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ALT-ENFORCERS: THE EMERGENCE OF STATE ATTORNEYS GENERAL AS WORKPLACE RIGHTS ENFORCERS

JANE R. FLANAGAN¹

INTRODUCTION

This Essay aims to document and explore the recent rise of state attorneys general as alternative or supplemental workplace rights enforcers, including the strategies they employ to enforce existing employment laws and to protect and advance the interests of vulnerable workers in their states more generally. In doing so, I will focus particularly on one strategy central to state attorneys general workplace enforcement efforts: partnership with community organizations and “alt-labor” groups, such as worker centers, that are not traditional labor unions but represent and advocate for the interests of workers, sometimes within a particular sector or geographic region.² I will argue that such partnerships are critical in order for state attorneys general to identify and prioritize the type of high-impact, affirmative workplace rights cases they want to bring and to leverage the impact of that work to obtain broad relief on behalf of vulnerable workers.

Enforcement partnerships between state attorneys general and alt-labor groups are neither a substitute for the regime of collective bargaining supported by robust and adequately funded private and public enforcement of employment standards originally envisioned by the New Deal, nor are they a true “new labor” tripartite bargaining and enforcement model that some scholars envision for the future.³ However, they are examples of real and creative ways that state and civil society actors are working to enforce and improve workplace rights in a time of widespread employer non-

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2. Brishen Rogers, *Libertarian Corporatism is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1631 (2016) (Rogers has defined these groups to include those that represent “workers of a particular ethnicity or who live or work in a particular neighborhood; others represent workers in a particular industry, such as restaurant workers, day laborers, or domestic workers”); Josh Eidelson, *Alt-Labor*, AM. PROSPECT (Jan. 29, 2013), <https://prospect.org/notebook/alt-labor/> [<https://perma.cc/UP28-UUR5>].

3. See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 46-47 (2016).

compliance and ossified federal labor and employment law.⁴ State attorneys general are also conducting this enforcement work, I will argue, in ways that cut across some of the traditional divisions between labor law and employment law and bring some worker voice into employment law enforcement.

Part I describes the role of state attorneys general, their emergence as strategic affirmative rights enforcers, and the recent entry of a group of attorneys general into workplace rights enforcement specifically. Part II examines the sources of legal authority and tools that state attorneys general use to conduct workplace enforcement and advocacy on behalf of vulnerable workers. Part III draws from interviews and recent cases and investigations to show how state attorneys general partner with alt-labor and community groups to conduct enforcement and protect and advance workplace rights. Part IV looks at the limitations of these partnerships. I conclude that while these limitations are real, state attorneys general are well-suited to partner with alt-labor and community groups and that these partnerships enable them to be highly effective supplemental workplace rights enforcers.

I. WHY STATE ATTORNEYS GENERAL? WHY NOW?

A. Background on State Attorneys General

State attorneys general are constitutional officers in most states and serve as the chief law enforcement officers of every state.⁵ While their constitutional directives and duties vary from state to state, attorneys general typically represent the state and control all litigation concerning the state; act as the chief legal officer of the state and provide legal opinions clarifying the law; pursue public advocacy; and, in some states, conduct criminal law enforcement.⁶ State attorneys general are also charged with representing the interests of the people of the state collectively, and often interpret this role to include representation of their state's most vulnerable

4. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002); see also Michael M. Oswald & Cesar F. Rosado Marzan, *Organizing the State: The New Labor Law Seen from the Bottom-Up*, 39 BERKELY J. EMP. & LABOR L. 415, 417-20 (2018) (describing other examples of creative collaborations "up-and-down" partnerships between government agencies and alt-labor groups in Chicago).

5. STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers, National Association of Attorneys General, 3d ed. 2013) (a state Office of Attorney General is established the constitution of 44 states).

6. *Id.* at 11.

residents.⁷ The New York Attorney General’s website explains these dual roles as follows:

The Attorney General is both the “People’s Lawyer” and the State’s chief legal officer. As the “People’s Lawyer,” the Attorney General serves as the guardian of the legal rights of the citizens of New York, its organizations and its natural resources. In [her] role as the State’s chief legal counsel, the Attorney General not only advises the Executive branch of State government, but also defends actions and proceedings on behalf of the State.⁸

State attorneys general have not always emphasized their role as “the people’s lawyer” so strongly. In fact, they are generally thought to have come more fully into this strategic, affirmative enforcement role after 1998, the year that a group of state attorneys general filed a multistate suit against big tobacco companies seeking reimbursement for the Medicaid costs associated with smoking-related diseases.⁹ The suit was based on multiple state laws enforced by the attorneys general of most states and was litigated and resolved in a coordinated manner, ultimately resulting in the largest civil settlement ever reached in the United States.¹⁰

State attorneys general have since engaged in numerous other large-scale coordinated affirmative enforcement actions from attacking misrepresentations by subprime mortgage lenders,¹¹ to reining in misrepresentations by for-profit colleges and universities,¹² to going after polluters in clean air and environmental cases.¹³ Many state attorneys general now have a “public interest” or “public protection” division within their office, charged specifically with bringing affirmative civil litigation in areas like consumer

7. See, e.g., OFFICE OF THE ATTORNEY GEN. OF N.M., <https://www.nmag.gov/about-the-oag.aspx> [<https://perma.cc/2WBN-NYWK>] (last visited Dec. 13, 2019) (“The New Mexico Office of the Attorney General is focused on . . . giving a voice to vulnerable populations.”).

8. See *Divisions and Bureaus*, N.Y. ATTORNEY GEN., <https://ag.ny.gov/bureaus> [<https://perma.cc/J5AX-2M84>] (last visited Sept. 23, 2018).

9. Phillip Green, *Keeping Them Honest: How State Attorneys General Use Multistate Litigation to Exert Meaningful Oversight Over Administrative Agencies in the Trump Era*, 71 ADMIN. L. REV. 251, 254 (2019); Ashley L. Taylor, Jr., Anthony F. Troy, & Katherine W. Tanner Smith, *State Attorneys General: the Robust Use of Previously Ignored State Powers*, 40 URB. LAW. 507, 512 (2008).

10. Taylor et al., *supra* note 9, at 512.

11. See *Ameriquest to Pay \$325 Million in a Settlement Over Lending*, N.Y. TIMES (Jan. 21, 2006), <https://www.nytimes.com/2006/01/21/business/ameriquest-to-pay-325-million-in-a-settlement-over-lending.html> [<https://perma.cc/3WXN-TBZE>].

12. See, e.g., Erin Arvedlund & Bob Fernandez, *AG Josh Shapiro’s Legal Fight vs Navient, For-Profit Colleges Heats Up in Pa.*, PHILA. INQUIRER (Jan. 18, 2019) <https://www.inquirer.com/business/josh-shapiro-navient-cec-attorneys-general-cfpb-mick-mulvaney-20190118.html> [<https://perma.cc/59BN-NY9N>].

13. See, e.g., Press Release, Office of the N.Y. Attorney Gen., Attorney General James Announces Landmark Multistate Settlement with Fiat Chrysler (Jan. 10, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-landmark-multistate-settlements-fiat-chrysler>.

protection, antitrust, environmental, and/or civil rights. The cases these divisions bring are typically initiated, not on individual complaint, but on investigation or reporting that reveals broad patterns of illegality across a firm or industry. The relief state attorneys general seek is similarly far-reaching and may include injunctions, compliance monitoring, restitution to victims, and civil penalties.¹⁴

Until recently, however, most state attorneys general affirmative enforcement work did not include cases involving employment rights. Most states have a separate state agency, typically a state department of labor, charged with enforcing state minimum wage, overtime, wage payment and collection, and meal or rest break laws.¹⁵ Paralleling the federal model established by the federal Fair Labor Standards Act, state departments of labor are statutorily charged with taking complaints of wage and hour violations, conducting administrative investigations and hearings, and – on those occasions when the matter cannot be resolved at the administrative level – referring those wage claims to litigation.¹⁶ The office of the state attorney general then conducts the litigation on behalf of the department of labor in its capacity as lawyer for the state (and as it would for any other litigation involving any other state agency).

With the notable exceptions of Massachusetts, New York, and California, prior to around 2015 state attorneys general only pursued workplace rights cases only upon referral by the state agency and not affirmatively in their capacity as lawyers for the people.¹⁷ This is a critical difference in that, in the former role, the state attorney general is bound by the findings and the direction of the client agency (which is likely informed by an initial wage claimant focused on obtaining individual relief). In the latter, affirmative role, the state attorney selects the case, directs the litigation, may draw

14. Indeed, commentators have compared *parens patriae* suits to large-scale class action in terms of their scope and relief. See Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 763 (2016).

15. The United States Department of Labor maintains a list of all state departments of labor and their respective websites. *State Labor Offices*, U.S. DEPT. LAB., https://www.dol.gov/whd/contacts/state_of.htm [<https://perma.cc/D8MN-Q8BK>] (last visited Dec. 13, 2019).

16. See 29 U.S.C. § 216. (Westlaw Current through P.L. 116-68); see also *id.*

17. Massachusetts is an outlier that it has been the primary statutory enforcer of the state's employment laws since 1993. See MGL Ch. 48, § 27(C). New York started doing affirmative labor work after the election of Elliot Spitzer in 1999. See Jennifer Brand, *Adding Labor to the Docket: The Role of State Attorneys General in the Enforcement of Labor Laws* 10-11 (Nat'l State Attorneys Gen. Program at Colum. Law Sch., 2007), <https://www.law.columbia.edu/sites/default/files/microsites/careerservices/THE%20ROLE%20OF%20STATE%20ATTORNEYS%20GENERAL%20IN%20THE.pdf>. The California Attorney General's Office filed its first affirmative workplace rights enforcement action in 2008 according to one official there. See e-mail correspondence with Officer at CA. Attorney Gen. Office (Nov. 12, 2019).

on various sources of legal authority to do so, and may be focused on obtaining broader relief.

Since 2015 five states have created dedicated affirmative workplace rights enforcement bureaus or divisions. These are: the District of Columbia, Illinois, Minnesota, New Jersey, and Pennsylvania.¹⁸ A number of other states—Colorado, Connecticut, Maryland, Rhode Island, Vermont, Virginia, and Wisconsin—have announced initiatives and charged at least one attorney within the office with looking at labor issues and getting involved in multistate actions.¹⁹ Thanks to a former bureau chief of the New York Attorney General’s Labor Bureau, this cohort of states talks regularly, meets on occasion, and—as will be discussed—has engaged in significant affirmative employment cases and investigations across a broad range of issues affecting workers.

B. State Attorneys General Involvement in Workplace Rights

A number of factors likely contributed to increased interest from progressive state attorneys general in labor and employment issues in recent years.

1. Increasing Recognition of Wage Theft

First, workers’ advocates and academics have spent more than a decade documenting the massive scope of wage law non-compliance in the United States and arguing that this was a form of “wage theft” thereby making it a law enforcement problem.²⁰ One study from 2017 found that in the ten most populous states in the country, around 2.4 million workers reported being paid less than their state’s minimum wage each year, resulting in an average individual loss of about \$3,300 for full time low-wage

18. Phone interview with and e-mail from Terri Gerstein (Nov. 1, 2019) [hereinafter Gerstein Interview and E-mail]. Gerstein is the former Chief of the Labor Bureau within the New York Attorney General’s Office and has played a vital role in establishing and running these monthly calls and building these intra-state relationships from the Harvard Law School’s Labor and Worklife Program, State and Local Enforcement Project. See *State and Local Enforcement Project*, HARV. L. SCH., <https://lwp.law.harvard.edu/state-and-local-enforcement-project> (last visited Dec. 13, 2019) [<https://perma.cc/3FWC-84M9>].

19. Gerstein E-mail and Interview, *supra* note 18.

20. See, e.g., KIM BOBO, *WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID – AND WHAT WE CAN DO ABOUT IT* (2009); see also Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* 5 (2009) (A survey of low-wage workers in Chicago, Los Angeles, and New York finding that more than 60% of workers surveyed were underpaid by more than \$1 per hour and nearly 76% of those workers who worked more than 40 hours in a week were not paid required overtime).

workers each year.²¹ Against the concurrent national backdrop of rising income inequality, attorneys general could hardly help but note that these wages were being taken from people who could little afford it. As Minnesota Attorney General Keith Ellison, who founded a unit dedicated to wage theft in his office in 2018, explained:

[W]hen you ask yourself how do we get such massive inequality in our country, it's not just because of huge tax cuts for the rich like we passed last year, it's also working people not getting what they've even been promised at all. Before we ever talk about raising the minimum wage to this or that, let's talk about getting all the wages people are already due and owed.²²

2. Under-resourced Labor Agencies

Another, related factor that may have led state attorneys general into workplace enforcement is the reality that traditional wage enforcement agencies, namely state departments of labor and the U.S. Department of Labor, do not have the resources to adequately enforce employment laws. On the state level, one recent study estimated that there is one state investigator for every 146,000 workers in the United States.²³ The federal Department of Labor also faces significant enforcement challenges with an estimated one investigator for every 135,000 workers.²⁴

While formal collective bargaining or union grievance procedures can be an alternative means of enforcing or advancing workplace standards, unionization rates have dropped to around 10% of the private sector workforce.²⁵ And employers' widespread reliance on mandatory arbitration provisions with class action waivers has drastically limited the possibility of large-scale private employment class actions. As a result, already strained

21. David Cooper & Theresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [<https://perma.cc/W5VG-4CTT>].

22. Stephen Montemayor, *Attorney General Keith Ellison, Minnesota Lawmakers Look to Crack Down on Wage Theft*, STAR TRIB. (Mar. 25, 2019), <http://www.startribune.com/attorney-general-keith-ellison-lawmakers-training-spotlight-on-wage-theft/507544602/> [<https://perma.cc/Y5ZP-BKHW>].

23. Zach Schiller & Sarah DeCarlo, *Investigating Wage Theft: A Survey of the States*, POL'Y MATTERS OHIO (Nov. 2010), <https://www.policymattersohio.org/research-policy/fair-economy/work-wages/minimum-wage/investigating-wage-theft-a-survey-of-the-states> [<https://perma.cc/QQ65-FES3>].

24. Cooper & Kroeger, *supra* note 21, at 5.

25. U.S. Bureau of Labor Statistics, *Union Members—2019*, U.S. DEP'T LAB. 1 (Jan. 22, 2020), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/P4FD-PK47>] (The Bureau of Labor Statistics finds that in 2018, 10.5% of workers were unionized in comparison with 20.1% in 1983, the first year that comparable union data are available).

public agencies are often the only formal enforcement mechanism available to workers seeking to enforce their workplace rights.²⁶

3. A Changing Workplace

State attorneys general may also be cognizant of the challenges traditional labor enforcement agencies face in applying twentieth century laws, based on a twentieth century model of employment, to the twenty-first century workplace.²⁷ As one former Chief from New York State Attorney General's Labor Bureau put it "[t]he types of issues presented by today's workforce do not lend themselves to what is often a complaint-handling approach led only by a usually understaffed labor agency."²⁸ In light of foreign and domestic outsourcing and fissuring and the increase in "gig" work, a single workplace or line of production may involve complex relationships between sub-contractors, temporary staffing agencies or labor brokers, individuals classified as independent contractors, and/or platform-based vendors or contractors.²⁹ These layers of complexity are difficult to address effectively through an individual administrative complaint, handled by an investigator, against a single employer. While there is no doubt that departments of labor have grown far more strategic in their enforcement approach, state attorneys general can bring legal strategy and various legal tools to bear on such complex workplace scenarios.³⁰

4. Politics

There is also no ignoring the political dimension of the entry of progressive state attorneys general into workplace rights. As has been well documented, state attorneys general have become more politicized and politically important in recent decades.³¹ This politicization has extended to

26. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1646 (2018) (Ginsberg, J. dissenting) ("The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.").

27. Brand, *supra* note 17, at 6-7.

28. Brand, *supra* note 17, at 7.

29. See DAVID WEIL, *THE FISSURED WORKPLACE* (2014).

30. The California Department of Labor for one has well-developed strategic partnership that involves partnering with coalition of community organizations to enforce wage laws in certain industries. See, e.g., NAT'L EMP. LAW PROJECT, CALIFORNIA STRATEGIC AGENCY PARTNERSHIP 1 (2018), <https://s27147.pcdn.co/wp-content/uploads/CA-Enforcement-Docment-Letter-11-27-18-1.pdf> [<https://perma.cc/KLW4-8USE>]. For more on strategic wage enforcement generally, see DAVID WEIL, BOS. UNIV., *STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION* (2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/ZN38-UKBL>].

31. Mark L. Earley, "Special Solicitude": *The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 564-65 (2018) (discussing the increasingly partisan dynamic between state AG's and the degree to which attorneys general lawsuits brought against the federal government have increas-

labor and employment issues. During the Obama administration, for example, a coalition of twenty-one Republican state attorneys general filed suit and, ultimately, successfully enjoined implementation of the Department of Labor's proposed changes to the overtime standard.³² With the election of President Donald Trump in 2017, the tables turned and many Democratic state attorneys general saw the need to counter what they perceived to be the federal administration's actively hostile stance to the interests of workers. In 2018 and 2019, coalitions of attorneys general submitted comments in opposition to the Department of Labor's proposed changes to the regulations concerning tipped employees³³ and overtime exemptions³⁴ as well as to the National Labor Relations Board's changes to the joint employment standard.³⁵ Thus, while the focus of this Essay is not on state attorneys' general involvement in multi-state actions involving the federal government, it is a backdrop to their involvement in workplace rights enforcement.

II. HOW STATE AG'S CONDUCT WORKPLACE RIGHTS ENFORCEMENT

A. Cases and Investigations

State attorneys general have various sources of authority that they may rely on in order to engage in workplace enforcement activity.³⁶ This authority varies by state and is often the primary factor that shapes how state attorneys general enter into and act on workplace rights issues.

ingly divided along party lines); Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633 (2018).

32. Daniel Wiessner, *U.S. Judge Strikes Down Obama Administration Overtime Rule*, REUTERS (Aug. 31, 2017), <https://www.reuters.com/article/us-usa-overtime/u-s-judge-strikes-down-obama-administration-overtime-pay-rule-idUSKCN1BB2Y8> [<https://perma.cc/RZJ3-SE8L>].

33. See Press Release, Office of the Attorney Gen. of CA, Attorney General Becerra to Trump Administration: Let Workers Keep Tips They Earned (Feb. 5, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-trump-administration-let-workers-keep-tips-they-earned> [<https://perma.cc/2G4Y-H43X>].

34. See Press Release, Office of the Attorney Gen. of Penn., AG Shapiro Leads Multi-State Coalition Opposing Federal Rollback of Overtime Protections (May 21, 2019), <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-leads-multi-state-coalition-opposing-federal-rollback-of-overtime-protections/> [<https://perma.cc/XDR6-8RQN>].

35. See Press Release, Office of the N.Y. Attorney Gen., AG James Leads Coalition of Twenty Five Attorneys General in Opposition to Changes in Proposed Rule Weakening Employee Protections (Jan. 11, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-leads-coalition-25-attorneys-general-opposition-proposed> [<https://perma.cc/PZ9J-AB8N>].

36. For a comprehensive overview of the various sources of authority that state attorneys general may draw on to do labor and employment enforcement, see Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws to Protect America's Most Vulnerable Workers*, 39 COLUM. J. L. SOC. PROB. 495 (2006).

1. Broad General Authority

Some state statutes grant attorneys general very broad authority to address legal violations of all varieties within a state. For example, New York's executive law, states that:

[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages³⁷

Other state statutes give the attorney general broad discretion to prosecute, defend, or otherwise appear in any case involving a violation of state law or in any case that implicates the public interest.³⁸

In the absence of broad statutory authority, state attorneys general can often use their *parens patriae* powers to protect the residents of their states from illegal conduct, including in the workplace. The doctrine of *parens patriae* derives from the English common law concept that the state has a quasi-sovereign interest in the well-being of its citizens and standing to assert that interest.³⁹ State attorneys general have used this authority to bring cases on behalf of the people of their respective states, to protect, for example, their health or financial interests or the interests of the state economy generally.⁴⁰ Notably, when acting in a *parens patriae* capacity, state attorneys general also have standing to enforce common law.⁴¹

37. N.Y. EXEC. LAW § 63 (12) (McKinney 2019).

38. See, e.g., D.C. Code Ann. § 1-301.81 (West 2017); MICH. COMP. LAWS ANN. § 14.28 (West 2017); NEV. REV. STAT. § 228.120 (West 2019) (the "Attorney General may appear in, take exclusive charge of and conduct any prosecution in any court of this state for a violation of any law of this state, when in his opinion it is necessary.").

39. Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600, 607 (1982).

40. *Id.* For more information on state attorneys' general use of *parens patriae*, see Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1666 (2015); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000); Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000); Jim Ryan & Don R. Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 ILL. B.J. 684 (1998).

41. See, e.g., Complaint ¶ 14, *People of the State of Illinois v. Jimmy Johns*, Case No. 2016-CH-07746, Circuit Court for Cook County, Chancery Division (June 8, 2016) (the Attorney General "brings this lawsuit pursuant to Section 7(a) of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/7(a) and her common law authority to pursue actions in *parens patriae* to preserve the economic well-being of Illinois residents and businesses impacted by Defendants' unlawful conduct").

2. Specific Statutory Authority to Enforce Employment Laws

In a minority of states, the attorney general has explicit statutory authority to enforce wage and hour or other employment laws. In Massachusetts the Attorney General's Office has exclusive authority to inspect workplaces, enforce wage and hour laws, and bring civil and criminal suits for violations.⁴² In Ohio and Florida, the respective state constitutions charge the attorney general with enforcing the minimum wage.⁴³

A more recent trend is to give the state attorney general supplemental authority to enforce labor and employment laws. In the 2019 legislative session the Minnesota Attorney General and the Minnesota Division of Labor and Industry collaborated to support legislation that increased the criminal and civil penalties available for violations of wage theft.⁴⁴ Additionally, the legislation contains a single line that states that "in addition to the enforcement of this chapter by the department [of labor], the attorney general may enforce this chapter."⁴⁵

Also in 2019, the Illinois legislature passed Senate Bill 161.⁴⁶ The legislation gives the attorney general:

the power and duty on behalf of persons within this State, to intervene in, initiate, and enforce all legal proceedings on matters related to the payment of wages, the safety of the workplace, and fair employment practices including, without limitation, the provisions of the Prevailing Wage Act, Employee Classification Act, Minimum Wage Law, The Day and Temporary Labor Services Act, or Wage Payment and Collection Act whenever the Illinois Attorney General believes it is necessary to protect the rights and interests of Illinois workers and businesses.⁴⁷

The legislation, which took effect in January of 2020, effectively gives the Illinois Attorney general broad authority to investigate and bring claims involving violations of all of the state's core employment laws.⁴⁸

Neither the Minnesota nor the Illinois law takes any authority or responsibility away from the state department of labor but, rather, reflect a policy judgment by the state legislature that the state needs additional en-

42. MASS. GEN. LAWS ANN. ch. 149, § 27C (West 2004).

43. FLA. CONST. art X, § 24(e); OHIO CONST. art. II, § 34a.

44. MINN. STAT. §§ 175.20, 177.27, 177.30, 177.32, 177.45 (2019). For a comprehensive summary of changes, see *Summary of Minnesota's New Wage Theft Law*, DEP'T LAB. & INDUS., https://www.dli.mn.gov/sites/default/files/pdf/wage_theft_law_summary.pdf.

45. MINN. STAT. § 177.45.

46. S.B. 0161, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

47. *Id.*

48. *Id.*

forcement of workplace protections.⁴⁹ By design that enforcement is discretionary and allows the attorney general to bring cases on his or her own volition (not only as a result of an individual complaint) and on behalf of the people of the state.

3. Other Relevant Statutes

Beyond wage and hour laws, state attorneys general may enforce other laws that are relevant to worker protection.⁵⁰ Indeed, one of the strengths of state attorneys general as workplace rights enforcers is that they tend to view their role more holistically. For example, the Washington State Attorney General's office describes its Worker Protection Initiative as uniting "multiple legal divisions as part of a multifaceted effort to protect Washington workers" and address the "challenges facing workers" which "include labor issues, antitrust, civil rights, consumer protection, criminal justice, or environmental issues."⁵¹ This is a significantly different conception of the role than a traditional, wage and hour agency; rather than focusing on enforcement of a particular statute, the focus starts with a particular problem workers experience and then looks to see what laws may be relevant to that problem.

Approaching enforcement from a broader worker protection framework can lead state attorneys general to take a less siloed approach to a host of violations experienced in a single workplace. For example, in 2016 the Office of the Illinois Attorney General, in conjunction with the state Department of Labor, filed suit in federal court against a number of employment agencies that advertised that they could provide restaurants with the "a large number of Mexican workers" for their kitchen jobs and specifically targeted and referred workers of Mexican and Central American na-

49. *Id.* The bill creates a new 15 ILL. COMP. STAT. § 205/6.3, which reads: "[t]he General Assembly finds that the welfare and prosperity of all Illinois citizens and businesses requires the establishment of a Unit within the Attorney General's Office dedicated to combatting businesses that underpay their employees, force their employees to work in unsafe conditions, and gain an unfair economic advantage by avoiding their tax and labor responsibilities. The Worker Protection Unit shall be focused on protecting the State's workforce to ensure workers are paid properly, guarantee safe workplaces, and allow law-abiding business owners to thrive through healthy and fair competition."

50. For a comprehensive overview of laws state attorneys general have relied upon to do workplace rights enforcement, see Romer-Friedman, *supra* note 36; Terri Gerstein & Faisal Sheikh, *An Overview of State Attorney General Labor Jurisdiction*, STATE AG.ORG (May 2017), <https://static1.squarespace.com/static/577e9d93b3db2b9290cd7005/t/5ad6a946f950b724bbd36de9/1524017479077/An+Overview+of+State+Attorney+General+Labor+Jurisdiction.pdf> [<https://perma.cc/54N8-XB9Y>].

51. BOB FERGUSON, WASH. STATE ATTORNEY GEN. OFFICE, 2019 LABOR DAY REPORT, https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/Office_Initiatives/Labor%20Day%20report%202019.pdf [<https://perma.cc/NVT4-227P>].

tional origin for such jobs.⁵² Once referred, the restaurants workers were subjected to abysmal working conditions, treated worse than workers of other races/national origins, and paid once monthly to what worked out to be as little as \$3 an hour.⁵³ The lawsuit pled both federal and state civil rights violations, as well as violations of the state minimum wage, overtime, and wage payment laws, thus blurring the traditional intra-employment law divisions, for example between civil rights enforcement and wage and hour enforcement.⁵⁴

Approaching workplace enforcement from a broader worker protection standpoint also blurs traditional divisions between labor and employment law. While employment law is generally more focused on bestowing individual rights and labor law more focused on collective power,⁵⁵ state attorneys general have recently focused on addressing individual workplace violations that in the aggregate decrease workers' power in the labor market. Washington Attorney General Ferguson for one has focused significant enforcement resources on attacking no-poach agreements between corporate parents and their franchisees that bar either party from hiring the other's workers, a practice that economists believe leads to wage stagnation.⁵⁶ To date, Attorney General Ferguson's office has entered into agreements with over 150 different national chains to end the practice and a coalition of other state attorneys general has also resolved a number of no-poach cases.⁵⁷ Similarly the Illinois and New York Offices of the Attorney General have attacked employers' overuse of unenforceable non-compete agree-

52. Kari Lydersen, *Homeless But Employed: the Chicago Restaurant Workers Living Under the Bridge*, THE GUARDIAN (Apr. 17, 2016), <https://www.theguardian.com/society/2016/apr/17/homeless-employed-chicago-restaurant-workers-exploited> [<https://perma.cc/QBW7-Q9C4>]; Press Release, Office of the Ill. Attorney Gen., Madigan Lawsuit Alleges Immigrant Worker Abuse by Employment Agencies and Chinese Buffet Restaurants (Nov. 13, 2015), http://www.illinoisattorneygeneral.gov/pressroom/2015_11/20151113.html [<https://perma.cc/7U2V-FMTR>].

53. *Id.*

54. The case pled wage violations as part and parcel of the discriminatory treatment. Plaintiffs' First Amended Complaint at ¶ 97, *People of the State of Illinois et al. v. Xing Ying Emp't Agency*, et al., No. 15-cv-10235, 2016 WL 3252216 (N.D. Ill. Apr. 22, 2016) ("Restaurant Defendants targeted Latino employees so that they could pay them less than minimum wage and subject them to discriminatory working conditions.").

55. Andrias, *supra* note 3, at 38.

56. FERGUSON, *supra* note 51, at 5-6; Press Release, Office of the Wash. Attorney Gen., AAG to Testify to Congress as AG Ferguson's Anti No-Poach Initiative Reaches 155 Corporate Chains (Oct. 28, 2019), <https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate> [<https://perma.cc/SH9Z-4WMS>].

57. *Id.*; Press Release, Office of the Ill. Attorney Gen., Attorney General Raoul Announces Settlements with Four Fast Food Chains to End Use of No-Poach Agreements (Mar. 15, 2019), http://www.illinoisattorneygeneral.gov/pressroom/2019_03/20190315b.html [<https://perma.cc/YY7M-9PXX>].

ments for low wage workers, including sandwich makers at Jimmy John's and custodians and receptionists at the co-working company WeWork and secured broad settlements that release thousands of employees nationwide from their non-competes.⁵⁸ In all of these cases, the harm the investigations or suits sought to address was the aggregate impact on workers' bargaining power, mobility, and wages.

III. HOW STATE AGS PARTNER WITH ALT-LABOR TO ENFORCE AND ADVANCE WORKPLACE RIGHTS

In writing about how the New York State Attorney General's Labor Bureau became a model of affirmative workplace enforcement, one former chief wrote:

Two major catalysts brought about the change into an affirmative labor bureau. One was the personal support and encouragement of a new attorney general The other was the Bureau's strategy of "partnering" with community groups, unions, and non-profits to bring affirmative cases. This strategy enabled the Bureau to identify problem industries and workplaces, and to locate individual workers who were willing to come forward to complain about workplace violations. Most importantly, this strategy enabled the Bureau to gain the trust of these workers, many of whom would ordinarily be reluctant to come forward to a government agency.⁵⁹

While she wrote this in 2007, the new crop of state attorneys general interested in workplace rights enforcement find the same reasons to partner with community and alt-labor groups compelling. As the below examples illustrate, at almost every stage of their work, state attorneys general utilize community partnerships to maximize the effectiveness and impact of their enforcement, education, and advocacy efforts.⁶⁰

58. Erik Larsen, *WeWork Scraps Strict Non-Compete Deals in N.Y. Settlement*, BLOOMBERG (Sept. 18, 2018), <https://www.bloomberg.com/news/articles/2018-09-18/wework-scraps-strict-non-compete-deals-in-n-y-settlement> [<https://perma.cc/LRV5-LK4Z>]; Samantha Monkamp, *Jimmy John's Agrees to Pay \$100,000 to Illinois AG over Noncompete Contracts*, CHI. TRIB. (Dec. 7, 2016), <https://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html> [<https://perma.cc/4NTZ-W8S8>].

59. Brand, *supra* note 17, at 11.

60. State attorneys general, of course, also partner with other government agencies, traditional unions, trade groups, and employers as well, but those partnerships are not the focus of this Article.

A. How Alt-Labor Groups Partner with Attorneys General in Cases and Investigations

1. Case Generation and Referral

Because state attorneys general have limited resources and only supplemental employment enforcement responsibilities, they tend to focus on cases that will be impactful either because the conduct at issue is particularly egregious or because it is representative of a larger problem in a particular industry or location. Alt-labor and community groups can identify issues on the ground that merit government attention but that government might not otherwise be aware of, and can gather and aggregate enough information and witnesses to give state attorneys general a threshold sense of whether to invest more time and resources in launching an investigation into a particular problem or complaint.⁶¹

i. Identifying vulnerable workers.

This aggregating, identifying, and connecting role is particularly useful when it comes to cases involving very vulnerable workers. These cases are of high value to government enforcers who explicitly prioritize protection of their most vulnerable residents, yet understand that the most vulnerable residents are also the least likely to seek out government services directly because they fear retaliation; do not trust government; would not know how to contact government; or some combination thereof.⁶² Community partners may be in greater positions of trust with vulnerable workers and can help vulnerable workers become aware of a legal violation and build comfort in bringing it to the attention of government.⁶³

Partnerships between state attorneys general and alt-labor or community groups have led to a number of significant cases for vulnerable, immigrant workers in recent years. In Massachusetts, Greater Boston Legal Services and Boston University Law School's Trafficking Clinic have helped the Massachusetts Attorney General's office identify and bring cases involving immigrant domestic workers.⁶⁴ The workers were brought from their home countries, housed and controlled by their household employers who gave them almost no time off and chronically underpaid them,

61. Phone interview with Officer at N.Y. Attorney Gen. Office (Oct. 22, 2019); phone interview with Officer at D.C. Attorney Gen. Office (Oct. 25, 2019).

62. Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143, 152.

63. *Id.*; phone interviews with Officers at N.Y. and D.C. Attorney Gen. Offices, *supra* note 61.

64. Email from Officer at Ma. Attorney Gen. Office (Oct. 18, 2019).

often sending small sums of money to the workers' families via wire transfers in place of actual wages."⁶⁵ Massachusetts Attorney General Maura Healey issued citations to household employers under the state's domestic worker protections as well as wage and hour laws.⁶⁶

Other offices have similarly taken action on behalf of very low wage, vulnerable immigrant workers. The New York Attorney General's Office has about a twenty year history in protecting low-wage immigrant workers employment rights.⁶⁷ Among other matters, it recently investigated and resolved a case referred by TakeRoot Justice and the National Mobilization Against Sweatshops involving home care workers who were illegally threatened with deportation after they complained about unpaid wages.⁶⁸ The New York Attorney General's office also recently criminally charged an employer for patterns of wage theft involving day laborers, in a case referred by the Don Bosco Community Center and a coalition of community groups united against wage theft in Westchester County, New York.⁶⁹ In California, the Filipino Workers Center and the Women's Employment Rights Clinic at Golden Gate Law School have referred cases involving Filipino immigrant employees in the residential care facility industry.⁷⁰ The *Xing Ying* case involving immigrant restaurant kitchen workers, discussed above, was also referred to the state agencies by alt-labor groups and the Mexican consulate.⁷¹ Indeed, in surveying recent state attorney general enforcement actions involving vulnerable immigrant workers, I could not find one that had *not* been referred by a community group.

For community and alt-labor groups, state attorneys general may be particularly good partners in cases involving very vulnerable workers because they investigate and sue in the name of the people of their states and thus typically do not need to disclose the names or identities of individual impacted workers, unlike in a private lawsuit requiring named plaintiffs or

65. Press Release, Office of the Mass. Attorney Gen., Three Couples Cited Nearly 450,000 for Failing to Pay Their Live-In Domestic Workers (May 15, 2019), <https://www.mass.gov/news/three-couples-cited-nearly-450000-for-failing-to-pay-their-live-in-domestic-workers> [https://perma.cc/6FSA-STK6].

66. *Id.*

67. Brand, *supra* note 17, at 12, 13, 29-32; Gerstein Interview and E-mail, *supra* note 18.

68. Press Release, Office of the Attorney Gen. of N.Y., Attorney General James Secures \$450,000 For 100 Home Health Aides Threatened With Deportation (Sept. 13, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-secures-450000-100-home-health-aides-threatened> [https://perma.cc/59EX-ER27].

69. *Workers' Advocates in Westchester Unite Against Rampant Wage Theft*, DON BOSCO WORKERS INC. (Jan. 20, 2018), <http://donboscoworkers.org/workers-advocates-in-westchester-unite-against-rampant-wage-theft/> [https://perma.cc/79VC-9KDX].

70. Email from Officer at CA. Attorney Gen. Office (Oct. 18, 2019).

71. See *Xing Ying Employment Agency et al.*, 2016 WL 3252216.

a department of labor complaint.⁷² This can give workers some initial comfort in talking to a state attorney general's office and can also help protect the most vulnerable workers from immediate retaliation.

ii. Identifying industry-level trends or significant bad actors.

Many alt-labor groups engage in industry-level organizing and awareness campaigns that lead them to identify systemic legal issues that make good case referrals. For example, several years ago the New York Attorney General's Office investigated and litigated a number of related wage payment cases involving large fast food franchises including McDonald's, Domino's, and Papa John's.⁷³ The allegations in those cases were originally identified by "Fast Food Forward," a coalition of workers' groups, who noticed these patterns of underpayment while in the midst of a campaign to try to organize and improve working conditions for restaurant workers.⁷⁴ Several of these investigations resulted in significant settlements, including around \$4.5 million dollars in back wages for employees of various Papa John's franchises.⁷⁵

The press coverage around the fast food investigations highlights how an industry-level focus like this can further both the aims of an attorneys general office(s) and alt-labor groups. In announcing a suit against Domino's Pizza as part of the fast food initiative, for example, then Attorney General Eric Schneiderman described the underpayment scheme as "widespread, systemic illegality, and it victimizes some of the most vulnerable workers in our state,"⁷⁶ thus emphasizing the ways in which the case made good use of limited enforcement resources on behalf of workers who are most in need of protection. Jonathan Westin, executive director New York

72. Note that some state departments of labor do permit anonymous or third-party complaints that would permit a workers' center or union, for example, to act as the complainant. Others require a name and/or send the employer a copy of the initial wage complaint after it is filed.

73. Julie Turkewitz, *State Said to be Reviewing Pay for Fast Food Workers*, N.Y. TIMES (May 15, 2013), <https://www.nytimes.com/2013/05/16/nyregion/state-said-to-be-reviewing-pay-for-fast-food-workers.html> [<https://perma.cc/NU5R-8R4F>].

74. Phone interview and email from Officer at N.Y. Attorney Gen. Office (Oct. 22, 2019 and Oct. 24, 2019, respectively).

75. Press Release, Office of the N.Y. Attorney Gen., AG Schneiderman Announces \$170,000 Settlement with Papa John's Pizza Franchisee (Jan. 5, 2018), <https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-170000-settlement-papa-johns-pizza-franchisee-failing> [<https://perma.cc/4C22-V79R>] (listing settlements with other franchisees and total dollar value).

76. Press Release, Office of the N.Y. Attorney Gen., AG Schneiderman Announces Lawsuit Seeking To Hold Domino's And Its Franchisees Liable For Systemic Wage Theft (May 23, 2016), <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-lawsuit-seeking-hold-dominos-and-its-franchisees-liable> [<https://perma.cc/EA2W-874B>].

Communities for Change, which was leading the Fast Food Forward organizing drive was also quoted in a news article about the investigation saying,

“[w]hat the attorney general is probably seeing is what we have seen and heard from workers in the fast-food industry for over a year now It shows how rampant this is and how serious of a crime it is to steal wages from the lowest income workers in the city.”⁷⁷

Thus Westin’s statement situated the suit within a larger struggle of fast food workers and emphasized the attorney general’s involvement as indicative of the seriousness of the allegations.

Other state attorneys general have similarly conducted industry-level enforcement initiatives originally identified through alt-labor organizing drives. In a matter originally referred by the DC Chapter of Jobs with Justice, the Attorney General of the District of Columbia (“D.C.”) recently filed suit against a national electric contractor called Power Design for misclassification of employees as independent contractors.⁷⁸ In addition to being engaged in ongoing organizing involving Power Design, Jobs with Justice had also been advocating for more strategic enforcements of municipal labor laws as part of the DC Just Pay Coalition and had helped pass a new misclassification law in D.C.⁷⁹ As such, the suit against Power Design furthered both the D.C. Attorney General and the alt-labor group’s separate but aligned goals: for the D.C. Attorney General this case was a way to direct limited enforcement resources at a big player in an industry involved in an ongoing pattern of illegal behavior;⁸⁰ for Jobs with Justice, the case could help lend credence to further organizing and advocacy efforts.⁸¹

77. Turkewitz, *supra* note 73.

78. See Press Release, Office of the Attorney Gen. of D.C., AG Racine Sues Power Design for Cheating Hundreds of Electrical Workers Out of Wages and Benefits (Aug. 6, 2018), <https://oag.dc.gov/release/ag-racine-sues-power-design-cheating-hundred> [<https://perma.cc/KK8P-DWGN>].

79. For more information on the Just Pay Coalitions, see *Making Our Laws Real*, D.C. JUST PAY COALITION (Apr. 9, 2018), <https://www.dcjwj.org/wp-content/uploads/2018/04/LawsReal.pdf>.

80. Press Release, Office of the Attorney Gen. of D.C., *AG Racine Sues Power Design for Cheating Hundreds of Electrical Workers Out of Wages and Benefits* (Aug. 6, 2018), <https://oag.dc.gov/release/ag-racine-sues-power-design-cheating-hundreds> [<https://perma.cc/KK8P-DWGN>] (emphasizing that “Power Design cheated hundreds of District workers out of their hard-earned wages and stripped them of their legal rights” and harmed law-abiding competitor businesses).

81. News Release, Jobs With Justice, DC Jobs With Justice Applauds Attorney General for Groundbreaking Suit Against Power Design, Inc. (Aug. 7, 2018), <https://www.dcjwj.org/project/theft/> [<https://perma.cc/DQ2N-DYMK>] (Jobs with Justice is “pleased to see the Attorney General take seriously the concerns of community organizations and share our vision that Power Design and companies that prey on District workers are held to account”).

2. Keeping Workers Involved through Investigation/Litigation

Enforcement partnerships do not end at the time a case is referred to an attorney general's office. Indeed, if after initial investigation the attorney general's office decides to move forward and take formal action against an employer, the continued involvement of the referring community group will often help the matter reach a successful resolution.⁸² Employers rarely keep good records of their underpayment or wage law avoidance schemes and thus, whether the impacted workers are immigrant domestic workers or misclassified electrical workers, the government's ability to prove a violation will often depend on worker testimony.⁸³ Community and alt-labor groups can play an important role connecting impacted workers to government attorneys, facilitating worker interviews and testimony, and staying in touch with worker witnesses for the duration of a case or investigation.⁸⁴

For community and alt-labor groups this kind of continued contact with workers is also in their organizational interests. An ongoing case or investigation may have the side benefit for alt-labor groups of keeping workers engaged and in touch with the organization and each other in the hopes of ultimately recovering their wages.

3. Identifying Impacted Workers and Ensuring Ongoing Compliance After the Conclusion of an Investigation.

When investigations or cases are resolved, either through settlement or court order, community and alt-labor groups also have a significant role to play in finding impacted workers and alerting them that they may be eligible to receive back wages. Settlements can result in significant back wages or restitution for impacted workers. In California, for example, a case referred to the attorney general's office as a result of a car wash organizing campaign, resulted in a settlement of over \$1.5 million, of which about \$800,000 was distributed to low wage workers as restitution.⁸⁵ In Massachusetts, a case brought against a commercial laundry facility and one of

82. Email from Officer at MA. Attorney Gen. Office (Oct. 18, 2019).

83. Brand, *supra* note 17, at 11 ("Most labor cases cannot be proven and litigated solely based on documentary evidence such as payroll records. These cases need to be developed based on the statements of workers who can testify to hours actually worked and wages paid.")

84. Gerstein Interview and Email, *supra* note 18; phone interview with Officer at N.Y. Attorney Gen. Office, *supra* note 61; phone interview with Officer at D.C. Attorney Gen. Office, *supra* note 61.

85. The remainder was civil penalty amounts, payable to the state. Keith Goldberg, *Calif. Car Washes to Pay \$1M to Wash Away Suit*, LAW 360 (Jan. 10, 2012), <https://www.law360.com/articles/299100/calif-car-washes-to-pay-1m-to-rinse-away-wage-suit> [<https://perma.cc/B49H-DZR6>]; Email from Officer at Ca. Attorney Gen. Office (Oct. 18, 2019).

the temporary agencies that supplied in with workers, resulted in around \$900,000 in back wages and unpaid overtime.⁸⁶ Yet impacted low-wage workers like the employees of these car washes or commercial laundries can be difficult to contact, particularly given their transience and the years that it can take for a case to proceed through investigation and litigation. As such, community and alt-labor groups' relationships with these workers were critically important in these examples and other matters to alert workers that they may be eligible for relief and to help them through the process of claiming their wages.⁸⁷ Of course, such resolutions also help community and alt-labor groups to maintain and build credibility with workers who see them delivering results in the form of a positive outcome.

Finally, even the settlement and payment of back wages may not be the end of a community or alt-labor groups' partnership with a state attorney general's office on a particular case or investigation. Alt-labor or community groups may play a (formal or informal) role in alerting the attorney general's office if it appears that the employer in question is not complying with the terms of the settlement or court-order and has reverted to the illegal conduct.⁸⁸

B. Other Ways Alt-Labor Can Partner with State Attorneys General: Multistates, Reports, Outreach and Education, Community Events

In his seminal article on Alt-Labor, Josh Eidelson described how workers' centers and alt-labor groups may use a "combination of tactics" to effect change including "lawsuits, consumer and media outreach, training in workers' rights, and collaboration with friendly employers."⁸⁹ The same could be said of offices of state attorneys general. Even state attorneys general that do not have the authority or resources to actively pursue a docket of labor cases may nonetheless use the power of the office to elevate workplace rights issues in other ways.⁹⁰

86. See *Commercial Laundry to Pay \$900,000 in Back Wages to Workers; Owners of their Temp Agency Face Criminal Charges*, DORCHESTER REP. (Mar. 25, 2017), <https://www.dotnews.com/2017/commercial-laundry-pay-900000-back-wages-workers-owners-their-temp-age> [<https://perma.cc/WQ7S-CUST>]. Email from Officer at MA. Attorney Gen. Office (Oct. 18, 2019).

87. Email from Officer at Mass. Attorney Gen. Office (Oct. 18, 2019); Email from Officer at CA. Attorney Gen. Office (Oct. 18, 2019).

88. Andrew Elmore, *Collaborative Enforcement*, 10 NE. U. L. REV. 72, 112 (2018) (Participation of community and alt-labor groups in case resolution provides ongoing access to workers and compliance monitoring in ways that may be more effective and efficient than government inspections).

89. Eidelson, *supra* note 2.

90. Terri Gerstein & Marni Von Wilpert, *State Attorneys General Can Play Key Roles in Protecting Workers' Rights*, ECON. POL'Y INST. 9-11 (May 7, 2018), <https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/> [<https://perma.cc/863Q-XZ7T>].

1. Multistate Investigations

State attorneys general may be able to band together to draw attention or learn more about emerging workplace rights concerns where the law is silent or out of date. A good example of this is the 2016 multistate attorney general initiative on use of “on-call” shifts for retail workers.⁹¹ Through attempts to organize retail workers, organizers had learned that one of retail workers’ biggest concerns were their unpredictable schedules, including their employers’ reliance on-call shifts, which required hourly workers to arrange childcare, travel to work, and report for a scheduled shift, only to learn then whether they would be expected remain at work and actually paid.⁹² The practice was not illegal, and while some states, like New York, had laws that required workers’ to be paid for reporting for duty, many did not.⁹³

Ultimately a coalition of nine state attorneys general sent a letter to fifteen large national retailers seeking information about their use of on-call shifts and citing concerns about the impact of unpredictable scheduling on workers and their families.⁹⁴ As a result of the attorneys general investigation and the spotlight placed on the practice, the majority of retailers investigated agreed to voluntarily cease their use of on-call shifts rather than face the prospect of a protracted investigation and possible litigation.

2. Reports

Attorneys General also issue reports on emerging workplace issues, particularly where there is no law on point, or they are contemplating a change in the law. For example, the New York Attorney General’s office issued a comprehensive report based on its investigation into payment by payroll card.⁹⁵ In Pennsylvania, a partnership between the Attorney General’s Office and a Temple University Law School clinic led to a report on

91. Lauren Weber, *Regulators to Probe Controversial On-Call Scheduling*, WALL ST. J. (Apr. 13, 2016), <https://www.wsj.com/articles/regulators-to-probe-controversial-on-call-scheduling-1460520061> [<https://perma.cc/JH6F-6UZ5>].

92. Peter Ikeler & Giovanna Fullin, *Training to Empower: A Decade of the Retail Action Project*, 21 J. LAB. & SOC’Y 173, 175 (2018).

93. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1(b) (2016).

94. Lauren Weber, *Regulators to Probe Controversial On-Call Scheduling*, WALL ST. J. (April 13, 2016), <https://www.wsj.com/articles/regulators-to-probe-controversial-on-call-scheduling-1460520061> [<https://perma.cc/JH6F-6UZ5>] (the states involved were California, Connecticut, D.C., Illinois, Massachusetts, Maryland, Minnesota, New York, and Rhode Island).

95. ERIC T. SCHNEIDERMAN, OFFICE OF THE N.Y. STATE ATTORNEY GENERAL, PINCHED BY PLASTIC: THE IMPACT OF PAYROLL CARDS ON LOW-WAGE WORKERS (2014), <https://ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf> [<https://perma.cc/E4Y3-WP4W>].

non-compete agreements.⁹⁶ The District of Columbia Attorney General also recently issued a report on payroll fraud and held a public hearing on the issue in connection with the report.⁹⁷ Community and alt-labor groups can be a resource for this kind of public report by providing general background, sector-specific information, or connecting offices of attorneys general with workers to interview about the issues they are investigating.

3. Education and Outreach Events

For those states just beginning to enter into workplace rights enforcement, conducting outreach to community and alt-labor groups and in conjunction with these groups, can be another important way to build enforcement partnerships, identify areas of interest, and build an office's profile on labor and employment issues.⁹⁸ Alt-labor and community groups conduct their own education campaigns and events and may share an interest in bringing government representatives to participate in those events.⁹⁹ For example, in fiscal year 2019, the Fair Labor Division of the Massachusetts Attorney General's Office conducted around 175 outreach or community training events including "presenting at meetings organized by community-based partners."¹⁰⁰ The Fair Labor Division also holds wage theft clinics at various locations across Massachusetts with the help of a long list of community partners including legal aid organizations, workers centers, unions, law schools, and private attorneys and offer a direct means for workers to receive legal counseling (such as help with basic pleadings) or find legal representation.¹⁰¹

IV. LIMITATIONS

State attorneys' general involvement in workplace rights enforcement and their collaboration with alt-labor and community groups in this en-

96. *Students Present on Non-Compete Agreements*, TEMPLE UNI. BEASLEY SCH. L., <https://www2.law.temple.edu/csj/students-present-non-compete-agreements-office-attorney-general/> [<https://perma.cc/S69F-2ZR8>] (last visited Dec. 13, 2019); email from Officer at PA. Attorney Gen. Office (Oct. 25, 2019).

97. KARL A. RACINE, OFFICE OF THE ATTORNEY GEN. FOR D.C., *ILLEGAL WORKER MISCLASSIFICATION: PAYROLL FRAUD IN THE DISTRICT'S CONSTRUCTION INDUSTRY* (2019), <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf> [<https://perma.cc/E9K7-UU8A>].

98. Brand, *supra* note 17, at 13; email from Officer at PA. Attorney Gen. Office, *supra* note 96.

99. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 446 (2006).

100. MAURA HEALEY, OFFICE OF THE ATTORNEY GEN. OF MASS, 2019 LABOR DAY REPORT 10, <https://www.mass.gov/files/documents/2019/08/29/Labor%20Day%20Report%20FY2019.pdf> [<https://perma.cc/8CPQ-LR5V>].

101. *Id.*

forcement are positive developments for those who believe in the need for more community-driven enforcement of employment standards. However, these partnerships have inherent limitations that must be understood and acknowledged.

A. Limitations on State Attorneys General as Alt-Enforcers of Workplace Rights

As workplace rights enforcers, state attorneys' general strengths are also their limitations. State attorneys' general status as supplemental workplace enforcers, their relatively small size, and the breadth of laws and issues they enforce outside the workplace, enable them to be selective and strategic in their enforcement work and make them comparatively nimble and creative in their enforcement. However, this also means that they have limited resources, competing priorities, and nothing that obligates them to do affirmative labor and employment cases. Realistically a large and resource intensive workplace rights case may have to compete for limited resources and attorney time with a big civil rights or consumer case in many states.

The discretionary nature of state attorneys' general involvement with workplace rights enforcement also makes it more subject to political change. While workers' rights may be having a "moment" right now in certain states with certain state attorneys general, it remains unknown to what degree these fledgling efforts will withstand changes in administration, particularly across party lines. State attorneys' general legacy and status as workplace enforcers will be largely dependent on the ability of their office to build expertise and a sustained commitment to the work over time and through shifts in administration at both the state and federal levels.

Federalism also imposes clear limitations on state attorneys' general work in this area. State attorneys general are able to investigate a range of wage and hour issues, workplace discrimination, and anti-competitive labor practices, because these are areas of the law where states are permitted to legislate and enforce above the federal standard. Yet state attorneys general are limited in their ability to impact issues like collective bargaining rights or immigrant employment rights – issues that are hugely influential on the kind of power that workers can wield in their workplaces – but generally federally preempted.¹⁰²

102. State attorneys general have done some work around the edges of these issues. For example, after the Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), concerning public

B. Limitations on State AG Partnerships with Community Organizations

There are also clear limitations in the extent to which state attorneys general can partner with community organizations around workplace rights enforcement. Many of these limitations are the same as those identified in prior scholarship concerning co-enforcement models with state or local labor agencies.¹⁰³ One of these tensions is between government agency's need to maintain appropriate neutrality, confidentiality, and independent decision-making, and a community organization's understandable desire to remain updated on the progress of a case or investigation it referred, involving workers it identified.¹⁰⁴ Government agencies may be limited in the information they can share with community and alt-labor groups due to legal confidentiality requirements or simply hesitant to share much information out of concern about a group's activist tactics.¹⁰⁵ On the other side, community groups may grow frustrated and stop bringing complaints or cases to government if they are then cut off from any information about how those cases or investigations are proceeding.¹⁰⁶

To some extent these tensions are natural and to be expected given the different roles and goals of government enforcers, including state attorneys general, and alt-labor groups. To make a collaboration work then, "[a]ll parties to the collaboration must be clear on the roles that each group will

employee union agency fees, eleven state attorneys general offices issued advisories to the agencies in their state explaining the impact of the decision and guidelines for agency action. *See, e.g.*, Press Release, Office of the MA Attorney Gen., AG Healey Issues Guidance on Public Sector Workers Rights and Obligations in the Wake of Janus Ruling (July 3, 2018), <https://www.mass.gov/news/ag-healey-issues-advisory-on-public-sector-workers-rights-and-employer-obligations-in-the-wake> [<https://perma.cc/4R2R-2DVV>]. In light of the Trump administration's focus on undocumented workers, a number of state attorneys general have issued guides or held events to further educate workers, employers, and the general public about what legal rights both documented and undocumented immigrant workers actually have in their workplaces. *See, e.g.*, OFFICE OF THE ATTORNEY GEN., STATE OF ILL., GUIDANCE FOR ILLINOIS RESIDENTS: IMPACT OF IMMIGRATION STATUS ON EMPLOYEES' RIGHTS IN THE WORKPLACE (2018) http://www.illinoisattorneygeneral.gov/rights/Guidance_for_Illinois_Residents_on_Immigration_Issues_in_the_Work_Place_122718.pdf.

103. *See* Matthew Amengual & Janice Fine, *Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 1, 9 (2016).

104. Elmore, *supra* note 88, at 124-26; Brand, *supra* note 17, at 24, 25.

105. Janice Fine, *Solving the Problem from Hell: Tripartism As A Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L.J. 813, 843 (2013) (Fine makes the case that this tension is constructive: "[c]ivic actors will push for as much information and aggressive action as they can get . . . in contrast, government actors will be more cautious, more focused on getting the employer's perspective, and more motivated to keep some of the details of their investigations confidential. This will be a constructive tension.")

106. Fine, *supra* note 62, at 154.

play . . . Partners must understand that once a case is brought to the attorney general, the attorney general's office will pursue its own law enforcement goals which may not dovetail exactly with the interests of the outside partner."¹⁰⁷ Not all of the violations that a community group encounters will make good referrals nor will the attorney general's office pursue all of them. On both sides there needs to be open communication and a nuanced understanding of the broader goals and objectives of the other.

CONCLUSION

While relatively recent entrants into workplace rights enforcement, state attorneys general have proven themselves to be flexible and entrepreneurial in ways that cut across traditional administrative employment law enforcement divides; traditional labor law/employment law divides; and state-by-state enforcement divides. State attorneys' general background and experience in enforcing consumer, anti-trust, and environmental laws makes them more focused on collective remedies and savvy about market forces that weaken workers' bargaining power.

One of the strengths of state attorneys' general emerging workplace enforcement model is their partnership with alt-labor and other community groups. These partnerships allow state attorneys general to better identify cases that merit strategic prioritization and to resolve those cases in successful and impactful ways. They also keep state attorneys general aware and responsive to emerging workplace issues that impact workers in their day-to-day lives. While these enforcement partnerships importantly do not and cannot solve the massive underenforcement of employment laws in the United States, they do provide a model of how public enforcement agencies can conduct creative enforcement that responds to the priorities and concerns of unrepresented workers in the contemporary workplace.

107. Brand, *supra* note 17, at 24, 25.