

Building Robust Labor Standards Enforcement Regimes in Our Cities and Counties

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Introduction

An unprecedented number of cities and counties around the nation have adopted a local minimum wage that is higher than the federal wage floor. Today, more than 20 cities and counties have a higher local minimum wage; 11 were approved in 2014 alone.¹

This wave of local minimum wage wins can substantially improve the lives of millions of workers, especially because workers are calling for higher minimum wages than ever before. For such wins to make a real difference to workers and their communities, however, strong enforcement provisions need to be part of any local minimum wage proposal. A robust local regime will strengthen workers' ability to assert their rights and ensure employer compliance with the new wage laws.

The Current State of Wage Enforcement

The rates of noncompliance with existing wage laws remain staggeringly high, particularly in low-wage industries. A seminal 2009 national study of the low-wage workforce in New York City, Chicago, and Los Angeles found that more than two in three low-wage workers experienced at least one wage violation in their previous work week, including 76 percent who were not paid overtime and 26 percent who were not even paid the minimum wage.² A 2014 report that estimated the social and economic effects of minimum wage violations in California and New York reported that wage violations in 2011 in these two states alone cost workers at least \$32.7

million a week, or around \$1.7 billion a year.³ The report further found that at least 50,000 families in the two states suffered income losses due to minimum wage violations, and at least 14,800 families were brought below the poverty level.⁴

The high rates of violations are the result of many factors. Labor standards enforcement is primarily complaint-driven, relying on individual workers coming forward to assert violations of the law. But fear of retaliation, limited knowledge about workplace rights and where to file wage claims, and the limited remedies available to workers prevent many from coming forward. Other factors that contribute to the high rates of noncompliance include the inability of many private attorneys to take workers' cases, insufficient damages and penalties assessed against law-breaking employers, woefully under-resourced public enforcement agencies, and the lack of political will to engage in proactive and strategic agency enforcement.

As more cities and counties adopt higher minimum wage standards, they also have the opportunity to establish a local enforcement regime, either by using existing tools and administrative agencies or by building from scratch. They should adopt a broad and robust enforcement system that channels public resources and private litigation to ensure that workers, law-abiding employers, and communities actually benefit from the new higher wage levels.

Tools and Strategies to Build a Robust Local Enforcement Regime

This policy brief outlines enforcement tools and strategies that should be part of any campaign to adopt a local minimum wage. These tools and strategies deter violations of these new wage standards, strengthen workers' ability to file wage claims, and increase recovery of unpaid wages. Many of the recommendations outlined in this brief build upon successful wage theft campaigns on the local and state levels. Some of these proposals can be achieved either legislatively or administratively, with the understanding that the legislative route is less vulnerable to changes in political leadership and agency heads.

In cities and counties that may not have the legal authority to adopt their own local minimum wage because the state “preempts” such local regulation,⁵ some of the strategies discussed below can be used to combat violations of existing state wage protections, building upon

the traditional police powers that cities and counties already possess.

Finally, cities and counties with a new minimum wage law are likely to lack sufficient resources to track and tackle on their own the wage law violations within their jurisdictions. They should partner with worker organizations and their members who work in various industries and occupations with strong ties to certain racial or ethnic communities and geographic areas. Because the engagement of workers and worker organizations in enforcement efforts can be a good strategy to empower workers and raise labor standards in local labor markets, some of the tools discussed below are designed to position these organizations as a fully integrated partner in the public agency's enforcement efforts.

I. A Local Labor Standards Office to Investigate Violations and Strategically Enforce Wage Rights

As part of any local wage campaign, advocates should push for the creation of a local labor standards office with dedicated staff and funding to enforce the new law. If the creation of an independent office is not politically viable, and the new law will be enforced by an existing city agency, advocates should push for dedicated staff and funding specifically assigned to investigate and enforce the new minimum wage law.

A. Funding the Local Labor Standards Office

In addition to advocating for straightforward budget allocations in their city councils to fund a new local labor standards office, given possible political and economic pushback, advocates should identify and pursue revenue sources outside the city budget process at the outset of their campaigns. Identifying and establishing different revenue sources to fund the city's enforcement operations also minimizes its vulnerability to changes in the city's political leadership and maximizes the sustainability of the local labor standards office. For example, local minimum wage laws should include mandatory minimum civil penalties for wage violations and mechanisms that direct the collected penalties back to enforcement operations. In addition, advocates can consider

dedicating a percentage of licenses fees collected from businesses operating within a jurisdiction to fund the enforcement operation.

B. Strategic Enforcement by the Local Labor Standards Office

Public enforcement agencies are often the front-line access point for workers seeking to recover unpaid wages. For many workers who will not be able to get an attorney to assist them with a private lawsuit, they are often the only option. But agencies generally have limited resources and cannot fully investigate all individual claims. Therefore, they must use their resources strategically, with an eye toward engendering greater compliance with wage and hour laws.

1. A Triage System

First, local enforcement agencies should develop strategic enforcement priorities, including initiating investigations focused on high-violation industries. It should implement a tiered triage system for individual worker complaints based on these priorities. Rather than a simple “first in, first out” approach, which can result in the elevation of limited-impact, low-priority cases to

the detriment of other cases that involve critical issues or have a broader influence, a triage system helps agencies focus their limited resources on the most strategic targets. Such enforcement priorities include:

- Whether the claim presents an opportunity for a high-profile or high-impact enforcement action in industries with high rates of wage and hour violations as a way to send a strong public message to the employer community that violations don't pay;
- Whether the investigation is likely to benefit harder-to-reach populations, such as immigrant workers, who may face barriers in coming forward to complain directly because of their English level or immigration status;
- The seriousness of the violation, based on the number of workers affected, the amount of back wages and damages at stake, the employer's history of violations, and whether it involves a large national employer;
- The potential to collaborate with worker organizations to reach out to low-wage workers; and
- Whether retaliation has been threatened or has occurred.⁶

2. Proactive Enforcement

In addition to simply collecting the back wages already owed to workers, the local enforcement agency will ideally have other enforcement tools that it can use (such as liquidated damages, interest, and other monetary penalties, as will be discussed) to combat wage theft. It should use the full range of these tools.

Examples of enhanced tools to punish and deter violators include:

- Going after the full back wages, damages, interest, and other penalties available under the law;
- Treating individual worker complaints as covering the entire workplace so that other workers who fear coming forward will benefit from the agency's investigation;
- Seeking injunctive relief (an order prohibiting the employer from engaging in certain conduct), with monitoring for future compliance, in high-priority cases.

3. An Expedited Administrative Adjudicative Process

The local enforcement agency should develop an administrative adjudication process to move worker claims

through as expeditiously as possible, while affording due process to employers contesting claims. As part of this process, agencies must communicate effectively with workers who have or will file complaints, including simplifying complaint procedures and explaining them clearly on an agency website; providing a downloadable claim form; providing an emergency contact in cases of retaliation; and updating workers on the status of investigations at regular intervals.

C. Criminal Penalties and Prosecution

Many states recognize that nonpayment of wages is stealing, and impose criminal penalties for violations of wage laws. Similarly, local minimum wage laws can impose criminal penalties to raise the costs to employers for violating the law. Criminal penalties are in addition to civil penalties, damages paid to workers, or fines that businesses are ordered to pay by an agency or a court. Criminal sanctions can include fines to be paid into a public fund, restitution to workers who suffered wage theft, and jail sentences.

If advocates are successful in establishing a local enforcement agency, they should encourage that agency to pursue criminal prosecution as part of its strategic enforcement. When the local agency refers cases to the local police or prosecutors, workers' claims can languish because local prosecutors are not typically knowledgeable about the wage laws and other issues that may affect workers when they file wage claims against their employers, such as retaliation or the importance of keeping a workers' immigration status out of the case. At the same time, the local agency should not use criminal enforcement to the exclusion of civil claims, which can typically bring more back wages to workers and can be easier to pursue. If criminal prosecution is to be a part of the duties of the local agency, advocates should require criminal prosecution rules-and-procedures training for its staff.

Even in jurisdictions where it is not possible to establish a new agency, advocates should explore whether local theft-of-services laws provide an avenue for prosecution of businesses that violate the law. While civil claims and civil penalties are far more effective than prosecution, prosecution might be explored in the absence of these alternatives.

II. An Expansive Definition of Who is an “Employer”/Who is Liable for Wage Violations

Critical to strong enforcement of local wage laws are broad definitions of which individuals and entities are “employers” responsible for the wages and working conditions of workers. Most state minimum wage laws have very broad definitions of “employer,” “employ,” and “employee” that track the language in the federal Fair Labor Standards Act. These broad definitions, at least in theory, are meant to capture most workplace relationships and hold accountable as employers all individuals and entities that have the power to control workplace conditions, extending liability up and across supply chains and other structures. At a minimum, advocates should include such broad definitions of employer and employee in any local minimum wage law in order to ensure that the law’s new wage requirements reach all of those entities that have the power to ensure compliance.

While existing state and federal employment definitions are in theory very broad, enforcement of these existing

standards has been inadequate to deter violations. Even when the appropriate employer with the right to control workplace conditions is theoretically liable under the law, many jurisdictions have thwarted these standards through narrow court decisions or agency interpretations. Therefore, advocates should consider drafting local wage laws to expressly hold those up the chain accountable for wages and working conditions. For example, a local minimum wage law could expressly provide that corporate franchisors are employers alongside their franchisees, as the City of Seattle’s minimum wage law provides. Going further, a local minimum wage law could hold automatically liable any lead business that outsources any part of its business operations for workplace violations that occur at any point in the subcontracting chain, regardless of whether or not that lead business is an “employer” under the wage law, as a recent California state law does.⁷

III. Enforcement as a Strategy to Empower Workers

The enforcement of workers’ rights can be a good vehicle for worker organizations to educate and engage workers in upholding their rights and to empower workers. To facilitate more active engagement of workers and worker organizations in the enforcement of local wage laws and to improve conditions for long-term compliance, it is important for enforcement agencies to see worker organizations as fully integrated partners to their work, rather than merely a group to be consulted.⁸ One way to achieve this goal is to include a requirement in the local wage law that the local enforcement agency cooperate with governmental and non-governmental entities and stakeholders in carrying out its enforcement functions and duties.⁹ This legislative mandate can then become a basis to demand and establish a more formalized and sustained partnership with worker organizations. Such a formalized partnership can include dedicated city grants for community outreach and education programs, as the cities of San Francisco and Seattle have done in the enforcement of their local minimum wage ordinances. These mandates can also prompt the local enforcement agency to engage the business community in enforcement-related efforts.

Examples of the enforcement-related activities that worker organizations can engage in under this partnership model include:

- Conducting educational outreach to workers on their workplace rights and to employers on their obligations under the law, including know-your-rights trainings, distribution of literature to workers at their workplace or other locations, and outreach to businesses to foster compliance (and to facilitate the agency’s ability to consider them willful violators subject to additional penalties should they subsequently violate the law after learning of their obligations);
- Helping workers monitor and detect violations in their workplaces and gather information that the enforcement agency can use to prosecute cases;
- Assisting workers in filing complaints and conducting any advocacy needed with the agency. Worker organizations could be additional sites for workers to file complaints (instead of only going to the enforcement agency), and groups could be authorized to file complaints as a third party on behalf of workers, when necessary to protect workers’ identity.¹⁰
- Identifying high-violation industries and employers for agencies to target for proactive investigation and

enforcement. Worker organizations could also identify and develop campaigns in coordination with the agency's targets for proactive investigation.

- Assisting the enforcement agency in monitoring of workplaces, particularly in high-violation geographic areas or industries, or in areas where businesses received community outreach and education. This would not mean that community representatives

would review payroll records or interview employers or workers; rather, their presence may spur workers to come forward to speak up about violations. If violations were found as a result of an investigation, the agency could enter into a monitoring agreement permitting the agency to inspect and re-investigate the violator for a number of years after the violations were found.

IV. A Commission or Taskforce to Protect Workers from Retaliation

Employer retaliation is a powerful deterrent to worker organizing and enforcement of rights. It also significantly hampers public enforcement if employers think that they have license to retaliate against workers who file complaints.

As an initial matter, local wage laws should include a provision that any adverse or discriminatory action taken by an employer against a worker within a certain time period after a worker complains is presumed to be retaliatory. Currently, the cities of San Francisco, Santa Fe, Oakland, San Diego, and Washington, D.C. have included such a presumption of retaliation in their local minimum wage ordinances.

Additionally, to further the goal of more fully engaging workers and worker organizations in the enforcement process, advocates can consider establishing a commission to study the issue of retaliation and generate strategies to effectively address it. This commission could be a vehicle for worker organizations and workers to collectively engage employers and the government to protect workers from retaliation in local or regional labor

markets. The commission could have tripartite representation—the government, workers, and employers—and could carry out a number of activities, including:

Conducting a survey or other fact-finding initiative to study and document the problem of retaliation, and to develop strategies to address it. As part of this work, the taskforce could convene hearings and town hall meetings across the city and conduct case studies of particular industries and occupations, all of which would offer workers and worker organizations an opportunity to engage in this process.

Creating an anti-retaliation strike force whose primary goal would be to act immediately and aggressively to preserve workers' jobs where possible, or to seek the immediate reinstatement of workers who have faced retaliation, as some state labor departments and attorneys general currently do. Worker organizations can play the vital role of being the "eyes and ears" that identify affected workers, and can develop campaigns in connection with the work of the strike force.

V. Denial, Suspension, and Revocation of Business Licenses or Permits Until Violations Are Remedied

Cities such as San Francisco, Houston, Chicago, Seattle, Somerville, Massachusetts, and New Brunswick and Princeton, New Jersey have enacted local ordinances that allow for the suspension or revocation of business licenses or permits of employers that cheat workers out of their pay. In San Francisco, the city's public health department works with local and state enforcement agencies to initiate a permit revocation hearing against employers who have outstanding judgments for unpaid wages.¹¹

This proposal can be implemented even in cities that lack the authority to enact a local wage law. Key provisions of this law would include:

- Allowing for the suspension of applicable city business licenses or permits for employers who have been found to have committed wage theft. For instance, where an employer has failed to resolve a wage theft violation by failing to comply with a court order, administrative order, or settlement, this law would suspend or deny a business

- license until unpaid wages have been paid in full.
- Defining wage theft expansively to include findings of liability in any judicial or administrative proceeding related to any local, state, or federal law regulating wages, and to include any instance where an employer has entered into a settlement agreement with or without admitting liability.
 - Establishing a formal complaint process for workers and community organizations to file complaints

- against a business that has unpaid settlements and judgments, and making information about such businesses available to the public.
- To the extent that certain industries are not required to obtain a city license as a condition of doing business, expanding the existing licensing scheme to include these industries in order to give the city the ability to then suspend or revoke business licenses for wage theft violators in those industries.

VI. Strong Stop-Goods or Stop-Work Orders in Contracted Workplaces

Under a so-called “hot goods” provision, the U.S. Department of Labor can seek a court order to stop the transport or sale across state lines of goods produced by any employee whose minimum wage and overtime rights were violated.¹² It can also seek monetary damages, including the amount of unpaid wages, from those holding the goods. This hot-goods order applies not just to the employers whose employees produced the goods, but also to subsequent purchasers or end-possessors of those goods—meaning contractors and worksite employers can be on the hook for unpaid wages even if they are not found to be the employer of the unpaid workers.¹³ New York and California have analogous hot goods provisions that apply in the garment industry.

When used, this hot-goods provision creates a strong incentive for contractors and end-users to ensure that they are working with reputable and responsible entities that comply with wage and hour laws. Thus, advocates

should push for hot-goods powers for local enforcement agencies. These local proposals should also afford a private right of action for workers and their advocates to seek hot-goods holds directly—a crucial component missing from the federal hot-goods provisions.

A related remedy is to empower local enforcement agencies to issue a stop-work order in a workplace where wage violations are occurring, including in workplaces where there are multiple contractors. Under this remedy, an agency could freeze any and all work taking place in that workplace until the violation is remedied, regardless of which employer or contractor is committing the violation. For example, an agency could issue an order to shut down a hospital catering company violating the law that would essentially shut down food services in the entire hospital. The hospital itself could then lift the stop-work order by paying the unpaid wages, and then seek reimbursement from the catering contractor.¹⁴

VII. Strong Damages and Penalties

Compensation to workers who have experienced wage theft should be high enough to make it worth the trouble for workers to raise complaints and file lawsuits, and to deter violations in the future. Nationally, the stronger states and cities require employers caught cheating their employees to repay the unpaid wages plus liquidated damages equal to two times the unpaid wages, for a total of three times of the unpaid wages (often termed “treble damages”). These laws often apply to both private lawsuits and enforcement by public enforcement agencies. These damages incentivize compliance because without them, the only penalty an employer caught violating the law has to pay is the unpaid wages he should have paid in the first place.

San Diego’s recently passed minimum wage ordinance requires such treble damages, as do five states—Arizona, Idaho, Massachusetts, New Mexico, and Ohio. Ten other states allow for treble damages in other wage claims. San Francisco’s ordinance is even stronger, requiring payment of unpaid wages plus \$50 per worker per day that a violation occurs or continues. The best state laws, which cities enacting local wage laws should emulate, automatically require these damages in all wage claims. Exceptions and additional conditions that weaken this model policy that should be fought against include (1) requiring workers to show that the employer’s violation was “willful” before imposing treble damages; (2) making the imposition of treble damages non-mandatory, or

in administrative cases, leaving it to the discretion of the agency; (3) imposing treble damages only when the employer is a prior offender; and (4) imposing treble damages only after the employer fails to satisfy a judgment for unpaid wages. These burdens make the damages less

effective as a deterrent and require more investment from the worker and the agency to recover wages that are likely way past due.

VIII. A Private Right of Action

Private enforcement, i.e., workers bringing claims in court as opposed to public agencies for adjudication, is another vital way that workers can recover unpaid wages and enforce labor standards. This is especially important given limited public resources available for agency enforcement. Thus, at the outset, any local minimum wage law must include a provision allowing for a “private right of action” to allow workers or worker organizations (on workers’ behalf) to file claims in court.

A. Providing for Attorneys’ Fees

The high cost of legal representation is a significant barrier to workers bringing private lawsuits to achieve redress for wage theft. Low-wage workers are almost never able to pay for costs, and although some lawyers accept cases on a contingency basis (where the lawyer’s

fee is a percentage of whatever final amount of back wages and other damages is recovered), the relatively small sums of money at issue in many claims brought by low-wage workers may not be enough to compensate a lawyer fully for his or her time.

City minimum wage laws can help workers bring wage theft claims by adding a reasonable amount for attorney’s fees and other costs of litigation to the damages that a worker receives when he or she prevails in a lawsuit against her employer. Most state minimum wage laws provide for attorney’s fees. The best policy, which should be incorporated into any effort to enact a local minimum wage law, automatically awards attorneys’ fees and costs to workers who win their case, rather than leaving it to the discretion of the court.

IX. A Statute of Limitations that Works

A statute of limitations is a deadline by which a wage claim must be filed. After the deadline has expired, workers lose the right to make a complaint. This has proven to be a major obstacle to pursuing compensation for wage theft, because workers often do not know their legal rights or when those rights have been violated, hesitate to file claims for fear of retaliation, or are strung along by the employers who claim they will pay them later. When workers fail to assert their rights on time, the clock runs out, leaving them without recourse and unable to recover the wages and damages they are owed. And because these statutes of limitations also apply to agency claims, workers lose out when public enforcement agencies take a long time to initiate and conduct wage claim investigations.

A typical statute of limitations for minimum wage laws is two to three years, but many states have extended this statute of limitations to four to six years, giving workers more time to file a wage claim and a chance to recover a greater share of unpaid wages (when a worker, for example, may have been underpaid for 10 years, but can only recover for the length of time that falls within the statute of limitations). Some state laws also suspend, or “toll,” the statute of limitations when a worker files a wage claim with the enforcement agency, so that the time spent investigating the case does not count against the deadline. Advocates should push for as long of a statute of limitations as possible, and should consider including such a “tolling” requirement in their local minimum wage law.

Conclusion

The movement to raise the minimum wage in cities and counties has had unprecedented victories across the country. To ensure that higher minimum wage laws in our cities and counties translate into higher wages for workers, we have to build a strong enforcement system that accompanies the higher wage standard. In this policy brief, we outline a concrete menu of policies that

guides building a vigorous system that encourages workers to come forward to assert their rights to be paid fair wages. We also outline policy levers that workers and advocates can use as vehicles to engage and empower workers in asserting their workplace rights. Our hope is that these policies help inspire meaningful collective action to turn the tide against wage theft.

Endnotes

1. NELP, City Minimum Wage Laws: Recent Trends and Economic Evidence on Local Minimum Wages (December 2014), available at <http://www.nelp.org/page/-/rtmw/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf?nocdn=1>
2. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, at 3, National Employment Law Project (September 2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>
3. Eastern Research Group, The Social and Economic Effects of Wage Violations: Estimates for California and New York, Final Report prepared for U.S. Department of Labor (December 2014), available at <http://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf>
4. *Id.*
5. States that expressly authorize such broad local wage powers include California, Washington State, Arizona, the District of Columbia, New Mexico, Maryland and Illinois (the latter three by legal interpretation). States that expressly prohibit local wage powers include Alabama, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Wisconsin and New York (the latter by legal interpretation). In the remainder of the states, a locality's ability to adopt a higher local minimum wage has not been tested, but depending on state caselaw on preemption, may be possible. States generally have the authority to broadly define the scope of their enforcement regime.
6. A detailed framework agencies can follow to improve the complaint process is available in NELP's Winning Wage Justice Guide, <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1>, at pp. 46-49.
7. See Cal. Lab. Code § 2810.3.
8. See Janice Fine & Jennifer Gordon, Strengthening Labor Standards Enforcement through Partnerships with Workers' Organization, *Politics & Society*, 2010, 38:552 (discussing how community-based organizations must be fully integrated into the agency's work and how these partnerships can give workers' organizations equal standing with government and employers).
9. A similar mandate is enshrined in the New York City Human Rights Law. Under the NYC Human Rights Law, the functions of the Commission of Human Rights include "to cooperate with governmental and non-governmental agencies and organizations having like or kindred functions." N.Y. ADC. LAW § 8-104. The powers of duties of the Commission also include "to enlist the cooperation of various groups, and organizations in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes bigotry and discrimination." N.Y. ADC. LAW § 8-105.
10. Six states (Arizona, Arkansas, California, Colorado, New York, and Rhode Island) allow organizations or individuals, including fellow workers in the same workplace, to file administrative complaints on behalf of affected workers.
11. At the state level, New Jersey has the power to suspend business licenses, including liquor licenses of employers who repeatedly violate wage and hour and tax laws. Utah can suspend liquor licenses for violations of civil rights laws, and Massachusetts and Connecticut can suspend liquor licenses for violations of unemployment insurance laws. More recently, California's employers can get their business license suspended or revoked if the State department of labor or a court finds that an employer retaliated against a worker by making a report or threatening to report the citizenship or immigration status of a worker or the worker's family member.
12. 29 U.S.C. §215(a)(1). 29 U.S.C. §212(a) also permits the DOL to seize hot goods if the goods were produced in a location where children were illegally working. New York and California have hot goods authority for garment workplace violations.
13. An affected employer can contest the order in court with the same due process rights normally available to parties subject to a proposed injunction. Where goods are perishable or will lose value if not sold promptly, courts have allowed the goods to be sold, with proceeds paid to the court to pay the wages that are due.
14. For example, Connecticut's Stop Work Order (SWO) provision grants the state's DOL the authority to conduct an investigation that could lead to a SWO upon a complaint for non-payment of wages or a workers' compensation violation (although it only allows for a SWO to be issued upon a finding that there has been a workers' compensation violation). <http://www.ctdol.state.ct.us/wgwkstnd/StopWork/Section31-76a.htm>