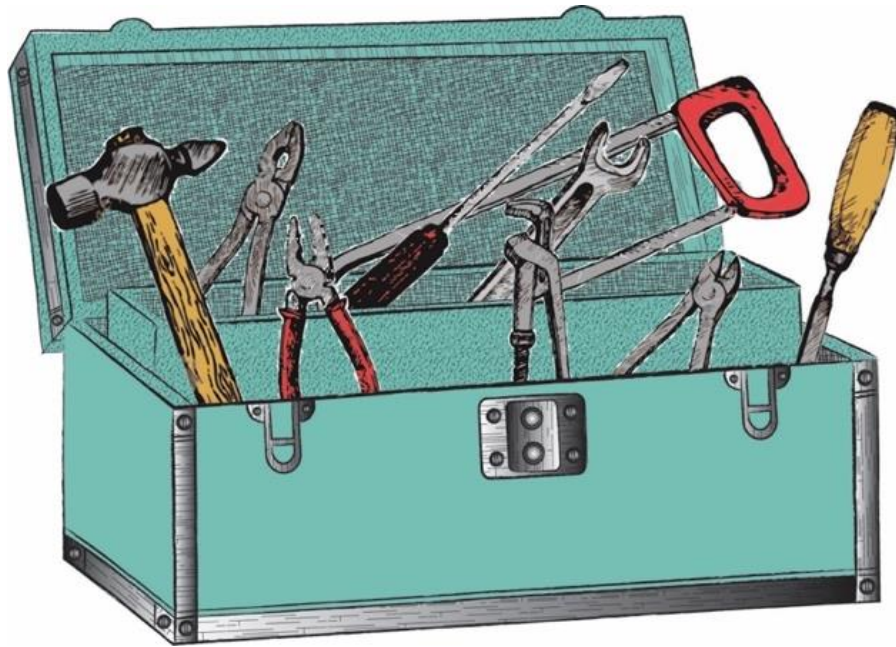


# The Labor Standards Enforcement Toolbox



## Tool 7: Sharing Information With Community Organizations

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## EXECUTIVE SUMMARY

This paper will help labor standards enforcement agencies and community and worker organizations establish and maintain strong partnerships in which open and regular information sharing is prioritized. It will guide agencies and organizations in building a common understanding about each partner's capabilities and limitations and the need for routine communication. The paper also addresses challenges agencies may face to sharing information and provides ideas for how agencies can institutionalize information sharing, formally and informally. Finally, this paper offers examples demonstrating how partnerships and information sharing can improve compliance throughout an industry and reach a broader group of workers.

## INTRODUCTION

Labor Standards violations occur at an alarming rate. Recent research finds 2.4 million workers in the ten most populous states lose \$8 billion annually because of minimum wage violations, indicating \$15 billion is lost annually, nationwide.<sup>i</sup> While labor standards enforcement agencies are charged with ensuring a just day's pay for every worker in their jurisdictions, most agencies do not have the resources to monitor and enforce all labor standards violations by themselves.

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.<sup>ii</sup> Agencies need community and worker organizations to help them improve compliance in industries most rife with violations. Because community and worker organizations have unique information and expertise, as well as the trust of vulnerable workers that enforcement agencies lack, they can help to identify patterns of violations and bring cases to agencies that would otherwise go unaddressed. Accordingly, robust enforcement necessitates that agencies build strong, enduring partnerships with organizations to successfully reach these workers and better target high risk sectors.<sup>iii</sup>

Partnerships lead to uncovering more violations per investigation and recovering more money for employees. Under former Commissioner Julie Su, Department of Labor Standards Enforcement (DLSE) launched what is now the most developed co-enforcement model in the nation. DLSE entered into partnerships with key stakeholders, including community organizations, associations, and industry representatives, which has enabled DLSE to take on cases of greater magnitude and impact. The resulting high-quality, in-depth investigations have increased the ratio of violations to investigations: in 2010, DLSE found an average of less than half of a violation per investigation; in 2017-2018, DLSE found an average of 1.5 violations per investigation. Wages assessed per inspection rose from \$1,402 in 2010 to \$28,296 in 2017-2018.<sup>iv</sup> As DLSE noted in its 2018 legislative report, "better targeting leads [to] fewer law-abiding employers to be inspected, more unpaid wages to be found, and more citations to be issued per employer."

In a broader context, government today is trending away from bureaucratic isolation and toward greater collaboration with people and organizations. This is leading to a better understanding of the dimensions of problems government is trying to solve, fosters teamwork to create and act on solutions, and leads to outcomes that truly address the problems

identified. Finally, with support from stakeholders who had a role in the process, the solutions are more likely to be implemented promptly and without litigation.<sup>y</sup> In the case of labor standards enforcement, partnerships facilitate the identification of problem industries, workplaces and workers who are having their rights violated and make it more likely that workers are willing to come forward with complaints and speak with investigators during investigations.

## **BUILDING A FOUNDATION OF UNDERSTANDING**

While partnerships between agencies and community and worker organizations can bolster enforcement capacity and ensure scarce resources are used effectively, successful partnerships are only possible when both parties openly share information pertinent to their partnerships. Agencies and organizations have different missions and live in diverging political climates so conflict is inevitable, but by building the relationship in good faith, communicating respectfully and openly, and remembering the bottom line – effective enforcement of workers’ rights – they can successfully navigate conflict, strengthening their relationship and resulting in more positive enforcement outcomes.

All too often, agencies do not share information once an investigation is opened and stick to the practice because it’s been their protocol. Additional concerns that disclosure would impact employee confidentiality cause agencies to shy away from reworking their approach to sharing information. This hesitance by the agency frustrates organizations who gave the workers the confidence to come forward in the first place, take protecting their confidentiality extremely seriously and upon whom the workers are often still depending, creating strain between agencies and organizations.

By building a strong foundation of understanding, agencies and organizations take the initial step needed to establish mutually beneficial relationships that will bolster enforcement and save resources. Below are examples of information and topics agencies and organizations may consider for building such a foundation:

1. Share information about the mission and the constraints under which each party operates. Agencies and organizations have different missions and resources and live in diverging political climates. Understanding the world in which the other operates is fundamental to a strong relationship.
2. Explore strengths and weaknesses regarding each party’s expertise, capacity, and resources.
3. Be open and honest about institutional, structural, or legal limitations that may interfere with the party’s ability to complete their mission or interfere in the relationship with the other party.
4. Be straightforward about information that may not be openly shared with the other party and why you cannot share it. Be open to rethinking assumptions about what can and cannot be shared. It is much better, for example, for the agency to tell the organization in advance that it cannot provide information about its budget without a

formal request for information because of an internal government policy, than for the agency to deny a request without explanation when the topic arises.

5. Heal old wounds. Address past interactions that have been hurtful or problematic. Discuss why the experience was negative and agree to a more constructive way for dealing with similar situations in the future.
6. Acknowledge that your interests may diverge. Agree to remain respectful and professional when the going gets tough. Agree that the first step when conflict or tension arises between the parties will be to communicate with the other party. Designate at least one person from the agency and organization to be responsible for this communication, and ensure this person is aware of all the foundational information the parties have shared. Agree on the option of using a facilitator for difficult conversations when direct communication fails.

Even after building a foundation of understanding, conflicts between agencies and organizations will continue to arise. Conflicts are healthy, even necessary, for both sides to fulfill their missions. However, by understanding the other party's perspective and exercising respectful, open communication, agencies and organizations can successfully navigate conflict, strengthening their relationship and achieving more positive enforcement outcomes.

### Co-Enforcement

Co-enforcement of labor standards is an enforcement model wherein agencies target specific, high risk sectors and partner with organizations that have industry expertise and relationships with vulnerable workers.<sup>vi</sup>

Due to relationships of trust and power, enforcement agencies, workers, worker organizations, and employers each have unique attributes that are not interchangeable:

- Agencies are endowed with the power to set standards, incentivize behavior, compel compliance, and legitimize claims;
- Workers bring firsthand experience of working conditions and employer practices, and have relationships with other workers and supervisors;
- Community and worker organizations have reputational credibility giving them access to vulnerable workers and information on problematic firms and industries, as well as access to tools for compelling compliance that may not be politically feasible for agencies;
- High road employers can establish best practices and work together to report unfair competition.<sup>vii</sup>

By harnessing the attributes of all parties, co-enforcement helps agencies manage the shifting and decentralized employment structures designed to evade traditional enforcement capabilities.

## ONGOING INFORMATION SHARING IS A TWO-WAY STREET

Co-enforcement requires routine communication between agency investigators and organizations. Too often, though, agencies are reluctant to provide enforcement information to organizations. Consequently, organizations may feel agencies make arbitrary enforcement decisions, focus their resources on the wrong cases, operate without transparency, act paternalistically without proper input from those affected by violations, or hoard power at the expense of vulnerable workers. While agencies expect organizations to share information about alleged violations and to refer workers to them for investigations, once the referral is made and the intake is complete, agencies and investigators commonly see this as the end of information sharing with the organization, instead insisting on communicating directly with the complainant.<sup>viii</sup> Such practices undermine the relationship and the effectiveness of the agency. When agencies expect the flow of information to be a one-way street, it demonstrates to the community organizations that their role is symbolic, marginal, or merely consultative; in other words, not a true partnership. Thus, for agencies to maintain strong relationships with organizations, ongoing information sharing is necessary.

### ***Intake***

The two-way street of information sharing often commences at intake or even earlier. After its receipt of an intake referral from a community partner, an agency is wise to verify whether the partner represents the employee and, if so, clarify directly with the employee and partner how the representation and communication will work during the intake and investigation. Often, the community partner already has intake information from the employee, so the agency could receive it and assess what additional information, including interviews, the agency needs. Moreover, the employee may want to communicate directly with the agency, with a representative from the partner present. Thus, the investigator needs to make space for such coordination.

### **Example**

The Seattle Office of Labor Standards (OLS) is working on protocol for receiving intakes from community organizations, which will empower community organizations to conduct the intake and save resources within the agency for requesting supplemental information and documentation. Most recently, OLS met with the community organizations to review its intake form, present a guide summarizing what constitutes a strong referral to OLS, and share its investigative process. OLS reframed the content of the documents to simplify language, include fields on the intake form for the organization to indicate whether it will represent the worker, and indicate what supporting documentation would strengthen the referral, such as pay stubs or a manual from the employer. The guide explains what constitutes a strong referral: a worker who wants OLS to recover company-wide, has documentation to support its claim, is willing to be interviewed, and is willing to wait on a short waitlist, among other factors. The investigative process highlights for the organizations and workers what to expect throughout the investigation. At the meeting, the organizations had an opportunity to provide feedback to OLS about the process and tools. OLS also

reviewed its enforcement priorities with the organizations, so the organizations know how OLS decides which companies to investigate.

OLS has an end-goal in mind. “The hope is to generate stronger referrals, to avoid duplicate work for the worker and to plug in our community partners closer to our process,” explained OLS Strategic Analyst Jennifer Wong. OLS anticipates receiving intake information directly from the organization and avoiding duplication of the basic intake. Seattle laid the groundwork for strong partnerships built on trust. Thus, the agency is confident that the opportunity to receive documents and verify that everything is consistent, coupled with the credibility of the referral from organizations invested in having a good relationship with OLS, will result in a stronger intake than OLS could do alone. Moreover, the agency is saving resources by avoiding duplication and receiving information from more employees than would otherwise speak to OLS.

## ***Investigations***

Sharing information during an open investigation can be the most contentious aspect of information sharing. Agencies must understand when an organization refers a worker to the agency, and the agency refuses to provide information about the status of the case, the organization will be less willing to refer other vulnerable workers to the agency.<sup>ix</sup> From the organization's perspective, knowing the status of the case is imperative for the organization to maintain credibility with the people they serve.<sup>x</sup> When organizations are denied this information repeatedly, they tend to look for other venues to address workers’ allegations, which undermines the agency’s ability to serve the most vulnerable workers and receive referrals for the most impactful cases.<sup>xi</sup>

Though it is unrealistic to expect an agency to share information about every investigation, there are certain cases in which an agency should almost always share information with an organization: for example, when workers party to the investigation designate the organization as their representative. Just as communicating information to an employer’s attorney does not compromise the investigator’s neutrality, providing information to a worker organization about a case they referred or in which they represent workers does not. For this reason, there should at least be parity between the information shared with employer attorneys and organizations when workers have officially designated the organization as their representative in the matter. Likewise, just as an agency may limit the information it provides to an employer during an open investigation, it can set boundaries as to what information it provides to organizations.

Without a formal designation that the organization is the worker’s representative, it may be less clear how much information an investigator should share. There is no right answer as to when and how much information agencies and organizations should share. Rather, the process of discussing and building consensus around information sharing is what is important. For example, agencies and organizations could work together to create an information sharing agreement in which they outline scenarios and define how much information will be shared. The agency can explain boundaries to organizations upfront and create an agency-wide policy to ensure limitations on information shared with organizations do not vary by investigator.



Since it might not be immediately apparent that an organization referred the worker, it's important that the agency remain open to revisiting which parameters apply in each investigation. Moreover, the agency can take care to protect confidential information from all parties and representatives, as discussed in more detail [below](#).

## Sample Information Sharing Outline

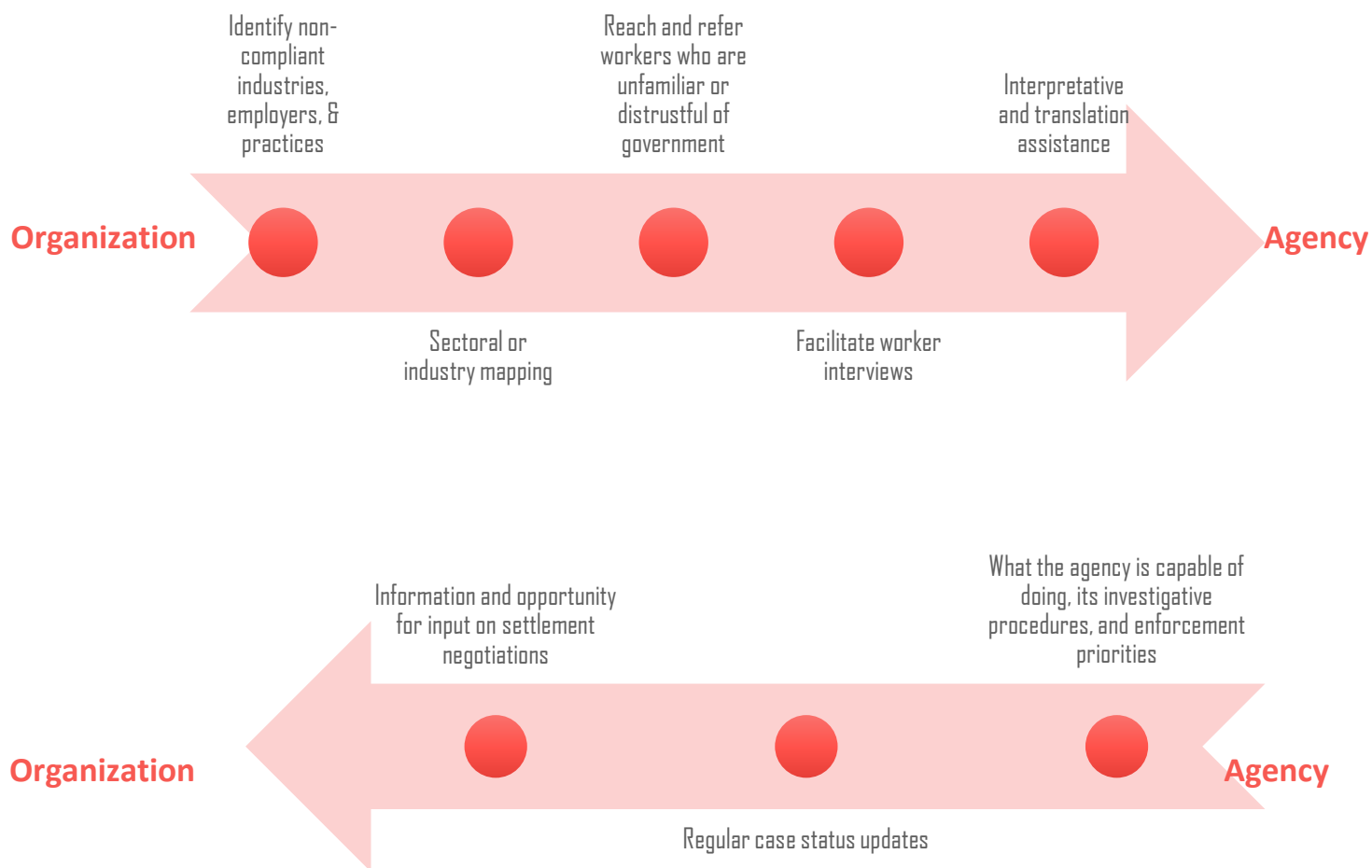
Relationship	Information-Sharing
Worker referral (organization not designated as representative)	No more than monthly updates, upon request. Agency will provide general outline of investigative steps taken, the investigative steps to be done, and a projected timeline for case closure. Agency will not reveal specific investigative information (e.g. names of employer witnesses), and organization will not be included in settlement negotiations.
Worker referral with representative designation	Agency will discuss the case with the organization as if it were the worker, sharing specific information about the case when updates are available. Organization will be kept abreast of settlement negotiations and able to provide input.
Organization and agency targeted industry together and did industry-mapping, organization referred case, facilitated interviews, assisted with interpretation (i.e. co-enforcement)	Agency and organization will meet twice a month, sharing all investigative information and coordinating work. Agency and organization will also communicate on an as needed basis throughout the investigation. Organization will be closely consulted during settlement negotiations and when possible have a seat at the bargaining table for negotiations.

From case inception, some agencies take on the matter as a plaintiff, relying on their duty to enforce the law in the public interest, instead of naming complaining employee(s) as plaintiffs. This can be difficult for organizations to understand and can lead to confusion and frustration in

the field. Nonetheless, it's important for the agency to consider sharing information with complaining employees and any involved organization throughout the investigation, including allowing the employees to hear the employer's response to their allegations and have an opportunity to respond to it. To do so provides more complete information to the agency and promotes employee and organizational buy-in to the agency's process and outcomes.

### ***Policies and Procedures***

Regularly sharing information regarding the agency's policies and procedures is necessary for both parties to work efficiently. Such policies and procedures include the agency's enforcement priorities, [triage](#) process, [investigative](#) and [settlement](#) processes, and penalties policy. This information will allow organizations to make informed worker referrals, thus bolstering their credibility with workers and saving the agency resources as it will receive fewer intakes for nonpriority complaints.





### ***Capacity and Legal Barriers***

Agencies should also be upfront about capacity limitations and legal deficiencies in the laws they enforce. By sharing information about resource limitations, the organization and agency can have an informed conversation about how best to bolster each other's strengths while filling in capacity gaps. Additionally, organizations can use their advocacy power to lobby for more resources for the agency and meaningful changes to the law. In doing so, organizations act as a countervailing power against political pressure from businesses pushing weak laws and enforcement practices.<sup>xii</sup>

Collecting wages due is something many agencies struggle to do completely or well when an employer is unwilling to pay. Often, the laws do not provide the agency with enough power to collect amounts due. For example, in 2013, the National Employment Law Project and UCLA Labor Center released a study based on a comprehensive review of records released by the California Division of Labor Standards Enforcement (DLSE) revealing staggeringly low [collections](#) rates.<sup>xiii</sup> The report also found DLSE did not have sufficient legal tools to recover unpaid wages from the worst employers. In 2015, community organizations used this information to write, sponsor, and help pass Senate Bill 588, which expanded the collections tools available to DLSE to increase collections rates.<sup>xiv</sup> DLSE advocated for broader powers to collect and implemented systems to use the powers, rendering DLSE better able to fulfill its mission. By fiscal year (FY) 2017 to 2018, DLSE's Judgment Enforcement Unit saw a 110% increase from the year prior in the amount of money collected for citations and unpaid wage judgments, recovering a total of \$10,478,835.<sup>xv</sup>

## **CHALLENGES TO INFORMATION SHARING**

It is common for agencies to be reluctant to share information with community organizations about their ongoing enforcement efforts. Their reasons include the fear of appearing non-neutral or biased, the belief that they do not have the discretion to share information with worker organizations, that sharing information threatens their ability to maintain the confidentiality of complainants or prevail on appeal or in litigation, and that sharing information is more trouble than it is worth. The challenges information-sharing presents can be addressed through thoughtful planning and policies.

### ***Neutrality***

Concern: Agencies and investigators may be reluctant to share information about investigations with worker organizations for fear of appearing non-neutral or biased. Likewise, employers may argue that exchanging information with worker organizations compromises the agency's independence. While reasons differ, a common argument agencies raise against accepting information or evidence from organizations is that the information may be selective, skewed, or even falsified to help workers prevail in the investigation.

Discussion: Just as many employers can afford attorneys, accountants, and human resource staff to help them respond to an administrative investigation, organizations can help provide workers' information to the agency.

Solution: To be “on the side of the law” requires an agency to do everything it can to obtain all relevant evidence. Experienced investigators know that a major obstacle to obtaining employee evidence, especially when employees are vulnerable, is fear of retaliation. Through their relationships, networks, and reputational credibility, trusted organizations can help agencies overcome this obstacle. By providing a safe space, cultural competency, and explanations of their rights and protections in their preferred languages, organizations can empower employees to participate in investigations and provide information they would otherwise be unwilling to share.

As factfinders, then, the most effective enforcement agencies recognize worker organizations as a valuable resource that can help agencies obtain evidence that is otherwise inaccessible, which helps to ensure investigators have the information necessary to reach the appropriate conclusion. There is nothing compromising about an organization notifying an agency of alleged violations, organizing interviews with workers who claim their rights have been violated, providing copies of employer policies or schedules, or even reconstructing payroll. Like all information an investigator receives, it is the investigator’s job to determine the credibility of all allegations, witnesses, and documentary evidence whether it is obtained from the employer, an employee, or an organization. For example, the agency would review a portion of the organization’s payroll reconstruction to check for accuracy, just as it would review an employer’s reconstruction. Thus, accepting information from organizations does not mean accepting it as true, but rather understanding organizations can provide a necessary connection to all aspects of the investigation to ensure the agency is effectively uncovering the truth.

**"Another premise of government neutrality is the assumption that government is not supposed to take sides. . . . We are on the side of the law. What does this mean? It means we are on the side of employers who play by the rules; we are on the side of employees whose rights have been violated. We need to always act fairly but if you break the law, you are going to view our enforcement as biased..."**

**Julie Su, Secretary of the California Labor & Workforce Development Agency, former California Labor Commissioner <sup>xvi</sup>**

## ***Discretion***

### ***Sharing Information***

Concern: State and local enforcement agencies are bound by state laws regulating what information government must provide per a public records or freedom of information request. Because government must balance the public’s right to access government records with other public interest needs, including preventing the invasion of individuals’ privacy, public disclosure laws include exemptions from disclosure, which vary by jurisdiction. While some exemptions to

disclosure laws may be discretionary such that the public body has the authority to decide whether it will disclose the requested information, some laws prohibit disclosure of certain information. For example, government entities are commonly precluded from disclosing “personal information” contained in government records. The definition of personal information varies, but may include an individual’s social security number, driver’s license number, credit card information, and unlisted phone number.<sup>xvii</sup>

**Solution:** Agencies and partner organizations need to be familiar with their public disclosure laws and the exemptions that limit agency discretion regarding information sharing and plan accordingly. Despite some exemptions, agencies generally have ample discretion to provide information about ongoing administrative investigations, and in many jurisdictions can do so without a public disclosure request. In sharing information more liberally, the agency will not only create stronger partnerships with community partners, but greater transparency also helps to gain trust from the general public.

In addition to exemptions in public disclosure laws, some jurisdictions have other laws that limit what information can be shared. For example, in California, government officials working in “state departments,” including the California Division of Labor Standards Enforcement (DLSE), cannot provide information obtained through administrative interrogatories or subpoenas as it relates to “confidential or private transactions, property or business of any person.”<sup>xviii</sup> Failure to comply is a misdemeanor and disqualifies the government official from working in the department.<sup>xix</sup> While this law is not specific to DLSE, it has implications for what information DLSE may share with its community partners. Agencies should review their code for any laws that limit information sharing to determine whether such additional requirements exist in their jurisdictions and be transparent about these limitations with community partners. Likewise, especially on cases in which the community partner is heavily involved, parties will want to consider and discuss limitations to information sharing from the outset of the investigation to inform the case strategy.

### ***Withholding Information***

**Concern:** Because of the significant public interest in access to information, agency discretion regarding the release of information is much more limited when the agency wants to withhold information requested per the relevant public disclosure act. As much, if not all, of the information a community partner gives to an enforcement agency must be disclosed if requested, both the agency and its partners should anticipate that information provided to the agency may become public. Accordingly, it is crucial that both the agency and the community partners understand the public disclosure laws and exemptions. Likewise, agencies and community partners may create an agreed upon procedure regarding information the organization will not turn over to the agency that errs on the side of caution. Generally, this would mean organizations refrain from providing agencies with sensitive worker information that is irrelevant to the investigation, for example workers’ immigration status.

In some states, requirements to disclose information go beyond what an organization has turned over to an agency. Public records laws in some jurisdictions subject work funded by public contracts to public disclosure and may apply to information obtained by community

partners that received public funding even where the information was not turned over to the agency. For example, Minnesota’s public disclosure law, the Data Practices Act, includes a “privatization” provision that requires that where a government entity enters into a contract with a “person” – which includes an individual, partnership, corporation, or association – to perform any “government function,” all of the data created, collected, received, stored, used, maintained, or disseminated by the “person” in performing those functions is subject to the public disclosure law and the “person” must comply with those requirements as if it were a government entity.<sup>xx</sup> Under Minnesota’s law, then, whether a community partner that has contracted with the Minnesota Department of Labor and Industry is subject to the law will depend on whether the work the partners are doing under the contract constitutes a “government function.” This is a question without a simple answer, but a wise one for community organizations that are considering contractual partnerships to consider.<sup>xxi</sup>

Solution: As legal nuances regarding public contracts vary and as the agency has better access to resources and expertise, the agency should proactively address all issues of disclosure with community partners. One way agencies can accomplish this is by providing training to community partners at the outset of the partnership on relevant public disclosure laws to ensure partners are fully informed about their obligations and potential risks. For example, when the Seattle Office of Labor Standards (OLS) created its Community Outreach and Education Fund, it provided training to the community organizations with whom it contracted that included a full module on applicable public disclosure laws. The module was presented by OLS’s Public Disclosure Officer and included ample time for organizations to ask the agency’s subject matter expert questions specific to their own situations. The training provided essential information so that organizations could take steps to protect sensitive information they did not want made public. Another way to addressing issues of disclosure is to consider a common interest agreement, discussed in detail [below](#).

## **Confidentiality**

Concern: Some enforcement agencies have the legal authority, and responsibility, to keep the names of complainants and witnesses confidential, even if the information is requested.<sup>xxii</sup> Confidentiality is important as it helps to shield workers from retaliation, which can incentivize vulnerable workers to participate in investigations. However, some agencies see confidentiality concerns as a barrier to information sharing with community partners. They fear that if they provide workers’ identifying information to organizations they would then be required to produce the same information if they received a public records request. This is a valid concern, but one that can be avoided.

Solution: The agency can prioritize keeping the identity of participating complainants and witnesses confidential while also creating policies and strategies that allow for information sharing and mitigate risks to confidentiality. For example, agencies can have a clear policy that they will not release the names of complainants and witnesses protected by confidentiality. The policy can also include that the agency will refer complainants and witnesses to partner organizations. This a tactic used by the New York City Office of Labor Policy & Standards (OLPS). OLPS occasionally refers workers to organizations for support in ongoing investigations or to assist with ancillary issues. OLPS always attempts to obtain consent from the worker to reveal

their identity to a third party and rarely would reveal a worker's identity without their consent. Depending on the particular worker's needs, OLPS provides the organization's contact information directly to the worker, for the worker to contact the organization. This strategy will help connect the worker to the organization without the agency revealing the identity of the complainant or witness. Alternatively, if an organization is helping to locate employees and arrange interviews, the agency could provide the full list of employees it received from the employer to the organization, which would not out any individual complainant or witnesses.

Benefits: Maintaining confidentiality is in the agency's and the partner organization's interest, but agencies should not assume organizations know why they are withholding some information. It is an agency's responsibility to fully explain to organizations their concerns about sharing some information, like witnesses' names and contact information, so organizations understand the agency is not making arbitrary decisions regarding information sharing. Transparency around agency decision making will help agencies garner trust and strengthen their partnerships.

### ***Appeal and Litigation***

Concern: Some agencies have also expressed concern that sharing information with community partners during an investigation could be used against them if a case is appealed or otherwise litigated. Where the agency has proved the case on the merits such concerns are generally unwarranted. Thus, while there is danger in accepting a community partner's theory of the case without objective evidence proving the allegations, it would be a stretch to argue that communicating with a community organization, in addition to the employer or its representative, to obtain all relevant evidence compromises the agency's findings.

Other concerns regarding information sharing and litigation pertain to privileges that protect agencies from being compelled to disclose information if the case is litigated. The two most relevant privileges are attorney-client and work product.

#### **Attorney-Client Privilege**

Attorney-client privilege protects from forced disclosure information a client shares with their attorney. This privilege is waived when a privileged communication is made in the presence of or disclosed to individuals outside of the attorney-client relationship. For example, an investigator has a conversation with the agency's lawyer describing their findings in a joint employment case in order to get the lawyer's legal advice as to whether a joint employment relationship exists. If the investigator shares details about this conversation with the community partner, they may have waived attorney-client privilege and if the case goes to trial, the investigator may be compelled to testify and describe the conversation they had with the attorney. One step agencies and partners can take to mitigate risks of waiving the attorney-client privilege is signing a common interest agreement, which is discussed in greater detail [below](#).

#### **Work Product Doctrine**

The work product doctrine protects materials prepared in anticipation of litigation from forced disclosure in litigation. Case law on this issue is limited, but does suggest documents obtained

or created as part of administrative investigations are for the purposes of collecting facts to determine whether sufficient evidence exists to support the charge and not in anticipation of litigation.<sup>xxiii</sup> The doctrine, though, would generally apply after the case moves from the investigative phase to preparing for possible litigation. Waiving the work product doctrine is less clear-cut than waiving the attorney-client privilege. Generally, waiver of the work product doctrine occurs when a party shares protected information with an adversary, or with a non-adversary if the disclosure substantially increases the opportunities for potential adversaries to obtain the information.<sup>xxiv</sup> Thus, providing protected information to a community partner may not waive the work product doctrine but it could increase the risk a court will find the agency waived the privilege. Significantly, the work product doctrine is not absolute and can be overcome if the opposing party shows that it has substantial need for the materials and cannot, without undue hardship, obtain their substantial equivalent by other means.<sup>xxv</sup>

Counsel for executive agencies will also keep in mind structuring the relationship to avoid waiving the deliberative process privilege.

Solutions: While these issues should be discussed with the agency's counsel and considered when determining what information to share and how to share it, potential waiver of the privileges applies in limited circumstances. Thus, with appropriate planning, in all likelihood, neither will pose a significant barrier to information sharing.

### ***Use of Resources***

Concern: Another reason agencies may not share information about enforcement is they may feel keeping a community partner in the loop on investigations is not a priority, or that the organization is demanding too much information, detracting from the agency's ability to complete the investigation.

Solution: The Workers Defense Project (WDP), the preeminent low wage Latino worker organization in Austin, and the Austin Police Department (APD) present a prime example of how a community partner can increase the reach of an overstretched agency. WDP and APD have been working together for 14 years to investigate criminal unpaid wage cases. APD detectives have high caseloads, so WDP takes on a significant amount of the investigative work, including sending demand letters, calculating damages, and attempting to mediate claims. To facilitate their partnership, WDP and APD work closely together to formulate case strategies and communicate about cases an average of three to four times per week. The time APD spends communicating and maintaining a strong relationship with WDP ultimately saves APD's resources as it allows WDP to shoulder the bulk of the investigative work.

WDP formed a second partnership with the Occupational Safety and Health Administration (OSHA) to improve health and safety in the construction industry. WDP identifies workers and collects information that it provides to OSHA, who then initiates an investigation while keeping WDP up-to-date on the case, communicating frequently, copying WDP on letters, and meeting quarterly to review their partnership. Through this partnership, WDP learned that because of OSHA's mandate to investigate every complaint, it needed to be judicious about the cases it referred, passing along only serious violations to avoid draining OSHA's resources. From OSHA's

perspective, WDP’s willingness to understand and adapt to its challenges was critical in alleviating some of the tensions that can arise when agencies and organizations work together.<sup>xxvi</sup>

While healthy partnerships can help agencies extend their reach, agencies are wise to address situations in which a partner is demanding more than an agency can provide, empowering investigators to have frank conversations with organizations regarding their capacity and limitations. For example, an organization may call an investigator every day to ask for an update on the case. From the organization’s perspective, they may feel frequent communication is the best means for a fast resolution to the investigation. The investigator, though, may be juggling a caseload of a few dozen company-wide investigations and daily communication with the organization may actually detract from the investigator’s overall effectiveness. To address the situation, the investigator may openly explain their resource constraints and inability to maintain such frequent contact while suggesting an alternative arrangement like a standing weekly check-in. Community partners must be understanding of agency limitations and willing to compromise on such issues.

**Benefits:** The agency is wise to view the short-term use of resources for collaboration in context of the long-term payback of dividends. Like any relationship, navigating partnerships with community organizations may pose some challenges. However, the benefits of healthy partnerships with trusted community organizations will render the agency better equipped to achieve broad, sustained compliance. For instance, community partners can connect agencies with vulnerable workers, refer cases, conduct outreach and education campaigns, provide industry expertise or language capacities an agency may lack, and create press campaigns to publicize violations and cases.

## Partnerships and Information Sharing in Other Contexts

Partnering with community organizations and sharing information across the public-private divide is an issue that arises in the context of numerous challenges with which federal, state, and local governments grapple. Lessons learned from past initiatives provide guidance for agencies interested in or already partnering with community organizations to bolster their enforcement efforts.

The below table incorporates principles distilled from an Institute for Local Government report and an Obama Administration best practices guide to building partnerships.<sup>xxvixxxviii</sup>

Common Pitfalls of Agencies	Helpful Practices for Agencies
Treating the community partner as a one-way “supplier” of information	With your partner, develop processes for two-way communications about concerns that have been mutually defined



The agency does not take time to truly understand the partners' hopes for the process and outcomes	Understand partners' motivations for participating in the partnership, while recognizing and working to accommodate their risks and constraints
Failing to compensate the partner for its work	Ensure the partnership has access to sufficient resources and that all parties are committed
Having unrealistic expectations for the organization	Early in the partnership, establish a shared understanding about what the organization can practically do. Consider partnering with multiple organizations with various strengths.
Community organizations are not treated as equals in the partnership	Involve the partner in setting goals for the partnership. Be clear about the information you can and cannot share and why. Share in the responsibility for decision making and outcomes.
There is no partnership agreement, or the one that exists does not clearly define the responsibilities of each partner	Establish in writing a detailed set of responsibilities (with timelines) for each partner and revise together as necessary. Agree on the actions and achievable goals for each partner and on measurable outcomes to evaluate effectiveness.
The community organization feels used because they invested their time and resources providing information or feedback, but the agency did not share information about the outcome	Explain decisions and next steps and explore ways to strengthen two-way communication, including reporting back about outcomes. Foster trust and respect among partners, including respect for each other's missions, goals, and limitations.
Lack of communication	Manage the partnership by clearly defining how often partners will check-in, responsibilities, ground rules, and mechanisms for resolving disagreements.
The partners are unaware of legal consequences that stem from the collaboration	Involve partners' legal counsels to assist in ensuring partners are fully aware and complying with various legal requirements.
The public is unaware of the partnership	Publicize the partnership's successes.

Even though these recommendations are not specific to partnerships between labor standards enforcement agencies and community organizations, the takeaways are applicable and serve as a helpful guide for partnering across the public-private divide.

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Organizations, too, might consider the following to overcome pitfalls and improve practices.

<b>Common Pitfalls of Organizations</b>	<b>Helpful Practices for Organizations</b>
Expectation that the agency will prioritize the matters the organization brings forward	Understand the agency's job is to enforce the laws equitably, work with the agency to create a policy regarding how the agency will prioritize cases, including cases referred by partner organizations. If there is a concern about how the agency prioritizes matters, ask for a copy of their policy or, if it doesn't exist, for the agency to develop one.
Lack of Communication	Connecting the agency and investigator with new staff when there is organizational turnover. Inform the agency of resource limitations and how the organization can help in an investigation.
Agency feeling used	Communicate to the agency if the organization is using the Investigation to build worker power, for example to put pressure on the employer for issues unrelated to the underlying claim.
Having unrealistic expectations of what the laws allow or prohibit	The agency can only enforce the laws on the books. Where the laws are weak or inadequate, organizations can use their political power to advocate for changes to the law. Discuss with the agency early in the partnership where it has identified statutory gaps. These conversations should be ongoing as agencies may discover additional gaps as they investigate particular situations.
Having unrealistic expectations for the agency	Early in the partnership, establish a shared understanding about what the agency can practically do, sharing information about the agency's entire responsibility and power, body of work, and how the moving parts of the agency operate together.
Tendency to go to the media or elected representatives when the going gets tough	With the agency, develop processes for two-way communication about concerns that have been mutually defined; when the going gets tough, have an intermediary to help settle the dust and keep the relationship moving forward to the goal. When the media seems like the only alternative, inform the

	agency and explain why the organization feels it has exhausted other avenues.
Failure to prioritize the relationship	Manage the partnership by clearly defining how often partners will check-in, responsibilities, ground rules, and mechanisms for resolving disagreements.
Lack of transparency with agency	Before referring a matter to the organization, look at it with a neutral eye to assure that the allegations are strong. Provide all relevant information regarding a worker's allegations. Failing to include facts that may not be beneficial to a worker's case can undermine the agency's trust in the partnership.

## FORMALIZING INFORMATION SHARING

Ideally, information sharing is formalized so it is sustained over the course of different administrations and political climates. This also ensures parties' expectations and commitments are clear and institutionalized, which will alleviate tension and uncertainty created by case-by-case decision-making and indefinite cooperation.<sup>xxix</sup> Moreover, it will promote transparency, give power to vulnerable workers, help minimize the occurrence of arbitrary enforcement decisions, focus resources on priority cases, and open the door to collaboration with and input from people affected by violations.

The most common way to formalize information sharing is through a memorandum of understanding (MOU) or common interest agreement (CIA). An MOU or CIA allow agencies and organizations to negotiate and define ground rules for engagement, each party's roles and responsibilities, as well as the manner and type of information that will be exchanged. CIAs, also known as a joint defense agreement, differ from MOUs. An MOU is a formal agreement but it is not legally binding. Government agencies may use it to define how they will collaborate and state their common interests. A CIA is primarily a litigation tool that allows parties to share privileged information without waiving applicable privileges.

MOUs are common for defining cooperation and information sharing between enforcement agencies, including between the [U.S. Department of Labor](#) and its [state counterparts](#). A sample between DOL and the Colorado Department of Labor and Employment reads, "With the specific and mutual goals of providing clear, accurate, and easy-to-access outreach to employers, employees, and other stakeholders, and of sharing resources and enhancing enforcement by conducting coordinated investigations and sharing information consistent with applicable law, the Parties agree to enter into this partnership . . ." and goes on to list the parties' purpose,

responsibilities, how the parties will share information and resolve disagreements, and setting the term of the agreement.<sup>xxx</sup>

CIA's also define cooperation and information-sharing but are legally binding. California has used CIA's to formalize partnerships between California DLSE and their community partners. Other agencies have experimented with CIA's but there is limited data to establish their efficacy.

Another way to formalize information sharing is by amending regulations to formally recognize organizations as representatives equal to employer attorneys. For example, the Seattle Office of Labor Standards' Rules of Procedure explicitly allow a party to "designate an individual over the age of eighteen (18) to be the party's representative."<sup>xxx</sup> The regulation expressly states that the representative exercises the rights of the party and that communication with the representative is communication with the party. To carry out this regulation, OLS has a form workers can complete to formally appoint organizations as their representatives.<sup>xxxii</sup>

Investigators are used to communicating with attorneys who represent employers during investigations. Just as employers' attorneys represent them, workers should be permitted to appoint community organizations to be their representatives in an investigation. To facilitate this, agencies can create a form for workers to complete and sign to formally appoint an advocate or representative. As a best practice, the agency can incorporate the option to make this designation on the complaint form or if no complaint form exists, make the designation form available online and inform workers about their option to appoint an advocate or organization. When such an appointment is made, advocates or organizations should be treated on par with employers' attorneys.

A third way to formalize information sharing is by outlining responsibilities and the flow of information between the agency and the organization in a contract. The following examples could be used to maximize each partner's resources and avoid redundancies:

1. Intake: Empower the organization to conduct intakes, provide intake information to the agency, and highlight that the agency may meet with the worker to ask clarifying and supplemental questions and request records to round out the intake information. Permit the organization to assist the employee with the intake form and be present for the intake interview, if the agency conducts it.
2. Investigation: Clarify what information the agency will share about an open investigation the organization referred.
3. Communication: Indicate in the contract how often the agency and organization will meet. If there are multiple community partners, consider setting regular individual meetings between the agency and each organization as well as regular time for the agency and all organizations to meet as a group. These meetings need to be carefully planned and facilitated by key organization and agency leaders. In cases where the relationships are just being established or where they have become contentious, consider bringing in an outside facilitator who is acceptable to both parties.

These attempts at outlining roles and responsibilities can go a long way in building rapport and trust with organizations and workers. Ultimately, the agency will receive more information from community organizations and workers, allowing it to more effectively enforce the laws.

## INFORMAL INFORMATION SHARING

In some jurisdictions, politics or legal barriers may currently prevent the agency from formalizing relationships between enforcement agencies and worker organizations. However, routinizing the flow of information informally is still possible. Like formal arrangements, informal information sharing requires the facilitation of dialogue, setting and maintaining clear ground rules, bringing stakeholders together, exploring common interests and working in a collaborative spirit.<sup>xxxiii</sup> Agencies must also recognize the potential pitfalls of informal information sharing arrangements, including that they are subject to changes in the political landscape and notions of individuals within the agency, and establish internal mechanisms to avoid them.

For example, agencies can:

- Create internal policies with input from organizations regarding when and how investigators will share information, like the information sharing chart on page 5 above.
- Train investigators on information sharing policies, as well as the importance of a strong relationship with community organizations, and that information sharing is critical to those relationships.
- Calendar regular meetings with organizations throughout the year to facilitate dialogue between the agency and organizations framed by agendas, facilitation structures, and ground rules agreed upon by a consensus.
- Establish relationships between the public disclosure officer and staff members from organizations to facilitate an efficient process for public disclosure requests. This will provide space for conversations regarding the information the organization needs and how it can most efficiently be produced by the agency.

When done openly and in good faith, informal information sharing can foster trust and build a foundation for a strong partnership between the agency and organizations.

## EXAMPLES

### ***CLEAN and the California Commission of Labor<sup>xxxiv</sup>***

The [Community Labor Environmental Action Network](#) (CLEAN) is a coalition of worker centers, unions, and community organizations that advocates for rights of carwashers, or carwash workers, in L.A. County, which has the largest carwash industry in the U.S. Community organizations first started organizing for change in the 1990s when worker stories made it clear the industry was highly dangerous and workers were vulnerable to exploitation and labor standards violations.

CLEAN's goal was to effect industry-wide change, and it took a multifaceted approach that included organizing for changes in the law, conducting union campaigns, assisting workers to

file class action lawsuits, and bringing cases to the NLRB and California Division of Labor Standards Enforcement (DLSE). CLEAN understood it had industry-specific information DLSE investigators needed and so it worked to build stronger relationships with agency leaders and investigators.

In 2010, when Julie Su was appointed to lead DLSE, she arranged for CLEAN to do presentations to educate agency staff and opened lines of communication between CLEAN and DLSE field investigators. When DLSE needs to identify more workers for a complaint, they are willing to share workers' names and contact information with CLEAN so CLEAN can reach out to workers. Investigators are also briefed by CLEAN before they conduct on-site investigations to obtain information specific to each location so they know precisely what and who to ask for when they arrive. Investigators then do follow-up interviews with workers at CLEAN, take CLEAN's assistance on payroll reconstruction and wage calculations, and provide CLEAN with updates on cases.

CLEAN and DLSE routinized the flow of information and prioritized developing their relationship, an investment that has paid off. Focus groups with carwashers indicate aggressive enforcement and unionization has improved working conditions throughout the industry. Likewise, under Su, DLSE has seen the highest amount on record of minimum wages and overtime wages assessed, an accomplishment Su credits to DLSE's partnerships with labor and community groups like CLEAN.

### ***Seattle's Community Engagement Specialist***

The Seattle Office of Labor Standards (OLS) has invested substantial resources into its community partnerships, awarding over [three million dollars](#) from 2017 to 2019 to seven organizations and community partners to fund activities ranging from outreach to intake to complaint resolution. OLS also has a Community Engagement Specialist, a full-time staff member designated to foster these partnerships and communicate regularly with the organizations. OLS's current Community Engagement Specialist is Claudia Alexander Paras, who came from a community organization to work with OLS. She expressed the importance of information sharing, stating,

Reciprocal information sharing is key to building strong partnerships between OLS and community organizations because everyone is engaged and able to think collaboratively on strategic enforcement and engagement of workers experiencing labor standards violation. All the pieces of the puzzle are laid out and solutions or connections that one side may not have been able to see on their own can be pieced together when everyone is at the table.<sup>xxxv</sup>

To institutionalize information sharing and foster a culture of collaboration, all of the organizations and OLS meet quarterly to discuss their work and trends in the data collected by the organizations. Different staff from OLS also participate in the meetings to provide training and resources on nuances in and changes to the laws. This also serves as a way for organizations to get to know different members of the enforcement team to help build

relationships throughout the agency. Moreover, the enforcement team remains accountable to the community organizations, receiving feedback from them and keeping their perspective in mind throughout enforcement efforts. The OLS Community Engagement Specialist also meets on a quarterly basis with each organization to have deeper conversations about workers and strategies for engagement, how OLS can be more supportive, and the work the organizations are doing outside of labor standards to get a better understanding of what is happening on the ground in community. Between meetings, the Community Engagement Specialist is in continual contact with the organizations, communicating with at least one organization every week to talk through OLS's policies and updates, stay current on language access and translation work, and provide onboarding training for new staff about the partnerships when the organization has turnover.

As a result of these partnerships, organizations conducted 404 labor standards trainings reaching 4690 workers in 2017 and 502 labor standards trainings reaching 4561 workers in 2018. As well, in 2017 and 2018, organizations educated individuals about Seattle's labor standards laws and confirmed that a violation occurred for 1247 people that did not want to complain to OLS. Those workers received information about the law only because a trusted organization had it. Moreover, the organizations captured the industry in which each of these 1247 people worked, bolstering OLS's data about where violations occur in Seattle and shaping OLS's strategic enforcement efforts.

## CONCLUSION

Partnerships between agencies and worker organizations are powerful tools that can make enforcement agencies more effective in their enforcement efforts. However, partnerships will only be effective and sustainable where the agency and its partners trust each other and are able to regularly share information pertinent to their partnerships. Though there are some challenges to information sharing across the public-private divide, trusted worker organizations have unique capabilities and access to information that state actors do not. When agencies and organizations are able to combine their attributes through partnerships and information sharing, the enforcement gains will far outweigh the costs, and agencies will be better able to protect the rights of vulnerable workers and ensure a level playing field for compliant employers.

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<sup>i</sup> David Cooper and Teresa Kegan, Employers steal billions from workers' paychecks each year, Economic Policy Institute, 2017, <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> 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).

<sup>iii</sup> Id. at 362.

<sup>iv</sup> California Labor Commissioner's Office, 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement, [https://www.dir.ca.gov/dlse/BOFE\\_LegReport2018.pdf](https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf).

<sup>v</sup> National Policy Consensus Center, Integrating Collaborative Activities: Public Deliberation with Stakeholder Process: [https://www.pdx.edu/npcc/sites/www.pdx.edu/npcc/files/integrating\\_activities.pdf](https://www.pdx.edu/npcc/sites/www.pdx.edu/npcc/files/integrating_activities.pdf), 3.

<sup>vi</sup> Fine, *supra* note ii, at 362.



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vii Id. at 364-365.

viii Matthew Amengual and Janice Fine, Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States, 11:2 Reg. & Governance, 129, 148 (2016) (quoting the former Director of the San Francisco Office of Labor Standards Enforcement).

ix Id. at 149.

x Id. at 156.

xi Fine, *supra* note ii, at 366.

xii Id. at 365.

xiii Eunice Hyunhye Cho, Tia Koonse, and Anthony Mischel, Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers, National Employment Law project, 2013, <https://www.nelp.org/publication/hollow-victories-the-crisis-in-collecting-unpaid-wages-for-californias-workers/>. For an excellent discussion on barriers to enforcement and collections in California and throughout the U.S., see Marianne Levine, Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law, *Politico*, 2018, <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

xiv See e.g. Wage Justice Center, Legislative Changes, <http://wagejustice.org/legal-strategies/> (last visited June 14, 2019).

xv BOFE, *supra* note iv, at 11.

xvi Fine, *supra* note ii, at 382.

xvii See e.g. N.J. Stat. Ann. § 47:1A-1.1, which exempts the disclosure of “that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person.”

xviii Cal. Gov. Code § 1183.

xix Id.

xx Minn. Stat. § 13.05(11).

xxi See e.g. *Helmberger v. Johnson Controls, Inc.*, 839 N.W.2d 527, 534 (Minn. 2013) (Page, J., concurring) (disagreeing with the majority's holding that a function is governmental when it “involves the exercise of power conferred by statute upon local agencies in administering the affairs of the state and the promotion of the general public welfare,” and instead relying on the following, non-exclusive factors “that are entitled to varying weight depending on the facts and circumstances of the case”: (1) whether a statute confers upon the government entity the duty to perform the services outlined in the contract; (2) the degree to which the government entity has delegated decision-making authority to the private person; and (3) whether the contracting government entity has performed the contracted-for services in the past) (internal citations omitted).

xxii This authority may stem from multiple laws. For example, the Seattle Office of Labor Standards has discretion to withhold the identifying information of complainants who request confidentiality. The agency's discretion is the result of a disclosure exemption in the Washington Public Records Act specific to investigative and enforcement agencies combined with an explicit mandate under local labor laws requiring the agency keep confidential the name and identifying information of the complainant. See RCW 42.46.240(2) and SMC 14.20.050(B)(1).

xxiii See *Hugley v. the Art Institute of Chicago*, 981 F. Supp. 1123 (N.D. Ill. 1997).

xxiv See *Gutter v. E. I. DuPont de Nemours & Co.*, 1998 WL 2017926 (S.D. Fla. May 28, 1998).

xxv Fed. R. Civ. P. 26(b)(3)(2).

xxvi See Fine, *supra* note ii, at 369-379.

xxvii Institute for Local Government, Partnering with Community-Based Organizations for More Broad-Based Public Engagement, 4, 2015, [https://www.ca-ilg.org/sites/main/files/file-attachments/partnering\\_with\\_comm\\_based\\_orgs\\_final.pdf](https://www.ca-ilg.org/sites/main/files/file-attachments/partnering_with_comm_based_orgs_final.pdf). The Institute for Local Government (ILG), through interviews with local officials and community leaders across California, published a report for public entities interested in partnering with community-based organizations to achieve broad-based public engagement.

xxviii Community Partnerships Interagency Policy Committee, Building Partnerships: A Best Practices Guide, 4-5, 2013, <https://www.fs.fed.us/sites/default/files/building-partnerships-a-best-practices-guide.pdf>. The Obama Administration's best practices guide, drew on the experience of over 20 federal agencies to present “Keys to Success” for public-private partnerships.

xxix See Janice Fine and Jennifer Gordon, Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations, 38:4 Pol. & Soc'y., 552, 561 (2010).

xxx Find the full text here: <https://www.dol.gov/whd/workers/Misclassification/co.htm>.

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<sup>xxx</sup> SHRR 140-050(1).

<sup>xxx</sup> Seattle’s template language reads:

“Authorization to Share Information

I, [Witness], authorize the Seattle Office of Labor Standards to share information about my complaint with (check one or both):

- ☐ [Representative]
- ☐ Any person from the [Organization].

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[Witness]

Date”

<sup>xxx</sup> Fine, *supra* note ii, at 367 (citing Chris Ansell and Alison Gash, Collaborative Governance in Theory & Practice, *J. of Pub. Administration Research & Theory* 18 (2008)).

<sup>xxx</sup> This example is from Fine, *supra* note ii, at 372 – 376.

<sup>xxx</sup> Personal communication, June 19, 2018.