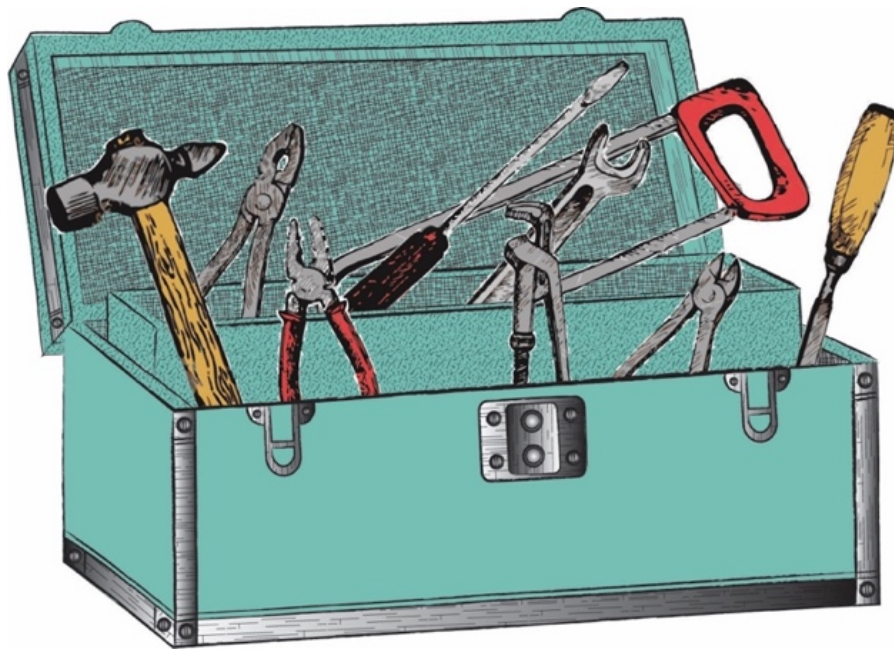


# The Labor Standards Enforcement Toolbox



## Tool 4: Introduction to Strategic Enforcement

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# STRATEGIC ENFORCEMENT

**Labor standards laws** — including paid sick days and fair wages and hours—are designed to protect workers and level the playing field for responsible employers. But these laws are only effective when robustly enforced. Wage theft remains a problem despite many states and cities passing legal protections. According to a study of 10 states by the Economic Policy Institute (EPI), 2.4 million workers every year report being paid less than the minimum wage. EPI estimates these workers were collectively underpaid by more than \$8 billion annually.<sup>i</sup>

Traditional enforcement is becoming less effective because of complex U.S. employment relationships, changing firm and industry structures, resource limitations, and a difficult political climate. Companies are feeling pressured to cut costs and limit liability. This has led to “fissuring” of employment relationships through subcontracting, franchising, and the increased use of fixed-term contracts, temporary staffing agencies, and independent contracting arrangements.<sup>ii</sup> Subcontractors and franchisees are pushed to cut costs wherever they can. As a result, low-road practices have become normalized across many sectors and vulnerable workers are afraid to complain. Too often, a firm wanting to maintain higher labor standards is placed at a severe competitive disadvantage.

Enforcement agencies will never have enough investigators to broadly improve compliance by responding to complaints individually. Additionally, a complaint-driven approach leaves behind many vulnerable workers. Some workers may not be aware of their rights, fear reprisal if they speak up, or think their complaints won’t be considered. That’s especially true for workers with tenuous immigration status. Unfortunately, most workers’ fears of retaliation are well-founded.<sup>iii</sup>

“Strategic enforcement” refers to agencies being selective about where and how they use resources. Agencies prioritize and direct efforts to where the problems are largest, where workers are least likely to exercise their legal rights, and where the agency can impact industry-wide compliance. Proactive investigations are important, but strategic enforcement is broader than conducting directed investigations. It is about using limited resources in a manner that furthers the agency’s mission of promoting compliance with labor standards.

## KEY ELEMENTS

- Identifying enforcement priorities;
- Conducting proactive investigations;
- Using all enforcement tools;
- Strategic outreach and communications;
- Resolutions that promote ongoing compliance;
- Building a culture of planning, evaluation, and review; and
- Partnering with community stakeholders and other agencies.

*Strategic enforcement is broader than conducting directed investigations. It is about using limited resources in a manner that furthers the agency's mission of promoting compliance with labor standards.*

Agencies with statutory limitations can still triage and strategically investigate incoming complaints. This brief discusses strategic enforcement techniques, including identifying priority industries and conducting proactive investigations; using all enforcement tools; resolving investigations with agreements that promote ongoing compliance; developing and using partnerships; improving outreach and education; using strategic communications; and building a culture of planning, evaluation, review, and continuing improvement. Agencies should experiment with these strategies to find the best way to deploy their resources.

## IDENTIFYING PRIORITY INDUSTRIES; PROACTIVE INVESTIGATIONS

In addition to responding to complaints, enforcement agencies should draw on evidence and experience to direct their resources where workers are most at risk. They should ask the following questions:

- **Where do the data and evidence show wage violations are most likely to occur?** The U.S. Department of Labor (U.S. DOL) Wage and Hour Division (WHD), for example, identified priority industries using data from the Bureau of Labor Statistics' Current Population Survey. It developed a list of priority industries based on prevalence of wage violations. The list was then cross-referenced with complaint data, which showed industries with the highest violations and the lowest complaints. This analysis allowed the agency to focus on industries that have high violation rates and where workers are least likely to complain.
- **Where do emerging business models lend themselves to such violations?** For example, construction and other industries that are highly sub-contracted are prone to wage violations. Because the bottom of the contracting chain has thin profit margins, it's highly incented to misclassify workers to avoid expensive benefits, including workers' compensation. Retail, janitorial work, and hospitality also have business models that incent noncompliance with labor standards.

### GETTING BUSINESSES ON BOARD

Businesses also benefit from strategic enforcement, which levels the playing field and allows high-road employers to compete. Specific outreach and guidance directed at businesses can improve awareness and compliance.

- **Where might vulnerable workers be reluctant to raise their voices and exercise their rights?** Agencies should determine whether local industries have significant numbers of workers who are immigrants or undocumented as well as susceptible to retaliation. They should pay special attention to industries like home care, where workers are primarily women and immigrants and work alone in people’s homes. Partners can help identify problematic industries.
- **Where do community partners, other enforcement agencies, and high-road employers provide an opportunity to impact an industry?** The California Labor Commissioner's Office is pioneering this approach, considering where existing partnerships, knowledge, and resources make it possible to improve compliance industry-wide. The labor commissioner considered data on high-violation industries—combined with geographical strengths and resources—to pilot community partnerships focused on the restaurant, agriculture, janitorial, garment, car wash, construction, and residential care industries in specific locations.

## USING ALL ENFORCEMENT TOOLS; PROMOTING ONGOING COMPLIANCE

Regardless of whether agencies conduct proactive investigations, they should consider whether they are using all their enforcement tools and promoting ongoing compliance through their complaint resolutions.

**Using all Enforcement Tools:** The Connecticut Department of Labor Division of Wage and Workplace Standards, for example, has issued thousands of stop-work orders to employers that misclassify workers as a pretense for not complying with workers’ compensation and other laws. Stop-work orders immediately get an employer’s attention. This helps agencies efficiently obtain back wages, penalties, and compliance.

**Understanding Business Models and Industries:** Agencies should consider where violations stem from. Investigations should extend beyond parties that can resolve only the current violation or pay back wages to consider which entities can promote future compliance in the industry. Agencies need to understand business models and carefully consider employment relationships. They should look to see if there is [misclassification](#)<sup>iv</sup> or [joint employment](#)<sup>v</sup> and if parties further up the supply chain bear responsibility or should be engaged.

**Damages:** Agencies should consistently pursue full liquidated and other damages, in addition to back wages. Without additional damages, employees are not fully compensated for their harm. Wage theft has a cascade effect on workers’ lives, leading to additional hardships like inability to pay rent. Moreover, employers receive the equivalent of a no-interest loan when they are only required to compensate workers with the wages initially owed. Collecting liquidated damages increases the costs of non-compliance and incents improved behavior.

**Ongoing Compliance:** In addition to obtaining restitution for workers, employers should consent to future compliance. That includes complying with all required postings and notifications, training, monitoring, and recordkeeping and reporting.

## CRITICAL PARTNERSHIPS

Agencies can achieve better, more impactful outcomes by forging relationships with other government agencies, non-governmental agencies, worker centers, unions, the business community, and private plaintiffs' attorneys.

For example, the New York State Attorney General's labor bureau has partnered with other federal and municipal government agencies to leverage their collective powers. For instance, the bureau can partner with New York City's comptroller office, which has authority to conduct audits but can't issue subpoenas.

Plaintiff's counsel can provide information about legal barriers to private enforcement of workers' rights. That includes cases where the private bar can't receive a fee or where contractual provisions preclude effective remedies. This can inform agencies' enforcement priorities.

Finally, worker advocates can help agencies by:

- *Identifying non-compliant industries and practices;*
- *Providing information about industry operations and key players;*
- *Connecting agencies with workers who are unfamiliar with enforcement officials or distrust institutions;*
- *Referring cases;*
- *Facilitating interviews with workers:*
  - *Providing or identifying language translation services;*
  - *Identifying neutral, convenient meeting locations for worker interviews and check distributions;*
- *Providing complementary investigatory tools (e.g., background research on employer, industry, and historical or parallel workplace issues);*
- *Providing information obtained through their own outreach and investigations of violations;*
- *Collaborating on investigations through formal or informal agreements between agencies and community organizations;*
- *Providing feedback on compliance assistance materials; and*
- *Partnering on outreach and education.*



### ***Example of Federal-State Cooperation to Promote Restitution and Deterrence***

U.S. DOL partnered with the New York State Attorney General to fight wage violations in the fast food industry. U.S. DOL investigated several Papa John’s franchisees, finding extensive minimum wage and overtime pay violations. Even after U.S. DOL explained the violations, the owner continued to short workers on overtime pay. He tried to cover it up by telling employees to clock in under fake names for their overtime hours.

In addition to U.S. DOL’s civil resolution of the case by consent judgment in 2015, the New York Attorney General criminally prosecuted the Papa John’s franchisees and the owner of the franchisees. Working together, the agencies obtained back wages, penalties, and damages for roughly 300 employees. It also sent a strong message to other employers about the consequences of noncompliance.<sup>vi</sup>

The joint investigation allowed agencies to use complementary investigatory capabilities and leverage New York State’s longer statute of limitations, higher minimum wage rate, and criminal penalties. Because of the prosecution, the owner of the franchisees was sentenced to 60 days in jail. The consent judgment also required the defendants to implement forward-looking compliance measures, including improving their recordkeeping systems, designating an internal wage and hour compliance officer, and an independent monitoring audit. These steps can bring about systemic improvements in workplaces with pervasive violations.

### ***Example of Innovative and Effective Public-Private Partnerships***

The California Labor Commissioner's Office has partnered with community organizations, including the Maintenance Cooperation Trust Fund (MCTF). MCTF is a janitorial watchdog organization established by Local #1877 of the Service Employees International Union (SEIU) and its signatory contractors. Together, they’re investigating the janitorial industry, which is plagued by noncompliance. Multiple layers of subcontracting, the underground nature of much

of the work, and janitors' work during off-hours in locked office buildings make it a challenging industry to investigate. As a result, there's rampant noncompliance with wage and hour laws.

The California Labor Commissioner's Office established a taskforce to better understand the janitorial industry, particularly its process of subcontracting. The taskforce partnered with MCTF, which employs former janitors to conduct field investigations. The MCTF investigators understand the industry's structure and are well positioned to interview and establish trust with current workers. MCTF also provided insight to the California Labor Commissioner's Office on subcontracting schemes designed to avoid minimum wage and overtime payments.

The partnership is now part of a collaboration between the Labor Commissioner's Office, the National Employment Law Project, and workers' rights and legal advocacy organizations. Partners like MCTF can help interview workers and develop information and collect evidence, including proof of wage payments. Furthermore, partners can serve as a liaison between workers and the agency throughout the investigation; coordinate interviews; and develop initial employer profiles.

Since the partnership began, there have been an unprecedented number of citations and judgments brought against unscrupulous employers, which have generated significant back pay for janitorial workers. After citations are issued, community partners like MCTF prepare workers for hearings, publicize the outcome of the case, and help ensure ongoing compliance.

## STRATEGIC OUTREACH AND COMMUNICATIONS

Violations can be prevented, identified, and remedied when workers know their rights and employers are aware of their legal responsibilities (as well as the consequences of breaking the law). Key components of education and awareness include outreach events; compliance assistance guidance; know-your-rights resources in multiple languages; community outreach and coordination; and sharing information about resolutions as part of a strategic communications plan.

Publicizing judgments can be an effective deterrent. One analysis suggested that an Occupational Safety and Health Administration press release led to "88% fewer violations at later inspections of other facilities in the same sector within a 5 km radius."<sup>vii</sup> Publicizing resolutions also gives employers valuable information about their legal responsibilities and notifies workers of their rights.

Finally, strategic communications include telling a compelling story about why your work matters, as demonstrated by the [data section](#) of U.S. DOL's wage and hour division website.<sup>viii</sup>



## PLANNING, EVALUATION, AND REVIEW

Strategic enforcement will be most successful when agencies can:

- *Develop capacity to analyze their enforcement and administrative data;*
- *Conduct economic and statistical studies to improve the agency's understanding of the regulated community; and*
- *Present data in more accessible ways for use by employers, workers, researchers, and other stakeholders; and*
- *Facilitate studies that will inform enforcement, outreach, and policymaking.*

This ensures agencies are allocating resources to programs and enforcement strategies backed by strong evidence of effectiveness. The added resources will also support evidence-based analysis of the agency's ongoing regulatory program and implementation process. Many agencies may not have this capacity currently, but they can start by developing baseline data about their own complaints and investigations.

## CONCLUSION

Agencies engaging in strategic enforcement will continue to develop, refine, and tailor their processes based on their unique circumstances and mission.





In addition to leveling the playing field for all employers, strategic enforcement is a responsible use of taxpayer funds. Complaint-driven enforcement will benefit some select group of individuals. But it isn't efficient or comprehensive enough to achieve systemic change and ongoing compliance. Using data; allocating resources to the most serious violations; and strategically engaging in outreach, education, partnerships, and communications is the responsible way to use an agencies' resources.

For additional information, see our [strategic enforcement webinar](#) and our websites:

**CLASP:** <https://www.clasp.org/issues/jobs-training-education/job-quality-and-worklife>

**CIWO:** <https://smlr.rutgers.edu/content/center-innovation-worker-organization-ciwo>

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## Endnotes

<sup>i</sup> David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute, May 10, 2017, available at <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/>.

<sup>ii</sup> David Weil, "Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division," May 2010, available at <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

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<sup>iii</sup> According to a national survey, 43 percent of workers who complained to their employers about their pay and working conditions were subject to retaliation. “Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States,” National Employment Law Project, July 2013, available at <http://www.nelp.org/content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (citing Annette Bernhardt, Ruth Milkman, Nik Theodore et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, Sept. 2009).

<sup>iv</sup> U.S. Dept. of Labor, Wage & Hour Div., Administrator’s Interpretation letter No. 2015-1, “The Application of the Fair Labor Standard Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,” July 15, 2015, available at [http://www.fissuredworkplace.net/assets/Administrator\\_Interpretation\\_on\\_Misclassification\\_2015.pdf](http://www.fissuredworkplace.net/assets/Administrator_Interpretation_on_Misclassification_2015.pdf) (withdrawn June 2017).

<sup>v</sup> U.S. Dept. of Labor, Wage & Hour Div., Administrator’s Interpretation letter No. 2016-1, “Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act,” Jan. 20, 2016, available at [http://www.fissuredworkplace.net/assets/Administrator\\_Interpretation\\_on\\_Joint%20Employment\\_2016.pdf](http://www.fissuredworkplace.net/assets/Administrator_Interpretation_on_Joint%20Employment_2016.pdf) (withdrawn June 2017).

<sup>vi</sup> New York State Attorney General Press Release, “A.G. Schneiderman And U.S. Department Of Labor Announce \$500,000 Agreement With Papa John’s Franchisee Over Wage Violations,” available at <https://ag.ny.gov/press-release/ag-schneiderman-and-us-department-labor-announce-500000-agreement-papa-johns>.

<sup>vii</sup> Matthew S. Johnson, “Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety Laws,” Apr. 3, 2018, available at <https://drive.google.com/file/d/1HcKpGXZuFWNNLa1YTIOA4Hte1BiJabT-/view>.

<sup>viii</sup> U.S. DOL WHD website, available at <https://www.dol.gov/whd/data/>.