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Courtlyn G. Roser-Jones
The Ohio State University Moritz College of Law, roser-jones.1@osu.edu

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Abstract

Regulatory efforts to curb wage theft are failing. And for good reason: these laws generally empower individual workers to pursue their rights when employers neglect to pay them what they are owed and deter employers with substantial penalties. But the vast majority of workers do not take formal action against their employers. So, when the penalties for committing wage theft are almost entirely triggered by claims workers do not bring, they do not deter employer behavior. Instead, because the likelihood of being penalized at all is so low, some employers make profit-maximizing decisions to commit wage theft on a large scale. In addition to being against the law, these practices impose substantial costs on taxpayers and distort the competitive labor

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market, as law-abiding employers struggle to compete with others who cut costs by underpaying workers.

This Article explores government contracting initiatives at the state and local level as a supplemental tool for deterring wage theft. In addition to deterring unlawful behavior, conditioning government contracts and other public business relationships on recipients' past and continued compliance with existent wage payment laws ensure that public funds are not used to subsidize wage theft's public harm. Furthermore, publicly labeling wage-theft offenders as ill-fit government partners or providers of public goods and services challenges industry practices that have normalized this one particular kind of property "theft."

While contract-based initiatives are an increasingly popular government tool for promoting certain workplace activities, these initiatives are specifically well suited for promoting wage-payment obligations and addressing the economic and logistical shortcomings of existing anti-wage-theft laws. Rather than relying on individual worker complaints to spur the enforcement process, contract-based initiatives make self-enforcement and rigorous disclosure obligations the price tag for lucrative public works and publicly subsidized opportunities. And because the potential penalty (or cost) of committing wage theft is contract ineligibility, contract-based initiatives turn employers' cost-benefit analyses inside out. Instead of using low enforcement rates and predictable penalties to determine whether wage theft is likely the most profitable course of action, conscious employers must make these decisions with an added cost variable—the potential loss of public business opportunities. As the movement towards privatization marches on into new services and industries, more employers than ever should assess these costs as too high to risk having to pay.

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INTRODUCTION

For years, lawmakers have debated ideal wage minimums and payment obligations as part of a broader initiative to address income inequality and alleviate poverty among the working poor.[1] Then the COVID-19 pandemic changed how many think of "low-wage work"[2] when these same occupations were deemed "essential" to our day-to-day lives during lockdowns across the country.[3] Once a progressive, fringe idea, approximately two-thirds of Americans—and corporate giants like Amazon, Target, and Starbucks—now support a fifteen-dollar-an-hour minimum wage.[4] This wave of support

1. *See* Arindrajit Dube et al., *Minimum Wage Shocks, Employment Flows, and Labor Market Frictions*, 34 J. LAB. ECON. 663, 664–68 (2016) (describing the ideal minimum wage as a moving target due to inflation and the popular belief that a minimum wage that is too low does not alleviate poverty, whereas a minimum wage that is too high stifles economic growth and reduces jobs for low-wage workers). *But see* David H. Autor et al., *The Contribution of the Minimum Wage to US Wage Inequality over Three Decades: A Reassessment*, 8 AM. ECON. J.: APPLIED ECON. 58, 89 (2016) (finding that the minimum wage appears to have played "a substantially smaller role . . . in the rise of [income] inequality than suggested by earlier work"); DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 137–40 (Twentieth-Anniversary ed. 2015) (challenging the conventional understanding that a higher minimum wage reduces the number of jobs available to low-wage workers).

2. Vincent A. Fusaro & H. Luke Shaefer, *How Should We Define "Low-Wage" Work? An Analysis Using the Current Population Survey*, U.S. BUREAU LAB. STATS. (Oct. 2016), https://perma.cc/L9N6-HKK4. According to the Bureau of Labor Statistics, a full-time employee whose annual earnings fall below the poverty line for a family of three is engaged in "low-wage" work. *See id.* For an example of how "low-wage" lacks an agreed-upon definition in the scholarly community, see David R. Howell et. al., What's the Right Minimum Wage? Reframing the Debate from 'No Job Loss' to a 'Minimum Living Wage' 16–28, 37–48 (July 2016) (working paper), https://perma.cc/7L7N-L3GT (PDF).

3. *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/NR7W-32JC (last updated Mar. 29, 2021). The Centers for Disease Control and Prevention defines "'essential workers' as those who conduct a range of operations and services in industries that are essential to ensure the continuity of critical functions in the United States." *Id.*; *see also* Molly Kinder & Laura Stateler, *Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a $15 Minimum Wage.*, BROOKINGS (Feb. 5, 2021) https://perma.cc/2TQU-K9A8.

4. *See* Leslie Davis & Hannah Hartig, *Two-Thirds of Americans Favor Raising Federal Minimum Wage to $15 an Hour*, PEW RSCH. CTR. (July 30,

arrives on the cusp of a radical reimagining of work as we know it.[5] The rise of remote work, layered corporate structures, unprecedented turnover, and an ongoing labor shortage have fertilized the grounds for a variety of protective work laws—including substantial increases to the minimum wage.[6] But too often these minimum wage initiatives ignore a harsh truth: minimum wage laws have never actually ensured that workers are paid the minimum wage rate. Instead, due to lackluster penalties and ineffective enforcement regimes,

2019), https://perma.cc/5NQR-YM65; Arjun Panchadar, *Amazon Raises Minimum Wage to $15, Urges Rivals to Follow*, REUTERS (Oct. 2, 2018), https://perma.cc/D565-CA4U; Janet Nguyen, *Why Target is Raising Its Minimum Wage to $15*, MARKETPLACE (June 17, 2020), https://perma.cc/JHV5-Y3KQ; *see also* Pallavi Gogoi, *$600 a Week: Poverty Remedy or Job Slayer?*, NPR (June 27, 2020), https://perma.cc/RNT4-D2LS (finding that when the federal government began paying an additional $600.00 each week in unemployment benefits during the pandemic, many low-wage workers earned more while unemployed than they did working their full-time jobs). The belief behind the additional amount was that unemployment benefits would now cover at least basic living expenses almost everywhere in the United States. *Cf.* Gogoi, *supra*. This, by implication, recognized that low-wage workers regularly do not make enough to cover basic living expenses.

5. *See* Christina Maslach & Michael P. Leiter, *COVID Changed the World of Work Forever*, SCI. AM. (Mar. 1, 2022), https://perma.cc/GE8G-YS9G (examining how the shift from in-office to remote work increased stress for some families, as the "work-home" boundary was breached, while allowing others, those "with comfortable home offices and few parental responsibilities," to have more time and energy while saving money on commuting); *see also* Joanne Lipman, *The Pandemic Revealed How Much We Hate Our Jobs. Now We Have a Chance to Reinvent Work*, TIME (May 27, 2021), https://perma.cc/C5QG-DTX8 (stating that the pandemic served as an opportunity for individuals to "redefine" their careers).

6. *See* JUSTIN SCHWEITZER & KYLE ROSS, CTR. FOR AM. PROGRESS, HIGHER MINIMUM WAGES SUPPORT JOB GROWTH AS THE ECONOMY RECOVERS FROM COVID-19 1–5 (2021), https://perma.cc/29FQ-X5WZ (PDF) (discussing trends in state minimum wage laws during the pandemic); Lipman, *supra* note 5 (discussing how the pandemic provided an opportunity for workers to reassess "their relationship to their jobs"); David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 147, 148–49, 156 (2019) (discussing the various ways businesses have reorganized themselves); Lulu Garcia-Navarro, *The Pandemic Could Be Leading to a Golden Age for Unions*, NPR (Oct. 17, 2021), https://perma.cc/85JC-BHH7 (describing reinvigorated labor organization as an economic result of the COVID-19 pandemic).

noncompliance with existing wage-payment obligations abounds.[7]

So, what good is a fifteen-dollar-an-hour minimum wage when employers do not pay it?

Paying workers a subminimum wage is one of many ways employers commit "wage theft," or deny workers the wages to which they are legally entitled.[8] Although versions of this practice have been around as long as paid labor has, with the twin crises of the COVID-19 pandemic and subsequent recession, wage theft in the United States has now reached "epidemic" proportions.[9] And as with most epidemics, once underway, marginalized persons and communities—the working poor, undocumented immigrants, women, and people of color—bear the brunt of wage theft's effects.[10] In response, state and local lawmakers have experimented with a variety of

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7. *See, e.g.*, *The Importance of Combatting Wage Theft: Hearing on S.B. 195, S.B. 196, S.B. 197, S.B. 198, and S.B. 199 Before the S. Lab. & Indus. Comm. on Raising the Minimum Wage*, 114th Cong., Leg., 2015 Reg. Sess. 1 (Pa. 2015) (written testimony of Michael Hollander, Staff Attorney, Community Legal Services, Inc.), https://perma.cc/7ERT-ZFRA (highlighting how wage theft, which in this context meant the "failure to pay workers the wages owed to them," hurts low-wage employees).

8. Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 765 (2019); *see id.* ("Wage theft is the illegal non-payment or underpayment of wages in violation of wage and hour law or contract law."). For an explanation of wage theft in its many forms, see *infra* Part II.A.

9. Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), https://perma.cc/MP8X-PQVF; *see* Lee & Smith, *supra* note 8, at 767–69 (describing the "Epidemic of Wage Theft"); *see also, e.g.*, Susan Ferriss & Joe Yerardi, *As Guest Workers Increase, So Do Concerns of Wage Cheating*, ASSOCIATED PRESS (Mar. 2, 2022), https://perma.cc/R6RW-94W9 (citing rising concerns of wage cheating).

10. *See* Lee & Smith, *supra* note 8, at 765–69 ("[W]hile wage theft impacts everyone, it disproportionately impacts young people, those with less formal education, women, and workers of color."); HUGH BARAN & ELIZABETH CAMPBELL, NAT'L EMP. L. PROJECT, FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET $9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS 4–5 (2021), https://perma.cc/KLK2-Y7FN (PDF) (investigating the impact of wage theft on U.S. workers earning less than thirteen dollars per hour); DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 3 (2017), https://perma.cc/2LY4-3W8P (PDF) (stating that the working poor are disproportionately made up of immigrants, women, the less educated, younger workers, and people of color).

legislation.[11] These "anti-wage-theft laws" employ diverse strategies from worker education programs, to increased monetary penalties and civil fines, enhanced mechanisms for post-judgment collection, and even criminal liability.[12] But for the most part, these strategies have failed to deter wage-theft behavior significantly better than the federal legal scheme.[13] Using a predominately claimant-based approach to reporting and enforcement, they task the individual victims of wage theft—the ones with the most to lose and the least political influence—with remedying a societal problem.[14] Meanwhile, many offending employers are profiting twice from committing wage theft: once from the wages they refuse to pay, and again when they underbid law-abiding competitors to secure lucrative private and public business.[15]

This Article proposes a contract-based initiative for combatting wage theft. It suggests that governments use their incredible procurement power to induce private employer compliance with existing wage-payment laws, by making employers who commit wage theft ineligible for public contracts and other government-subsidized benefits such as tax abatements and business licenses.[16] This strategy incorporates anti-wage-theft efforts into a burgeoning "responsible contracting" movement that aims to raise workplace standards through conditional government spending in the private sector.[17] Furthermore, while states have always played an essential role in regulating the workplace—often filling in the holes left open by the federal scheme—contract-based initiatives enlist local government actors into comprehensive deterrence

11. *See generally* Lee & Smith, *supra* note 8.

12. *See id.* at 775–82 (outlining common legislative anti-wage-theft strategies).

13. *See id.* at 783–805 (outlining the limitations of common anti-wage-theft strategies and concluding that they "are unlikely to significantly reduce wage theft").

14. *See id.* at 770–72 (examining the burdens faced by workers in battling wage theft).

15. *See id.* at 766–67, 770–72.

16. *See infra* Part III.A.

17. DAVID MADLAND ET AL., CTR. FOR AM. PROGRESS ACTION FUND, CONTRACTING THAT WORKS: A TOOLKIT FOR STATE AND LOCAL GOVERNMENTS 1 (2010), https://perma.cc/8CU5-375F (PDF).

strategies.[18] Preempted in many states from traditional workplace regulation, cities and localities can still influence private work standards by linking workplace standards, like wage-payment compliance, to their contractor decision-making as a quality-control and oversight measure.[19] And while these local contracting initiatives embody a wage-theft philosophy markedly different (i.e., more successful) than those of federal and some preemptive states, they are nonetheless fully enforceable as a matter of law.

It is good business to be a government contractor. State and local governments spend nearly two trillion dollars of taxpayer money every year purchasing public goods and services from private entities.[20] These contracts to repair bridges, shovel the courthouse steps, or install city hall's high-speed internet finance millions of jobs.[21] And new jobs are being financed all the time, as more and more government functions get outsourced into private hands.[22] Yet despite being funded by taxpayer dollars, the privilege of doing business with the government is not inherently conditioned on a record of

18. *See id.* at 2 ("State and local governments seeking to protect taxpayers and workers and promote quality services should begin by requiring careful review of decisions to contract out government work to the private sector."); *see also* Lee & Smith, *supra* note 8, at 806 (noting that "[s]tate and local regulation . . . still holds promise" in light of the Trump administration's "rollback of federal workplace protections"); Matthew S.R. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the* Lochner *Court*, 1 N.Y.U. J.L. & LIBERTY 476, 482, 493–95 (2005) (describing progressive legislative enactments of state workplace legislation pre- and post-*Lochner* era). For a discussion on why federal workplace laws do not evolve to meet the moment, see generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

19. *See generally* Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 W. VA. L. REV. 941 (2020).

20. *See* Ronald C. Fisher, *How State and Local Governments Are Crucial to the Economy*, GOVERNING FUTURE (Sept. 25, 2020), https://perma.cc/SR49-YGAN.

21. *See id.*

22. *See* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 419 (2006) (musing that perhaps "privatization has succeeded too well" as government officials are pressured to outsource more and more government functions); *see also* Fisher, *supra* note 20 ("When a state or a county repairs a road or bridge, or when a school district builds a new school, private contractors are hired to do the work.").

compliance with its workplace laws.[23] Instead, partly because of blind bidding procedures that award contracts to the lowest bidder, wage-theft violations are common amongst government contractors, as low bids often get that low by cutting labor costs.[24] Worse still, contractors who steal wages from their workers during the fulfillment of government contracts regularly remain eligible to have their contracts renewed and to bid on subsequent contracts in the future.[25] This acquiescence blesses a culture that already views wage theft as a minor infringement—more like a parking ticket or a fine than a morally objectionable form of theft.[26]

Wage theft is always individually harmful—and it imposes societal costs when it increases poverty rates, deprives communities of resources, and denies governments of employment and income-tax revenue.[27] But when wage-theft

23. *See, e.g.*, KATHRYN EDWARDS & KAI FILION, ECON. POL'Y INST., OUTSOURCING POVERTY: FEDERAL CONTRACTING PUSHES DOWN WAGES AND BENEFITS 3–5 (Feb. 2009), https://perma.cc/Q8QU-WBMN (PDF) (examining the effects of federal government contracting on those employed by contractors).

24. *See* KARLA WALTER ET AL., CTR. FOR AM. PROGRESS ACTION FUND, FEDERAL CONTRACTORS ARE VIOLATING WORKERS' RIGHTS AND HARMING THE U.S. GOVERNMENT 6–21 (2022) [hereinafter WALTER ET AL., FEDERAL CONTRACTORS VIOLATING WORKERS' RIGHTS], https://perma.cc/76QF-UAZH (PDF) (reporting various cases of labor law violations by private contractors); *Financial Fraud and Wage Theft Continue to Plague Construction Industry*, NAT'L ALL. FOR FAIR CONTRACTING (Mar. 25, 2019), https://perma.cc/SC76-TYXU (describing the wage-theft scrutiny faced by Massachusetts' construction industry); U.S. GEN. SERVS. ADMIN., REVIEW OF GSA'S SUSPENSION AND DEBARMENT PROGRAM 5–8 (2009), https://perma.cc/JEX5-GSBX (PDF) (evaluating whether the hiring of a contractor was appropriate to handle work resembling government decision making and recommending the avoidance of future contractor utilization).

25. *See, e.g.*, Vincent Corso, *Judge Rules Hawbaker Bidding Cannot Be Suspended by PennDOT*, CENTRE CNTY. GAZETTE (Jan. 27, 2022), https://perma.cc/FQ8P-TXFQ. For further discussion on this, see *infra* Parts I.C. & Part IV.

26. *See* Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL'Y REV. 93, 103–13 (2018) [hereinafter Hallett, *The Problem of Wage Theft*] (stating that employers commit wage theft because the penalties are small).

27. *See* PAUL K. SONN & TSEDEYE GEBRESELASSIE, NAT'L EMP. L. PROJECT, THE ROAD TO RESPONSIBLE CONTRACTING: LESSONS FROM STATES AND CITIES FOR ENSURING THAT FEDERAL CONTRACTING DELIVERS GOOD JOBS AND QUALITY SERVICES 3 (2009), https://perma.cc/TEN2-FHZ8 (PDF) (noting that taxpayers often bear hidden costs to wage theft by providing services to supplement workers' incomes, such as Medicaid and the Earned Income Tax Credit). For

offenders are subsidized by taxpayer funds, the public harm is unique and compounding. Not only does tax revenue decrease while reliance on social-support programs goes up, but research also finds that contractors who commit wage theft are far more likely to have significant performance problems and ultimately deliver a lower-quality product.[28] And because in government contracting that "product" is a public good, and that "performance" is a public function, these contractors not only diminish the quality of public goods and services, they cost taxpayers more money over time after defects are remedied and excessive maintenance costs are paid.[29]

And what of the harm to law-abiding businesses and service providers? The "high road" employers that lawmakers covet for their communities?[30] When governments contract with wage-theft offenders, they deprive high-road employers of the large and growing industry of public work, and they deprive the public of high-road employers' quality goods and services—goods and services that are likely to be delivered in a timely, predictable, and satisfactory manner. Indeed, rather than compete against bidders who reduce costs by committing wage theft or other unlawful acts, high-road employers often choose not to bid on public contracts at all.[31] However, as

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discussions on the individual harms of wage theft, see generally Matthew Fritz-Mauer, *The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm*, 54 U. MICH. J.L. REFORM 735 (2021); Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397 (2015).

28. *See* WALTER ET AL., FEDERAL CONTRACTORS VIOLATING WORKERS' RIGHTS, *supra* note 24, at 3–4.

29. *See, e.g.*, KARLA WALTER ET AL., CTR. FOR AM. PROGRESS ACTION FUND, CONTRACTING THAT WORKS: HOW STATE AND LOCAL GOVERNMENTS CAN UPHOLD HIGH STANDARDS FOR WORKERS, BUSINESSES AND TAXPAYERS 2 (2015), https://perma.cc/ AD8F-CVF9 (PDF) (noting that a 2003 study in New York City "found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with no workplace law violations").

30. *See* THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 22 (Annette Bernhardt et al. eds., 2008) (characterizing "high road" employers are those who view employees and the skills that they possess as an integral part of a business's competitive advantage, whereas "low road" employers are those who considered labor as a commodity and workers as a cost to be minimized).

31. *See infra* Part IV.

governments are regularly the largest purchasers within their communities, these high-road employers are nevertheless setback when their governments contract with wage-theft offenders, as these contracts deflate industry rates overall.[32] As such, contrary to government endeavors to be "model employers" regarding their own workforces, by outsourcing public services to employers that commit wage theft, they enable the very opposite.[33]

Academic literature is only just beginning to explore anti-wage-theft laws enacted at the state and local levels. But for decades, economists have explained excessive violations of federal wage payment obligations as, in part, due to penalties and low enforcement rates not incentivizing employer compliance.[34] Likewise, at least two legal scholars have applied this same critique to modern state and local anti-wage-theft laws.[35] In so doing, they first observe that, while these laws' increased penalties should reduce incidences of wage theft, they fail to do so when their imposition depends almost entirely on workers initiating formal administrative complaints or private causes of action.[36] Workers victimized by wage theft do not pursue either of these against their employers and never have at any significant rate, making these penalties largely obsolete.[37] Second, the scholars suggest that, like their federal

32. *See* WALTER ET AL., FEDERAL CONTRACTORS VIOLATING WORKERS' RIGHTS, *supra* note 24, at 2–4 (finding that 29% of government contractors violated federal labor laws and suggesting that increasing federal regulation of contractor compliance with workplace laws would "raise standards for workers and may produce good value for publicly supported programs").

33. *See, e.g.*, U.S. MERIT SYS. PROT. BD., THE FEDERAL GOVERNMENT: A MODEL EMPLOYER OR A WORK IN PROGRESS? 51–55 (2008), https://perma.cc/FZ6C-2C2R (PDF) (concluding that the Federal Government has many strengths as an employer, while outlining various areas of improvement).

34. For a seminal work on the economics of compliance with minimum-wage requirements, see generally Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333 (1979).

35. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 118–19 (critiquing anti-wage-theft laws); Lee & Smith, *supra* note 8, at 794–95 (same).

36. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 103–13; Lee & Smith, *supra* note 8, at 784–88.

37. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 103–13 (explaining the various reasons that the wage-theft crisis has persisted); Lee & Smith, *supra* note 8, at 770–71 ("[E]mployers may engage in wage theft

counterpart, current state and local anti-wage-theft laws either undervalue the cost-benefit evaluations employers undertake when making wage compliance decisions or they fail to acknowledge these profit-based considerations altogether.[38]

This Article provides a supplemental strategy for combatting wage theft—one that is tailored precisely to addressing preceding anti-wage-theft laws' noted shortcomings. Contract-based initiatives that integrate prospective contractors' records of wage payment compliance into the awarding process are responses to public harm.[39] They do not rely on individual worker complaints to spur the enforcement process.[40] Rather, with contract-based initiatives, self-enforcement, voluntary disclosure, and community monitoring are the ticket price for doing business with the government.[41] For this "ticket," government contractors already comply with additional laws, regulations, and oversight that only apply to government contractors, licensees, and other proprietary beneficiaries.[42] Likewise, because these "tickets" are so desirable, other prospective contractors and beneficiaries have a competitive incentive to ensure employer-contractors are honest in their disclosures of past violations as well as required payroll and structural information so that the market remains fair. Also, contract-based initiatives do not just recognize that some employers perform cost-benefit assessments when making legal compliance decisions, they turn these assessments inside

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because they correctly believe that workers will not make claims about unpaid wages.").

38. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 119 (concluding that in a state that imposes treble damages for wage law violations, "damages would need to exceed twenty-four times the unpaid wages owed in order for the cost-benefit analysis to come out in favor of compliance" with the wage laws); Lee & Smith, *supra* note 8, at 794–95 (providing an overview of various studies examining the likely cost-benefit analysis employers undertake when deciding whether to comply with anti-wage-theft laws).

39. *See infra* Part III.

40. *See infra* Part III.A.

41. *See infra* Part III.A.1.

42. *See infra* Part III.A.1.

out.[43] Now instead of low enforcement rates and penalties being the cost of noncompliance, contract-based initiatives add the loss of government contracting opportunities to the cost of noncompliance.[44] This opportunity loss could be particularly influential to the same group of employers motivated by profit margin to commit wage theft—as both wages and market opportunity directly manipulate profit projections.

To be sure, contract-based initiatives are not all-encompassing solutions to wage theft. Not all employers are public (sub)contractors or are interested in publicly subsidized benefits. However, the nature of privatization and multilayered contracting schemes shrink this number of employers every day.[45] Moreover, to the extent that wage theft has been normalized, contract-based initiatives do not need to directly impact all employers—only enough to alter normalized industry behaviors. Indeed, the realistic goal of contract-based initiatives and all anti-wage-theft efforts is not perfect coverage and compliance. For now, it is to deter, to the greatest extent possible, a harmful practice typically inflicted on the weakest and poorest segments of society and too often affecting public services and goods.

This Article proceeds as follows: Part I diagnoses the problem of wage theft and explains how its individual harms reverberate throughout communities and society. It proceeds to describe the industries and working groups where wage theft is prevalent with an emphasis on high-risk industries and groups that are commonly involved in public works or service projects.[46] It concludes by examining the employers who commit wage theft and the complex structural, economic, and cultural dimensions

43. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1236–38 (2003) (discussing how government created initiatives spur private action).

44. *See id.* at 1242–46 (laying out the "reasons for concern" about the trend toward public-private partnerships such as competition and market incentives for improved public services and goods). As privatization grows, it is becoming harder and harder to find an employer that does not have government contracts, or at least relies on some government licensing or financial benefit to do business. *See id.* at 1240. The few who don't cannot in good faith expect to have continued growth in the future without them.

45. *See infra* Part III.

46. *See infra* Part I.B.

that influence their behavior.[47] Part II describes federal wage laws and the different kinds of anti-wage-theft laws states and localities have implemented over the past fifteen years. Then to articulate why these laws have not significantly reduced wage-theft activity, it connects these regulatory strategies to the scholarly literature on profit maximization, claims-based enforcement, and operational decision-making.[48] In so doing, Part II concludes that as long as wage-theft detection is linked to aggrieved workers' initiating formal action, enforcement rates will remain low and, for some employers, the expected costs of noncompliance (in terms of assessed legal sanctions) will not outweigh the benefits (immediate profits) to committing wage theft on a wide scale. Part III introduces local and state government contracting initiatives as an anti-wage-theft strategy and uses Columbus, Ohio's novel Wage Theft Prevention and Enforcement Ordinance[49] as a specific neocorporate example. Part III also addresses the practical and legal limits of the Columbus Ordinance, as well as the limitations to combatting wage theft and other workplace behaviors via government spending more generally. It includes discussion on effective regulatory disclosure regimes, community involvement in public contract decision-making, and avoiding due process concerns. The piece then briefly concludes with Part IV by assessing the Columbus Ordinance on both functional and legal grounds.

I. DIAGNOSING WAGE THEFT AND ITS SOCIAL COSTS

Wage theft, or the failure to pay workers the earnings they are legally entitled to, presents in many forms. While the simplest of which looks like employers not paying workers for all of their time worked, wage theft also occurs when employers pay workers less than the agreed-upon rate, or less than the legal wage minimum, or overtime rate for their time worked.[50]

47. *See infra* Part I.C.

48. *See infra* Part II.B.

49. COLUMBUS, OHIO, ORDINANCES ch. 377 (2020).

50. *See* KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 25–27 (2011) (explaining that, in addition to an employer simply failing to pay wages owed, checks may bounce or an employer may become insolvent).

Wage theft can be hidden on the books when workers are forced to record fewer hours on timesheets than what they worked (also known as working "off the clock").[51] Or it can happen off the books entirely when workers paid regularly "under the table" in cash are denied all or part of what they are owed.[52] For "tipped workers," wage theft takes place when employers pay their workers a subminimum tipped wage for performing non-tipped work like rolling silverware, or when employers refuse to make up the difference when a worker's subminimum tipping wages plus earned tips do not equal at least the minimum wage.[53] Wage theft also happens when employers confiscate earned tips for illegal tipping pools, or when employers attempt to keep any portion of workers' tips for themselves.[54]

Finally, although wage-payment laws expressly exclude "independent contractors" from coverage and "exempt" certain workers from overtime requirements, an employer can

51. *Id.* at 24. Working off the clock might occur either during unpaid break time, before checking in, or after checking out, as was the case with Wal-Mart. *See id.* For a more detailed description of how employers' timekeeping software facilitates wage theft through "automatic break deductions" and a particular form of illegal timekeeping known as "rounding," see Elizabeth C. Tippett, *How Employers Profit from Digital Wage Theft Under the FLSA*, 55 AM. BUS. L.J. 315, 317–23 (2018).

52. *See* BOBO, *supra* note 50, at 23–24.

53. *See infra* Part I.B.2. The Fair Labor Standards Act ("FLSA") defines "tipped workers" as workers customarily receiving more than thirty dollars per month in tips. 29 U.S.C. § 203(t). Although most laws permit employers to pay "tipped workers" a subminimum wage rate, this only applies when that rate combined with their tips received equals the regular minimum wage rate. *Id.* § 203(m)(2). *See also, e.g.*, Daniel Wiessner, *Steakhouse Chain Fleming's Sued Over Servers' 'Excessive' Non-Tipped Work*, REUTERS (May 24, 2022), https://perma.cc/3MFN-MHR9 (providing an example of a restaurant sued for wage theft).

54. It is illegal to force tipped workers to contribute a portion of earned tips to improper tip pooling or sharing arrangements. *See* 29 U.S.C. § 203(m)(2)(B); Wage Payments Under the Fair Labor Standards Act of 1939, 29 C.F.R. §§ 531.52, 531.54 (2023). For additional details on activities that may constitute wage theft for tipped employees—such as details on payment for "side work," see 29 C.F.R. §§ 531.50–60, see also *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB., https://perma.cc/72m3-2th6 (last visited Sept. 19, 2023) ("Deductions for walkouts, breakage, or cash register shortages reduce the employee's wages below the minimum wage. Such deductions are illegal . . . because any such deduction would reduce the tipped employee's wages below the minimum wage.").

misclassify workers as either independent contractors or exempt employees.[55] And although misclassification is not in and of itself "wage theft," whenever employers avoid wage payment or overtime obligations by misclassifying workers as independent contractors or exempt employees, they are committing wage theft.[56]

Altogether, these forms of wage theft cost American workers billions every year.[57] Conservative annual estimates are that employers steal $15 billion in wages from their workers—enough to cover four years of in-state university tuition for nearly 400,000 students.[58] This cost is disproportionately levied on the working poor.[59] A 2008 study reported that more than two-thirds of low-wage workers experience at least one wage-related violation every workweek.[60] Of those low-wage workers who worked more than forty hours per week: 76% were not paid the required overtime rate; 70% were not paid at all for work performed outside of their regular shift; and 26% were paid below the minimum wage for some or all of their hours worked.[61] A more recent study found that 17% of low-wage workers were paid below the applicable minimum wage for hours worked in the past year—just one form of wage theft.[62] Tipped low-wage workers do even worse than

55. 29 U.S.C. § 203; s*ee* BOBO, *supra* note 50, at 35–37 (detailing the problem of worker misclassification).

56. *See* COOPER & KROEGER, *supra* note 10, at 4 (explaining that contemporary business models such as franchising and online platforms in the gig economy are arguably designed to circumvent wage payment and other worker obligations keyed to the traditional employee-employer relationships by creating the appearance of independent contracting relationships).

57. *See id.* at 1 ("2.4 million workers lose $8 billion annually (an average of $3,300 per year for year-round workers) to minimum wage violations . . . .").

58. *Id.* at 2; *see also* Emma Kerr & Sarah Wood, *See the Average College Tuition in 2023–2024*, U.S. NEWS & WORLD REP. (Sept. 20, 2023), https://perma.cc/V8RU-RRQH ($10,662 average public in-state tuition).

59. *See* ANNETTE BERNHARDT ET AL., NAT'L EMP. L. PROJ., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2–4 (2009), https://perma.cc/T8XP-WLDS (PDF) (finding that workplace violations are severe and widespread in low-wage labor markets).

60. *Id.* at 5.

61. *Id.* at 2–3.

62. *See* COOPER & KROEGER, *supra* note 10, at 2 ("Workers suffering minimum wage violations are underpaid an average of $64 per week, nearly

their hourly counterparts, according to research. Over a third of tipped workers surveyed in 2021 reported making below the minimum wage for at least some of their hours worked in the past year.[63]

When low-wage workers experience wage theft, their losses are in dollars, not cents. Reports have found that those who experience minimum wage violations are underpaid by more than one dollar per hour or $2,634 over the course of a year.[64] Another study estimated that a victim of wage theft loses roughly $3,300 in stolen wages annually—reducing their yearly earnings from $15,080 to under $12,000.[65] Since the federal poverty line is drawn somewhere between these two figures, wage theft is resultantly the difference between poverty status or not for hundreds of thousands of workers and their families.[66]

Because it inflicts such significant individual and societal costs, labor activists and progressive scholars have fought hard to get the term "wage theft" adopted in political circles and popular culture.[67] These proponents rightfully observe that when workers are not paid their owed wages, these wages do not simply disappear—employers keep them, and, in doing so, are committing an immoral, if not criminally-wrongful, form of

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one-quarter of their weekly earnings. . . . [And] losing, on average, $3,300 per year . . . .").

63. ONE FAIR WAGE, NO RIGHTS, LOW WAGES, NO SERVICE: HOW INCREASED VIOLATIONS OF WORKERS RIGHTS IN 2021, COUPLED WITH HIGH HARASSMENT AND LOW WAGES AND TIPS, HAVE PUSHED WORKERS TO LEAVE THE SERVICE SECTOR 2 (2021), https://perma.cc/SER5-RK45 (PDF).

64. *See* BERNHARDT ET AL., *supra* note 59, at 2 ("These minimum wage violations were not trivial in magnitude: 60 percent of workers were underpaid by more than $1 per hour."); COOPER & KROEGER, *supra* note 10, at 9 (stating that workers lose an average of over $3,300 per year for year-round workers).

65. *See* COOPER & KROEGER, *supra* note 10, at 9. These earnings calculations assume that a person working forty hours per week at the $7.25 federal minimum hourly wage for fifty-two weeks earns $15,080 per year.

66. *See* Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315, 3315–16 (Jan. 21, 2022) (establishing the federal poverty line for 2023); *see also* U.S. BUREAU LAB. STATS., CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2020 (2021) [hereinafter U.S. BUREAU LAB. STATS., CHARACTERISTICS OF MINIMUM WAGE WORKERS], https://perma.cc/X8VW-T5MB (providing statistics on workers earning the federal minimum wage).

67. *See* Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1432–34, 1439–46 (2021).

theft.[68] But however rhetorically successful the phrase "wage theft" has been, it has failed to create a culture where wage theft is deplored the same as other property thefts.[69] On the contrary, "wage theft"—even when designated as such—thrives in our working ecosystem where power and resource distribution are vastly unequal, and decision-makers are under constant pressure to maximize profits.[70]

But profit margins and inequality—both systematic and unique to every workplace—are oversimplifications of wage theft and its causes. Rather, the reasons for wage theft are multidimensional, interconnected, and mutually reinforcing. The following sections in Part I describe these dimensions. They begin by identifying the working groups that experience wage theft at high rates and describe the characteristics and working relationships that make these groups particularly vulnerable. Relatedly, they then examine the industries and business models where wage theft is widespread.[71] Part I concludes with

68. *See, e.g.*, IHNA MANGUNDAYAO ET AL., ECON. POL'Y INST., MORE THAN $3 BILLION IN STOLEN WAGES RECOVERED FOR WORKERS BETWEEN 2017 AND 2020 3 (2021), https://perma.cc/5DLK-BAB6 (PDF) ("[O]nly a small portion of stolen wages are ever recovered on behalf of workers.").

69. *See, e.g.*, Meixell & Eisenbrey, *supra* note 9, at 2 ("[T]he total amount of money recovered for the victims of wage theft who retained private lawyers or complained to federal or state agencies was at least $933 million—almost three times greater than all the money stolen in robberies that year."); Judd Legum, *Want to Be a Criminal in America? Stealing Billions Is Your Best Bet to Go Scot-Free*, GUARDIAN (Dec. 7, 2021), https://perma.cc/775B-PMPQ ("Numerous companies steal billions in wages from workers in the United States each year. It is a crime that is seldom prosecuted—or covered in the media.").

70. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 104–05 (noting both that employers "are more likely to commit wage theft in low-wage and low-skilled industries" and that "[p]laintiff-side employment lawyers . . . often cherry-pick cases where they are likely to get large attorney's fees awards, such as class actions and lawsuits on behalf of highly paid employees whose damages are likely to be higher"); BARAN & CAMPBELL, *supra* note 10, at 1 ("Employer-imposed forced arbitration requirements have effectively prevented [low-wage] workers from ever recovering their stolen wages.").

71. *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1539–50 (2016) (noting the link between being more regularly exposed to abusive employment practices and low enforcement rates, both of which are consequences of power and resource disparities that exist between marginalized groups and their employers).

a discussion on wage-theft offending employers and certain factors they have in common, as well as common motivations involved in their decision-making. But modern employer decision-making is as complex and nuanced as modern employers are themselves. As such, while this Article focuses on profit-based motivations as a general employer motivator and looks for ways to manipulate it to promote compliance, of course, a multitude of other factors also influence a particular employer's behavior. Indeed, this variety is precisely why a comprehensive wage-theft strategy must utilize enforcement measures keyed to an assortment of different influences.

A. *Vulnerable Groups of Workers*

No worker is completely immune from wage theft, but certain groups of workers are more at risk than others. These working groups—low-wage earners, immigrants unauthorized to work in the United States, women, and people of color—are all more susceptible to wage theft than other, less-marginalized working groups.[72] Yet scholars have also noted that the same factors contributing to these groups' susceptibility also make them less likely to report violations and enforce their rights under wage-payment laws.[73] Both the high rates of wage theft and the low reporting of wage-theft activities are consequences of discrete power and resource disparities that exist between certain working groups and their employers.[74] Unique circumstances may exist that inhibit certain working groups from accessing the informational knowledge necessary for

72. *See* Lee & Smith, *supra* note 8, at 768, 784–87.

73. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 124 ("[W]orkers who . . . suffer from wage theft are the least likely to come forward to report a violation because they lack information about their rights, access to legal advice and counsel, time and resources to pursue a complaint, and the economic security necessary to risking [sic] complaining.").

74. *See id.* (expanding on why these groups are less likely to report wage theft violations); *see also* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1981) (describing the evolution of disputes from "naming" the problem, to "blaming" the source or responsible entity, and finally to "claiming" a remedy for the problem). When workers lack information regarding their legal rights, they are thus unable even to *name* the problem of wage theft. *See* Lee & Smith, *supra* note 8, at 785.

naming their legal rights.[75] Or other resources needed for claiming them in formal enforcement procedures. Furthermore, certain worker characteristics may raise the stakes of employer retaliation—such that the risk of provoking their employer with wage payment concerns might be too great.[76]

These factors underscore the importance of effective compliance mechanisms that do not primarily rely on these same vulnerable groups of workers to initiate enforcement and penalties on their own.[77] Indeed, these workers are more vulnerable to wage theft, in part, because they do not initiate such enforcement via individual claims.

1. Low-Wage Workers

Low-wage workers, who can least afford it, are harmed by wage theft at much higher rates than their living-wage-earning counterparts.[78] They are also less likely to attempt to enforce their legal rights and recover damages through formal processes.[79] One reason for this dynamic is their lack of financial resources.[80] Even filing a lawsuit in small claims court costs money upfront, and both the civil justice and administrative processes are hard to navigate without an attorney.[81] Then, if a low-wage worker does gather the money to hire an attorney and

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75. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 124.

76. *See id.* (listing economic security as a reason why some victims of wage theft do not pursue claims).

77. *See* COOPER & KROEGER, *supra* note 10, at 6 ("[F]or the greatest [deterrence] impact, [anti-wage-theft] laws must be accompanied by sufficient investigatory resources and authority, protection against retaliation . . . payment of victims' attorneys' fees by violators, and other legal provisions that empower victims to speak out against abuse.").

78. *See* Lee & Smith, *supra* note 8, at 784–87.

79. *See id.* at 785 (discussing studies that have shown "only one third of low-wage workers identified having a wage problem" while a higher percentage was found to have a wage problem that could be legally pursued).

80. *See* COOPER & KROEGER, *supra* note 10, at 22–24 (detailing the socioeconomic status of individuals that face wage theft).

81. Filing fees vary by jurisdiction. For example, in Franklin County, Ohio, filing a lawsuit in small claims court costs the filing party $78.00 up front, with additional service costs for Bailiff Service ($123.00), Service via Certified Mail ($123.00), or a Process Server ($126.00). *See* FRANKLIN CNTY. MUN. CT., COMPLAINT FORM, https://perma.cc/982J-77S9 (PDF) (last updated Mar. 20, 2019).

formally pursue a claim, they are almost always outmatched by employers later—both financially and when it comes to other key resources that enhance a party's ability to favorably resolve legal disputes.[82]

Financial resource disparities also play into how low-wage workers perceive the threat of employer retaliation for wage-theft claims.[83] Despite it being illegal, every worker who contemplates asserting their legal rights against an employer fears retaliation to some degree.[84] For those who live on the edge of poverty, potential retaliation that reduces their earnings or results in employment loss poses a greater risk than it would to higher earners who have amassed something in the way of savings.[85] Debt, hunger, homelessness, and all the other spiraling hardships consequent to being poor understandably make low-wage workers more fearful of retaliatory job (or hour) loss, and less willing to risk provoking their employer by pursuing a wage-theft claim.[86] Thus, when portions of their

82. *See* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1489–91 (2020) (defining "resources" as anything that enhances a party's ability to favorably resolve a case). In the context of wage disputes, these "resource" disparities that exist between low-wage workers and employers may be "repeat player" litigation experience, easily available payroll and timesheet records, and the additional finances needed to make full use of discovery tools. *Id.*

83. *See* BERNHARDT ET AL., *supra* note 59, at 53 ("The best inoculation against workplace violations is ensuring that workers know their rights, have full status under the law to assert them, have access to sufficient legal resources, and do not fear retaliation . . . ."). *See generally* Laura Huizar & Tsedeye Gebreselassie, *What a $15 Minimum Wage Means for Women and Workers of Color*, NAT'L EMP. L. PROJECT (Dec. 2016), https://perma.cc/P3UY-BHHM (PDF).

84. *See* BERNHARDT ET AL., *supra* note 59, at 21 n.17 ("Nearly every worker we surveyed was at risk of a minimum wage violation, with the exception of child care workers who work in their own homes.").

85. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 107 ("Low-wage workers are less likely to have the luxury of the time it takes to file a complaint and work their way through the complaint process than their higher-paid counterparts.").

86. *See* Carol Graham, *The High Costs of Being Poor in America: Stress, Pain, and Worry*, BROOKINGS (Feb. 19, 2015), https://perma.cc/TWE7-DN4C ("[Americans] with incomes below the poverty line were twice as likely to report chronic pain and mental distress as those earning $75,000 or more, and three to five times more likely to have extreme pain or extreme distress."); Hannah Denham & Taylor Telford, *Debt, Eviction and Hunger: Millions Fall Back into Crisis as Stimulus and Safety Nets Vanish*, WASH. POST (Aug. 23,

wages go unpaid, they are left with two undesirable choices: assert their claim and risk temporary job/income loss or keep quiet and remain employed. Ultimately, many low-wage workers choose the latter, deciding an employer who commits wage theft is better than no employer at all.[87]

Even now, in a tight labor market where more workers than ever are leaving their jobs for new ones in the "Great Resignation," scholars have pointed out a number of reasons as to why low-wage workers are still more fearful of retaliation than others.[88] For one, while all workers are generally likely to find new jobs quickly in today's economy, the time in between old jobs and new, or "frictional unemployment," can be devastating for low-wage workers living paycheck to paycheck.[89] Separately, the actual pool of job opportunities for low-wage

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2020), https://perma.cc/9W9Y-5PGJ ("[R]oughly 29 million U.S. adults—12.1 percent—said their households sometimes or often didn't have enough to eat the preceding seven days . . . . Nearly 15 million renters said they were behind on rent . . . .").

87. Just in case this message gets distorted, when an employer retaliates against a single worker, it serves as a clarifying reminder to co-workers. "[E]mployers understand that the odds that one of their employees will file a claim against them is minuscule, and that they can decrease the likelihood of that happening by retaliating against any worker who does complain." *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 108. Furthermore, even when low-wage workers know there are retaliation provisions in wage theft laws, they are likely to assume that employers will violate those with impunity, just as they have done so with the actual payment provisions that ground their claim.

88. *The "Great Resignation" in Perspective*, U.S. BUREAU LAB. STATS. (July 2022), https://perma.cc/SF8N-EQHJ; *see* Molly Kinder & Martha Ross, *Low-Wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, *in* BROOKINGS, REOPENING AMERICA: HOW TO SAVE LIVES AND LIVELIHOODS 30, 31–33 (John R. Allen & Darrell M. West eds., 2020), https://perma.cc/Y7G3-U33R (PDF) ("Many businesses simply will not take the necessary steps to protect their employees unless forced to by government, workers, or perhaps consumers. Companies often treat low-wage or frontline workers as costs to be minimized rather than people and assets to protect.").

89. *See* Eduardo Porter, *Low-Wage Workers Now Have Options, Which Could Mean a Raise*, N.Y. TIMES (Sept. 20, 2021), https://perma.cc/U2RL-65YZ (suggesting that with the large number of entry-level and otherwise low-wage positions open, low-wage workers find themselves in demand and in an advantageous bargaining position); *see also* Shahram Heshmat, *The Scarcity Mindset*, PSYCH. TODAY (Apr. 5, 2015), https://perma.cc/P49B-P5XW (describing the so-called "scarcity mindset," Heshmat discusses how instability or uncertainty has been shown to affect decision-making in low-income households).

workers may be smaller than it first appears due to other factors related to being poor.[90] For instance, geographers have observed that without the means to own a car, a low-wage worker's job pool is limited by where they can afford to live and the available commuting options to other work locations.[91] Legal scholar Sara Greene has discussed how this pool is even smaller for workers with children or other familial responsibilities, as many low-wage jobs require non-standard, or "on-call" hours.[92] Considering these observations, a low-wage worker who is also a single parent may view their regularly scheduled job, which is a short commute from their apartment and walking distance to the home of a relative willing to provide free childcare, as a rarity they cannot afford to lose. And they are probably right. Consequently, this worker may rationally choose not to file a wage-theft claim against their employer and risk being retaliated against if they are a victim of wage theft. Unfortunately, this choice perpetuates a cycle, as now the incentive for unscrupulous employers to commit wage theft against low-wage workers is even greater because the odds of them facing any consequence are even lower than the (already low) average rates.

In sum, economic insecurity and systemic barriers to mobility continue to buy the silence of low-wage workers—making them even more vulnerable to victimization.

2. Undocumented Immigrant Workers

Undocumented, immigrant workers perform some of the country's lowest-paying and most arduous jobs.[93] But they are

90. *See, e.g.*, E. Eric Boschmann, *Job Access, Location Decision, and the Working Poor: A Qualitative Study in the Columbus, Ohio Metropolitan Area*, 42 GEOFORUM 671, 671 (2011) (describing low-wage workers' decisions on where to live, to work, and how they will commute between these locations as the "residential-commuting-employment nexus").

91. *See id.* at 681; *see also* Kim England, *Suburban Pink Collar Ghettos: The Spatial Entrapment of Women?*, 83 ANNALS ASS'N AM. GEOGRAPHERS 225, 229 (1993) (defining the negative effect shorter commuting ranges have on employment opportunities as the "spatial entrapment" thesis).

92. *See* Sara Sterberg Greene, *Working to Fail*, 27 DUKE J. GENDER L. & POL'Y 167, 172–75 (2020).

93. *See* Krystal D'Costa, *What Are the Jobs That Immigrants Do*, SCI. AM. (Aug. 9, 2018), https://perma.cc/2GUJ-KYQ6 ("Unauthorized immigrant workers are concentrated in agriculture (17%), construction (13%), and leisure

also among those most victimized by wage theft—primarily because special circumstances raise the stakes of employer retaliation.[94] For undocumented workers these stakes look like arrest, detention, and perhaps even deportation if their employer retaliates against them by reporting them to immigration authorities.[95] While it is illegal for employers to hire workers before confirming their identity and eligibility to work in the United States, many do anyway, risking the small penalties levied on employer-offenders under the Immigration Reform and Control Act.[96] In fact, our economy relies on the more than seven million undocumented migrants and immigrants working in the United States, an estimated five million of whom performed "essential work" during the COVID-19 pandemic.[97]

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and hospitality (9%). They also represent about 22% of the business and other services sector, which includes legal services, landscaping, waste management, and personal services (e.g., dry cleaners, manicurists, and car washers)."); *see also* Miriam Jordan, *8 Million People Are Working Illegally in the U.S. Here's Why That's Unlikely to Change*, N.Y. TIMES (Dec. 11, 2018), https://perma.cc/RY66-XC2K (noting that the jobs held by undocumented workers are often those which "employers have trouble filling with American workers").

94. *See* COOPER & KROEGER, *supra* note 10, at 20; *see also* BERNHARDT ET AL., *supra* note 59, at 48 ("Foreign-born Latino workers had the highest minimum wage violation rates of any racial/ethnic group.").

95. *See, e.g.*, Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOCIO. Q. 593, 601–04, 607–09 (2011) (examining widespread wage theft against Latino laborers in post-Katrina New Orleans, Louisiana from 2007 to 2008, an estimated 90 percent of whom were unauthorized to work in the United States).

96. Pub. L. No. 99-603, 100 Stat. 3445 (1986) (codified as amended in scattered section of 8, 18, and 42 U.S.C.); *see* 8 U.S.C. § 1324a(e) (listing penalties for hiring, recruiting, and referral violations concerning the unlawful employment of aliens); REBECCA BERKE GALEMBA, LABORING FOR JUSTICE: THE FIGHT AGAINST WAGE THEFT IN AN AMERICAN CITY 5, 44–45 (2023)

> [The Immigration Reform and Control Act of 1986] did not hold employers accountable, and the risk of penalties was low; instead, it delivered them a subsidy in the form of a compliant work-force. Instead of sanctions, it gave employers a "sword" that "empowers [them] to terrorize their workers" . . . . IRCA did not intend to undercut labor protections or punish unauthorized workers, but its loopholes and selective enforcement basically guaranteed it. (citations omitted).

97. *Immigrants as Essential Workers During COVID-19: Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th

Aware of the constant threat of deportation undocumented workers live with every day, some employers hire undocumented workers because they know they are unlikely to make formal wage-theft complaints or complain about other illegal workplace behaviors.[98] This highly exploitative situation is what Elizabeth Fussell dubs the "deportation threat dynamic."[99] Fussell's dynamic also plays out in the interactions undocumented workers have with the U.S. legal system more generally.[100] Police officers and workplace investigators look like Immigration and Customs Enforcement ("ICE") Agents, wage-and-hour complaints look like immigration forms, and because the enforcement of one law (wage-theft) could mean the enforcement of another (immigration law), undocumented workers avoid all of these government institutions to remain safely under the radar.[101] Unfortunately, this avoidance exists

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Cong. (2020) (testimony of Tom Jawetz, Vice President of Immigration Policy, Center for American Progress), https://perma.cc/Z2H9-9GN5.

98. *See* Fussell, *supra* note 95, at 593–95

> Latino migrants who sought work as day laborers were more likely to experience wage theft but were equally likely to experience criminal victimization. These crimes occur because Latino migrants were visually identifiable by unscrupulous employers and criminals who assumed they were unauthorized and therefore felt confident that the migrants would not report them to law enforcement authorities.

99. *Id.* at 593. For another extreme example of this threatening power dynamic and the weaponizing of deportation threat, see, e.g., Brief for Petitioner at para. 8, *Gomez v. GEO Grp., Inc.*, No. 22-cv-00868 (E.D. Cal. July 13, 2022), a class action filed by immigrant detainees working at a for-profit prison for one dollar per day because they feared retaliatory deportation if they refused.

100. *See* Fussell, *supra* note 95, at 594 (explaining that a " growing number of local law enforcement agencies" have cooperated with ICE and extended local enforcement of immigration laws); *see also* GALEMBA, *supra* note 96, at 5 (describing the predicament undocumented immigrants are in when they are victimized or exploited by illegal activity—they need to make their exploitation visible to pursue legal remedies, but visibility risks immigration consequences).

101. *See* Fussell, *supra* note 95, at 595 ("[L]ittle ICE activity is necessary in a locality to make the deportation threat palpable to unauthorized migrants, causing them to behave in ways that minimize the risk of interacting with any law enforcement officers.").

even when government institutions and actors are there for the workers' protection.[102]

In addition to generally avoiding government institutions, language and other information barriers also mean some undocumented workers do not know of the wage obligations and legal protections, nor that these obligations and protections apply to them.[103] Such was the case in a New York Times investigative report on the inner workings of the city's nail salon industry.[104] After interviewing hundreds of salon workers, the article not only identified several discrete forms of wage theft

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102. *See, e.g.*, BERNHARDT ET AL., *supra* note 59, at 49 ("Minimum wage, overtime, meal break and other violations are not confined to the periphery of the economy or to marginal employers. On the contrary, such violations are widespread across demographic categories and in key industries and occupations that are at the heart of urban economies in the 21st century."); *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, U.S. DEP'T LAB. [hereinafter *Fact Sheet #48*], https://perma.cc/Z997-8NNL (last updated July 2008) ("The Department's Wage and Hour Division will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented."). In addition to wage statutes and regulatory activity prohibiting retaliation against any workers for exercising their rights, ICE and the Department of Labor ("DOL") have a memorandum of understanding not to perform enforcement activities at worksites that are the subject of an existing DOL investigation, and to assess all worksite tips and leads with an eye towards thwarting employers' attempts to use enforcement activities for retaliatory purposes. *See* Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, (Dec. 11, 2011), https://perma.cc/4GCX-MEPK (PDF). *But see 3 Chicken Plants Hit in 2019 Raids Agree to Pay Back Wages*, ASSOCIATED PRESS (Nov. 20, 2020), https://perma.cc/YH7W-9767 (reporting on a massive immigration raid of Mississippi poultry plants that were also under DOL investigation for wage theft).

103. *See, e.g.*, Hallett, *The Problem of Wage Theft*, *supra* note 26, at 128–29 (noting that although the DOL requires employers to post certain notices regarding workers' rights in their workplace, "there is no requirement that employers post it in any language except English"). *But see* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 457–65 (1999) (presenting empirical evidence showing that workers are generally confused about their legal rights).

104. *See* Sarah Maslin Nir, *The Price of Nice Nails*, N.Y. TIMES (May 7, 2015), https://perma.cc/UG5F-2YYQ (exposing common industry-specific instances of wage theft in the nail salon industry such as charging new workers a "training fee" (often between $100 and $200) and having new workers go completely unpaid (surviving on tips alone) for a period).

unique to the industry, but also reported that most of their interviewees—made up primarily of undocumented Asian or Latina women—were, due to their working and immigration status, completely unaware their employer needed to comply with any wage payment laws.[105] Federal wage and hour laws cover all workers—regardless of whether a worker is authorized to work in the United States.[106] To its credit, after the nail salon article was published, New York City revised its wage payment laws to make coverage and protections for undocumented workers more explicit and understandable to the workers they were designed to protect.[107] New York City now requires employers to provide all their workers with a detailed description of their coverage and protections at the time of hire.[108] This requirement, spelled out in the city's "Workers Bill of Rights," is made available in twenty languages.[109]

3. Women and People of Color

Women and people of color experience significantly higher rates of wage theft than their white, male counterparts, and, when they do, they lose a greater portion of their earnings.[110]

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105. *See id.* ("During the nearly three months Ms. Ren worked unpaid in the Long Island nail salon, like many manicurists, she had no idea that it was against the law, or that the $30 day wage her boss finally paid her was also illegally low.").

106. *See Fact Sheet #48*, *supra* note 102.

107. *See* N.Y.C. DEP'T CONSUMER AFFS., WORKERS' BILL OF RIGHTS (June 2018), https://perma.cc/53H3-9FZK (PDF) ("Workers in NYC have rights regardless of immigration status.").

108. *See* N.Y.C. COMM'N ON HUM. RIGHTS, SALARY TRANSPARENCY IN JOB ADVERTISEMENTS 1 (May 12, 2022), https://perma.cc/9DF5-5R3B (PDF) ("Employers must state the minimum and maximum salary they in good faith believe at the time of the posting they are willing to pay for the advertised job, promotion, or transfer opportunity.").

109. *See Know Your Rights: Important Information for Workers*, N.Y.C. DEP'T CONSUMER & WORKER PROT., https://perma.cc/N56E-2LKC (last visited Nov. 7, 2023); *see also* Michael M. Grynbaum, *New York Nail Salons Now Required to Post Workers' Bill of Rights*, N.Y. TIMES (May 29, 2015), https://perma.cc/57E9-RP4S (explaining that New York nail salons are required to post the Workers' Bill of Rights in clear sight of employees and customers).

110. *See* Miruna Petrescu-Prahova & Michael W. Spiller, *Women's Wage Theft: Explaining Gender Differences in Violations of Wage and Hour Laws*, 43 WORK & OCCUPATIONS 371, 391–92 (2016).

While scholars offer different understandings of how gender and race interact with workplace power dynamics, the results are systemically harmful to these marginalized groups.[111] To that end, wage theft's disproportionate impact on women and people of color is unsurprising. But wage theft's disproportionate impact on women and people of color is also related to women and people of color's overrepresentation in low-wage work.[112] Almost two-thirds of minimum wage earners are women—disproportionately women of color.[113] And the majority of all working African Americans and Latinos make less than fifteen dollars per hour.[114] Indeed, women and people of color are so concentrated in low-paying jobs that some scholars have suggested that wage-payment disparities are actually civil rights issues and should be addressed in an integrated legal fashion as both wage and civil rights claims.[115] While a conceptual framework that envisions wage theft as a civil rights violation is beyond the scope of this Article, emphasizing how wage theft reinforces other issues society denounces bolsters the case for a public response to combatting wage theft.

Along with being overrepresented in low-wage work, women and people of color dominate occupations and industries where wage theft is widespread. But the prevalence of marginalized groups in these industries explains only partly why these industries experience wage theft at such high rates.

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111. *See, e.g.*, Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 85–86 (2006) (arguing that courts should scrutinize informal power dynamics of the workplace as part of a more rigorous analysis of an employer's affirmative defense in sexual harassment claims); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1170 (2008) (focusing on "the racial and gender composition of committees that handle interviewing, promotion, and EEO matters" for equalizing power dynamics).

112. *See* Huizar & Gebreselassie, *supra* note 83, at 2.

113. *Id.* at 2 fig.1.

114. *Id.* at 2. By comparison, "On the other side of the economy, 18 percent of White and Asian men would fall below [the fifteen dollar per hour] threshold." Andrew Vam Dam, *Fewer Americans are Earning Less than $15 an Hour, but Black and Hispanic Women Make Up a Bigger Share of Them*, WASH. POST (Mar. 3, 2021), https://perma.cc/X3S8-4SYW.

115. For a general discussion of how wages and civil rights interact, see generally ALLICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001).

These industries also have their own specific components that contribute to wage theft's high rate. These industries and their components are explored in the subpart that follows.

B. *High-Risk Industries*

Although wage theft can occur in any workplace, the following occupations and industries have been identified as particularly high-risk.[116] The industries below are not only emphasized because they are considered high-risk for wage theft, but also because they are regularly involved in public works or vendor contracts or are the financial beneficiaries of other government-subsidized programs or licenses.[117]

1. Restaurant and Hospitality

There are innumerable opportunities for restaurant and hospitality vendors to do business with government officials. Within these industries, though, wage theft is pervasive for several reasons—many of which relate to tipping.[118] Federal and

116. *See* U.S. BUREAU LAB. STATS., CHARACTERISTICS OF MINIMUM WAGE WORKERS, *supra* note 66, tbl.5. (identifying industries at risk of wage theft, including hospitality, construction, and health services, among others). Like the high-risk individual characteristics discussed above, these occupations and industries routinely encounter unique informational and resource challenges, as well as distorted power dynamics between workers and their employers.

117. *See* PHILIP MATTERA, GOOD JOBS FIRST, GRAND THEFT PAYCHECK: THE LARGE CORPORATIONS SHORTCHANGING THEIR WORKERS' WAGES 9 (2018), https://perma.cc/85WM-8S8V (PDF) (using data on DOL and state administrative actions, as well as data taken from federal and state court records, to compile a list of the most-penalized industries for wage theft from 2000 to 2018). Retail, agriculture, manufacturing, and financial services are all industries where wage theft is widespread, but they are not discussed here because they do not routinely contract with state and local governments. *Id.*

118. *See, e.g.*, ONE FAIR WAGE, *supra* note 63, at 5–6 ("Tipped workers receive a subminimum wage under the FLSA; as result, they are especially vulnerable to wage violations and face far greater economic insecurity."). Although other kinds of tipped work are not immune from increases in wage theft, the impact is felt more for hospitality workers because, for some, tipping makes up a substantial portion of their income. *See* Irene Tung, *Wait Staff and Bartenders Depend on Tips for More Than Half of Their Earnings*, NAT'L EMP. L. PROJECT (Jan. 11, 2018), https://perma.cc/GC2J-BFAZ; *see also* JUSTIN SCHWEITZER, CTR. FOR AM. PROGRESS, ENDING THE TIPPED MINIMUM WAGE WILL REDUCE POVERTY AND INEQUALITY 8–9 (2021), https://perma.cc/2LAA-DCA4 (PDF) (noting that two-thirds of tipped workers in the industry are women and

state laws permit employers to pay tipped workers a subminimum wage—provided that, with tips, these workers make at least the minimum-wage rate.[119] But this employer benefit is not without complications. For one, employers paying this tipped wage must make up the difference whenever workers do not reach the minimum-wage threshold with their tips.[120] Identifying these discrepancies requires careful recordkeeping by an employer of both a worker's earned tips and their hours worked. Furthermore, when an employer pays a tip wage, there are limits on the amount of time tipped workers can spend doing non-tipped activities—such as cleaning, rolling silverware, or performing other side work.[121] If a worker surpasses that limit in any given working hour, the employer must pay them the full minimum-wage rate, regardless of their actual tips earned.[122] So, in actuality, employers must keep careful records of tipped workers' tips, hours worked, and the activities performed during any working hour.[123] And even this onerous recordkeeping

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nearly half are people of color, the personal and industry characteristics mutually reinforce wage-theft vulnerability).

119. *See, e.g.*, *Minimum Wages for Tipped Employees*, U.S. DEP'T LAB. (Jan. 1, 2022), https://perma.cc/9VCH-2U6B (compiling state specific data on tipped-worker minimum wage); *see also Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, *supra* note 54 ("The FLSA permits an employer to take a tip credit toward its minimum wage and overtime obligation(s) for tipped employees . . . . An employer that claims a tip credit must ensure that the employee receives enough tips . . . and direct . . . wages . . . to equal at least the minimum wage and overtime compensation required . . . ."); Wage Payments Under the Fair Labor Standards Act of 1938, 29 C.F.R. § 531.56(d) (2023) ("[T]ip credit equals the difference between the minimum wage required . . . and the cash wage paid . . . .").

120. For instance, federal law permits employers to pay tipped workers as little as $2.13 an hour, provided they make at least $5.22 in tips, to equal a minimum wage of $7.25. *See Minimum Wages for Tipped Employees*, *supra* note 119.

121. *See* 29 C.F.R. § 531.56(f) ("An employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation.").

122. *Cf. id.* § 531.56(f)(5) ("If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time.").

123. *See* SYLVIA A. ALLEGRETTO & DAVID COOPER, ECON. POL'Y INST., TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 17–18 (2014),

assumes tipped workers are not owed overtime for working more than forty hours per week. If overtime is owed—in addition to tips, hours worked, and activities performed—employers must also record a tipped worker's overtime hours and ensure their overtime is compensated at the appropriate rate.[124]

Predictably, employers often make errors while maintaining tipped workers' multiple pay rates and records in these already fast-paced industries. But medium-to-large restaurant and hospitality employers invest significant resources in technology to help manage these. Yet, still, pay errors are common and overwhelmingly on the side of underpayment.[125] As such, while some employers are most certainly making bona fide mistakes when paying tipped employees, others may choose to remain willfully ignorant about a complicated area in the law.[126] Others, still, may capitalize on these legal complexities by knowingly underpaying tipped workers and banking on their workers not being able to recognize the impropriety.[127] The same range of employer intent

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https://perma.cc/3WGA-M8KD (PDF) (noting the extensive record keeping that must take place to assure compliance with wage laws).

124. *See* 29 U.S.C. § 207 (establishing that an employee may not work more than forty hours per week without being appropriately compensated at an increased rate). Whereas traditional hourly workers are entitled to one and one-half times their regular rate of pay for hours worked more than a forty-hour workweek, tipped workers' overtime rate is calculated as one and one-half times the minimum wage rate, minus the difference between their subminimum wage rate and the minimum wage. *See* Wage Payments Under the Fair Labor Standards Act of 1938, 29 C.F.R. § 531.60 (2023). Under federal law, a calculation of a tipped worker making the subminimum wage rate of $2.13 per hour is as follows: $7.25/hour x 1.5 = $10.88; $7.25 – $2.13 = $5.12; $10.88 – $5.12 = $5.76, paid per hour over forty hours worked per week, regardless of earned tips. *See FLSA Overtime Calculator Advisor*, U.S. DEP'T. LAB., https://perma.cc/9RN3-4GW5 (last visited Nov. 13, 2023).

125. *See* ALLEGRETTO & COOPER, *supra* note 123, at 17–18 (noting that employer "[c]ompliance [with wage laws] is difficult to assess even if a good-faith employer would like to do so"); *see also* Elizabeth Tippett et al., *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 17–45 (2017) (outlining certain features of timekeeping software that can facilitate wage theft).

126. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 99 ("An employer may misinterpret the law in good faith or make a clerical mistake that causes a loss to workers.").

127. *See* ALLEGRETTO & COOPER, *supra* note 123, at 17–18 (noting that a tipped employee seeking to know if they were being underpaid would have to record their hours for the determined work week and tips then calculate if the

could also be behind employers committing wage theft via illegal tipping pools, or by charging exorbitant processing fees on credit card tips.[128] Regardless of their intent, though, both practices are cloaked in legal obscurity, and ultimately deprive workers of a portion of their earned tips.[129]

Despite payment obligations being more straightforward than with their tipped workers counterparts, hourly restaurant and hospitality workers, especially those working in the "back-of-house" also experience wage theft at high rates.[130] These workers are the "backbone of the industry," however, a significant portion of them are also unauthorized to work in the United States.[131] As such, for these workers, two propagating factors overlap—their working in high-risk industries and their precarious working or immigration status—to make them especially vulnerable to wage theft.[132]

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effective hourly rate equates the required state or federal minimum); *see also* Opinion letter from Barbara Relerford, Off. of Enf't Pol'y, Fair Lab. Standards Team, to de-identified individual (Oct. 8, 2004), https://perma.cc/HWE3-5KV4 (PDF) (noting that an employer may deduct from the employee's earnings if overpaid by mistake).

128. *See Stealing Tips*, WORKING AM., https://perma.cc/HSB4-SA6F (last visited Nov. 13, 2023) (alerting workers to ways their employers may be stealing worker wages).

129. *See supra* notes 123–128 and accompanying text. When employers pay a subminimum wage rate to tipped workers, tipping pools are not permitted to include non-tipped workers—such as hosts, concierges, cooks, dishwashers, and managers. *See* Wage Payments Under the Fair Labor Standards Act of 1938, 29 C.F.R. § 531.54(c)(1) (2023); *see also* Myers v. Copper Cellar Corp., 192 F.3d 546, 550–51 (6th Cir. 1999) (finding that tip pools that included salad makers were illegal because salad makers did not qualify as tipped employees as they did not engage in direct contact with customers).

130. "Back-of-house" or "BOH" is common industry jargon that refers to all the behind-the-scenes areas customers do not see. *Restaurant Management*, WEBSTAURANTSTORE, https://perma.cc/F9LB-XMQH (last updated Mar. 14, 2009).

131. Esther Tseng, *Undocumented Workers Hold the Restaurant Industry Together. Now, They Stand to Lose the Most*, EATER (May 29, 2020), https://perma.cc/63CE-8NXR; *see id.* ("The undocumented comprise 10 percent of all restaurant employees in the U.S., and as many as 40 percent in urban areas such as Los Angeles and New York.").

132. *See supra* Part I.A.2.

2. Construction

The construction industry is closely associated with public-private works projects and business partnerships. Unfortunately, the same close association exists between this industry and wage theft. Generally, wage theft thrives in construction due to three industry characteristics: (1) the nature of the project bidding and award process; (2) the common use of independent contractors and subcontractors; and (3) the prevalence of day labor, or other short-term working relationships.

For starters, construction work is awarded by bid, creating a cutthroat and inherently competitive industry where employers are rewarded for minimizing labor costs—even if they do so by committing wage theft.[133] For public construction projects, laws like the Davis-Bacon Act[134] require bidding contractors to pay workers a "prevailing wage rate."[135] These prevailing wage laws mostly prevent contractors from illegally manipulating wage costs in order to win public works contracts at the bidding phase—but scholars debate their efficacy when it comes to ensuring prevailing-wage payment later on.[136] Despite

133. *See* KEN JACOBS ET AL., U.C. BERKELEY CTR. FOR LAB. RSCH. & EDUC., THE PUBLIC COST OF LOW-WAGE JOBS IN THE U.S. CONSTRUCTION INDUSTRY 1–2 (2022), https://perma.cc/MUM8-Q4UR (PDF) (discussing how the construction sector is plagued by some of the worst labor practices in the United States and the decline of unionization played a role in protecting against exploitative labor practices).

134. Pub. L. No. 71-798, 46 Stat. 1494 (1931) (codified as amended in 40 U.S.C. §§ 3141–3148).

135. KARLA WALTER ET AL., CTR. FOR AM. PROGRESS, A HOW-TO GUIDE FOR STRENGTHENING STATE AND LOCAL PREVAILING WAGE LAWS 8 (2020) [hereinafter WALTER ET AL., A HOW-TO GUIDE FOR STRENGTHENING WAGE LAWS], https://perma.cc/4DD7-BY8S (PDF). The "prevailing wage" acts as a sort of minimum wage for construction workers and is set based on the local rates of workers performing similar jobs. *See id.*; *see also* DAVID MADLAND ET AL., CTR. FOR AM. PROGRESS, RAISING THE BAR: STATE AND LOCAL GOVERNMENT CAN USE PREVAILING INDUSTRY STANDARDS TO RAISE MINIMUM STANDARDS FOR PRIVATE SECTOR WORKERS 1–6 (Dec. 2020), https://perma.cc/95T2-2Q8K (PDF) (advocating for "the enactment of industry-specific, prevailing wage-style laws that apply to private sector employees").

136. *Compare* WALTER ET AL., A HOW-TO GUIDE FOR STRENGTHENING WAGE LAWS, *supra* note 135, at 13–15 (arguing that policymakers should "work to extend prevailing wage protections" as a mechanism for fighting wage theft), *with* Daniel P. Kessler & Lawrence F. Katz, *Prevailing Wage Laws and Construction Labor Markets*, 54 INDUS. & LAB. RELS. REV. 259, 271–74 (2001)

being required to submit payrolls periodically during the commission of a contract, scholars note that contractors can manipulate these payrolls to look compliant by underreporting workers or hours worked, or misclassifying workers as a class entitled to a lower wage rate.[137] Then, because the agencies responsible for monitoring these payrolls are under-resourced, these manipulated payrolls primarily go uninvestigated.[138] That is unless a worker fills out a formal complaint—which for a variety of reasons highlighted in this piece they rarely do.[139]

An ongoing investigation relating to a renovation project of the federal government's contracting and private-vendor headquarters (of all things) is illustrative of how wage theft happens even during federal construction projects where Davis-Bacon laws apply.[140] To be awarded the 124 million-dollar contract for renovating the United States General Services Administration ("GSA") building, the prime contractor provided all the prevailing wage rates of its employees, as well as the names, duties, and prevailing wage rates of all its subcontractors—including its subcontractor hired to remove asbestos from the pre-renovated building.[141] But after the asbestos removal was completed, 127 workers filed a complaint with the Department of Labor's ("DOL") Wage and Hour Division alleging their employer misclassified them on payroll

(finding that repealing prevailing wage laws may negatively impact White, unionized construction workers while actually benefiting Black constructions workers).

137. *See, e.g.*, Erik Gunn, *Federal Case Sheds Light on Payroll Fraud, Wage Theft and Worker Misclassification*, WIS. EXAM'R (Sept. 14, 2023), https://perma.cc/7934-AZB8 (reporting on a case of payroll fraud within the construction industry in Wisconsin and highlighting the prevalence of worker misclassification and wage theft).

138. *See* WALTER ET AL., A HOW-TO GUIDE FOR STRENGTHENING WAGE LAWS, *supra* note 135, at 13–15 (arguing the need for more robust enforcement mechanisms of prevailing wage laws during contract performance).

139. *See id.* (discussing how principals, affiliates, successors and assignees of contractors or subcontractors rarely file complaints due to potentially being ineligible for new contracts or funding during that time).

140. *See* Maryam Jameel, *Flawed System Lets Contractors Cheat Workers on Federal Building Jobs*, NBC NEWS (Aug. 21, 2017), https://perma.cc/Q733-AJ9D (illustrating how contractors' violations rarely show up in government databases, and subcontractors receive even less scrutiny when it comes to recovering under Davis-Bacon law).

141. *See id.*

reports as "general laborers" (and paid them the general laborer prevailing wage rate of $15.84 per hour) when they should have been classified as skilled laborers (and paid at least the $25.47 per hour prevailing wage rate).[142] After an investigation, agency officials agreed with the workers, awarding $640,693.74 in collectively owed back wages.[143] But their employer appealed the DOL's decision and, six years later, the asbestos workers have yet to receive any of their back wages owed.[144] Meanwhile, their employer continues to perform asbestos removal on federal buildings.[145]

Another characteristic contributing to wage theft's high rates in the construction industry, and prevalent during the GSA renovation project discussed above, is the common use of subcontractors and independent contractors. These practices—while not illegal or wage theft *per se*—create environments where wage theft can flourish.[146] Wage theft flourishes as more and more subcontractors are involved in the project, and therefore, the liable "employers" for wage-payment obligations are not the businesses in charge of the project site.[147] Indeed, these liable parties are sometimes hard to identify at all and their legal relationship and obligations remains unknown even to their own workers.[148] In a particularly egregious

142. *Id.*

143. *Id.*

144. *Id.*

145. *See id.* ("[The contractor] has received at least $5.8 million in federal construction contracts since 2013."); *see also* U.S. GEN. SERVS. ADMIN., GSA FY 2020 ANNUAL PERFORMANCE REPORT 11 (2020), https://perma.cc/TDT5-5JWT (PDF) (documenting the agency's increasing spending on construction projects).

146. *See, e.g.*, Jameel, *supra* note 140 (illustrating how weak oversight by federal agencies allows subcontractors to shortchange workers on government projects with little fear of being caught or future contracts); *see also* JACOBS ET AL., *supra* note 133, at 3 ("In most states, general and subcontractors are not liable for—and in fact benefit from—payroll fraud found further 'down the chain' of subcontractors . . . ." (citation omitted)).

147. *See supra* notes 18–19 and accompanying text.

148. *See* GALEMBA, *supra* note 96, at 64–66; *see also, e.g.*, Mark Erlich, *Misclassification in Construction: The Original Gig Economy*, 74 INDUS. & LAB. REL. REV. 1202, 1215–16 (2021) ("When the [National Labor Relations] Board sent subpoenas to the address of the subcontractors, all were returned 'undeliverable.'"); CLAYTON SINYAI & ERNESTO GALEAS, CATH. LAB. NETWORK, THE UNDERGROUND ECONOMY AND WAGE THEFT IN WASHINGTON DC'S COMMERCIAL CONSTRUCTION SECTOR 15 (2021), https://perma.cc/J3JH-E8DR

example of this, a 2020 survey conducted by the Catholic Labor Network ("CLN") found that nearly half the workers at major construction sites in Washington, D.C. did not work for a legitimate contractor or subcontractor listed on the project.[149] Rather, they were employed by fly-by-night "labor brokers" who functioned solely for the purpose of being employer intermediaries between the contractors of record and the workers.[150] Within this "vast underground economy" of contractors securing workers through labor brokers, the CLN noted that minimum wage and overtime violations were rampant because contractors believed they were immunized from legal accountability.[151] For practical purposes, though, the labor brokers weren't accountable either.[152] Often undercapitalized and paying workers in cash to operate without

(PDF) (discussing how some construction workers employed on private construction projects are hired by labor brokers, who allow "large subcontractors to maintain a measure of deniability for the payroll violations performed for their benefit").

149. *See* SINYAI & GALEAS, *supra* note 148, at 10 (noting that 47% of the workers in the sample appeared to be paid through a labor broker and it was not clear whether the brokers "that paid these workers were reporting them as independent contractors or not reporting them at all").

150. *Id.* at 3; *see, e.g.*, TOM JURAVICH ET AL., U. MASS. AMHERST LAB. CTR., THE SOCIAL AND ECONOMIC COSTS OF ILLEGAL MISCLASSIFICATION, WAGE THEFT AND TAX FRAUD IN RESIDENTIAL CONSTRUCTION IN MASSACHUSETTS i (2021), https://perma.cc/HD8L-8DAX (PDF)

> [R]eliance on illegally misclassified workers has been greatly facilitated by the emergence of a new labor intermediary: labor brokers, who supply the vast majority of mostly undocumented workers for jobs in residential construction . . . . [T]hey operate largely in the shadows and are nearly untraceable in that they pay their workers in cash and do not keep any records of employment.

see also ABEL VALENZUELA JR. ET AL., UCLA CTR. FOR STUDY URB. POVERTY, ON THE CORNER: DAY LABOR IN THE UNITED STATES (2006), https://perma.cc/S5SF-9FQB (PDF) ("On the supply side of urban labor markets, workers are increasingly turning to day-labor hiring sites, and other sources of contingent work like temp agencies and labor brokers . . . .").

151. SINYAI & GALEAS, *supra* note 148, at 4. Contrary to these beliefs, under the FLSA, more than one employer can be legally liable to an employee for the work they perform. *See* Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939, 40943 (July 30, 2021) (to be codified at 29 C.F.R. § 791) (rescinding a previous rule that in effect limited the liability of contractors and subcontractors under the FLSA).

152. *See* JURAVICH ET AL., *supra* note 150, at 12 ("Labor brokers work entirely in the world of cash which makes their operations invisible.").

a paper trail, these brokers simply disappeared when wage-theft allegations against them arose—leaving workers without their wages or any recorded "employer" to pursue a remedy against.[153]

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Finally, the prevalence of day labor in construction also enables contractors and subcontractors to commit wage theft.[154] Although the nature of construction work is always somewhat temporary, day laborers are employed on an even more provisional day-to-day basis.[155] This irregularity and disconnected working relationship between day laborers and employers cause employer identification and monitoring problems. Because they are not paying employment taxes and their workers are paid in cash, employers rarely keep records of hours worked past a few weeks—this scheme also makes it virtually impossible for workers to collect any objective evidence of underpayment. Likewise, the arrangement leads to even worse kinds of wage theft than underpayment, as nefarious employers may hire day laborers only to vanish at payment time, leaving workers without any payment or accountable party to pursue formal actions against.[156]

For many unauthorized workers, it is the lack of monitoring and recordkeeping that attracts them to day-labor work in the first place—as the absent paper trail that allows employers to evade wage-theft liability is also what permits them to hire

153. *See id.* at 13.

154. See generally GALEMBA, *supra* note 96, for excellent anthropological research on day laborers' experiences in Denver, Colorado. *See also id.* at 3–4 (writing about the hiring sites where day laborers find work and the procedures for doing so in the city). Because landing daywork requires a mix of cunning and speed, Galemba explains how the hiring street corners where workers solicit work are called "liebres"—Spanish for jackrabbit. *Id.* at 3.

155. *See* Abel Valenzuela Jr., *Day Labor Work*, 29 ANN. REV. SOCIO. 307, 318–19 (2003) (describing the "seemingly chaotic or unstructured processes" by which informal day labor hiring sites operate).

156. *See* VALENZUELA JR. ET AL., *supra* note 150, at 14–16; *see, e.g.*, Alyson Kay, *Stolen Paychecks: How Immigrant Workers Get Ripped Off*, ASSOCIATED PRESS (May 18, 2017), https://perma.cc/VZW5-ENA7 ("While wage theft occurs in many industries, construction contractors and subcontractors in particular use day laborers frequently . . . ."); Adam Echelman, *A Day in the Life of an SF Day Laborer: Waiting for Work, Struggling to Get Paid*, FRISC (Mar. 24, 2022), https://perma.cc/5DPC-ZALN (reporting on the story of a day laborer who is owed $3,780 and who has not been able to track down his employer).

workers without proper work authorization.[157] As such, more than 1.4 million of unauthorized workers in the United States are employed in construction, making up more than 10% of workers in the industry entirely.[158] Unfortunately, because the vulnerabilities inherent to temporary working arrangements, and the vulnerabilities associated with unauthorized workers overlap, wage theft in the construction industry occurs at nearly twice the regular rates overall.[159]

These ingredients coalesced in New Orleans after Hurricane Katrina devastated the city's infrastructure in 2005.[160] As the federal government sought to rebuild as quickly as possible, several work regulations were temporarily suspended—including a suspension of the Davis-Bacon Act's prevailing-wage obligations and formal bidding procedures, and a suspension of the Department of Homeland Security's requirement that employers confirm the identity and work eligibility of their workers.[161]

These regulatory suspensions sent a message to contractors and workers alike. Unauthorized workers—mainly from Honduras, Mexico, or other Latin American countries—flocked to New Orleans to fill labor needs.[162] But so did some contractors and subcontractors, who saw Davis-Bacon's suspension as an

157. *See* NICOLE PRCHAL SVAJLENKA, CTR. FOR AM. PROGRESS, UNDOCUMENTED IMMIGRANTS IN CONSTRUCTION 1 tbl.1 (2021), https://perma.cc/Y63G-KFX3 (PDF) (demonstrating the prevalence of undocumented workers in various industries); Claudia Montecinos, *Release: Millions of Undocumented Immigrants Are Essential to America's Recovery, New Report Shows*, CTR. FOR AM. PROGRESS (Dec. 2, 2020), https://perma.cc/JQ3E-MHKB (highlighting the important role undocumented immigrants have in supporting United States' economy).

158. Montecinos, *supra* note 157; *see also* JURAVICH ET AL., *supra* note 150, at 10 (discussing how the undocumented status of many day laborers makes them "extremely vulnerable to employment abuse").

159. *See* GALEMBA, *supra* note 96, at 43–47.

160. *See* LAUREL E. FLETCHER ET AL., REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY ON LABOR AND HUMAN RIGHTS IN NEW ORLEANS 12–13, 16–20, 22–23 (2006), https://perma.cc/597Y-F78R (PDF) (illustrating the contributions of documented and undocumented construction workers in New Orleans after Hurricane Katrina).

161. *See id.* at 39.

162. *Cf. id.* at 5 (explaining the purpose given by the Department of Homeland Security for this suspension was that it was intended "to accommodate survivors who had lost identity documents in the storm").

opportunity to profit from taxpayer dollars at the exploitation of unauthorized workers.[163] In addition to enduring hazardous living and working conditions, the rate of wage theft nearly doubled for construction workers in New Orleans post-Katrina.[164] The heavy reliance on labor subcontractors—each with their own management structures and hired translators, and constantly restructuring and changing names—led to the seemingly implausible situation of workers not even knowing the names of their direct employers, much less the general contractor in charge of their worksite.[165] And the common construction trick of hiring day laborers and then disappearing or refusing to pay them when the job was completed also thrived.[166] Things got so bad and so quick for these workers, that the government reinstated the suspended work regulations only two months after the suspension.[167] But later, during congressional hearings on the rebuilding's failures, experts noted that high rates of wage theft persisted for years

163. *See* Fussell, *supra* note 95, at 598–99, 603 (illustrating that during the suspension of the Davis-Bacon Act, day laborers increased and were mostly employed in residential construction, which occurred often outside of the governments purview).

164. *See id.* at 604 tbl.2 (illustrating that post-Katrina wage theft rose to 41.2 percent among Latino immigrants)*; see also* Loren K. Redwood, *Strong-Arming Exploitable Labor: The State and Immigrant Workers in the Post-Katrina Gulf Coast*, SOC. JUST. 33, 38–39, 41–43 (2009) (discussing the hazardous living and working conditions coupled with the exploitable labor force during the suspension of the Davis-Bacon Act).

165. *See* FLETCHER ET AL., *supra* note 160, at 16–23 (illustrating that the multitude of moving parts and approaches undocumented workers had to go through led to a disarray of who exactly is in charge); *see also* Redwood, *supra* note 164, at 38–43 (discussing how there is a lack of transparency with the hiring practices of contractors and subcontractors, which invites malfeasance).

166. *See* Warren Warren, *Wage Theft Among Latino Day Laborers in Post-Katrina New Orleans: Comparing Contractors with Other Employers*, 15 INT. MIGRATION & INTEGRATION 737, 741 (2014) (noting how some subcontractors changed the names of their businesses to conceal their identities after they had committed crimes against workers).

167. *See Adequacy of Labor Law Enforcement in New Orleans: Hearing Before the Subcomm. on Domestic Pol'y of the Comm. on Oversight & Gov't Reform*, 110th Cong. (2007) [hereinafter *Adequacy of Labor Law Enforcement in New Orleans*] (collecting testimony on alleged harms experienced by migrant workers following Hurricane Katrina including rampant wage theft and threats of deportation, and the lack of awareness and support by the Department of Labor and other government agencies regarding such issues).

after the suspension was lifted in New Orleans's construction and redevelopment industries.[168]

In hindsight, the rebuilding efforts in New Orleans provided valuable lessons about the important role legislation and enforcement play in perpetuating compliant industry norms—many of which were emphasized in a 2007 congressional hearing on the adequacy (or lack thereof) of labor law enforcement in post-Katrina New Orleans.[169] Although wage theft was widespread among low-wage workers and in the construction industry before, it became discernably worse after suspending prevailing wage and documentation requirements.[170] Despite these requirements being largely unenforced in the industry and labor market before their suspensions, when the largest procurer of services (the government) formally signaled that other factors (such as speed) were more important than these worker protections, Pandora's box opened.[171] Likewise, the very presence of government contracting standards, even when not perfectly enforced, impact contractors' behaviors and industry-wide norms in both the public- and private-sectors.[172]

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168. *See* Michelle Chen, *Four Years After Katrina, Workers Still Exploited in the Big Easy*, IN THESE TIMES (Aug. 31, 2009), https://perma.cc/WNW6-8ZNM; *see also Workers Rebuilding New Orleans Face Rampant Wage Theft*, WASH. INDEP. (July 30, 2020), https://perma.cc/EBV2-B4YH (documenting continued instances of exploitation and discrimination among marginalized groups of workers by New Orleans employers capitalizing on the recovery effort).

169. *See Adequacy of Labor Law Enforcement in New Orleans*, *supra* note 167, at 3–4 ("The interplay of labor law suspensions, an influx of workers, huge contractors, and non-enforcement of labor law created an environment, according to some of our witnesses, of virtual lawlessness in New Orleans. An environment they have described to us as the 'wild wild west.'").

170. *See* FLETCHER ET AL., *supra* note 160, at 29 (concluding that Hurricane Katrina exposed and exacerbated preexisting social problems and disparities in New Orleans).

171. *See* Warren, *supra* note 166, at 748–50 (finding positive correlation between widespread wage theft among low-income workers and labor markets designed to benefit employers through relaxed or suspended regulations and worker protections).

172. *See id.* (recommending policy considerations including license restrictions, taxes, and wage bonds to avoid issues of undercapitalization that promote unstable project funding and other costs that contractors then pass on to laborers absent such regulations).

3. Long-Term Healthcare

While healthcare providers of all sizes and specialties commit wage theft, the practice has become particularly common in the long-term healthcare industry.[173] This industry of nursing and assisted living facilities, as well as home healthcare providers, relies on Medicare and Medicaid, to cover nearly two-thirds of its operational costs.[174] Yet, despite being subsidized by public funds, the industry employs primarily low-wage workers as nurses' aides—the majority being women of color who earn less than fifteen dollars per hour.[175]

In addition to this familiar constellation of vulnerable worker characteristics, other industry factors unique to long-term healthcare have contributed to its high rates of wage theft.[176] A growing aging population and a labor shortage have produced a culture where workers are routinely expected to work more than forty hours a week as employers struggle to fill shifts with a labor force they don't have.[177] Additionally, to accommodate long-term healthcare's twenty-four-hour scheduling needs, wage payment laws have long afforded

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173. *See* Nicole Hallett, *Wage Theft and Worker Exploitation in Healthcare*, 24 AMA J. ETHICS 890, 891 (2022) [hereinafter Hallett, *Wage Theft and Worker Exploitation in Healthcare*] (finding wage theft is "rampant" in the healthcare industry, costing workers "millions of dollars per year in lost income").

174. *See* Kirsten J. Colello, *Who Pays for Long-Term Services and Supports?*, CONG. RSCH. SERV. (June 15, 2022), https://perma.cc/R28R-A5DC (PDF); *see also* Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 521 (2016) ("[T]wo-thirds of the home care industry is financed by tax dollars—primarily through Medicare and Medicaid . . . .").

175. *Occupational Employment and Wages, May 2022: 31-1131 Nursing Assistants*, U.S. BUREAU LAB. STATS., https://perma.cc/X265-KQD4 (last updated Apr. 25, 2023).

176. *See* Emily Paulin, *Inside the 'Staffing Apocalypse' Devastating U.S. Nursing Homes*, AARP (June 9, 2021), https://perma.cc/9ED2-AAAD (describing staffing shortages, high turnover rates, prioritization of short-term profits, and the practice of hiring certified nursing assistants as independent contractors, making them ineligible for paid time off and health insurance).

177. *See* Overtime Compensation, 29 C.F.R. § 778.60 (2023) (allowing hospitals and residential care establishments to utilize a fixed work period of fourteen consecutive days in lieu of the forty-hour week for the purpose of computing overtime). Under this "8 and 80" exception, employers pay time and one-half the regular rate for all hours worked over eight in any workday and over eighty hours in the fourteen-day period.

industry employers' additional flexibility with overtime pay and scheduling.[178] But this flexibility has made it more challenging for workers to know their rights and has enabled some employers in long-term healthcare to take advantage of this lack of knowledge.[179] Furthermore, some employers take advantage of the personal bonds many long-term healthcare workers feel towards their patients and commit wage theft by refusing to pay them for work performed "off the clock"—knowing these workers will work whatever time is necessary to adequately care for their patients.[180]

All these industry challenges—the labor shortage, complex twenty-four-hour scheduling needs, and workers' bonds and perceived care obligations to patients over time—are exacerbated when long-term healthcare is provided in a patient's home.[181] Added to this mix, though, is also the blurring of traditional employment lines when long-term healthcare is provided in a patient's home.[182] Lastly, an added legal complication, a special payment rule for healthcare workers working twenty-four-hour shifts in patients' homes, helps explain the prevalence of wage theft in the home-based long term healthcare industry.[183] Recently the focus of numerous contentious lawsuits and legislative debates, the so-called

178. *See* Daniel Massey, *Home Care Service Sued Over Pay Practices*, CRAIN'S N.Y. BUS. (Apr. 14, 2010), perma.cc/8KFL-5KBH (describing a class action lawsuit by workers against a home care services company alleging failure to pay overtime wages and falsification of pay data).

179. *See* Kennedy, *supra* note 174, at 519–521 (arguing persistent wage theft in the home healthcare industry is fostered by companies misclassifying workers as independent contractors to avoid overtime payment, insufficient fines and penalties for such violations, and the exclusion or lack of awareness among workers regarding available federal and state workplace protections).

180. *Id*. at 530.

181. *See* Relias Media, *Federal Wage and Hour Labor Laws May Confuse Healthcare Employers* (June 1, 2019), https://perma.cc/6QJT-C5HN (noting work done in private homes creates challenges regarding the official tracking and confirmation by employers of overtime hours, scheduled breaks, and total hours worked).

182. *See id.* (providing an example of how required thirty-minute meal breaks may deny employee overtime hours in a home care setting, thus contributing to wage theft).

183. *See* 29 U.S.C. § 207 (establishing limits on mandatory work and overtime provisions for home care and other domestic service workers under certain conditions).

"twenty-four-hour rule" permits employers to pay workers for only thirteen hours of a twenty-four-hour shift caring for a patient in the patient's home, provided workers receive uninterrupted breaks for meals and sleep.[184] But employers have struggled to manage these break requirements when workers are scattered across several sick or feeble patients' homes—leading to gross underpayment of twenty-four-hour shifts and unpaid overtime.[185]

As home healthcare providers are publicly subsidized, scholar Elizabeth Kennedy has compared wage-theft offenders to providers that misuse Medicare and Medicaid funds in other ways.[186] She notes that, contrary to the hefty fines imposed on these providers for "indirectly stealing from taxpayers through Medicaid fraud," directly stealing from workers and destabilizing the quality of public services for taxpayers is far less abhorred in the courts of law and public opinion.[187]

4. Fissured Business Models

Whereas certain employers operate in industries traditionally structured in ways that complicate wage payment obligations, other employers may choose to adopt certain business structures because they complicate wage payment obligations.[188] Indeed, certain business structures are thought

184. *See id*; *see also, e.g.*, Shillingford v. Astra Home Care, Inc., 293 F. Supp. 3d 401, 417 (S.D.N.Y. 2018) (permitting employers of home health care aides to deduct eleven hours from the count of compensable hours in a twenty-four-hour shift provided that the aide is given eight hours to sleep, actually receives five uninterrupted hours of sleep, and receives three hours of breaks for meals).

185. *See* Jennifer Gollan, *Lawmakers, Regulators Take on Senior Care-Home Operators Over Wage Theft, Worker Abuse*, REVEAL (Jan. 3, 2020) https://perma.cc/4H52-MJNA (finding some workers are paid "$2 an hour to work around the clock" while operators have been charged with withholding upwards of $8 million in wages over a nine-year period).

186. *See* Kennedy, *supra* note 174, at 518–19 (comparing conventional examples of taxpayer fraud with instances of wage theft among home care workers).

187. *Id.*

188. *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 ECON. & LAB. REL. REV. 33, 50 (2011) [hereinafter Weil, *Enforcing Labor Standards in Fissured Workplaces*] (describing how leading firms can establish themselves as "coordinators" rather than vertically integrated entities by securing customer allegiance and focusing on core

to exist specifically for the purpose of complicating questions of legal liability for workplace activities such as wage theft.[189] Because workplace laws are generally keyed to the single-employer and single-employee relationship,[190] structural designs that muddle these relational boundaries perpetuate wage theft, as true "employers" are not easily identified for liability purposes, and workers question their own status as "independent contractors" or employees.[191]

One common way businesses distort the employer-employee relationship is by outsourcing or subcontracting activities non-essential to their business, or what scholar and former head of the DOL's Wage and Hour Division, David Weil, refers to as "fissuring."[192] Businesses in the construction industry have long been fissured in this way—where, as was seen before with the GSA building restoration, a general construction contractor subcontracts entire portions of jobs (like asbestos removal) to other specializing independent contractors or businesses.[193] But now, other industries have also fissured as a way of reducing

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functions while allocating production and services to other entities, thus avoiding costs and responsibilities that employment laws are designed to enforce).

189. *See id*. at 36 (arguing a "critical factor" for the concentration of low wages and persistent labor standards violations derives from "the market dynamics and business strategies of the sectors where those workers are concentrated," whereby leading firms manipulate the basic employment relationship through subsidiary businesses in those markets).

190. *See id.* at 44 ("The modern employment relationship bears little resemblance to that assumed in core US workplace laws.").

191. *See id*. at 37 (noting deliberate misclassification of workers as independent contractors to avoid payments and liability for workplace injuries is a "major problem" particular to the construction industry). Some businesses like construction and apparel have incorporated subcontracting for over a century. *See* DAVID WEIL, THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 99 (2014). While subcontracting in and of itself does not constitute wage theft, the competitive pressures pushing construction firms toward subcontracting and additional layers of tasks often encourage the erosion of labor standards more generally. *See id*. at 100.

192. WEIL, *supra* note 191, at 5; *see id.* at 4–5 ("In essence, private strategies and public policies allow major companies to simultaneously profit from the core activities that create value in the eyes of customers and the capital markets and shed the actual production of goods and services.").

193. *See supra* Part I.B.2.

employment costs.[194] What delegitimizes these newly-fissured industries from the construction model is that, in many of these fissured relationships, the lead contracting business still maintains tight control of the outcomes of the subsidiary contractor.[195] For instance, a luxury hotel chain may adopt this model and—rather than hiring cleaning employees—outsource all the hotel's detailed cleaning specifications to a large janitorial company. This janitorial company may also fissure and shift all its laundry needs (including the hotel's) to a laundry company.

Despite profit margins being smaller and the incentive to commit wage theft being greater as work fissures down the supply chain, employment costs and obligations like wage payment, are shifted to bottom-layer businesses.[196] When these bottom-layer employers commit wage theft, businesses up the chain may or may not be deemed liable as "joint employers"—depending on just how much control they retained over the workers.[197] But this joint-employer status is a legal determination based on a weighing of several non-determinative factors.[198] Legal experts do not always correctly predict how these factors will be weighed, much less the workers themselves.[199] As such, the business most responsible for the structured arrangement and most capable of ensuring fair wages are paid—in the example above, the luxury hotel—may avoid liability for wage theft. In the least, they transform a threshold question of liability into a complex legal hurdle

194. *See* WEIL, *supra* note 191, at 17–21 (referencing high rates of labor standards violations in the home health care, hospitality, and retail industries).

195. *See id.* (noting that contractors rather than owners in many fissured business models are primarily involved with the setting of employment policies or their implementation).

196. *See supra* notes 151–153 and accompanying text.

197. Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 Fed. Reg. 40939, 40939 (July 30, 2021) (to be codified at 29 C.F.R. § 791); *see also supra* notes 151–153 and accompanying text.

198. *See* 86 Fed. Reg. at 40940 (listing various factors that can be weighed to determine whether a joint employer relationship exists); *see also* WEIL, *supra* note 191, at 43 (noting that profit margins are smaller and markets more competitive as work fissures down the supply chain—as such, the incentive to commit wage theft is also greater).

199. *See* WEIL, *supra* note 191, at 43.

workers must clear—one that will be too cost- or other resource-prohibitive for some aggrieved workers to overcome.

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In addition to contracting and subcontracting, franchising is also a fissured business structure that perpetuates wage theft.[200] Over the past three decades, the franchise model has outgrown the fast-food industry and is now found in such industries as janitorial services, barber shops, and even home healthcare.[201] Similar to fissured companies that use detailed contractor agreements to retain control of working outcomes, franchisors maintain control through strict franchise agreements.[202] Under these agreements, the franchisor still captures a significant portion of the revenue but designates the franchisee as the employer for legal liabilities.[203] Because franchisors take fixed cuts off the top, they have little incentive to ensure wage payment compliance.[204] Nonetheless, because the franchisor has retained so much control over other aspects of the franchisee's business, paying employees is one of the only

200. *See* David Weil & MinWoong Ji, *The Impact of Franchising on Labor Standards Compliance*, 68 INDUS. & LAB. RELS. REV. 977, 979 (2015) (describing how the fast-food establishment franchising model creates separate costs and incentives such that franchisees are "more likely not to comply with labor standards regulations than comparable restaurants owned by franchisors"); *see also* Alan Krueger, *Ownership, Agency, and Wages: An Examination of Franchising in the Fast Food Industry*, 106 Q.J. ECON. 75, 78 (1991) ("Agency problems are likely to arise in company-owned outlets because the parent company cannot perfectly observe the hired manager's actions and information set."); *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB., https://perma.cc/H4Z8-8QVF (last updated Mar. 2022) (discussing the problems franchising poses for evaluating an employee-employer relationship).

201. *See What are the Most Common Franchised Industries?*, INT'L FRANCHISE ASS'N, https://perma.cc/E7KK-5CAS (last visited Nov. 16, 2023).

202. *See* Krueger, *supra* note 200, at 78 (describing how typical franchise agreements require the franchisee to maintain a minimum level of quality, purchase inputs only from approved suppliers, and perform various on-site management and operational duties).

203. *See id.* at 81–86 (observing institutional and contractual structures that provide legal protections and reliable profit models for franchise owners).

204. *See* Weil & Ji, *supra* note 200, at 1004 ("[T]he pronounced differences in compliance arise from internal factors relating to the profit models faced by franchisees versus franchisors, and the tradeoffs the respective parties are willing to make.").

things a franchisee can do to increase profit margins after the franchisor's cut.[205]

Lastly, platform-based businesses—your Uber, Instacart, and Fiverr—are also fissured structures that distort traditional employment relationships and legal obligations when it comes to wage-payment.[206] Indeed, platform-based businesses are especially tricky to fit into current workplace legislation because they do not just shift employer and employee designations to other parties but arguably get rid of these designations entirely. These companies claim not to be employers—but only platform managers that connect providers of goods or services to requiring clientele via their developed algorithms, screenings, and selective incentives.[207] Likewise, the providers of goods and services on their platforms agree in the platform's terms of service that they are not "employees," but rather "independent contractors."[208]

The trouble with this arrangement is that determining who is an "employee" under wage-payment laws is a legal question, regardless of what the parties agree to in contract. Likewise, these platform-based workers are routinely economically dependent on the platform and the platform's algorithm, and terms of use control the nature of this arrangement.[209] This economic reliance and the platform's nature of control signal an employment relationship in the legal sense—but other considered factors, such as workers' control of their hours

205. *See* Krueger, *supra* note 200, at 77 (analyzing wage payment models indicating "a combination of high wages and delayed compensation are used to elicit effort from employees in establishments where monitoring is more difficult").

206. *See* Alex Park, *The Fast Food Industry Runs on Wage Theft: The Franchise Model Makes Hurting Workers Inevitable*, NEW REPUBLIC (May 26, 2022), https://perma.cc/L6GM-XJZR (attributing pay gaps among franchise workers to "third party management and the spread of fissured employment" which create challenges for enforcing workplace policies that were "built assuming simpler and more direct relationships").

207. *See* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 580–84 (2016) (summarizing arguments made by ridesharing companies in litigation over their labor practices).

208. *See id.* at 582.

209. *See id.* at 598, 601.

worked, make this legal question unclear.[210] So, while generally speaking, platform-based workers classified as "independent contractors," who meet the legal test of an "employee," may still pursue wage-theft claims, platform structures muddling of this threshold question adds another hurdle to wage recovery.[211] While not in dispute in more traditional working contexts, misclassified platform-based workers may not know that they, or the platforms they utilize, are being misclassified. Nor are the workers who work in this burgeoning work terrain even aware that these legal designations can be challenged in formal proceedings.[212] As such, platform-based companies' complex reordering of the employment relationship has reduced the likelihood of workers identifying and pursuing successful wage-theft claims against them.[213]

While these reordered relationships have made litigation more complicated, there is some good news for workers on the platform-based front when it comes to the filing claims. Many of the relational challenges that make it hard for workers to make formal complaints against their employers—such as, retaliation fears or employer loyalty—are also removed when platform-based companies are the putative employers.[214] That at least appears to be the case, as nearly 5,000 Uber and Lyft drivers have filed wage claims against the platform-based rideshare companies in California alone.[215] In response,

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210. *See* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257–58 (2006) (stating that courts determine employee status by using the economic reality test, which explores whether as a matter of economic reality the individual is dependent on the entity).

211. *See id.*

212. *See* FRANÇOISE CARRÉ, ECON. POL'Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 3, 8, 14 (2015), https://perma.cc/AQD7-VBD3 (PDF) (discussing legal options for misclassified employees and how misclassified employees are often not aware of their employment).

213. *See id.* at 8.

214. *See* Nicholas Iovino, *California Labor Commissioner Sues Uber & Lyft for Wage Theft*, COURTHOUSE NEWS SERV. (Aug. 5, 2020), https://perma.cc/AMG4-YWNK (stating that the California Labor Commissioner's Office planned to distribute any back wages, damages, or penalties recovered through litigation to nearly 5,000 drivers that filed wage complaints with the state against Lyft and Uber).

215. *Id.*

California Labor Commissioner, Lilia García-Brower, brought charges of systemic wage theft against Uber and Lyft in 2020.[216] In her charge, García-Brower challenges the platform business model's very core as "rest[ing] on the misclassification of drivers as independent contractors . . . [which] leaves workers without protections such as paid sick leave and reimbursement of drivers' expenses, as well as overtime and minimum wages."[217]

C. *Employers Who Commit Wage Theft*

Wage theft is not an offense committed by only small, unsophisticated employers navigating a complex regulatory system. The offense is not limited to undercapitalized businesses operating in competitive markets.[218] It is not confined to sweatshops, fast food outlets, and cheap retailers.[219] Instead, wage theft has become such a common offense because it happens with employers of all sizes and sophistications and in all types of industries.[220] Halliburton, Bank of America, Walmart, FedEx, and Circle-K stores have all boosted their profits by having workers work off the clock, denying them minimum wage and overtime pay, or engaging in other practices that deprive workers of the wages they are owed.[221] Although

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216. *Id.*

217. Press Release, Cal. Dep't of Indus. Rels., Labor Commissioner's Office Files Lawsuits Against Uber and Lyft for Engaging in Systemic Wage Theft (Aug. 5, 2020), https://perma.cc/3FV8-5EDQ; *see also* KEN JACOBS & MICHAEL REICH, U.C. BERKELEY LAB. CTR., WHAT WOULD UBER AND LYFT OWE TO THE STATE UNEMPLOYMENT INSURANCE FUND? 1–2 (May 7, 2020), https://perma.cc/U9NS-ZDYT (PDF) (reporting that damages for the Labor Commissioner's Office suit against Lyft and Uber could have added up to $413 million if they had been obligated to treat drivers as employees in the five years up to 2019).

218. *See* MATTERA, *supra* note 117, at 2 (examining resolved collective actions alleging wage theft against corporations on the Fortune 500 and how, since 2000, these large corporations have paid out penalties of $6.8 billion in 2,167 wage-theft cases).

219. *See id.* at 4–5.

220. *See id.* at 3–5. While Walmart is the most penalized corporation listed, five of the top twelve most penalized large corporations are banking and insurance companies. *Id.* at 9. The top twenty-five also include telecommunications, information technology, and investment services companies. *Id.*

221. *See, e.g.*, Press Release, U.S. Dep't of Lab., Halliburton Pays Nearly $18.3 Million in Overtime Owed to More Than 1,000 Employees Nationwide

employer behavior is nuanced and context-specific, there are strong reasons to believe that many employers' decisions are influenced by evaluations of profit maximization.[222] Indeed, commentators and sociologists have even suggested that these evaluations have led employers to build wage theft, or evading wage-payment obligations, on a wide scale into their business models as a profit-maximizing tool.[223]

Of course, employers do not openly admit to being influenced by cost-benefit evaluations when accused of wage

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After US Labor Department Investigation (Sept. 22, 2015), https://perma.cc/C88W-MQY2 (finding that Halliburton incorrectly categorized employees in twenty-eight job positions as exempt from overtime and failed to keep accurate records of hours worked by these employees); *see also* Bryan Schwartz, *Appraisers Landmark $36 Million Settlement with Bank of America for Failure to Pay Overtime*, WORKING RE (Aug. 27, 2015), https://perma.cc/8NGU-2K35 (discussing a lawsuit brought against Bank of America by workers for erroneously applying administrative and professional exemptions to residential staff appraisers); Irene Spezzamonte, *Convenience Store Chain to Pay $3.5M to Settle Wage Suit*, LAW360 (June 29, 2021), https://perma.cc/VLZ2-A8HH (sharing how Circle-K Stores Inc. paid millions of dollars to settle a case brought against them by their workers for failing to provide proper meal and rest breaks).

222. *See* David Weil, Compliance with the Minimum Wage: Can Government Make a Difference? 9–10 (Jan. 6, 2003) (unpublished manuscript) [hereinafter Weil, Compliance with the Minimum Wage], https://perma.cc/DY75-9QTQ (describing employers' evaluation of the benefits and costs of compliance, noting that generally the benefits of not complying grow with the divergence between the wage that employers desire to pay their workforce and the mandated minimum wage, and the rate of detection). For a discussion on the complexities involved in employer decision-making, see Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 L. & SOC'Y REV. 41, 45–48 (2004) (summarizing prior studies on the influence of various factors such as inspection frequency, perceived legitimacy of regulations, reputation, and the costs and competitive effects of compliance and noncompliance).

223. *See* MATTERA, *supra* note 117, at 10–11 (noting that of the large companies examined, 600 were "repeat offenders" who were charged and penalized for committing wage theft, only to engage in similar practices again); *id.* at 19 (providing an excerpt by Adam Shaw summarizing Mattera's report to say that "[t]hese corporations apparently consider private litigation and government enforcement of wage and hour laws a cost of doing business rather than a real threat to their bottom lines or their reputations"); *see also* BOBO, *supra* note 50, at 6 (highlighting how an employer managed to steal over $100,000 from poverty wage workers with no benefits by allowing them to receive less than the minimum wage).

theft.[224] So, that these evaluations occur, and just how influential they are in employer decision-making, is hard to determine. But economists have used the available data on the likelihood of detection for wage theft to at least illustrate what these cost-benefit evaluations might look like for employers. One study compiled data about the average-sized employer in the garment-making industry, the average underpayment per garment worker, the average civil penalty assessed in a DOL investigation, and the likelihood of a DOL inspection in any given year.[225] Using these numbers and the low probability of detection, it calculated the cost of not complying with wage payment obligations to be $121, compared to an employer benefit of $12,205 for noncompliance.[226] To determine the probability of detection needed to raise the perceived costs of noncompliance to equal to or greater than the benefits, economist Anna Stansbury used the overall median penalty assessed by the DOL to first-time wage-theft offenders between 2005 and 2021.[227] Her calculations determined that at least a 77%–88% probability of detection was needed to incentivize employers financially not to commit wage theft—and the actual probability of being detected was far from this threshold at 0.5%–2%.[228]

Given this low detection rate, most instances of wage theft come with no consequences at all. Yet, because the penalties for committing wage theft generally do not exceed the actual back wages owed for first-time offenders, even detected offending-employers may still come out better after paying assessed penalties for violating wage-payment laws than they

224. Except, when they do. *See, e.g.*, Massey, *supra* note 178 (quoting a CEO of a home care agency involved in an overtime class action filed by employers who stated that "[w]e just haven't paid overtime . . . . It's no mystery in this industry").

225. *See* David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238, 241–43 (2005).

226. *Id.* at 243.

227. Anna Stansbury, *Do U.S. Firms Have an Incentive to Comply with the FLSA and the NLRA?* 1–3, 9 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021).

228. *Id.* at 16–18.

would have having initially complied.[229] A recent example out of Pennsylvania is illustrative of this.[230] In one of the more successful enforcement efforts to date, the state's Attorney General, Josh Shapiro, charged one of the largest construction contractors, Glenn O. Hawbaker, with stealing over $20 million in wages and benefits from workers between 2015 and 2018.[231] But despite sound evidence of a conscious practice that had gone on far longer than the statute of limitations period, Hawbaker and the Attorney General's Office agreed to a $20,696,453 settlement or "full restitution" of the wages and fringe benefits owed in the last three years.[232] The settlement's large amount was celebrated for the full recovery of wages and benefits it secured for workers.[233] And Shapiro's win became one of the highlights of his successful 2022 gubernatorial campaign.[234] But there is another way to view the exactly $20,696,453 recovered from Hawbaker for the wage theft it committed during the time period not already barred by the statute of limitations. It is that, even when the system works, the punishment for wage theft is essentially the conversion of workers' owed wages into an employer's single, three-year, interest-free loan. The following Part discusses in more detail wage theft's regulatory and enforcement system's flaws, as well as reform efforts.

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229. *See id.* at 9 (explaining that the median penalty for first-time, willful violators was only fourteen cents for each dollar owed to its employees; for repeat, non-willful offenders it was only three cents per dollar owed; and for repeat, willful offenders just twenty-nine cents per dollar owed).

230. Zachary Phillips, *Pennsylvania Contractor Charged with Stealing $20M from Employees*, CONSTRUCTIONDIVE (Apr. 13, 2021), https://perma.cc/RN7H-CZK5. The charges resulted from a lengthy investigation that uncovered a complex scheme where the company, Glenn O. Hawbaker Inc., used promised worker retirement contributions to contribute to owners' and executives' retirement accounts. *Id.* Although investigators determined that these practices had gone on for decades, Hawbaker could only be charged for the last three years due to the statute of limitations. *Id.*

231. Geoff Rushton, *Hawbaker to Pay $20.7 Million After Pleading No Contest to Wage Theft Charges*, CENTRE CNTY. GAZETTE (Aug. 5, 2021), https://perma.cc/TY78-ULXQ.

232. *Id.*

233. *See* Press Release, U.S. Dep't of Lab., U.S. Secretary of Labor Marty Walsh Statement on Hawbaker Inc. Plea and Sentencing for Theft in Pennsylvania (Aug. 3, 2021), https://perma.cc/W34B-X5RZ.

234. *See* Chip Minemyer, *Shapiro Ad Points to AG's Work on Hawbaker Case*, TRIB.-DEMOCRAT (June 24, 2022), https://perma.cc/2YCC-GZPU.

II. REGULATORY EFFORTS TO PREVENT WAGE THEFT

To ground the following discussion of state and local efforts to prevent widespread wage theft, it is useful to understand the federal conditions that motivate ancillary state and municipal activity in the first place. Congress passed the first federal wage and hour law, the Fair Labor Standards Act[235] ("FLSA"), in 1938. A part of the New Deal's revolutionary package of protective work laws, the FLSA established a minimum hourly wage rate for all employees and a maximum number of hours per workweek before employees were owed overtime pay.[236]

To enforce its provisions, the FLSA authorizes employees to bring private lawsuits against their employers within two years of the offense.[237] The statute of limitations can be extended to three years if the factfinder determines that an employer willfully violated the statute.[238] Damages for a violation within the enforceable period are the unpaid wages, which may be doubled as liquidated damages unless the employer can show it had a reasonable, good-faith belief that it was not violating the law.[239] Amendments to the FLSA in 1949 created the Wage and Hour Division ("WHD") within the Department of Labor to assist with the administration and enforcement of the Act and investigate complaints.[240] Since then, though, partisan divides and special interests have stood in the way of meaningful updates to the statute that might have made the FLSA a more relevant regulator of modern working arrangements.[241] Today,

235. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).

236. 29 U.S.C. §§ 206–207; *see also* Franklin D. Roosevelt, *Radio Address of the President*, TEACHING AM. HIST. (May 24, 1938), https://perma.cc/SU3S-NWU8.

237. 29 U.S.C. § 255.

238. *Id.* §§ 216(b), 255(a).

239. *Id.* § 216(b)*; see also* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132–36 (1988) (determining that whether an employer is a "willful" violator has an element of subjectivity and historically in this context the term has been defined relatively narrowly).

240. 29 U.S.C. § 204.

241. *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 635 n.79 (2019) (sharing how the labor and employment agencies functioned relatively well until recent partisan breakdowns due to the National Labor Relations Board often changing its position with each administration change).

the text of the FLSA itself has been criticized as an outdated "geriatric piece of legislation" so firmly planted in the manufacturing context of the 1930s that modern working arrangements—such as remote work, fissured, and platform-based business models—are beyond its reach.[242] Moreover, the WHD has been sorely understaffed and underfunded and thus practices a targeted enforcement strategy, investigating only a small fraction of the complaints it receives.[243] When WHD investigations do occur, resolutions are common and first-time violators rarely pay a penalty more than the back wages owed.[244] When additional penalties are assessed for willful or repeat offenders, they are rarely greater than one dollar per dollar of back wages owed.[245]

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242. L. Camille Hebert, *The Fair Labor Standards Act: Foreword*, 7 EMP. RTS. & EMP. POL'Y J. 1, 1 (2003); *see also* ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUST., TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR, 1975–2004 2 (Sept. 2005), http://perma.cc/446Z-8EYB (PDF) (noting that while the number of workers covered by the FLSA grew 55 percent from 1975 to 2004, the number of Wage and Hour Division investigators decreased by more than 14 percent—from 921 to 788).

243. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 106 (finding that most complaints take long periods to resolve due to the DOL, and by extension the WHD, being "woefully underfunded and understaffed").

244. *See id.* at 111 ("Very rarely, an employer is forced to pay full back-wages and penalties.").

245. Celine McNicholas et al., *Civil Monetary Penalties for Labor Violations Are Woefully Insufficient to Protect Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 15, 2021), https://perma.cc/EXE4-RZPW; *see Restoring the Value of Work: Evaluating DOL's Efforts to Undermine Strong Overtime Protections: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & the Workforce*, 116th Cong. (June 12, 2019) (testimony of Heidi Shierholz, Senior Economist and Director of Policy, Economic Policy Institute). Even when complaints are handled, the Government Accountability Office reported that the WHD "frequently responded inadequately" and closed them "based on unverified information provided by the employer." *Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft: Hearing Before H. Comm. on Educ. & Lab.*, 111th Cong. (Mar. 25, 2009) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, and Jonathan T. Meyer, Assistant Director Forensic Audits and Special Investigations); *see also* EUNICE HYUNHYE CHO ET AL., NAT'L EMP. L. PROJECT, HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS 2 (2013), https://perma.cc/5S26-3PW3 (PDF) (explaining how even if workers are awarded damages at the conclusion of administrative investigations, they may see little to no recovery, finding only 17 percent of workers who prevailed at

A. *State and Local Anti-Wage-Theft Laws*

Because of inadequacies with the federal regulatory regime, states and, when not preempted, local legislatures have done most of the work when it comes to protective wage and hour legislation for a twenty-first-century economy.[246] These new laws at the state and local level span a range of issues—from setting minimum wage rates higher than the federal rate and expanding overtime coverage, to requiring paid sick days, paid family leave, and implementing fair workweek scheduling requirements.[247] And, indeed, state and local actions have also sought to address the wage-theft crisis over roughly the past fifteen years.[248]

This subpart provides an overview of these state and local efforts to regulate wage theft. Primarily relying on scholars Jennifer Lee and Annie Smith's comprehensive analysis of 141 state and local wage theft laws, it adopts their original typology of the five most common anti-wage-theft regulatory strategies: (1) authorizing worker complaints; (2) strengthening anti-retaliation provisions; (3) creating or enhancing penalties; (4) expanding employer liability; and (5) regulating information.[249]

1. Authorizing Worker Complaints

Of the 141 state and local anti-wage-theft laws that Lee and Smith examined, fewer than half (40 percent) were designed to facilitate workers or other authorized parties in initiating their own administrative or civil complaints.[250] Among these worker complaint strategies, 43 percent created another private right of action, and 41 percent established a state or city administrative

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the California wage and hour agency from 2008 to 2011 collected any money at all).

246. *See* Stansbury, *supra* note 227, at 20 ("It is important to note that many states have minimum wage and overtime requirements that exceed the federal standard, and many states have stronger enforcement apparatus and larger penalties.").

247. *See infra* Part IV.

248. *See* Lee & Smith, *supra* note 8, at 772 (finding that worker movements have attempted to address wage theft since roughly 2009).

249. *See id* at 775–84.

250. *Id.* at 777–78.

system—similar to the DOL's WHD—to investigate worker complaints.[251]

Other worker complaint strategies extended or tolled the statute of limitations for wage-theft claims.[252] For instance, New Hampshire extended the statute of limitations for wage and hour complaints from eighteen to thirty-six months,[253] and Massachusetts, which allows parties to choose between pursuing either a private right of action or an administrative claim, tolls the statute of limitations for filing court complaints during an administrative investigation.[254]

2. Anti-Retaliation Provisions

Lee and Smith found that 43% of anti-wage-theft laws attempted to strengthen retaliatory protections for workers.[255] Most of these do so through basic anti-retaliation provisions that prohibit retaliation against workers who either informally voiced wage-theft concerns, brought formal complaints against their employers, or otherwise assisted in the enforcement of anti-wage-theft laws by participating, for example, in an administrative investigation.[256]

Other anti-retaliation strategies, like Washington, D.C.'s, permit workers to file wage-theft complaints confidentially as a means of protecting them against retaliation.[257] Others establish a presumption of retaliation when employers take adverse actions against workers making a wage-theft complaint within a certain period of time, which then puts the burden on

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251. *Id.*

252. *See id.*

253. *See* N.H. REV. STAT. ANN. § 275:51(V) (2022) ("A wage claim may be filed by an employee . . . no later than 36 months from the date the wages were due.").

254. *See* MASS. GEN. LAWS ch. 149, § 150 (2022) (stating that for bringing a private action "the 3-year limitation period shall be tolled from the date that the employee or a similarly situated employee files a complaint with the attorney general").

255. *See* Lee & Smith, *supra* note 8, at 778–79.

256. *See id.* at 778 n.100 (listing various jurisdictions, including New York and Seattle, that have implemented anti-retaliation measures).

257. *See, e.g.*, D.C. CODE § 32-1306(a-1) (2023) (outlining the confidential nature of making a complaint so as not to invite retaliation by employers).

employers to prove a nonretaliatory reason for the action.[258] The city of Palo Alto, for example, applies this rebuttable presumption when employers take adverse actions against workers within ninety days of wage-theft complaints,[259] and San Mateo presumes retaliation for employers who terminate workers within 120 days of filing a wage-theft complaint. [260]

3. Creating Enhanced Penalties

By far the most popular anti-wage-theft strategy Lee and Smith recorded was the imposition of additional penalties when wage theft is committed.[261] This approach relies on the classic theory of deterrence: that harsher punishments will result in fewer violations.[262] As such, in addition to unpaid back wages, nearly half of these strategies increase monetary penalties for wage-theft offenders in the form of additional civil damages, government fines, and attorney's fees.[263] For example, Arizona's wage-payment law takes this, fairly straight-forward, approach, allowing workers to collect three-times the back wages owed in damages.[264]

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258. *See, e.g.*, PALO ALTO, CAL., MUNICIPAL CODE § 4.62.070(b) (2022).

259. *See id.*

260. *See* SAN MATEO, CAL., MUNICIPAL CODE § 5.92.050(d)(1) (2019).

261. *See* Lee & Smith, *supra* note 8, at 779–81 ("Just less than three-quarters (73%) of the laws examined authorize an administrative agency or court to impose penalties when it finds than an employer committed wage theft.").

262. *See* Juste Abramovite et al., *Classical Deterrence Theory Revisited: An Empirical Analysis of Police Force Areas in England and Wales*, 20 EUR. J. CRIMINOLOGY 1663, 1664 ("[Theorists of classical deterrence theory] believed that if punishment is severe, certain and swift, a rational individual will weigh potential gains and losses before engaging in illegal activity and will be discouraged from breaking the law if the loss is greater than the gain."); *see also* Lee & Smith, *supra* note 8, at 780 ("For willful violations by repeat offenders, some laws authorize the imposition of higher civil penalties.").

263. *See* Lee & Smith, *supra* note 8, at 780.

264. *See* ARIZ. REV. STAT. ANN. § 23-355 (2023). Other states, including Ohio, have taken a similar approach. *See* OHIO CONST. art. II, § 34a ("Damages shall be calculated as an additional two times the amount of the back wages . . . ."); Daniel Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and The Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 338 (2016) ("[A]n executive order waived the mandatory treble damages provision for first-time and 'procedural' violations in Ohio after February 2008.").

By contrast, Virginia's Wage Payment Act[265] ("VWPA") is indicative of how a more complex penalty enhancement strategy might look. Previously, the VWPA had permitted victims of wage theft to recover all wages owed, plus 8 percent prejudgment interest.[266] But in 2020, the law was amended to allow workers to recover the wages owed, plus liquidated damages in an amount equal to the wages owed, *and* reasonable attorney's fees and costs.[267] Moreover, if offenders are found to have "knowingly" failed to pay owed wages under the VWPA they pay a fine (not to exceed $1,000) to the Virginia State Treasurer, and workers can recover treble damages (three-times the back wages owed).[268]

Besides monetary penalties, wage theft laws have gotten creative with their enhanced penalty strategies. A number have experimented with what Lee and Smith call "Negative Publicity Penalties," which require offenders to report to the public that they have committed wage theft, either in notices posted at their place of business or on agency websites.[269] Other statutes now explicitly permit criminal penalties for wage theft.[270] And while criminal prosecutions for wage theft are still extremely rare, the availability of criminal charges does appear to promote meaningful plea agreements.[271] Lastly, other strategies have

265. VA. CODE ANN. § 40.1-29 (2023).

266. *See id.* § 40.1-29(G) (stating that employers will owe additional damages "plus interest at an annual rate of eight percent accruing from the date the wages were due").

267. *See id.* § 40.1-29(G), (J); *see also* Dallas Hammer & Katherine Krems, *Virginia Wage Payment Act Now Provides Meaningful Remedies to Wage Theft Victims*, NAT. L. REV. (Apr. 15, 2020), https://perma.cc/V2KV-CAV8 (noting the remedies available to wage-theft victims).

268. VA. CODE ANN. § 40.1-29(H), (J).

269. Lee & Smith, *supra* note 8, at 779–80.

270. *See, e.g.*, CONN. GEN. STAT. §§ 31-288, 31-69(a), 31-76(a) (2022); CAL. LAB. CODE § 218.5 (West 2023).

271. *See* Jeanne Kuang & Lil Kalish, *Though Wage Theft Is a Crime, Few California DAs File Charges for It*, CAL MATTERS, https://perma.cc/GEZ6-F25T (last updated Oct. 25, 2022) (finding a case where defendant believed a plea deal involving $1.6 million in restitution "was a 'safer route' than going to trial"); Scott Braddock, *First Reported Conviction Under Texas' New Wage Theft Law*, CONSTR. CITIZEN (Sept. 16, 2015), https://perma.cc/V3TF-BZV3 (reporting on a bill which allows for criminal prosecution of wage theft).

experimented with license revocation,[272] an important part of the deterrent proposal outlined below in Part IV. License revocation penalties authorize the non-issuance, suspension, or revocation of the license of an employer that commits wage theft.[273] These revocations, though, are mostly at the discretion of the agency responsible for issuing the license, and not the agency charged with investigating wage theft and enforcing wage payment compliance.[274]

4. Expanded Liability

Lee and Smith note that a small minority of anti-wage-theft laws contain strategies to expand the number of employers ultimately liable for unpaid wages.[275] These strategies are generally keyed to the challenges brought about by the fissured workplace.[276] By broadening the definition of an employer or allowing for employer successor and joint liability, they remove many of the incentives for subcontracting or decentralizing employment designations to avoid liability.[277] Moreover, these strategies may also ensure that workers who win their case will have someone to enforce a judgment against when sham businesses close, change their name, or disappear. Oregon state law does this by holding "[a]ny person who uses the services of a labor contractor . . . personally and jointly and severally liable" for the wages of the contractor's workers.[278] Likewise, in California, general contractors are liable for nonpayment of

272. *See, e.g.*, BERKELEY, CAL., MUNICIPAL CODE § 13.99.090(D) (2022) ("City agencies or departments may revoke or suspend any registration certificates, permits or licenses held or requested by the Employer until such time as the violation is remedied.").

273. *See, e.g.*, *id.*

274. *See, e.g.*, *id.*

275. *See* Lee & Smith, *supra* note 8, at 781–82 (finding a variety of strategies to expand the category of employers that can be liable by creating a broader definition of employer, creating successor liability, and allowing for joint and several liability).

276. *See* Weil, *Enforcing Labor Standards in Fissured Workplaces*, *supra* note 188, at 41–44 (finding that employment across a variety of industries has evolved by "shifting out the provision of work to other organisations").

277. *See id.* at 47 ("A reexamination of definitions of these questions—particularly under the Fair Labor Standards Act which includes a broad definition of 'employ'—is warranted.").

278. OR. REV. STAT. § 658.415(8) (2022).

wages by subcontractors, but not for additional penalties and liquidated damages.[279]

5. Information Requirements

Finally, half of the anti-wage-theft laws Lee and Smith examined regulated information requirements of employers' wage and hour payment obligations.[280] Of these laws, slightly fewer than half require employers to periodically disclose to workers their specific rates of pay, hours worked, and instructions on how to file a complaint if pay information is incorrect.[281] A small percent of these also entrust agencies with collecting this employer information on a periodic basis.[282] Other informational efforts do not require periodic distribution of information but create or enhance employers' recordkeeping requirements—thus placing the burden of preserving evidence of proper payment on employers when disputes arise.[283]

Another fifth of the informational strategies require employers to display a poster at the worksite about the rights of workers under the anti-wage-theft laws.[284] Other, less frequently used, informational strategies direct state and local agencies to educate workers on wage payment obligations in some other organized form, and even a smaller percentage of strategies utilized have required educational directives for employers.[285] Regulating information disclosures are another important component of the contract-based strategy taken up in

279. *See* CAL. LAB. CODE § 218.7(2) (West 2022).

280. *See* Lee & Smith, *supra* note 8, at 782 (characterizing these regulations as being "an effort to increase awareness about wage and hour laws or to enhance transparency regarding an employer's payment of wages").

281. *See id.* ("Less than a quarter (23%) of these disclosures require employers to make *extensive* mandatory disclosures directly to workers at the time of hire." (emphasis added)).

282. *See id.*

283. *See id.*

284. *See id.*; *see, e.g.*, N.Y. LAB. LAW § 195.1 (McKinney 2023) (mandating employers to provide extensive information related to an employee's wages directly to the employee "in writing in English and in the language identified by each employee as the primary language of such employee").

285. *See* Lee & Smith, *supra* note 8, at 801 ("The idea behind this strategy is that it can protect the recipients of the information to make better and more informed choices, while making those who disclose behave more honestly and diligently.").

Part III. But an important distinction between contract-based strategies and other generic informational disclosures is that contract-based strategies link additional disclosure obligations to an expressed goal (determining contract eligibility) or desired behavior.[286]

B. *Limitations of Common Wage-Theft Strategies*

That states and localities have successfully enacted a variety of anti-wage-theft laws over the past fifteen years is promising—especially because the concept of "wage theft" is not much older than that.[287] Unlike federal wage laws, politics does not appear to stand in the way of reform.[288] Or, rather, the local efforts of "alt-labor" and other community groups have just proven more persuasive at the state and local levels than other political forces.[289] While some of these state and local initiatives have indeed been impactful enforcement gap-fillers to the FLSA, in two significant ways they merely repeat the federal law's mistakes—such that wage-theft offenders fall through two layers (or three) of government response, instead of one.[290]

Like the FLSA, all of the common anti-wage-theft strategies identified in the subpart above—(1) facilitating worker complaints, (2) strengthening anti-retaliation provisions, (3) creating or enhancing penalties, (4) expanding employer liability, and (5) regulating information—either rely too heavily on individual worker complaints to trigger enforcement, ignore

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286. *See infra* Part III.

287. *See* Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 72 (2016) (explaining that "wage theft" is a relatively new term).

288. *See* Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPS. ON POL. 324, 335 (2016) ("[P]olicy campaigns, in turn, have been politically generative for the broader workers' rights movement—indeed, they have contributed to the development of alt-labor, which some have called the 'new face of the labor movement.'").

289. *See id.* at 335–36.

290. *See id.* at 328 ("What has been missed is that in the U.S. federal system, two layers of laws and agencies simultaneously enforce wage and hour standards at the federal and state levels."); *see also* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 108–09 (explaining that wage theft laws have failed to deter employers even though workers can recover damages under federal and state law).

employers' economic calculus in compliance decision making, or both.[291]

Anti-wage-theft strategies that enhance penalties or extend liability often fail to get off the ground because they are premised on individual workers initiating complaints. As previously discussed, individual workers—especially vulnerable ones—do not bring many wage-theft complaints against their employers for a variety of reasons.[292] For most, it is just too hard or too risky to pursue while lacking financial resources, information, or the high stakes necessary to hire a contingency-fee-based lawyer.[293]

Facilitating individual complaints by authorizing an administrative route to recover back wages has done little to remove these barriers.[294] The same nonlegal barriers preventing claimants from traversing through the courts also prevent them from filing administrative complaints.[295] While a well-resourced agency that performs regular inspections of wage payment procedures without being triggered by a complaint may work to combat wage theft in theory, none of the existing strategies at the state and local levels have invested the necessary resources required for doing so.[296]

Anti-retaliation laws and informational strategies are not completely unresponsive to the barriers preventing workers from bringing formal complaints.[297] But these strategies only address one of many barriers to bringing complaints, and they

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291. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 97, 104–05 (explaining that wage theft laws fail to disincentivize employers from continuing to commit wage theft because the probability of being caught for wage theft is very low).

292. *See id.*

293. *See id.* at 105–07 (discussing the many obstacles that workers face after filing wage-theft complaints, including navigating the process pro se, paying attorneys, and risking termination or retaliation).

294. *See id.* at 106 (explaining that most administrative complaints "sit in lengthy queues, or worse, go uninvestigated altogether" due to staff shortages and lack of funding).

295. *See supra* notes 83–85 and accompanying text.

296. *See* Lee & Smith, *supra* note 8, at 794–95 (observing that inspections may change employer behavior, but agencies lack resources to adequately enforce anti-wage-theft strategies).

297. *See id.* at 778–79, 782–83 (describing approaches employed by anti-retaliation laws and informational strategies to alleviate barriers preventing workers from filing complaints).

do so through remedial mechanisms not accessible to the workers not bringing complaints.[298] For instance, workplace disclosures may remove some of the informational barriers because workers now know their rights and how to enforce them by filing complaints.[299] But who will enforce these informational requirements on the front end, and how, when employers do not provide the information necessary for workers to pursue on enforcement? Likewise, while anti-retaliation provisions may provide a back-end remedy to lessen the economic consequences of employer retaliation, this remedy only happens after workers are able to overcome resource and informational barriers, and formalize and win their complaints.[300] They do little to address the silencing fear many workers feel regarding surviving the immediate financial consequences of retaliation.[301] So, like additional penalties and party liability, retaliation provisions and informational disclosures without their own enforcement mechanisms are keyed to the back end of legal rights pursuits.

Arguably, one additional penalty for wage theft, the assessment of attorneys' fees and costs, is effectively keyed to the front-end barriers preventing individual complaints. Laws that permit the recovery of high hourly rates alleviate informational and resource barriers by incentivizing attorneys to take on wage-theft cases and assist with filing individual complaints—even when the amount in controversy is small, or workers lack the financial resources to pay an attorney upfront.[302] But these too are limited in their effectiveness as

298. *See id.* at 770–71 (discussing reasons that employees often decline to bring complaints).

299. *See id.* at 782 (explaining that information strategies "regulate information in an effort to increase awareness about wage and hour laws").

300. *See id.* at 778 (explaining that anti-retaliation laws "create or strengthen protections for workers or others who take action against wage theft").

301. *See id.* at 792 ("[T]he anti-retaliation prohibitions generally fail to directly address anticipatory retaliation. Rather, they purport to protect an employee from retaliation once the worker has already taken certain steps to enforce their wage-related rights.").

302. *See* Hallet, *The Problem of Wage Theft*, *supra* note 26, at 105 (explaining that plaintiffs' employment lawyers generally prefer cases where they are likely to receive large attorney's fees awards); *see also, e.g.*, D.C. CODE §§ 32-1308(b)(1), 32-1308.01(m)(1) (2017) (providing that successful wage-theft plaintiffs' attorneys are entitled to fees calculated pursuant to the Laffey Matrix); *Laffey Matrix*, LAFFEYMATRIX.COM, https://perma.cc/LZ9J-

private attorneys cannot recover fees and will not take cases when offending employers have few assets to collect fees and costs from.[303]

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The most common anti-wage-theft efforts increase financial penalties for committing wage theft based on the basic economic deterrence theory that harsher financial penalties for noncompliance will deter wage-theft behavior.[304] And this strategy may indeed deter other undesirable behaviors in the workplace that do not, in and of themselves, come with perceived financial benefits, such as sexual harassment.[305] But with wage theft, the penalties of legal noncompliance do not deter behavior on their own because they are only half of the economic equation performed by offending employers.[306] Before increased penalties can be perceived as a financial deterrence to wage theft, these penalties (or costs) must be perceived to outweigh the profits (or benefits) of committing wage theft.[307] Because the benefits of committing wage theft are immediate profits, and the costs are legal penalties that have been discounted by the miniscule probability of enforcement, even employers in the most highly-investigated industries will rationally expect the benefits of noncompliance to vastly outweigh the potential costs.[308]

2HX5 (last visited Nov. 16, 2023) (detailing an hourly fee schedule under which an attorney with twenty years of experience who represents workers in a wage-theft case has a statutory rate of about $920 per hour).

303. See the discussion on "labor brokers" in Part I.B.2.

304. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 108–09 (explaining that anti-wage-theft laws impose penalties in order to deter employers from violating the laws); *see also* Lee & Smith, *supra* note 8, at 762 (identifying enhanced penalties as a common strategy utilized by anti-wage-theft laws).

305. *See* Joni Hersch, *Efficient Deterrence of Workplace Sexual Harassment*, 2019 U. CHI. LEGAL F. 147, 169 (2019) (suggesting that penalties may effectively deter workplace sexual harassment).

306. *See* Weil, Compliance with the Minimum Wage, *supra* note 222, at 3–4, 9–10 (describing cost-benefit analysis in which employers weigh benefits of noncompliance against cost of compliance and probability of being caught).

307. *See* Stansbury, *supra* note 227, at 2 ("A purely profit-maximizing firm makes a simple calculus: comply if the expected costs of noncompliance outweigh the profits that can be made through noncompliance.").

308. *See id.* ("The penalties companies can expect to pay if they are caught . . . are often relatively small compared to the profits that can be

In theory, regulatory schemes should be able to manipulate both the amount of penalties and the enforcement rates.[309] But here, again, is where wage theft presents unique challenges.[310] Employers operate on such vastly different scales that there is no universal deterrence rate.[311] Likewise, industries, as well as worker characteristics, may enhance or diminish the probability of detection—making universal deterrence rates improbable.[312] Speaking of employer differences, increased penalties have little influence on wage-theft offenders who, in today's fast-moving and layered economy, are employers in name only and never intend to be in business long enough to pay financial penalties.[313] These employers are common wage-theft offenders—despite them performing much more short-sighted economic analyses and giving immediate benefits significant weight that penalty enhancements do not address.[314]

Finally, both anti-wage-theft laws premised on individual complaints and assessing penalties for aggrieved workers illustrate a more general critique of these regulatory schemes. These efforts oversimplify the wage-theft harm as being only individual and leave no remedy for the societal costs resulting from the behavior.[315] Although many workplace laws promote important public policy goals *and* involve a private enforcement component, wage theft is a unique kind of public harm that private enforcement and assessed penalties to individual victims does not address.[316] These remedial structures make no

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earned through noncompliance—particularly when weighed against a small probability of detection of the violation for many firms.").

309. *See* Galvin, *supra* note 288, at 325.

310. *See* Lee & Smith, *supra* note 8, at 762–63 (addressing shortcomings of existing anti-wage-theft laws).

311. *See* MATTERA, *supra* note 117, at 13 (demonstrating diversity of employees and industries involved in wage-theft lawsuits).

312. *See* Stansbury, *supra* note 227, at 20 (explaining that employers with small numbers of workers, many vulnerable or dependent, and high-turnover industries face lower risk of detection).

313. *See* Stansbury, *supra* note 227, at 20 (stating that detection is substantially less likely for employers in high-turnover industries that may quickly go out of business).

314. *See supra* Part I.B–C.

315. *See* Fritz-Mauer, *supra* note 27, at 745, 747.

316. *See id.* at 745 (explaining that wage theft "trap[s] families in the vicious cycle of poverty" and "denies billions in revenue to the government").

restitution for the lost tax revenue and community resources this revenue could fund, or the increased strains on social welfare programs brought about by wage theft.[317] Private and administrative actions are simply inadequate remedies for behaviors like wage theft where the structural harm is felt both individually and collectively.[318] Fortunately, there are other ways for governments to exercise influence on private employer behavior, protect the public interests, and safeguard public funds and initiatives.[319] Public or private, money is power—and Part III displays this form of government spending power in action.

III. THE PURCHASING POWER PRESCRIPTION

As Part II discussed, regulatory strategies premised on workers' complaints—even when paired with stiff penalties—have not eradicated the wage-theft problem. Workers do not bring formalized complaints at rates such that the penalties for wage theft outweigh its profits for some employers.[320] This recognition of penalties and existing enforcement schemes as not incentivizing compliance does not indict all employers as being guilty of wage theft, or even as solely motivated by profits.[321] Rather, it recognizes that various factors (profits being one) play a role in employers' legal compliance decisions—factors in addition to legal mandates and the financial penalties imposed for their violations.[322] To this end, combatting wage theft requires the use of numerous

317. *See id.* at 747 (asserting that lost government revenue resulting from wage theft affects society by taking away unemployment insurance and workers' compensation funds from American workers).

318. *See id.* at 743 ("[W]age theft is a social problem that cannot be meaningfully remedied through an enforcement scheme that emphasizes private causes of action and passive, complaint-based administrative processes." (emphasis omitted)).

319. *See infra* Part III.

320. *See* Stansbury, *supra* note 227, at 2 (explaining that the penalties for violating anti-wage-theft laws are often small in comparison to profits made through noncompliance).

321. *See* Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 L. & SOC'Y REV. 41, 41–42 (2004) (describing employers' various motivations, such as fear of detection, and social pressures, contributing to employer's decisions to comply with wage theft laws).

322. *See id.*

government tools to influence as many factors relevant in employer decision-making as possible.[323] These efforts should be viewed as supplemental to existing wage payment laws and crafted to induce broader societal commitment to their underlying purposes—not as replacements to them.

One supplemental regulatory effort is to make compliance with wage payment laws a requirement for government contracting or other public-business benefits.[324] These contract-based strategies impact employers' cost-benefit evaluations by making the cost of noncompliance a loss of potential profits and the reputational harm generated by being publicly labeled as ineligible partners in promoting the public good.[325]

Recall from the previous section Pennsylvania Attorney General Shapiro's multimillion dollar recovery of unpaid wages and benefits from one of the state's largest construction contractors, Glenn O. Hawbaker, Inc.[326] This story, however, did not end there. After the Attorney General's investigation determined Hawbaker's wage-payment violations, Pennsylvania's Department of Transportation ("PennDOT") tried to bar the company from future PennDOT contracts based on a generic provision in the state's highway construction law that highway contracts be awarded only to "competent and responsible bidders."[327] This bar was short-lived, though, as a court enjoined PennDOT from barring the company from

323. *See id.* at 43 ("The traditional toolkit for obtaining compliance is through enforcement actions and imposition of sanctions for those found to be out of compliance. . . . A different perspective about regulation and compliance is provided by thinking about regulation as a social contract.").

324. *See infra* Part III.A.

325. *See* Stansbury, *supra* note 227, at 4 ("[A] profit-maximizing company will comply with a law if the expected costs of non-compliance, if a violation is detected, exceed the expected extra profits the company can make if it does not comply.").

326. *See supra* Part I.C.

327. 67 PA. CODE § 457.13 (2023); *see* Glenn O. Hawbaker, Inc. v. Dep't of Transp., No. 138 M.D. 2021, 2021 Pa. Commw. Unpub. LEXIS 694, at *16 (Commw. Ct. June 30, 2021) [hereinafter *Hawbaker I*] (summarizing that PennDOT supported its suspension of Hawbaker's contract, after Hawbaker was charged with criminal conduct, under statutory authority to "establish and maintain a system to qualify 'competent and responsible bidders'" (quoting 36 PA. CONS. STAT. § 670-404.1)).

bidding on future contracts.[328] After Hawbaker entered into a plea nolo contendere with the Attorney General's Office, PennDOT renewed its efforts to suspend Hawbaker's contract.[329] The court again enjoined PennDOT—noting that nowhere in Pennsylvania's construction law or implementing regulations does it say that a prevailing wage investigation and subsequent agreement to plea nolo contendere and pay back wages owed designates a contractor irresponsible.[330] Moreover, the court noted that wage-theft enforcement is the duty of the state's Department of Labor and Industry—not PennDOT.[331] In other words, the agency responsible for procuring state highway contracts did not have explicit statutory authority to bar contractors based on their egregious or repeated instances of wage theft, and the agency responsible for proscribing the penalties for wage theft did not have the interest or the resources to debar a contractor they have no business relationship with.[332] The Pennsylvania Supreme Court ultimately overturned the lower courts' decisions, but while the issue was on appeal Hawbaker continued to bid on *and win* public contracts—securing an $11 million dollar contract for bridge work just days after its ban was lifted by the lower court.[333]

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328. *See Hawbaker I*, 2021 Pa. Commw. Unpub. LEXIS 694, at *40.

329. *See* Glenn O. Hawbaker, Inc. v. Dep't of Transp., No. 138 M.D. 2021, 2022 WL 1592589, at *3–4 (Commw. Ct. Jan. 19, 2022).

330. *See id.* at *9.

331. *See id.* at *8.

332. *See id.* at *5 (noting that Hawbaker bid on 19 PennDOT projects during the three months after its attempted bar and was the low bidder on 3 of those projects, resulting in an award by DOT of contracts with a combined value in excess of $15 million); *see also* Glenn O. Hawbaker, Inc. v. Dep't of Transp., No. 138 M.D. 2021, 2023 WL 367587, at *4 (Pa. Commw. Ct. Jan. 24, 2023) [hereinafter *Hawbaker III*] (reviewing PennDOT's preliminary objections to Hawbaker's amended petition for review and concluding "that it is not clear and free from doubt that . . . PennDOT has administrative jurisdiction over . . . debarment proceedings").

333. *See* Glenn O. Hawbaker, Inc. v. Dep't of Transp., No. 20 MAP 2022, 2023 WL 8101752, at *16 (Pa. Nov. 22, 2023) (holding that Hawbaker was not entitled to injunctive relief and PennDot had the authority to administer its adjudicatory proceedings); *see also* Dennis Owens, *PennDOT Moves to Suspend Prominent Pa. Construction Company from State Work*, ABC27.COM (Sept. 8, 2021, 5:39 PM), https://perma.cc/RSR6-SBRS (last updated Sept. 8, 2021, 6:33 PM) (reporting on the execution of Hawbaker's $11 million contract for bridge work).

For Shapiro, now the governor, the answer as to whether Hawbaker *should* be suspended from state contracts was obvious.[334] But just who had the authority to suspend contractors who commit wage theft, and the administrative specifics of suspension, were less clear, thus necessitating a lengthy appeal.[335] Had the statutory language explicitly addressed wage-theft offenders' eligibility for public contracts beyond undefined "responsible contracting" provisions, litigation might have been avoided and Hawbaker would not have been able to win state contracts while its case was pending on appeal. Perhaps even this clarity would have made the company more committed to wage-payment compliance in the first place, and the over $20 million in wage theft would have never happened.[336] And, had Hawbaker's stronger commitment to compliance led to higher project bids, several lucrative state contracts may have been awarded to its compliant competitors.

If companies like Hawbaker securing new government contracts are the problem, the following subparts provide a solution. This part describes, in some detail, how laws limiting future contractual dealings with the government based on past employer behavior can prevent future instances of wage theft. It begins with an example, Columbus, Ohio's 2020 Wage Theft Ordinance.[337] Next it discusses past contract-based government spending initiatives to promote workplace conduct and standards. After this historical backdrop, the piece returns to the Columbus Ordinance, examines its legal foundation and its practical efficacy, and makes predictions for the future.

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334. *See* Zachary Phillips, *Pennsylvania Contractor Charged with Stealing $20M from Employees*, CONSTRUCTIONDIVE (April 13, 2021), https://perma.cc/89Q7-8NDS (reporting on Shapiro's belief that Hawbaker broke the law and determination to hold the company accountable).

335. *See Hawbaker III*, 2023 WL 367587, at *4 (expressing uncertainty over whether PennDOT had power to handle prevailing wage disputes).

336. *See supra* note 231 and accompanying text.

337. COLUMBUS, OHIO, ORDINANCES ch. 377 (2020); *see also* Matt Jaworski, *Unions Get Columbus, Ohio, City Council to Penalize Wage Theft*, PEOPLE'S WORLD (Oct. 20, 2020), https://perma.cc/TTW5-AUBY (explaining that Columbus Ordinance bars city from awarding contracts to violators of anti-wage-theft ordinance).

A. *Columbus, Ohio's Wage Theft Ordinance—A Contract-Based Wage-Theft Strategy*

In 2020, the city of Columbus, Ohio followed in the footsteps of cities before it and enacted a contract-based approach to curbing wage theft.[338] Columbus's Wage Theft Prevention and Enforcement Ordinance prohibits any covered entity who commits wage theft or payroll fraud, or who violates any of the Ordinance's disclosure obligations, from entering into business relationships with the city for a period of three years.[339] Broad in coverage and relational scope, the Ordinance applies to contractors, subcontractors of contractors, and subcontractors of higher-tiered subcontractors.[340] Moreover, the bar applies to (1) all city contracts for goods and services, (2) any business that registers with the city as a vendor to the city, and (3) all "financial incentive agreements" with the city, including tax incentives, tax abatements, tax credits, and other financial incentives, and commercial loans or grants or land conveyances for less than fair market value.[341]

The Ordinance defines "wage theft" as a violation of the various state wage and hour laws—including the Ohio Prompt Pay Statute,[342] the Ohio Minimum Fair Wage Standards Act,[343] Ohio's Minimum Wage Constitutional Amendment[344]—as well as a violation of any existing municipal ordinance, law of another state, or law of the United States that is "substantially equivalent" to any of the aforementioned Ohio statutes.[345] "Payroll fraud" is defined as concealing an entity's true tax liability or other financial liability to a government agency.[346] It includes, but is not limited to, misclassification of employees, failure to report or underreported payment of wages, or

338. *See* COLUMBUS, OHIO, ORDINANCES § 377.03.
339. *See id.* §§ 377.01(a)(1), 377.03(d)(5).
340. *See id.* § 377.01(e).
341. *Id.*
342. OHIO REV. CODE ANN.§ 4113.61 (West 2023).
343. *Id.* §§ 4111.01–4111.99.
344. OHIO CONST. art. II, § 34a.
345. COLUMBUS, OHIO, ORDINANCES § 377.01(j) (2020).
346. *Id.* § 377.01(h).

executing a cash transaction while failing to maintain proper records of reporting and withholdings.[347]

"Violations" under the Ordinance include final court orders, administrative decisions, arbitration awards, and any determination by the Wage Theft Prevention and Enforcement Commission ("Commission") that the Ordinance's informational disclosures or record keeping requirements are violated.[348] Together, these violations, along with the Commission's findings of disclosure obligation violations, are referred to in the Ordinance as "adverse determinations."[349]

1. Disclosure Obligations

Columbus's Wage Theft Prevention and Enforcement Ordinance requires entities interested in fiscal relationships with the city to make extensive information disclosures at the onset of the contract bidding process.[350] Failure to comply with its disclosure obligations makes a covered entity ineligible for the contract, benefit, or other financial relationships with the city.[351] Section 377.03 of the Ordinance details the covered entities pre-contract disclosure obligations.[352] Entities must disclose any "adverse determinations" as defined by the Ordinance within the past three years.[353] The primary contractor is also responsible for making these adverse determination disclosures for any subcontractor performing

347. *Id.*

348. *Id.* § 377.01(a).

349. *Id.*; *see id.* (establishing that an "adverse determination" also includes a covered entity's violation of obligations under sections 377.04, 377.05, 377.06, 377.07, 377.08, 377.09, or 377.10 of the City Code); *see also id.* §§ 377.01(a)(2), 377.01(a)(1)(A) (providing that an appealed adverse determination does not take effect until the initial determination is confirmed or the appeal is denied and that a settlement agreement entered into by the covered entity does not constitute an adverse determination).

350. *See id.* § 377.05.

351. *See id.* §§ 377.05(c), 377.03(e) (providing that covered entities that fail to comply with reporting obligations are placed on an adverse determination list, which makes entities ineligible to enter into any financial incentive agreement or contract with the city for three years).

352. *Id.* § 377.05.

353. *Id.* § 377.03(a).

work related to the contract.[354] If a covered entity's bid uses independent contractors to perform city contract work, the entity must also disclose its intent to do so during the bidding process, as well as information relating to the use of independent contractors—including a description of the work those independent contractors will perform, the rate and frequency of pay, and the duration of the work or services.[355] For comparison to the number of independent contractors, the covered entity must also provide the number of employees it employs and specify any crossover in duties with the independent contractor.[356] Independent contractor disclosures also apply to all subcontractors.[357] Likewise, prospective covered entities must disclose any de facto mergers, affiliate businesses or successorships to ensure that they are not part of a single, integrated enterprise nor an "alter ego" of another employer entity.[358] Entity ownership must be disclosed as well as past, legal names.[359]

If awarded the public work or benefit, the covered entity takes on continued disclosure and record keeping obligations under the Ordinance.[360] During the life of the contract or benefit, the entity has a continued duty to disclose of any new adverse determinations it or its (sub)contractors receive, as proscribed under the Ordinance.[361] To assist with this obligation, covered entities agree to include in their solicitations, agreements, contracts, and subcontracts a notice setting forth the adverse determination reporting requirements.[362] Entities also agree to

354. *See id.* § 377.03(a) ("A person that intends to . . . become a covered entity . . . shall. . . disclose . . . any adverse determination against the person, a predecessor of the person, or an affiliate of the person during the preceding three (3) years.").

355. *Id.* § 377.10(a)(2)(a)–(c).

356. *Id.* § 377.10(a).

357. *See id.* § 377.10(b).

358. *Id.* § 377.03(c)–(d).

359. *Id.* § 377.03(d).

360. *See id.* § 377.05 (describing continuing obligations of covered entities).

361. *See id.* § 377.05(b) (requiring entities to report any adverse determinations no later than thirty days from learning of the determination).

362. *See id.* § 377.09(a) (requiring entities to give notice in all business dealings that they are bound by the Wage Theft Prevention and Enforcement Chapter and are obligated to report to the Commission any noncompliance issues).

post notices at all public work locations and job sites, stating that the job location or development site is subject to the Ordinance.[363]

If independent contractors or subcontractors not conceived of during the bid are subsequently used, entities must supplement their pre-award disclosures within twenty-one days of the date the supplemental independent contractor commences work.[364] Additionally, covered entities and their subcontractors must maintain detailed payroll records during the entire life of the contract or agreement, and be able to produce these records within fourteen days upon city request.[365] There are no continued certifications or requirements for entities unless their circumstances change, as described above—meaning payroll records are not maintained or monitored on a scheduled basis.[366]

2. Ineligibility Sanctions for Wage-Theft Offenders

The substance of the Columbus Ordinance is that it disadvantages past offenders of applicable wage theft laws in contract bidding and provides financial incentives for compliance. Covered entities with an adverse determination are presumptively ineligible to receive city financial incentives or city contracts, or to perform any work on or related to a city contract as a subcontractor.[367] To meet due process obligations, covered entities are notified of their ineligibility,[368] their rights

363. *See id.* § 377.09(c) (error in original, providing two versions of § 377.09(c); referring to the second § 377.09(c)) (requiring entities to post "a conspicuous notice at all covered locations and development sites indicating that the location or development site is subject to this Chapter" through the entire construction project).

364. *See id.* § 377.10(c) ("All reports required under this section shall be provided to the Commission no later than twenty one (21) days following the date on which the independent contractor commences work on behalf of the covered entity.").

365. *See id.* § 377.07(a).

366. *See id.* (noting that covered entities must only provide wage records upon request).

367. *See id.* The Adverse Determination List also serves to enable contractors to certify that they are not using subcontractors with adverse determinations, as required by § 377.05(a)(3).

368. *See id.* § 377.02(i) ("The Commission shall provide written notice of its findings of facts and conclusions of law and any recommended penalties

to appeal this decision,[369] and their renewed eligibility date should no additional violations be assessed and no appeal filed.[370] If no appeal is filed, an entity is barred for a nondiscretionary period of three years, and their name appears on a public list of ineligible contractors and beneficiaries, an "Adverse Determination List."[371] The list is available for public reference should an entity be unaware of its status or the status of a potential subcontractor.[372] With these maintained exclusions, the city rewards law-abiding employers with a fairer and more competitive bidding pool.

In addition to pre-award disqualifications, the Ordinance provides for various other remedies—up to and including unilateral termination of the services or goods contract or financial-benefit agreement.[373] As a condition of continuing an active contract, the city may require that contractor-employers pay all of their past victims of wage theft and payroll fraud in full.[374] It can also require monthly payroll reports for the duration of the contract or require a posting of a bond or other

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and remedies for any adverse determination based on a violation of [a section of this chapter] of the city code."); *Id*. § 377.02(h)(3) ("The commission shall determine, based on all of the information presented, if a violation of . . . the city code has occurred.").

369. *See id.* § 377.02(h)(3)(2) ("A covered entity may appeal to the Franklin County Court of Common Pleas . . . ."); *id*. § 377.03(d)(4) (noting a final decision by the Commission may be appealed).

370. *See id.* § 377.03(e) (noting ineligibility lasts three years from the most recent adverse determination).

371. *See id.* ("A covered entity that is listed by the Commission on the adverse determination list is ineligible to enter into any financial incentive agreement with the City . . . for three (3) years from the date of the most recent adverse determination against the covered entity.").

372. *See id*. § 377.02(j) ("The Commission shall publish and update the adverse determination list . . . ."); *see also Wage Theft Prevention and Enforcement*, CITY OF COLUMBUS, https://perma.cc/9Z4X-J724 (last visited Nov. 18, 2023) (linking the most recent Adverse Determination List).

373. *See* COLUMBUS, OHIO, ORDINANCES § 377.12(b) (2020) (allowing the Commission to recommend to the City Attorney legal remedies such as unilateral termination or modification of the agreement, recapture of benefits, loss of low interest rate commercial loan benefits, requiring a bond to be posted, and permanent debarment from city contracts).

374. *See id.* § 377.12(b)(7) ("[T]he City may impose a stop work order until all victims of wage theft and payroll fraud have been paid in full and there is full compliance with the terms of this Chapter . . . .").

insurance equal to one year of gross wages.[375] Moreover, in the case of financial incentive agreements, the city can reduce future tax abatements, recapture subsidies, cancel low-interest rates on loans, and suspend or revoke grant funds—either entirely or until conditions are met.[376]

Although these remedies and the Adverse Determination List's corresponding three-year ban are meant to prioritize law-abiding employers when awarding city work and benefits, entities included on the list or assessed a penalty during contract performance are not without recourse. They may appeal their inclusion on the list in state court or submit a one-time waiver request form to the Wage Theft Prevention and Enforcement Commission itself.[377] Moreover, for special circumstances, such as a limited amount of service providers or cost-prohibitive changes to an already-established provider, a city department may request a waiver of a contractor's inclusion on the Adverse Determination List and thus the contractor's three-year ban.[378]

3. Commission's Creation and Tasks

To regulate and enforce its provisions, the Ordinance creates the Wage Theft Prevention and Enforcement Commission.[379] Among other duties, the Commission is responsible for publishing the monthly Adverse Determination List, reviewing one-time entity waivers, and hearing complaints from Columbus residents, workers, and other businesses regarding an entity's suspected noncompliance with the Ordinance.[380]

The Commission ensures that the Ordinance's disclosure obligations and continuing obligations are met—but this is not

375. *See id.* § 377.12(b)(6).

376. *See id.* § 377.12(b)(1)–(4).

377. *See id.* § 377.02(h)(3)(2) (allowing an appeal to the Franklin County Court of Common Pleas); *id.* § 377.02(r) (allowing the Commission to grant a waiver by a supermajority vote from the Commission).

378. *See id.* § 377.02(t) (allowing a city department to request a waiver from the Commission for a covered entity that would "result in serious disruption to the efficient and orderly operations of the City or the covered entity is a sole source provider of goods").

379. *See id.* § 377.02(a).

380. *See id.*

just a mere formality. The Commission is empowered to scrutinize these disclosures and spot common structural and hiring practices that may indicate violations or require further information or monitoring.[381] Moreover, the Commission may approve settlement agreements when a covered entity has violated its obligations but has taken reasonable action to cure, remedy, or correct this violation.[382] But it may also, in specific instances, assign an "adverse determination" and subsequent ban on entities that refuse to provide required disclosures, or cure mistakes.[383] Importantly, to facilitate the Commission in discharging its duties, the Commission is granted a direct line of access to other agencies or investigative bodies investigating complaints of wage theft and payroll fraud.[384] For instance, as a condition of the city contract or benefit, covered entities must agree to authorize any of these agencies and investigative bodies to furnish copies of findings, determinations, and relevant documents to the Commission upon request.[385] Thus, the federal agency tasked with investigating wage-theft complaints, the

381. *See* § 377.03(a)–(c) (granting the Commission authority to review contractor and subcontractor relationships for city projects); *see also id.* § 377.02(g) (requiring the Commission to conduct investigations after receiving an official complaint).

382. *See id.* § 377.02(a). A covered entity must authorize that these findings, determinations, and relevant documents be provided to the Commission upon request. *See id.* § 377.07(a).

383. *See, e.g.*, *id.* § 377.07(b) ("[F]ailing to provide requested [payroll] records in a timely manner shall constitute an adverse determination and shall result in the covered entity being placed upon the adverse determination list."); *see also id.* § 377.11(a)(3) (empowering the Commission to develop rules and regulations "for imposing sanctions and levying penalties for failing to timely submit reports and sworn statements required by this Chapter").

384. *See id.* § 377.02(*l*) ("The Commission may contract with a qualified non-for-profit organization to assist with investigations and education programs."); *id.* § 377.02(s) ("If the Commission, in the course of performing its duties, discovers evidence or receives a complaint that a person has committed wage theft or payroll fraud, the Commission may refer the matter to the United States Department of Labor, the Ohio Department of Commerce, or any other appropriate entity for further investigation."); *id.* § 377.08(a) ("A covered entity is required to authorize any agency or other investigative body investigating a complaint of wage theft or payroll fraud to release to the Commission any and all related evidence, findings, complaints and determinations . . . .").

385. *See id.* § 377.08(a) (requiring covered entities to release any and all related evidence except evidence that is "privileged or confidential and that [is] subject to public disclosure . . . .").

DOL, could divert complaints it receives against city contractors to the Commission for review.[386]

The Commission is carefully comprised of five appointed, community-member volunteers and the procedures by which it conducts its work are outlined and made public in its bylaws.[387] To balance unique concerns and ensure the committee has a diversity of views and the expertise required to assess adverse determinations and wage-theft complaints, two Commission members are chosen by the mayor's office, two are selected by the city council, and one member is chosen by the other four appointed Commissioners.[388] Commissioners are volunteers and must disclose potential conflicts of interest with respect to matters before the Commission and complete the ethics training and attestations required of any Columbus city official.[389] To encourage legitimacy, Commission meetings and hearings are open to the public, and the Commission's findings of facts and conclusions of law must be in writing.[390] Commission rules or regulations must be promulgated in accordance with the Commission's authority under the Wage Theft Prevention and Enforcement Ordinance, the city's filing and publication rules, and the Commission's bylaws.[391]

386. *See id.* § 377.08(a).

387. *See id.* § 377.02(b)–(e). Initial Commissioners are appointed for staggered terms. *Id.* § 377.02(d). Thereafter, each member shall be appointed for a term of three years. *Id.*

388. *See id.* § 377.02(c).

389. *See* CITY OF COLUMBUS, THE BYLAWS OF THE WAGE THEFT PREVENTION AND ENFORCEMENT COMMISSION art. IV, § 3 ("Each Commission member has a duty to disclose potential conflicts of interest with respect to matters before the Commission."); *id.* art. II, § 1 ("The Commission shall consist of five volunteer members . . . . Commission Members shall complete an Ethics Law training from the Ohio Ethics Commission within 12 months of appointment.").

390. *See* COLUMBUS, OHIO, ORDINANCES § 377.02(e) (2020); *id.* § 377.02(i).

391. *See id.* § 377.11(b) ("The adoption and promulgation of any rules or regulations by the Commission shall comply with the [relevant] provisions of [the Columbus Ordinances]."); *id.* § 121.05 (listing Columbus's rules for rule promulgation); CITY OF COLUMBUS, *supra* note 389, art. X, § 1 ("The Commission has the authority to promulgate Rules and Regulations, in accordance with § 377.11, to carry out its duties as provided in Chapter 377.").

B. *Other Contract-Based Strategies Impacting the Workplace*

Many government contracting procedures already promote workplace standards by linking contracting decisions to other policy objectives.[392] Obviously, considering its size, federal government contracting has the largest reach.[393] These contracting initiatives have a rich history of addressing discrimination as well as other workplace policy concerns through statute and administrative action.[394]

1. Federal Contracting Efforts to Promote Workplace Standards

The federal government's use of contracting to promote workplace standards is not a new practice. President Hoover signed into law the Davis-Bacon Act, setting a prevailing wage for public-construction-project workers during the Great Depression, and a similar prevailing wage law for service contractors shortly followed.[395] Both prevailing wage laws establish payroll and other recordkeeping obligations for

392. The Davis-Bacon Act of 1931 being one of these examples. Pub. L. No. 71-798, 46 Stat. 1494 (codified as amended in 40 U.S.C. §§ 3141–3148). The Act established the requirement for paying the local prevailing wages on public works projects. *See* 40 U.S.C. §§ 3141–3142.

393. *See A Snapshot of Government-Wide Contracting for FY 2021 (Interactive Dashboard)*, GOA WATCHBLOG (Aug. 25, 2022), https://perma.cc/B6F4-NXTA (illustrating the size of federal government contracting). The Davis-Bacon Act demonstrates the reach of federal government contracting. It requires the paying of local prevailing wages on public works projects for laborers and mechanics. *See* 29 C.F.R. § 3.3 (2023). It applies to "contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works." *Davis-Bacon and Related Acts*, U.S. DEP'T LAB., https://perma.cc/X54H-EFJV (last visited Nov. 18, 2023); *see* 29 C.F.R. § 3.3 (establishing when the Davis-Bacon Act and related regulations apply).

394. *See* Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1134 (2007) (providing examples of executive orders, issued by various administrations, that promoted workplace standards such as antidiscrimination policies).

395. *See generally* Davis-Bacon Act of 1931, Pub. L. No. 71-798, 46 Stat. 1494 (codified as amended in 40 U.S.C. §§ 3141–3148); Walsh-Healey Public Contracts Act of 1936, Pub. L. No. 74-846, 49 Stat. 2036 (codified as amended at 41 U.S.C. §§ 6501–6511).

contractors and impose a government-wide debarment of three years for contractors who violate their "obligation to employees" under the law.[396] Occasionally, other workplace laws have included similar debarment language and procedures.[397] However, despite this debarment language in the statute, it is far from guaranteed that a violating contractor will be debarred.[398]

Statutory procedures for debarment must begin with a recommendation from either the DOL or the contracting-agency head, upon a reasonable cause to believe a contractor or subcontractor committed a violation that "disregard[ed]" their obligations to employees.[399] Thus, mere violations of a law do not *per se* constitute a "disregard" of their obligations for debarment purposes, but guidance on this additional standard and evidentiary proof is all over the map.[400] If a recommender has

396. 40 U.S.C § 3144(b)(1); s*ee id.* § 3144(b)(2) (establishing the three-year prohibition on contracting with the federal government under the Davis-Bacon Act); 41 U.S.C. § 6504(b) (establishing the three-year prohibition on contracting with the federal government under the Walsh-Healey Public Contracting Act); *see also* Ken M. Kanzawa, *Legal and Practical Issues in Implementing Executive Order 13673: Fair Pay and Safe Workplaces*, 44 PUB. CONT. L.J. 417, 418, 426, 431, 433 (2015) (discussing government imposed requirements on contractors to disclose certain fair play and safe workplace violations in order to bid for federal contracts); FAR 9.406-4(a) (2023) (requiring debarments of contractors from federal contracts to not generally exceed three years).

397. *See* Kanzawa, *supra* note 396, at 432–40 (comparing and contrasting President Clinton and President Obama's Executive Orders towards debarring contractors with employment violations); *see id.* at 418 (describing requirement of contracting officers "to consider prospective contactors' violations of tax, labor and employment, environmental, antitrust, and consumer protection laws" under President Clinton's "blacklisting rule").

398. *See* FAR 9.407-2 (2021) ("The spending official *may* suspend a contractor suspected, upon adequate evidence of . . . [a workplace violation]." (emphasis added)).

399. 29 C.F.R. § 5.12(b) (2023); *see id.* § 5.12(b)(1)

> [W]henever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator [of the Wage and Hour Division of the Department of Labor] finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors . . . the Administrator shall notify . . . the contractor or subcontractor . . . .

400. *See, e.g.*, *Sundex, Ltd.*, ARB No. 98-130, at 6 (1999), https://perma.cc/NH5R-A6XN ("'Disregard for obligations' under the

reasonable cause to believe a contractor has disregarded their obligation, the contractor is notified of the finding and may request a hearing.[401] If no hearing is requested, or if an administrative law judge agrees with the Recommenders' findings at the conclusion of the hearing, debarment is made final.[402]

In addition to federal statutes, contractors can also be administratively debarred for specified offenses, or under the Federal Acquisition Regulation ("FAR") System's "responsibility" provisions.[403] The administrative debarment procedure is similar to statutory debarment, but the length and standards differ.[404] Administrative debarment is discretionary in its imposition and length (but generally it is not to exceed three years),[405] and administrative debarments must be linked to protecting government proprietary interests and not assessed solely to punish contractors for misconduct.[406]

[Davis-Bacon] Act has been interpreted to mean a level of culpability beyond mere negligence, involving some element of intent.") Generally, some evidence must establish a level of "culpability beyond mere negligence." *Id.*

401. *See* FAR 9.406-3(c) (2023) (requiring a debarring official to give notice of potential debarment to contractors and allowing the contractor to submit an argument in opposition to the proposed debarment); 29 C.F.R. § 5.12(d)(2)(iv)(A) ("[T]he person or firm affected will be notified of the Administrator's finding . . . and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue.").

402. *See* 29 C.F.R. § 5.12(b)(2) ("If no hearing is requested . . . the Administrator's finding shall be final . . . ."). Sometimes within these agreements a contractor will voluntarily agree not to pursue federal contracts for a specified period of time. *See* 29 C.F.R. § 1471.640 (2023) (permitting contractors to settle with the Department of Labor through "voluntary exclusion").

403. *See* FAR 9.406-2 (2023) (establishing causes for debarment, suspension, and ineligibility to include the "responsibility" provisions in 48 C.F.R. §§ 9.100–100-5).

404. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-11, FEDERAL CONTRACTING: ACTIONS NEEDED TO IMPROVE DEPARTMENT OF LABOR'S ENFORCEMENT OF SERVICE WORKER WAGE PROTECTIONS 9–10, 10 n.17 (2020), https://perma.cc/6EEH-3HER (PDF) (comparing different forms of debarment).

405. *See id.* at 19; *see also* FAR 9.406-3–9.406-4 (2023) (establishing the typical debarment period is three years).

406. *See* FAR 9.402(b) (2023) (asserting that debarment sanctions under FAR should "be imposed only in the public interest for the Government's protection and not for purposes of punishment").

Given the evidentiary standards and the procedural hurdles recommenders must clear to debar a contractor, most debarment-worthy conduct ends in voluntary conciliatory agreements rather than formal debarment.[407] Larger, experienced contractors are especially well-versed in pushing for these conciliation agreements, or for extending debarment hearings and appeal procedures for years.[408] Furthermore, a history of registration errors have also made debarment unpopular and impractical.[409] In theory, all federal administrative and statutory debarments are registered in a central database where the public can search and view barred contractors via a keyword search or a contract identification number.[410] But before this central database was setup in 2013, agencies kept their own lists of debarred contractors and were responsible for checking with other agency lists and databases to be sure potential contractors and subcontractors were not ineligible.[411] Many of these separate databases included different contractor identifiers, layouts, and available public information.[412] These differences were grandfathered into

407. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, at 19–20, 19 n.36 (noting that there was a total of 5,261 SCA cases, 60 of which resulted in debarment and 3,339 resulted in compliance agreements).

408. *See id.* at 26 (noting that "[t]he debarment process can be lengthy and resource-intensive" and can at times take years to complete, making compliance agreements a faster, less intensive alternative).

409. For information on the System for Award Management ("SAM"), a government database used to keep track of debarred companies, see *OFCCP Debarred Companies*, U.S. DEP'T LAB., https://perma.cc/5UTL-Q5UW (last visited Nov. 18, 2023); see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, 28–29 (describing the difficulty of obtaining complete information on violations and debarment due to an incomplete database that often presents false or conflicting information about violations or debarment status).

410. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, at 28 (describing the general function of the SAM database).

411. *See* Federal Acquisition Regulation; System for Award Management Name Change, Phase 1 Implementation, 78 Fed. Reg. 37676, 37676 (June 21, 2013) (to be codified at 48 C.F.R. pts. 2, 4, 8–9, 12–13, 16–19, 22, 25–26, 28, 32, 44, 52) (explaining that prior to SAM there was a "need to enter multiple sites and perform duplicative data entry" for debarred companies); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, at 28–30 (addressing the challenges with acquiring complete information about which companies have been debarred).

412. *Cf.* DAVID B. ROBBINS ET AL., BLOOMBERG BNA, A SCARLET LETTER: DO THE EXCLUSION ARCHIVES ON SAM.GOV VIOLATE CONTRACTORS' LIBERTY INTERESTS? 1–2 (2016), https://perma.cc/S4SP-PJWQ (PDF) (discussing

today's central database—and are still frustrating debarment searches looking for contractor affiliates, named executives, and common ownerships.[413] Of course, also missing in the database are the many conciliation agreements entered into with agencies and contractors after an investigation determines a violation(s) has occurred.[414]

2. President Obama's "Fair Pay and Safe Workplaces" Executive Order and the Limits to Using Contracting Efforts

Presidents have also used government contract eligibility to promote workplace standards.[415] The practice of doing so through Executive Order can be traced back to World War II,[416] but not until the Obama Administration did a president attempt to debar employers for their past noncompliance with separate workplace statutes.[417] Frustrated by congressional gridlock in 2014, President Barack Obama declared it to be the "year of

databases prior to SAM.gov, "a website that consolidated four existing procurement databases . . . [becoming] the online repository that we have today"). Agencies report being particularly frustrated by their efforts to learn more information on a contractor barred by another agency. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, at 21–23. As requests often go through the DOL and responses take long periods of time. *Id.* While others go straight to the debarring agency, creating its own standardization concerns. *Id.*

413. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 404, at 28–31 (addressing the differences in information agencies input into their databases and its shortcomings); *see also id.* at 41–43 (discussing the impacts of data not matching in the databases).

414. *See* Neil Gordon, *Federal Awardee Database Integration Falls Short*, POGO (Feb. 16, 2023), https://perma.cc/FTW7-C8VY (addressing that SAM.gov is missing information regarding "exclusions, administrative agreements, or non-responsibility determinations").

415. *See* 40 U.S.C. §§ 101, 121(a) (vesting the President with the authority to issue Executive Orders that will promote economy and efficiency in government procurement). For a history of procurement legislation, see generally John S. Pachter, *What Is a Procurement? And Why Can't DoD and the Courts Get It Straight?*, 34 PUB. CONT. L.J. 1 (2004).

416. *See, e.g.*, Exec. Order No. 8802 (1941) (prohibiting the "discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin").

417. *See* Mike Lillis, *Obama Promises More Executive Action*, HILL (Feb. 14, 2014), https://perma.cc/TW5W-CFXL (discussing Barack Obama's intentions to act through executive actions).

action,"[418] and promised "to do everything in his power to help the middle class."[419] What he could do (without congressional approval) was pass executive orders, and the President signed seven that year related to federal contractors' labor relations and workplace matters.[420] In addition to Executive Order 13706,[421] which required employer-contractors to provide paid sick leave to their employees,[422] and Executive Order 13658,[423] which raised the minimum wage for all workers employed by federal contractors,[424] President Obama signed Executive Order 13673,[425] the "Fair Pay and Safe Workplaces" Executive Order ("Fair Pay Order" or "Order").[426]

The Fair Pay Order proved to be the most controversial.[427] It required pre- and post-award federal contractors to disclose any violations of fourteen federal workplace laws they or their subcontractors had committed within the last three years.[428] Among these laws was the FLSA and its prohibition of wage theft.[429] "Violations" of the enumerated fourteen laws included

418. Barack Obama, President, U.S., State of the Union Address: Opportunity for All (Jan. 28, 2014).

419. Lillis, *supra* note 417.

420. *See* Peter M. Shane, *Presidential Procurement Authority and Interests of Workers: The Statutory Basis for Obama Executive Orders on Federal Contracting*, RESEARCHGATE (Aug. 14, 2014), https://perma.cc/7JYK-U799 (discussing how "President Obama could not possibly have persuaded the legislative branch in 2014 to enact any of the requirements he has imposed" through executive orders). *See generally* 2014 Executive Orders Signed by Barack Obama, NAT'L ARCHIVES, https://perma.cc/T2S4-YAQT (last updated May 20, 2019).

421. Exec. Order No. 13706, 80 Fed. Reg. 54697 (Sept. 10, 2015).

422. *See id.* (establishing the application of sick leave for contractor employees).

423. Exec. Order No. 13658, 79 Fed. Reg. 9851 (Feb. 20, 2014).

424. *See id.* (addressing specific details regarding the application of the wage increase and providing the guidelines for enforcement).

425. Exec. Order No. 13673, 79 Fed. Reg. 45309 (Aug. 5, 2014).

426. *See id.* (discussing the transparency requirements for wages implemented to ensure consistency across federal agencies).

427. *See* Kanzawa, *supra* note 396, at 417–25 (addressing the criticism of the Fair Pay Executive Order).

428. *See* Exec. Order No. 13673, 79 Fed. Reg. at 45309.

429. *See id.* These disclosures were part of a contractor's bid proposal. *See id.* at 45309–10. In addition to the fourteen federal workplace and labor laws addressed in Executive Order 13673 for all prospective contractors, employer-contractors with a government contract exceeding $1 million were

administrative merit determinations, arbitral awards or decisions, or civil judgments involving the enumerated fourteen laws and their state equivalents.[430] It also mandated that contracting agencies reject bids from contractors with "serious, repeated, willful, or pervasive" violations, and cancel existing contracts, and/or initiate government-wide suspension and debarment proceedings.[431] While the final version of the Order and its administrative guidance did not require agencies to debar contractors for any past violations (all are evaluated on a case-by-case basis), prior versions were more explicit in their mandating of a three-year ban for contractors—enabling opponents to coin it the "Blacklisting" Order."[432] Despite the final Fair Pay Order being a significantly pared-down version of what it once was, business interests still challenged the legality of the Order on due process, compelled speech, and separation of powers grounds.[433] And although courts upheld the President's broad procurement authority, all of President Obama's Executive Orders promoting workplace

prohibited from requiring employees to enter into mandatory pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or torts related to sexual assault or harassment. *See id.* at 45314.

430. *Id.* at 45309; *see* Kanzawa, *supra* note 396, at 421 (addressing how in addition to government disclosures, the Fair Pay Order also mandated employer disclosure requirements to workers regarding their classification as employees or independent contractors, exempt or non-exempt employees, and other related compensation information).

431. Kanzawa, *supra* note 396, at 432; *see also* FAR 52.209-5(a)(1)(i)(D), 52.212-3(h) (2023) (mandating offerors certify whether, in the preceding three years, they have been convicted of or faced pending felony charges related to federal tax, labor, employment, environmental, antitrust, or consumer protection laws, received adverse court judgments in civil cases brought by the United States under these laws, or been found in violation of such laws by federal authorities); *see also* Contractor Responsibility, 65 Fed. Reg. 80256, 80256 (2000) (to be codified at 48 C.F.R. pts. 9, 14, 15, 31, 52) ("[C]larifying what constitutes a 'satisfactory record of integrity and business ethics' in making contractor responsibility determinations . . . .").

432. *See* Kanzawa, *supra* note 396, at 431–40 (reviewing the Fair Pay Executive Order and addressing its similarities with Clinton's "blacklisting" rule); *Call to Action: Oppose President Obama's Blacklisting Proposal*, ABC NEWSLINE (Aug. 19, 2015), https://perma.cc/E8ZR-FLKY (calling Executive Order 13673 the "blacklisting" executive order).

433. *See* Lydia Wheeler, *Businesses Blast Obama's 'Blacklisting' Regulations*, HILL (June 4, 2015), https://perma.cc/V278-A2P3 (discussing industry opposition to the Fair Pay Order).

standards—including the Fair Pay Order—were undone within the first two months of the Trump Administration.[434]

3. States and Localities' Contract-Based Strategies

States and localities are proving to be better at getting contract-based language conditioning financial incentives on workplace guarantees into law.[435] While most states have general "responsible" contracting language in their spending laws,[436] more specific legislation and guidance on responsibility determinations have proven to be the preferred mode of contract conditioning and debarment. Likewise, conditional informational disclosures have also proven more manageable at the local and state levels.[437]

The most common state contracting legislative initiatives have been the ones implementing more rigorous and defined "responsibility" screenings for prospective contractors. Like the Pennsylvania Prevailing Wage Act,[438] most state and local public contracting laws instruct government actors to purchase only from "responsible" contractors.[439] But many of these laws

434. *See, e.g.*, Exec. Order No. 13782, 82 Fed. Reg. 15607 (Mar. 30, 2017) (revoking the Federal Contracting Executive Order 13673).

435. *See, e.g.*, Cent. Iowa Bldg. & Constr. Trades Council v. Branstad, No. 11-cv-00202, 2011 WL 4004652, at *9 (S.D. Iowa Sept. 7, 2011) (upholding the governor's executive order relating to employer-contractors).

436. *See* MADLAND ET AL., *supra* note 17, at 1 (discussing the adoption of "responsible contracting" in state and local governments).

437. *See, e.g.*, Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 210–11 (3d Cir. 2004) (affirming the legality of the neutrality agreement between the developer and the union and emphasizing that city ordinances are not preempted under federal law when the city acts as a market participant rather than a regulator); *Debarred Firms and Individuals*, CHICAGO, https://perma.cc/2MAJ-8H76 (last visited Sept. 23, 2023) (providing a list of debarred firms and individuals in Chicago).

438. 1961 Pa. Laws 987 (codified as amended at 43 PA. CONS. STAT. §§ 165-1–165-17).

439. *See, e.g.*, 43 PA. CONS. STAT. §§ 165-1–165-17 (2023) (setting guidelines for public works projects, as means to promote a level playing field for contractors bidding on government projects and to maintain quality standards in construction work); 41 U.S.C. § 3702(b) (establishing the procedures for handling sealed bids to promote responsible bidders by considering factors like finances and past performance to ensure contracts go to qualified vendors who meet the government's needs and standards); Gene Ming Lee, *A Case for Fairness in Public Works Contracting*, 65 FORDHAM L. REV. 1075, 1094 (1996) (discussing sealed bidding).

(like Pennsylvania's) lack specificity as to how potential contractors' past, unlawful behavior should impact the responsibility analysis.[440]

Now, many of these state and local laws define responsibility explicitly and link procedurally rigorous screenings of a contractor's record of compliance with workplace laws to their responsibility determinations. These prequalification screenings generally weigh compliance with workplace laws along with various other factors, like the prospective contractor's financial stability and experience.[441] The best responsible contracting screenings use model questionnaires and publish their weighing formulas to notify bidders and the public of the evaluation process.[442] California uses one of these questionnaires in its responsibility screening—both as a prequalification threshold, and in its ranking of qualified bids.[443] Contracting officers score bidders based on their answers to the questionnaire to determine if they

440. *See* 62 PA. CONS. STAT. § 531(a) (making no mention of how past conduct will impact status in the Commonwealth's Contractor Responsibility Program); *see also* Ming Lee, *supra* note 439, at 1094 ("Not every firm will be considered 'responsible' or 'qualified,' however. There are both objective and subjective measures used in denying the opportunity of an award to a potential bidder."); Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. SCH. L. REV. 143, 146–47 (1995) (addressing how "responsibility" can have multiple meanings).

441. *See* Anechiarico & Jacobs, *supra* note 440, at 146–47 (noting that responsibility has been interpreted as an evaluation of multiple factors, including capital resources, skill, judgment, integrity, moral worth, and ability to do the job at hand).

442. *See, e.g.*, CAL. PUB. CONT. CODE § 20101 (West 2023) ("The Department of Industrial Relations, in developing the standardized questionnaire, shall consult with affected public agencies, cities and counties, the construction industry, the surety industry, and other interested parties.").

443. See *id.* § 20101(b)–(d). California was the first state to adopt this type of responsible contracting reform in 1999. *See Public Works Pre-Qualification of Contractors*, CAL. DEP'T INDUS. REL. (Mar. 2019), https://perma.cc/D6DF-CAVG. The California Department of Industrial Relations ("DIR") developed the model questionnaire, which, among other things, inquiries into a bidder's violations of laws and regulations, history of suspensions and debarments, past contract performance, financial history, and capitalization. *See id.*; CAL. DEP'T INDUS. REL., LABOR COMMISSIONER'S MODEL QUESTIONNAIRE 18–23 (2019) [hereinafter CAL. LABOR COMMISSIONER'S MODEL QUESTIONNAIRE], https://perma.cc/5ATV-LE6L (PDF).

meet the set point threshold for each category.[444] Then, prospective qualified bids that meet the threshold score are ranked based on their composite numerical score on the questionnaire and information contained in its financial disclosure statements.[445] For instance, California's questionnaire includes a category on compliance with occupational safety and health laws, workers' compensation and other labor legislation, in which a prospective contractor must score at least thirty-eight out of a possible maximum score of fifty-three to be eligible for state contracts.[446] Prospective contractors are awarded points in this category for activities and behaviors such as a prior history of wage law compliance.[447] They receive five points for having no past prevailing-wage violations, three points for having fewer than two, and zero points for four or more violations.[448] Thus, the better a prospective contractor's history of workplace law compliance, the better its prequalification score and the better its chances are of securing the contract.[449]

Massachusetts and Connecticut also began doing enhanced contractor responsibility reviews using a quantified point system.[450] Massachusetts' system requires firms to achieve a

444. *See* CAL. PUB. CONT. CODE § 20101(b); CAL. LABOR COMMISSIONER'S MODEL QUESTIONNAIRE, *supra* note 443, at 26 (providing the model guidelines for rating bidders and the model rating system).

445. *See* CAL. PUB. CONT. CODE § 20101(a), (d). Although contractors' questionnaire responses and financial statements are not open to public inspection, the names of contractors applying are public records, allowing the public to supplement the process by providing relevant information that applicants have not disclosed. *See id.* § 20101(a).

446. *See* CAL. LABOR COMMISSIONER'S MODEL QUESTIONNAIRE, *supra* note 443, at 19–22; *id.* at 27 (establishing scoring criteria); s*ee also* Jennifer L Dauer, Diepenbrock Elkin, & Clare M. Gibson, Jarvis Fay Doporto & Gibson, Presentation at League of California Cities: Public Works Contracts in a Tough Economy: Tips and Techniques for City Attorneys (July 12, 2011), https://perma.cc/MQ7Q-RT5P (addressing bidders' responsibilities).

447. *See* CAL. LABOR COMMISSIONER'S MODEL QUESTIONNAIRE, *supra* note 443, at 19–22.

448. *See id.* at 30.

449. *See id.*

450. *See* 810 MASS. CODE REGS. § 9.05(4) (2020) (listing criteria and subfactors used to evaluate General Contractors for prequalification); CONN. GEN. STAT. ANN. §§ 4a-100(c)(5), (f) (2022) (requiring the applicant to provide information concerning "any administrative proceedings that concluded adversely against the applicant during the past five years" and tasking the

threshold prequalification score before they are eligible to bid on public works projects.[451] Points are awarded based on the bidder's safety record, past legal proceedings, compliance with workplace and other laws, past employee terminations, and compliance with equal employment opportunity goals.[452] Similarly, Connecticut's system evaluates prospective bidders based on their integrity, work history, experience, financial condition, and record of legal compliance.[453]

The same responsibility screenings are increasingly being used at the municipal level. For example, both the city of Oregon, Ohio and the borough of Bristol, Pennsylvania require potential bidders to disclose past legal violations or litigation—especially those concerning workplace laws—as part

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commissioner with determining whether to prequalify an applicant based on criteria regarding past performance); *see also* COMMONWEALTH OF MASS. DIV. OF CAP. ASSET MGMT. & MAINT., APPLICATION FOR PRIME/GENERAL CONTRACTOR CERTIFICATE OF ELIGIBILITY 15 (2016), https://perma.cc/GU2W-Q2W9 (PDF) (asking prequalification candidates to disclose whether, within the past five years, they have been involved in litigation relating to "a violation of any state or federal law regulating hours of labor, unemployment compensation, minimum wages, prevailing wages, overtime pay, equal pay, child labor or workers' compensation").

451. *See* 810 MASS. CODE REGS. § 9.08(8) (providing, "[t]o be prequalified, . . . interested General Contractors must achieve the minimum number of points in each of the four general evaluation categories as well as a total minimum score overall of 70 points," and noting that the evaluation category scores are reflected in the *Division of Capital Asset Management and Maintenance Guidelines for Prequalification*); *see also* DIV. CAP. ASSET MGMT. & MAINT., GUIDELINES FOR PREQUALIFICATION OF GENERAL CONTRACTORS AND SUBCONTRACTORS TO WORK ON PUBLIC BUILDING CONSTRUCTION PROJECTS 18–26 (2018), https://perma.cc/L276-KDHS (PDF) (explaining subcategory points are allocated based on evaluations of the contractor's management experience (fifty points); references (thirty points); and capacity to complete (twenty points)).

452. *See* DIV OF CAP. ASSET MGMT. & MAINT., *supra* note 451, at 18–26; *see also* CONN. GEN. STAT. ANN. §§ 4a-100(c)(3), 31-57b (requiring applicants to provide information regarding past adverse legal proceedings and barring state contract awards to any firm "which has been cited for three or more willful or serious violations of any occupational safety and health act").

453. *See DAS Construction Contractor Prequalification Program FAQs*, CONN. DEP'T ADMIN. SERVS., https://perma.cc/S9X5-F5BV (last visited Sept. 24, 2023) (stating the five categories of criteria for prequalification are integrity, work experience, experience and qualifications of supervisory personnel, financial condition, and safety).

of prequalifying to bid on municipal public-works projects.[454] Los Angeles also directs city agencies to review potential bidders' history of labor, employment, environmental, and workplace safety violations, and (like its state) the city uses a detailed questionnaire asking bidders to disclose and explain past and pending workplace litigation, past public-contract suspensions, and outstanding judgments.[455] Full transparency is a crucial feature of the Los Angeles policy, which makes bidders' responses to the questionnaire subject to public review.[456] This allows the public to assist the agency in its review process by providing relevant information that applicants may not have volunteered.[457]

Another major focus of local and state responsible contracting policies has been conditioning contracts on a firm's payment of a so-called "living wage" to all their workers—not just the workers covered under prevailing wage laws.[458] The philosophy driving these policies is that "high-road" contracting employers who pay living wages across the board have more stable workforces generally, and this minimizes the hidden public costs of low wages.[459] Studies on the effects of living wage policies have confirmed these results, and now more than 140 cities and one state (Maryland) have adopted living wage requirements for all employees employed by

454. *See* OREGON, OHIO MUNICIPAL CODE § 180.1 (2002); BRISTOL, PA. MUNICIPAL CODE § 1-1503(3)(G) (2008).

455. *See* L.A., CAL., ADMIN CODE § 10.40.2(b) (2000).

456. *See id.* § 10.40.2(c) ("Questionnaires will be public records and information contained therein will be available for public review, except to the extent that such information is exempt from disclosure pursuant to applicable law.").

457. *See id.* ("The awarding authority may rely on responses to the questionnaire, information from compliance and regulatory agencies and/or independent investigation to determine bidder responsibility.").

458. *See, e.g.*, St. Louis, Mo., Ordinance No. 65597 § 3(B) (Aug. 5, 2002), (mandating that all businesses receiving public contracts—and in some cases, economic development subsidies—pay all their employees a living wage, defined as 130 percent of the federal poverty guidelines for a family of three, translating to $14.57 per hour as of 2021).

459. *Cf.* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 119; *see also State Minimum Wage Laws*, U.S. DEP'T LAB., https://perma.cc/3A3J-VWDJ (last updated July 1, 2023) (providing an interactive map of state minimum wage laws illustrating states with higher, lower, or equivalent minimum wage as compared to federal minimum wage).

contracting-employers—regardless of whether they work on the public works or service job.[460] One Maryland study determined that the state's living wage requirement for all employees of employer-contractors improved the public contracting process overall by shifting the bidding pool towards more reliable, high-road contractors.[461] Nearly half of the bidders interviewed reported that the living wage requirement encouraged them to bid on state contracts because contractors who paid meager wages would not automatically be able to underbid them.[462]

In addition to the popularity of living wage laws applicable to all employees working for contracting employers, and the creativity of "responsible contracting" systems, many cities and states also ensure that contracting employers provide benefits such as health insurance and paid sick days to all their employees, and not just those performing public work.[463] Likewise, to ensure that employers do not respond to these increasing employment costs by hiring less "employees," a small handful of municipal laws require pre-contract informational disclosures and periodic reviews of a (prospective) contractor-employer's independent contractor usage and classifications.[464] Ordinances in Worcester and Somerville, Massachusetts take this approach. Their contractors must

460. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 119; *see also* Candace Howes, *Living Wages and the Retention of Home Care Workers in San Francisco*, 44 INDUS. RELS. 139, 160–63 (2005) (finding that higher wages have led to decreased employee turnover, decreased reliance on public assistance, and increased productivity, improving the quality and reliability of an employer-contractor in all their performance, including public works or services).

461. *See* MICHAEL C. RUBENSTEIN, DEP'T OF LEGIS. SERVS., IMPACT OF THE MARYLAND LIVING WAGE 5 (Tamela D. Burt ed., 2008), https://perma.cc/J3FJ-N4J6 (PDF) ("Several studies have found evidence of increased worker productivity and employer absorption of some costs due to the pressure of competitive contract bidding.").

462. *See id*. at 10–11 (noting that the added obligations also did not impact the average number of bidders for Maryland service contracts, but rather the number of bids actually increased once its living wage policy took effect—from 3.7 bidders to 4.7 bidders per job).

463. *See, e.g.*, SAN DIEGO, CAL. MUNICIPAL CODE § 22.4220(c) (2021) (mandating ten paid sick, vacation, and/or personal leave days, and another ten unpaid leave days for illness or to care for an ill family member).

464. *See, e.g.*, SOMERVILLE, MASS., ORDINANCES § 2-355 (2008) (detailing requirements of the responsible employer ordinance); WORCESTER, MASS., REV. ORDINANCES § 35 (2012) (same).

certify every week that they properly classify all their workers, and that they've complied with all workers' compensation and unemployment tax laws.[465]

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From these past federal, state, and local efforts, there are plenty of lessons to learn about effectively implementing contracting-based workplace initiatives. First among these lessons is that many contracting initiatives start on the front end of contracting—regulating the screening of prospective bidders and requiring significant informational disclosures for contract eligibility.[466] What these disclosures require, who reviews these disclosures, and how they are reviewed varies, but many include disclosure obligations of wage-payment events besides just formally-adjudicated decisions.[467] These front-end disclosures and their use in contracting determinations do not raise due process concerns, so long as contractors are given advance notice and a right to respond when they are not awarded a contract on these grounds.[468] Likewise, while the due process obligations will vary depending on the statutory language and regulatory procedures, prospective contractors who are denied contracting opportunities due to front-end disclosures will have weaker due process claims than existing contractors because of the speculative nature of their "property right."[469]

Indeed, many disclosure obligations are not about past behaviors at all, but rather they collect information about a potential contractor's structural design or payroll information.[470] Not all contract initiatives provide useful

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465. *See, e.g.*, WORCESTER, MASS., REV. ORDINANCES § 35(c); *see also Purchasing & Bids*, CITY OF WORCESTER, https://perma.cc/MS3E-PBDZ (last visited Sept. 25, 2023) (providing a "Weekly Workforce Utilization" report form); Alex Raskolnikov, *Deterrence Theory: Key Findings and Challenges*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 179, 179–192 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (discussing patterned informational disclosures and managerial activity).

466. *See supra* Part III.B.3.

467. *See supra* notes 442–453 and accompanying text.

468. *See supra* notes 368–370 and accompanying text.

469. *See* Anechiarico & Jacobs, *supra* note 440, at 147 ("The courts have also held that, since there is no right to a public contract, agencies could declare would-be contractors responsible without a due process hearing.").

470. *See supra* notes 450–456 and accompanying text.

guidance on how these factual disclosures should be assessed.[471] That lack of guidance is a flaw, but perhaps not a fatal one since underlying these factual disclosures is the inference that transparency itself creates some degree of self-regulation.[472] Relatedly, regulatory disclosure obligations for contractors are also useful communicative tools—signaling to firmwide decision-makers where the difficult areas of legal compliance are, as well as specific targeting objectives.[473]

Second, contract-based initiatives must establish a procedural preference for lawful contractor employers to the disadvantage of serious legal offenders. Methods of doing so include complete bars to public contract eligibility or more holistic reviews that score these compliance histories along with other variables.[474] The circumstances guiding these decisions and the weight given to different variables should be pre-disclosed, detailed, and nondiscretionary with any method.[475] Consistent with contracting's transparency and fairness initiatives, these methodological decisions and objective disqualifications should come with notice and hearing rights, along with limited rights to appeal.

Finally, successful initiatives continually monitor contractors throughout the performance of the contract. To ensure contractors cooperate with continued monitoring, unilateral cancellation and non-renewal is usually on the table, if seldom tried. The reasons for existent contract cancellations being rare have to do with the complicating factors that relate to existent property interests in public contracts, as opposed to prospective ones.[476] Furthermore, while continued monitoring is

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471. *See supra* note 440 and accompanying text.

472. *See* Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 FLA. ST. U. L. REV. 389, 394–96 (2021) ("[A]t base, the central justification for government transparency has always been the notion that it fosters civic engagement and facilitates the public's ability to provide democratic oversight.").

473. *See id.* at 437–39 (providing examples of public feedback on proposed administrative rules).

474. *See supra* notes 447–457 and accompanying text.

475. *See supra* notes 442–449 and accompanying text.

476. *See* Anthony M. Bertelli et al., *When New Public Management Fails: Infrastructure Public-Private Partnerships and Political Constraints in Developing and Transitional Economies*, 33 GOVERNANCE 477, 479 (2019) ("While cancellation is statistically rare, its likelihood depends both on factors

made easier with extensive self-disclosure obligations on the front-end, the specifics and workings of an effective continual monitoring and disclosure system remain in the experimentational phases.[477] Just who compiles and reviews information, and their relation to the contractor and state, will vary.[478] But relying on already-strained administrative agencies like the DOL or state equivalents to perform these continuous monitoring tasks is ill-advised—at least not without a commitment of substantially more resources.

Without additional resources, this kind of continuous monitoring may be done with assistance from the public.[479] But tasking constituents with any government authority comes with its own legitimacy, informational, and legal concerns.[480] Despite these concerns, public contracting decisions that touch on workplace conditions may be a uniquely fitting place to experiment with public involvement—as it is ultimately public dollars and public goods and services at stake. Moreover, public involvement can tap into vastly different experience in workplace matters and enable access to workers generally hesitant to come forward to state actors.[481]

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related to the project's political environment and attributes specific to the project itself.").

477. *See* John Rehfuss, *Contracting Out and Accountability in State and Local Governments—The Importance of Contract Monitoring*, 22 STATE & LOC. GOV'T REV. 44, 44 (1990) ("Monitoring contracts to assure effective performance is a crucial but little understood and underreported part of the contracting-out process. While much material aimed at the practitioner discusses monitoring, the subject is rarely included in academic literature.").

478. *See id.* at 47 (listing out several methods of who may be enlisted with monitoring).

479. *See* WALTER ET AL., A HOW-TO GUIDE FOR STRENGTHENING WAGE LAWS, *supra* note 135, at 13 ("Lawmakers could strengthen prevailing wage laws by including statutory requirements that state and local labor agencies establish co-enforcement programs with unions and other community organizations to monitor compliance.").

480. *See* Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 UNIV. CHI. LEGAL F. 143, 172–73 (2018) (explaining that concerns of co-enforcement models that include private individuals and organizations are favoritism, breaches of confidentiality).

481. *See id.* at 153–56 (comparing the strengths and weaknesses of monitoring completed by state actors and monitoring completed by other workers, work organizations, and the public).

IV. PURCHASING POWER'S EFFICACY

Whether government contracting procedures will become a key ingredient in combatting wage theft is still unknown. These efforts are still relatively new, their effects unstudied, and their ideal models still evolving. As such, while the following subparts make some initial assessments about the contracting model out of Columbus, there are plenty of reasons why a locality with an interest in combating wage theft may still choose to wait and see when it comes to a contracting initiative.

Interestingly, though, neighboring localities in Ohio are not waiting. Since Columbus passed its Wage Theft Ordinance in 2020, the city of Cleveland[482] has passed an extremely similar ordinance—as have Cuyahoga[483] and Euclid[484] County. Moreover, in February 2023, Columbus, Ohio became the first city to enter into a formalized work-sharing partnership with the federal government's DOL, giving the city full access to the federal agency's enforcement database.[485]

These early successes are promising, but will the Columbus Ordinance work? In other words, are neighboring jurisdictions passing similar ordinances because they are politically popular, or are there reasons to believe that a contract-based initiative will curb wage-theft behavior? Is the city's partnership with the DOL a collaborative effort to improve compliance with all federal, state, and city wage laws and regulations? Or is it the offloading of work from an agency that does not, and likely will not ever, have enough investigators to enforce all the workplaces laws in its charge?

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482. CLEVELAND, OHIO, ORDINANCES §§ 190.01–.06 (2022).

483. CUYAHOGA COUNTY, OHIO, CUYAHOGA COUNTY CODE §§ 501.15, 501.19, 505.03 (2023).

484. EUCLID, OHIO, ADMINISTRATIVE CODE OF THE CODIFIED ORDINANCES OF THE CITY OF EUCLID § 109.25 (2023); *see* Pamela Gray-Mason, *Wage Theft Legislation Passed*, EUCLID OBSERVER (Aug. 1, 2023), https://perma.cc/6YVX-CD7C.

485. *See* Press Release, City of Columbus, City of Columbus and US Department of Labor Sign Historic Agreement to Prevent Wage Theft (Feb. 1, 2023), https://perma.cc/U7EH-ZSUQ ("This historic cooperation between the City and the federal Department of Labor ensures we are able to better protect workers and make sure they're fully paid what they're rightfully owed.").

A. *Assessing Columbus, Ohio's Wage Theft Ordinance on Functional Grounds*

As detailed before, Columbus's Wage Theft Ordinance requires prospective city contractors and beneficiaries to disclose information on any subcontractor or independent contractor working on the project, past and present organizational mergers, alter egos, and common ownership, and the Ordinance bars employers with wage-theft violations from contracting with the city and being the beneficiaries of other public business relationships.[486] Moreover, under the Ordinance, wage theft offending employers are placed on the city's "Adverse Determination List," and they remain on the list of ineligible contractors for three years unless they appeal the administrative decision.[487]

As with other contracting initiatives, the pre-contract and continuing disclosure obligations are in and of themselves designed to serve a self-regulatory purpose.[488] But whereas other regulatory disclosures are criticized for being unnecessarily burdensome, the Ordinance requires disclosures that are targeted to the nature of modern business structures where wage theft rates are high.[489] The Ordinance's disclosure obligations require detailed and targeted disclosures, crafted to identify wage-payment challenges involved in modern fissured business structures and industries where both wage theft and government contracting are common.[490] Columbus's Ordinance requires the disclosure of information on every subcontractor

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486. *See* COLUMBUS, OHIO, ORDINANCES §§ 377.03, 377.05 (covering the procedural and material changes that the Wage Theft Ordinance would enact to help combat the pervasive problem of wage theft).

487. *See id.* § 377.04 (stating that no contractor on the "adverse determination list" can be awarded a contract); *see also* § 377.01 (detailing out the procedural requirements for the appeals process and the "adverse determination list" timeframe).

488. *See* Kwoka & DuPey, *supra* note 472, at 438 ("[T]he dominant mechanism in the disclosure literature for changing disclosers' behavior is the feedback loop between the public and the disclosers. That is, the public will learn the relevant information and react in a way that forces changes in behavior.").

489. *See* COLUMBUS, OHIO, ORDINANCES § 377.03(c) (2020) (discussing the disclosure requirement and then subsequent review by the Wage Theft Prevention and Enforcement Commission).

490. *See, e.g.*, Tippett, *supra* note 51, at 325.

involved in public works projects.[491] Unlike other contracting schemes, there are no tier limits or limits to the number of subcontractors that must disclose information—but, presumably, some contractors will be incentivized to use fewer subcontractors and retain more central control and authority over projects given that joint liability they have for a subcontractor's failure to provide the required disclosures.[492]

The same limiting incentive exists to limit the use of independent contractors to the ones who are necessary to complete the project and highly likely to be classified properly. Indeed, disclosure schemes, like the Ordinance, may be useful regulatory tools for addressing the complicated issue of "misclassification"—one that legal experts can get wrong (especially when new businesses and technologies produce novel working schemes). A strength of regulatory obligations is that they can be used to regulate even when unsure about what to regulate due to rapidly changing behaviors and adjustments to new work demands and technologies.[493] And, in requiring disclosure, the Ordinance regulates all these changes and provides insight into classifications that may be designed to evade, rather than violate, the law.[494] These evading employers, while not breaking the law, will at the very least have to defend these decisions in government contracting.

The Ordinance's disclosure obligations also comport with the general view that disclosure can be used to regulate even

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491. *See* COLUMBUS, OHIO, ORDINANCES § 377.01(e) (providing that a subcontractor is a covered entity under the Ordinance); *see also id.* § 377.05(b) (specifying the obligations of the contracting party to provide a sworn statement regarding the "adverse determination list" status of all covered entities).

492. *See id.* § 377.05(a)(4) (enumerating that "any" subcontractor that was used in the project on the adverse determination list would have to be disclosed).

493. *See* Kwoka & DuPey, *supra* note 472, at 431

> [T]argeted transparency as regulation requirements are much easier to measure and adjust. Without discarding our other transparency tools, targeted transparency as regulation may provide additional ways to enhance our transparency system to operate more as intended. The literature on disclosure demonstrates that certain design elements in disclosure laws make them more effective. These elements can be incorporated into targeted transparency as regulation requirements to maximize the possibility of their success.

494. *See* COLUMBUS, OHIO, ORDINANCES § 377.01 (2020) (providing specific classifications regulated by the Ordinance).

when unsure about what to regulate because disclosing party behavior is rapidly changing to adjust to new work demands, workplace environments, and technological advances.[495]

Another functional attribute of the Columbus Ordinance is the Commission it creates.[496] This Commission brings not only expertise but also community ties. Ideally, because the Commission reviews these detailed pre-contract disclosures, its expertise will enable contractors to cure wage-payment or classification mistakes when identified early in the bidding process or seek guidance on difficult classification questions before the contract performance begins.[497] An experienced city official could likely provide the same review and cure functions, but only with additional resources.

Perhaps the wild card of the Ordinance's functionality has to do with the Commission's receipt and assessment of complaints.[498] While a state actor could likely assume the task of pre-disclosure review, the Commission's enforcement model cannot be undertaken by the state alone.[499] Commissioners are community members with some expertise—but, if selected carefully, they are also rooted in different organizational, racial and ethnic, linguistic, geographic, cultural, and political communities.[500] Similar associations may promote the trust of vulnerable workers that other state agencies often lack, empowering them to pursue wage-theft complaints they would not with another government arm.[501]

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495. *See id.* § 377.03(c) (discussing the disclosure process which includes any changes that may have occurred in the business).

496. *See id.* § 377.02(a) (creating the Wage Theft Prevention and Enforcement Commission).

497. *See id.* § 377.03(c); *id.* § 377.02(c) (determining the selection of the commission members).

498. Besides inadequate compliance with disclosure obligations—which the Commission can investigate, and which are themselves grounds for placement on the Adverse Determination List—most of the other ways employers will be debarred still require worker complaints, which, for reasons discussed, are not often brought in other contexts. *See supra* Part I.A.

499. *See* COLUMBUS, OHIO, ORDINANCES § 377.02(a) (2020) (establishing the Commission which is not limited solely to governmental members).

500. *See id.* § 377.02(b)–(c).

501. *See* Fine, *supra* note 480, at 152

> Organizations have the trust of vulnerable workers that state agencies often lack. Worker organizations that are deeply rooted in their racial and ethnic, linguistic, geographic, sectoral, cultural or

Another aspect of the complaints process that is still unanswered concerns the role resident taxpayers, competing contractors, and interest groups will play. While the Commission's complaint standard is not onerous, concerns that any of these entities will file complaints are valid.[502] Perhaps future initiatives will find another underused tool in the government's arsenal that incentivizes residents to bring forth complaints—such as permitting *qui tam* actions for providing information on violations of wage theft by employers benefiting from public funds.[503]

Along with functional strengths and the uncertainties that come with this contracting initiative are the limitations. To state the obvious, one of the Ordinance's limitations is that its coverage is not absolute—not everyone is a government contractor, or wants to be.[504] As such, these contract-based strategies are not be-all-end-all solutions to wage theft. But the crisis of noncompliance with wage payment obligations will require re-embedding industry-wide norms, and contracting initiatives have historically had some success at setting industry-wide standards in both public and private sectors.[505] As such, to the extent contract ineligibility and the Ordinance's "Adverse Determination List" are value judgments on the appropriate use of public funds, they may shift more private employer behavior than first thought.

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political communities are able to gain the trust of marginalized or undocumented workers who are often reticent to complain directly to government.

502. Residents do not need to become their own investigators—ferreting out wage-theft claims before submitting a complaint. The Commission is the investigator of such complaints and has the authority to request the information necessary to determine its validity and grounds for a hearing. *See* COLUMBUS, OHIO, ORDINANCES § 377.02(g).

503. *See* Hallet, *The Problem of Wage Theft*, *supra* note 26, at 138 n.217 ("A qui tam action, which allows a private party to recover damages owed to the government, is a well-established mechanism for increasing the incentive for private parties to engage in socially-desirable litigation.").

504. *See* COLUMBUS, OHIO, ORDINANCES § 377.01(e) (2020) (addressing specifically government contracts and those who seek to engage in these contracts).

505. *See* Hallett, *The Problem of Wage Theft*, *supra* note 26, at 143 (presenting methods in which other social movement have found success: "reframing, naming, and shaming").

For now, though, contract-based strategies are best understood as supplemental pieces of a comprehensive wage-theft strategy. Likewise, their efficacy cannot be judged on a scale of whether they alleviate wage theft entirely in contracting industries. Only along with a number of the enforcement schemes discussed above in Part III can we assess whether the collaborative efforts of government, workers, society, and high-road contractors have re-embedded wage-theft norms and addressed the wide-spread crisis.[506]

B. *Assessing Columbus's Wage Theft Ordinance on Legal Grounds*

Other challenges to contract-based wage-theft strategies are legal ones. Although ordinances like Columbus's have a firmer foundation than administrative debarment or debarment under general "responsibility" contracting statutes, contract-based initiatives will always have opponents, concerned that these initiatives function as modes of regulation without regulation's processes, structures, and constitutional protections.[507] But surely there is strong legal precedent for statutes with contract restrictions, such as these, so long as they are narrowly tailored and provide due process protections.[508] As with most prospective property interests, the due process concerns are less than when an existing contract is cancelled. While still largely unexplored, contractors' due process concerns may actually have a firmer foundation in their liberty interests, as contracting bars have an important labeling function. If these labels evolve into stigmatization and immediately impact a contractor's ability to do business, these due process procedures may need revision.

Also predicted to come up on the legal front, as they are in season, are compelled speech claims—as the disclosure requirements for prospective entities are indeed onerous. There

506. *See* Fine, *supra* note 480, at 172–76 (discussing how the development of effective enforcement models has become increasingly urgent as more labor mandates are being passed at the local and state levels).

507. *See generally* PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021).

508. *See, e.g.*, Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 8101–8106; *see also supra* Part III.B.

is also a growing body of precedent where employers have successfully engineered workplace disclosure obligations into compelled speech claims.[509] For instance, in *National Association of Manufacturers v. NLRB*,[510] the D.C. Circuit struck down, on compelled speech grounds, a National Labor Relations Board ("NLRB") rule requiring employers to post a notice informing employees of their rights under the National Labor Relations Act,[511] and imposing penalties for failing to post the notice.[512] And although that case was later overturned in part, the decision has had continuing effects in terms of notice-posting requirements themselves and the government's authority to compel employers to provide information to or about their workforce.[513]

But disclosure obligations for public contractors are at least one more step removed from these compelled speech claims, as contracting with the government is a privilege and not a right. And, for that prosperous privilege, the state can impose conditions just as a private actor would in the marketplace.[514] Even under the unconstitutional conditions doctrine which limits the government's conditioning of a privilege or benefit on the forbearance of constitutional rights, governments enjoy especially broad control over funding programs and government contracts.[515]

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509. *See* Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. CIV. RTS-CIV. LIBERTIES L. REV. 323, 325 (2016) (discussing a new generation of First Amendment theories protecting businesses' day-to-day activities involving speech and their potentially calamitous effects on workers).

510. 717 F.3d 947 (D.C. Cir. 2013), *overruled in part by* Am. Meat. Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

511. 29 U.S.C. §§ 151–169.

512. *See Nat'l Ass'n of Mfrs.*, 717 F.3d, at 958.

513. *See* Garden, *supra* note 509, at 348 ("Even though that case was later overturned in part by the D.C. Circuit sitting en banc, the [original] panel's decision has had continuing effects in terms of the notice posting requirement itself, as well as uncertainty regarding the NLRB's ability to compel employers to notify employees of their rights.").

514. *See id.* at 345 (discussing the argument that partial government employers have the "right to have public employers set terms and conditions of employment unilaterally").

515. *See* Kay L. Levine et al., *Protecting State Constitutional Rights from Unconstitutional Conditions*, 56 U.C. DAVIS L. REV. 247, 261 (2022).

CONCLUSION

Much debate can be had about privatization's effect on the scope and content of public policy concerns. But there is consensus on at least one thing: conditions on these public-private relationships are powerful tools for inducing private behavior. When behaviors have largely slipped through the cracks of other layers of regulatory and enforcement efforts, and when these behaviors disproportionately harm vulnerable members and society, governments should willingly add this tool to their regulatory arsenals.

Wage theft is precisely one of those behaviors that other regulatory efforts have failed and that disproportionately harms the most vulnerable members of our society. Likewise, contract-based initiatives are especially fitting pieces to combatting wage theft because of the profit-related dimensions and the barriers to individual complaints that plague existing regulatory efforts for combatting wage theft. But, looking towards the future, contracting initiatives can and will likely be used to promote a variety of private workplace standards and employer behaviors. And, as governments move more and more public functions into private hands, the reach of these contract initiatives on private employers and entire industries only grows.

To be sure, contract-based strategies will not fix the problem of wage theft instantly or entirely. Normalized behavior takes deliberate action and time to undo. And although we have not found them yet, there are probably limits to privatizing public functions and activities—so not every employer is, or ever will be, a public contractor. But, for now, there is energy here in contract-based initiatives to craft a framework of public accountability when profiting from public money. Because, while regulation can be complicated, the notion that paying the piper means also getting to call the tune remains a simple one.