California issued a citation against Adat Shalom Board & Care, Inc. totaling \$7,137,036.

This case demonstrates how DLSE and its partners leverage their unique, non-substitutable capabilities to successfully target high-risk industries in which vulnerable workers are employed. Enforcement partnerships require more than agencies relying on community partners to refer cases or conduct outreach. Community partners have expertise and access to workers and information that agencies often do not have and cannot obtain on their own. By partnering with worker and legal organizations with close connections to these worker communities and knowledge of high violation industries, California’s partnership helped to enhance the voices of workers throughout the enforcement process. Together, partners worked to clean up high violation industries and raise standards across priority industries. Further, when worker organizations are involved in the enforcement process they are further legitimized in the eyes of workers, which can provide additional financial resources and increase opportunities for them to engage with workers. Thus, worker organizations were able to leverage the partnership’s enforcement efforts to organize workers and build worker power. As a result, the partnership has been able to take on cases of far greater magnitude and complexity, resulting in the highest numbers of violations found and back wages assessed than ever before.¹⁵

Recommendations:

1. WHD’s district offices should create industry-based strategic enforcement teams that include unions and worker organizations with industry expertise to develop strategies in WHD’s priority industries.¹⁶

¹⁵ See Bureau of Field Enforcement (BOFE), “2017-2018 Report on the Effectiveness of the Bureau Field Enforcement,” (CA Labor Commissioner’s Office, 3 and 8-9, available at https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf).

¹⁶ Though we have heard concerns raised that industry enforcement teams that include partner organizations may trigger requirements under the Federal Advisory Committee Act (FACA), our analysis indicates FACA would not apply. This is because WHD’s intent in forming such teams would be to exchange facts or information not obtain advice, opinions, or recommendations from the group acting in a collective mode. Of course, additional safeguards

2. Create a grant program to support partner organizations on WHD’s industry-based strategic enforcement teams. Effective, sustainable enforcement partnerships require worker organizations with strategic capacity and a threshold level of resources they can dedicate to day-to-day enforcement work. This is why a number of state and local jurisdictions have implemented grant programs to support their enforcement partners and better ensure they have the bandwidth they need to successfully collaborate.¹⁷ OSHA has acknowledged the importance of assisting worker organizations to build the capacity to be effective partners through its Susan Harwood Training Grants. WHD needs a similar grant program that is designed to support partner organizations in the following activities:
 - Disseminating information and conducting outreach and training to educate employees about their rights under worker protection laws;
 - Conducting educational training for employers about their obligations under worker protection laws;
 - Training workers as workplace monitors to identify violations and together with their co-workers, bring them to the attention of their employers and if necessary, appropriate government agencies
 - Conducting orientations, trainings and planning sessions jointly with agency officials;
 - Providing assistance to workers in filing claims of worker protection violations including operation of hotlines to aid workers in reporting workplace problems;
 - Identifying patterns of wage-theft and other non-compliance history, including discrimination;
 - Assisting enforcement agencies in conducting investigations, including filing complaints, collecting evidence and recovering back pay;
 - Monitoring compliance with relevant worker protection laws and compliance agreements;
 - Performing joint visitations to worksites with agency officials;
 - Establishing networks for education, communication, and participation in the workplace and community;
 - Evaluating the effectiveness of programs designed to prevent violations of worker protection laws and to enhance enforcement of those laws;
 - Recruiting and hiring of staff and volunteers; and
 - Producing and disseminating outreach and training materials.

Of course, we understand this is a recommendation that will require congressional cooperation, and thus cannot be accomplished immediately through administrative action. However, we raise it here because such funding will be essential to institutionalizing and maintaining long-term enforcement partnerships needed to contend with wage theft across low wage, high violation industries.

5. Increase Coordination with State and Local Enforcement Agencies

could be instituted to further ensure FACA is not a barrier to long-term enforcement partnerships. We would welcome a follow-up conversation to discuss this matter further.

¹⁷ See e.g. NJ Stats. Annot. § 34:11D-10; San Francisco Municipal Code § 12R.25; and Seattle Municipal Code §§ 3.15.007-009 (2017).

More than half of labor standards enforcement capacity in the U.S. resides at the state and local level. Thus, in order to tackle the staggeringly high levels of wage theft across the U.S., agencies must work together to leverage the true enforcement capacity available in each jurisdiction. Effective interagency enforcement efforts will require the national leadership and coordination that only WHD can provide. Specifically, WHD must work with state and local enforcement agencies to engage in robust and reciprocal information-sharing, training, coordination, strategic referrals, and joint investigations.

Recommendations:

- 1) Create a task force to discuss and implement strategies to improve collaboration and coordination between WHD and state and local enforcement agencies.
- 2) Create a grant program for state and local enforcement agencies designed to facilitate sharing of innovative strategies and practices. Specifically, the grant program should fund:
 - Regular trainings and convenings of WHD and state and local agency staff to foster interjurisdictional relationship-building and sharing of best practices, including the cost of travel and other logistics and full-time staff to organize and manage such events;¹⁸and
 - Tools to facilitate coordination on interjurisdictional investigations, including technology upgrades and data sharing to better inform state and local strategic enforcement efforts.

Again, we understand a grant program could not be implemented administratively and we recognize the proposal has budgetary implications, but to change employer behavior and achieve widespread, sustained compliance requires using the full complement of enforcement tools and capacity available at every level of government. Few states and localities have funding to support such interagency collaboration. Thus, funding from the federal government will be vital to improving WHD’s coordination with its local and state counterparts.

6. Address Regional Disparities in Wage and Hour Enforcement Capacity

While the majority of labor standards enforcement capacity resides at the state and local level, it is not equally distributed. Instead, this capacity seems to be heavily concentrated in the Northeast, Midwest, and the West. Workers in one region in particular—the South—have both the weakest statutory rights and the least enforcement capacity in the country. This deficit itself likely compounds profound racial disparities in wages, since Southern states are home to the highest concentration of Black workers in the U.S. The economic and political legacy of slavery, post-Reconstruction exclusion and New Deal accommodations has exacerbated the subordination of Black workers in the South and given rise to a particular regional economy (historically less

¹⁸ Daniel J. Galvin, 2016, “Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance.” *Perspectives on Politics* 14 (2): 324–50; Daniel J. Galvin, 2019, “From Labor Law to Employment Law: The Changing Politics of Workers’ Rights.” *Studies in American Political Development* 33,1: 50-86.

manufacturing and more reliant on agriculture) and set of labor market institutions (lower rates of unionization; and more and older Right-to-Work laws limiting union power) that are unique in the U.S. and that disadvantage Black workers. The related historical under-development of political institutions in the South has resulted either in an absence of regulatory institutions all together in certain states, or carefully calculated diminished state-level administrative capacity in others, making the enforcement of public labor standards exceedingly difficult.

Recommendations:

1. Conduct research to examine the extent to which differential access to and enforcement of employment standards, which corresponds to the uneven spatial distribution of Black workers, is an overlooked source of systemic racial inequality in wages in the U.S.¹⁹
2. Where it is shown that enforcement capacity in the South is lacking relative to states in other regions, federal policymakers must deploy additional resources. Specifically, staffing in the Southern district offices of the WHD and the Equal Employment Opportunity Commission should be significantly expanded.²⁰ Further, baseline studies that identify the sectors with the highest violation rates should be carried out in each of the states so that strategic enforcement strategies that maximize resources can be implemented.
3. For the reasons detailed above, it will be especially important to pursue and support partnerships with the worker, community and legal aid organizations that are in relationship with low-wage black and immigrant workers.

B. Expand OSHA's Walk-Around Rule

Like wage and hour violations, health and safety violations are prime opportunities to organize workers and build worker power. The Occupational Safety and Health Act (OSH Act) provides that a representative authorized by employees shall be given the opportunity to accompany investigators during an inspection of the workplace, notify OSH Administration (OSHA) of an alleged violation, and request an inspection.²¹ At a time when they represented a third of the US workforce, the “walk-around” rule was largely assumed to apply to labor unions in the plants under inspection. The definition of an employee representative was subsequently broadened to include a person affiliated with a union or a community organization who did not have to be a coworker.²² In a 2013 Standard Interpretation, OSHA explained,

¹⁹ We are currently conducting such research and an article on the subject is forthcoming.

²⁰ WHD's [FY 2022 Congressional Budget Justification](#) seeks an additional \$30,500,000 and 175 FTE “to restore enforcement staff thereby strengthening enforcement strategies serving communities most vulnerable to economic exploitation.” (pg. 19) The hire of additional FTEs presents an opportunity to strategically increase staffing in southern district offices where data demonstrates overall enforcement capacity is the most limited.

²¹ *Occupational Safety and Health Act, U.S. Code* 29 §§ 657(e)-(f) (1970).

²² Richard E. Fairfax, OSHA Interpretation Letter Regarding Standards 1903.8, 1903.11, 1952.10 and 1903.20 to Steve Salman, Health and Safety Specialist, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, OSHA (Feb. 21, 2013), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604 [<https://perma.cc/F6XY-WVTJ>].

There are numerous ways that an employee representative who is neither an employee... nor a collective bargaining agent could make an important contribution to a thorough and effective inspection. This could be because of the representative's experience and skill... There are also many instances where non-English speaking workers want a representative who is fluent in both their own language and English, something that will facilitate more useful interactions with the CSHO during the inspection. Finally, workers in some situations may feel uncomfortable talking to an OSHA CSHO without the trusted presence of a representative of their choosing.²³

However, the Trump Administration rescinded this interpretation in 2017.

Recommendation: Like the Obama Administration, the Biden Administration should institute a clear policy that expands the definition of “employee representative” such that it encompasses third parties who are not employees, including unions, worker centers, community-based organizations, and nonprofit legal aid organizations. Once expanded, OSHA should not shy away from opportunities to use it.²⁴

C. Create Multi-Agency Task Forces to Increase Compliance

Unitary enforcement, which is widely practiced in Europe and Latin America, offers important lessons for the US Department of Labor.²⁵ Public enforcement in the U.S. is a specialized system of work regulation in which responsibility is dispersed over a dozen different agencies each with a narrow jurisdiction. Each agency is expected to investigate violations in its own narrow jurisdiction and to sanction the enterprises in which the violations occur. Limited resources and government silos mean that employers violating multiple laws enforced across various agencies may only be held accountable for a fraction of their violations. This is especially problematic as we know that violating employers are often out of compliance with multiple laws. Interagency task forces organized regionally are needed to communicate and coordinate across agencies to deter violations, take comprehensive corrective actions, and ensure violations do not recur.

Recommendation: Establish multi-agency task forces by creating MOUs between WHD, OSHA, SOL, OFCCP, NLRB, EEOC, and DOJ that allow for robust information-sharing; permanent points of contact; referral authority; consultation duties and obligations; coordinated investigation and enforcement; cross-training and interchange of agency personnel; joint education and outreach programs; joint policy-making and research; personnel and resource commitments to enforcing the MOUs; reporting requirements; and internal and interagency compliance reviews with the MOUs.

²³ U.S. Occupational Safety and Health Administration, *Standard Interpretations (Archived): Whether Workers at a Workplace without a Collective Bargaining Agreement May Authorize a Person Who Is Affiliated with a Union or a Community Organization to Act As Their Representative Under the Occupational Safety and Health Act (OSH Act)* (Washington, DC: DOL, 2013), <https://www.osha.gov/laws-regs/standardinterpretations/2013-02-21>.

²⁴ Janice Fine, 2017, “New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward,” *The University of Chicago Legal Forum* 2017 (7), p. 145, available at <https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/7>.

²⁵ Michael Piore and Andrew Schrank, *Root Cause Regulation: Protecting Work and Workers in the Twenty-First Century* (Cambridge, MA: Harvard University Press, 2018).

II. Clarifications to the OMB Uniform Guidance

The Biden Administration, in its Build Back Better efforts, has the opportunity to ensure that every taxpayer funded project addresses inequities and maximizes their potential to lift millions of Americans--particularly workers of color--out of the current economic crisis.

In its June 2021 memo, "Recommendations for Clarifications to the OMB Uniform Guidance" Jobs to Move America proposed:

- Deleting the geographic preference prohibition from 2 CFR § 200.319(c);
- Adding language to 2 CFR § 200.318 that allows recipients to require local hire and PLAs on construction projects, and targeted hire of individuals with barriers to employment;
- Adding a new US Jobs Plan scoring credit in 2 CFR § 200.322(b) and change the existing (b) to (c);
- Adding a new requirement at 2 CFR § 200.318(m) for non-federal agencies to crack down on misclassification of employees as independent contractors in federally funded contracts;
- Requiring non-Federal entities to Procure for Training when Switching to New Technology; and
- Requiring non-Federal Entities Purchasing AVs and large number of EVs to Complete Workforce Impact Assessments.

We strongly support each of these recommendations as well as the proposed language for accomplishing each change.

Recommendation:

Additionally, regarding 2 CFR § 200.318, language should be added to create community compliance monitoring programs to help ensure recipients are meeting local hire and targeted hire requirements. Here's our proposal:

"The non-Federal entity may also require contractors to cooperate with a community compliance monitoring program that is created by the non-Federal entity. The community compliance monitoring shall consist of organizations or collaborations of organizations that have at least two or more of the following: industry expertise; workforce equity, labor standards, health, and safety expertise and relationships with under-represented workers; multi-lingual capacity, experience with reasonable accommodations requirements and best practices; intake and outreach staff; access to culturally relevant community networks; and investigative or auditing capacity. The community compliance program shall have full access to all information necessary to monitor each contractor's compliance with this section."