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CENTER FOR LABOR & A JUST ECONOMY

AT HARVARD LAW SCHOOL

BUILDING WORKER POWER IN CITIES AND STATES

A TOOLKIT FOR STATE AND LOCAL LABOR POLICY INNOVATION

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CENTER FOR LABOR AND A JUST ECONOMY

BUILDING WORKER POWER IN CITIES AND STATES: A TOOLKIT FOR STATE AND LOCAL LABOR POLICY INNOVATION

CLJE:LAB

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INTRODUCTION

Our system of federal labor laws has long failed to adequately protect workers' rights to organize and bargain collectively. Moreover, decades of court decisions have further compounded this issue with preemption doctrines that inhibit states from legislating on labor issues to address deficiencies in federal law. But despite the limitations that federal preemption poses, creative policy approaches continue to emerge at the sub-federal level.

In our 2020 "Clean Slate for Worker Power" report, we proposed setting federal labor law as a floor and enabling policy experimentation at the state and local levels, provided that such experimentation strengthens labor standards and the right to engage in collective activity. Achieving this goal would take passing federal legislation, which appears unlikely in the near term.[1] Nevertheless, even within the constraints of existing preemption doctrine, states and localities have been testing the bounds, passing laws, and trying new models that build worker power.

As a resource designed for policymakers, organizers, strategists, researchers, communicators, and lawyers, this toolkit surveys the landscape of worker power-building policies that have been — or might be — attempted at the state and local levels. In doing so, CLJE:Lab aims to chart possible paths forward for new policy avenues that expand organizing and foster empowerment for workers.

As an exercise in capturing the ongoing nationwide experimentation and dynamism, this toolkit is and will remain a work in progress. We plan to continue to refine and update it as often as needed, and we encourage you to check back frequently for new additions and to share your suggestions.

We have given particular attention to whether the policies included have faced preemption challenges, how those challenges were resolved, and how they can be avoided in the future. However, the toolkit is not designed to provide a comprehensive legal analysis of these questions. Instead, we hope that it will be a living document that will continue to be useful for a broad range of actors seeking ideas and guidance on how to advance worker power-building efforts wherever possible.

1 *See* Clean Slate for Worker Power, *Overcoming Federal Preemption: How to Spur Innovation at the State and Local Level*, Lab. & Worklife Program, Harv. L. Sch. (May 2021), https://clje.law.harvard.edu/overcoming-federal-preemption-how-to-spur-innovation-at-the-state-and-local-level/.

ABOUT CLJE:LAB

CLJE:Lab is the policy and legal innovation lab at Harvard Law School's Center for Labor and a Just Economy (CLJE). Here, our ideas for building worker power and strengthening democracy hit the ground. Our mission is to foster creativity and develop innovative approaches to empowering working people. Despite political gridlock and the challenges to passing comprehensive labor law reform, we believe there is tremendous potential for creativity and experimentation at the local, state, and federal levels to move the needle toward greater economic and political equality.

ABOUT THE CENTER FOR LABOR AND A JUST ECONOMY

CLJE is Harvard Law School's hub of collaborative research, policy, and strategies to empower working people to build an equitable economy and democracy. Through convening stakeholders, disseminating ideas, advising policymakers, and shaping how the media understands progressive labor issues, the Center is committed to reimagining the law and developing paradigm-shifting policy.

OVERVIEW OF LABOR LAW PREEMPTION

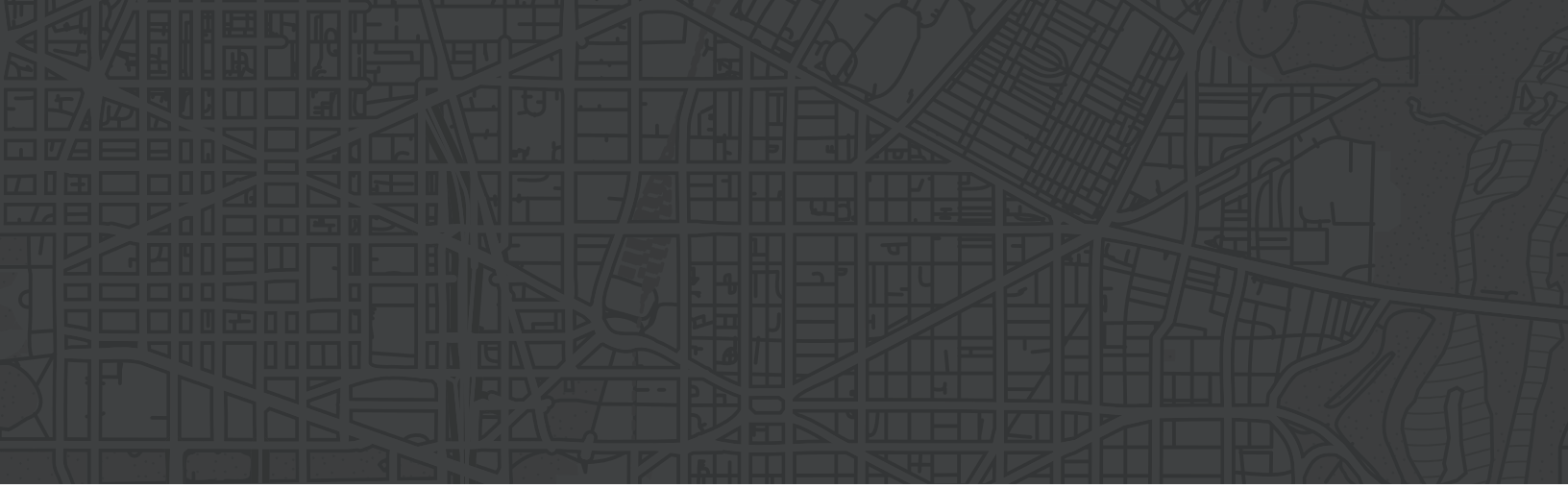
FEDERAL PREEMPTION

(FROM CLEAN SLATE POLICY OPTION PAPER, "OVERCOMING FEDERAL LABOR PREEMPTION")[2]

Federal preemption of labor law rests on 50 years of judicially created doctrine, not on any statutory language in the National Labor Relations Act (NLRA) or subsequent federal labor legislation nor on any discernible congressional intent.[3] Despite the lack of statutory language on preemption, the judicially created jurisprudence is extensive. Indeed, "it would be difficult to find a regime of federal preemption broader than the one grounded in the NLRA."[4]

The judiciary has created multiple federal preemption doctrines. Under *Garmon* preemption,[5] states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.[6] In *Garmon*, an employer obtained a state injunction against a union for picketing.[7] Instead of simply holding that the injunction was invalid because it interfered with federally protected labor rights, the Court created a broad preemption doctrine that covers even arguably protected or prohibited conduct — necessarily more than conduct regulated by the NLRA.[8] Since the 1959 Supreme Court decision, *Garmon* has been riddled with inconsistencies and exceptions.[9]

2 *Id.*
3 *See, e.g.,* Chamber of Com. v. Brown, 554 U.S. 60, 65 (2008) (noting that the NLRA contains no express preemption provisions).
4 *See* Benjamin Sachs, *Despite Preemption: Making Labor Law in Cities and States,* 124 Harv. L. Rev. 1153, 1154 (2011).
5 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).
6 *See id.* at 245–46.
7 *See id.* at 237.
8 *See id.* at 244–46.
9 *See* Henry H. Drummonds, Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy, 70 La. L. Rev. 97, 163–88 (2009).



The Supreme Court broadened preemption further in *Machinists*,[10] where the Court held that the NLRA preempts areas intended to be left to "the free play of economic forces."[11] There, an employer brought an unfair labor practice complaint under state law against unionized workers for refusing overtime work during contract negotiations.[12] The Supreme Court ruled in favor of the union but expanded the *Garmon* doctrine to hold that Congress intended for certain conduct "to be controlled by the free play of economic forces,"[13] and thus not to be regulable by states any more than by the National Labor Relations Board (NLRB).[14] Though the union in *Machinists*, like the union in *Garmon*, benefitted from the Court's expansion of federal preemption, the decision has effectively been read to prohibit states and cities from promoting unionization and collective bargaining.[15]

Following these seminal cases, courts have developed a theory of jurisprudence in preemption cases that distinguishes between states and localities acting as a purchaser or market participant (which is generally permissible) versus attempting to regulate labor relations (which is generally considered preempted). When a state or local government takes action affecting labor relations that serves its proprietary — as opposed to regulatory — interest, the action is not subject to NLRA preemption. In *Boston Harbor*,[16] the Supreme Court upheld the city's project labor agreement (PLA) requirement because it was tailored to one particular job, the Boston Harbor cleanup project.[17] While courts have generally upheld local laws promoting PLAs,[18] other laws have not fared as well. *Machinists* has been used to strike down the following: an action by the Los Angeles City Council to deny the renewal of a taxicab franchise unless the cab company settled a labor dispute with its drivers;[19] a narrowly focused Illinois statute governing rest breaks and meal periods for hotel attendants in one county (enacted during a strike by hotel attendants against a hotel owner);[20] and a statute prohibiting "employers that receive state funds from using those funds to 'assist, promote, or deter union organizing.'"[21]

10 Machinists v. Wis. Emp. Rel. Comm'n, 427 U.S. 132 (1976).

11 *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); *see also id.* at 147.

12 *See* id. at 135.

13 *Id.* at 140 (quoting Nash-Finch Co., 404 U.S. at 144).

14 *Id.* at 149.

15 *See* Moshe Z. Marvit, *The Way Forward for Labor is Through the States,* Am. Prospect (Sept. 1, 2017), http://prospect.org/article/way-forward-labor-through-states.

16 Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (Boston Harbor), 507 U.S. 218 (1993).

17 *See id.* at 232.

18 *See*, e.g., Ohio St. Bldg. & Constr. Trades Council v. Cuyahoga Cnty. Bd. of Comm'rs, 781 N.E.2d 951 (Ohio 2002) (holding that state statute could not under NLRA prohibit "project labor agreements" in pzublic works contracts), Associated Builders & Contractors, Inc. v. S.F. Airports Comm'n, 981 P.2d 499 (Cal. 1999) (upholding a "project stabilization agreement" that specified procedures for resolving labor disputes), and George Harms Constr. Co. v. N.J. Tpk. Auth., 633 A.3d 76 (N.J. 1994) (upholding agreement).

19 *See* Golden State Transit Corp. v City of L.A., 475 U.S. 608, 618–19 (1986).

20 *See* 520 S. Mich. Ave. Assocs., Ltd. v. Shannon, 549 F.3d 1119, 1131–36 (7th Cir. 2008).

21 Chamber of Com. v. Brown, 554 U.S. 60, 62 (2008) (quoting Cal. gov't. Code § 16645.2(a) (West Supp. 2008).

SECTION I

STATE CONSTITUTIONS AND PUBLIC SECTOR COLLECTIVE BARGAINING RIGHTS

Credit: Greg O'Beirne / Wikimedia Commons

BACKGROUND

The Supremacy Clause of the Constitution establishes that state constitutions may not conflict with rights secured under the federal Constitution. State constitutions can, however, protect additional rights. As Justice William J. Brennan noted in 1977, "State constitutions ... are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[1]

In recent years, strategic efforts to bolster and protect a range of individual rights — including reproductive, voting, and workers' rights — have focused on state courts and constitutions. In some state constitutions, the right to collective bargaining has been enshrined and reinforced, conferring protections on workers' rights to protect them from erosion by anti-union legislation. Moreover, state constitutions have provided a path to securing rights for categories of workers excluded from federal collective bargaining law, such as agricultural workers and public sector employees.

Methods for amending constitutions vary by state, though most generally involve a process of democratic participation.[2] In every state except Delaware, amendments proposed by state legislatures must go before voters, and 17 states allow citizens to propose and add constitutional amendments to ballots without the legislature.[3] As such, proponents of worker power can leverage democratic mechanisms to pass worker-friendly amendments to state constitutions, even in states with less union-friendly legislatures.

1 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977).

2 *See* Jessica Bulman-Pozen and Miriam Seifter, *The Democracy Principle in State Constitutions,* 119 Mich. L. Rev. 859 (2021).

3 John Dinan, *Constitutional Amendment Processes in the 50 States*, Brennan Center for Justice (July 24, 2023), https://www.brennancenter.org/our-work/research-reports/constitutional-amendment-processes-50-states.

OBJECTIVE OF STATE INTERVENTION

State constitutions contain several categories of existing provisions that do or can protect, to varying degrees, workers' rights to organize and collectively bargain. Constitutions in six states — Florida, Hawaii, Illinois, Missouri, New Jersey, and New York — explicitly affirm the right to collective bargaining. However, these protections have not always prevented hostile state legislatures from eroding workers' rights, as seen in the passage of legislation in 2023 preventing payroll deductions for public sector union dues in Florida.[4] Nevertheless, enshrining rights and protections within state constitutions has compelling benefits. For instance, because state constitutions are more difficult to amend than state statutes, rights guaranteed within constitutions tend to be less vulnerable to the political whims of changing legislatures.[5]

In addition, following the Supreme Court's decision in *Janus v. AFSCME*,[6] many states expanded protections for public sector collective bargaining through state laws or constitutional amendments. Some of these new provisions were designed to assist public sector unions in increasing membership or making collection of dues easier, thereby mitigating some of the impact of the *Janus* decision.

PREEMPTION RISK

State constitutional provisions are a promising way to protect workers where federal law does not, especially for those workers excluded from federal labor law: agricultural workers, domestic workers, independent contractors, and state employees. However, where state constitutions substantively expand the collective bargaining rights of workers covered by the NLRA, preemption challenges will likely arise.

OPTIONS FOR STATE OR LOCAL ACTION

CHALLENGING LAWS PROHIBITING UNION SECURITY AGREEMENTS

State laws that prohibit union security agreements, usually referred to as "right-to-work" laws, exist in 26 states, either through statutes or constitutional provisions.[7] In recent decades, the movement to ban union security agreements has systematically weakened unions' resources to bargain for workers by making it illegal to collect fair share fees from workers represented by the union.[8] Consequently, wages are 3.2% lower on average in right-to-work states than their non-right-to-work counterparts.[9] What's more, in 2018, the Supreme Court's decision in *Janus* further eroded labor power by ruling that public sector unions could not require non-union workers to pay fees to cover the cost of representation,[10] extending bans on union security agreements to the entire public sector.

Several states have enshrined bans on union security agreements in their constitutions. For example, the Florida Constitution recognizes "the right of employees ... to bargain collectively" but also declares "the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."[11] The Florida Supreme Court has interpreted this provision as prohibiting union security agreements in the state.

By contrast, the Illinois Constitution specifically protects union security agreements. In 2022, Illinois voters passed the Workers' Rights Amendment, which not only enshrines the fundamental right for public sector workers to organize and bargain collectively but also creates a barrier against future attempts to ban union security agreements, making Illinois the first state in the country to do so. The amendment specifies that "no law shall be passed that interferes

4 Michael Sainato, *DeSantis Leads Republican States' Attacks Against Public Sector Unions*, The Guardian, (Nov. 10, 2023), https://www.theguardian.com/us-news/2023/nov/10/anti-union-desantis-republican-florida-alaska.

5 Aubrey Sparks, *State Constitutions and Protections for Workers*, OnLabor Blog (May 16, 2018), https://onlabor.org/state-constitutions-and-protections-for-workers/.

6 Janus v. A.F.S.C.M.E., Council 31, 138 S. Ct. 2448 (2018) (holding that mandating union agency dues from public sector employees was unconstitutional compelled speech under the First Amendment).

7 Joey Cappelletti, *Michigan Becomes 1st State in Decades to Repeal 'Right-to-Work' Law*, PBS NewsHour (March 24, 2023), https://www.pbs.org/newshour/politics/michigan-becomes-1st-state-in-decades-to-repeal-right-to-work-law.

8 Janelle Jones and Heidi Shierholz, *Right-to-Work is Wrong for Missouri,* Econ. Pol'y Inst. (July 10, 2018), https://www.epi.org/publication/right-to-work-is-wrong-for-missouri-a-breadth-of-national-evidence-shows-why-missouri-voters-should-reject-rtw-law/.

9 Elise Gould and Will Kimball, *"Right-to-Work" States Still Have Lower Wages,* Econ. Pol'y Inst. (April 22, 2015), https://www.epi.org/publication/right-to-work-states-have-lower-wages/.

10 Janus v. A.F.S.C.M.E., Council 31, 138 S. Ct. 2448 (2018).

11 Fla. Const. art. I, § 6.

with, negates, or diminishes the right of employees to organize and bargain collectively … **including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment"** (emphasis added).[12] In 2023, similar constitutional amendments aimed at precluding future legislative attempts to erode collective bargaining rights were proposed in Vermont and Pennsylvania.[13]

Depending on their constitution, states have several options for using constitutional amendments to advance worker power in the right-to-work context. First, states with constitutional provisions like Florida's, which have been interpreted to preclude union security clauses, can amend their constitutions to remove those clauses. Second, states where the constitution is silent on union security clauses can follow the example of Illinois and enshrine clear protection for collective bargaining rights in the constitution to preclude future adoption of any bans. Finally, in states with statutes barring union security agreements and no constitutional provisions on the issue, states can invalidate these statutes through either constitutional amendments or legislative repeal.

PROTECTING PUBLIC SECTOR COLLECTIVE BARGAINING

While the NLRA governs private sector workers' labor rights, labor rights for state and local government workers — explicitly excluded from the Act — vary by and within states as well as by occupation. In recent years, efforts to undermine public sector collective bargaining have intensified in some states. States like Wisconsin have passed legislation restricting a range of collective bargaining rights for public sector workers, including limiting which conditions of work can be collectively bargained.[14] A number of Republican-led states have since followed suit in rolling back public sector collective bargaining rights.[15]

Where state statutes and ordinances have sought to undermine public sector collective bargaining rights, state constitutions can provide a defense, even in states generally less friendly to worker organizing.[16] In Missouri, the collective bargaining provisions in the state's constitution have been interpreted as extending to both private and public sector employees, with the state court recognizing that "'[e]mployees' plainly means employees. There is no adjective; there are no words that limit 'employees' to private sector employees."[17] In 2021, the Missouri Supreme Court invoked this provision to strike down a state law placing limits on public sector unions.[18]

There are several states where public sector workers still have no right to collective bargaining, and in some states, they also have no right to strike.[19] In North Carolina and South Carolina, public sector collective bargaining is banned. In Texas and Georgia, only police and firefighters have the right to bargain. Additionally, there are states — primarily throughout the South — where the right is not protected, resulting in either no bargaining at all or sporadic bargaining in individual cities and counties.[20] Thus, another option to build worker power is to expand collective bargaining rights for public sector workers in states where it is not allowed or not guaranteed.

EXPANDING PUBLIC SECTOR COLLECTIVE BARGAINING RIGHTS

In the wake of the *Janus* decision, a few states passed statutes amending their public sector collective bargaining laws. These laws fell into several categories: 1) allowing unions to charge fees for certain services provided to nonmembers; 2) relieving public sector unions from certain obligations vis-a-vis nonpaying

12 Ill. Const. art I, §25(a) (emphasis added); Jennifer Sherer, Illinois Workers' Rights Amendment Sets New Bar for State Worker Power Policy, Econ. Pol'y Inst. (December 7, 2022), https://www.epi.org/blog/illinois-workers-rights-amendment-sets-new-bar-for-state-worker-power-policy-other-state-legislatures-should-seize-the-moment-to-advance-worker-racial-and-gender-justice-in-2023/.

13 PR. 3, Right to Collectively Bargain, Vermont General Assembly, https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2023&sInd=0&body=H&type=B&bn=950; https://legislature.vermont.gov/bill/status/2024/PR.3.

14 Wis. Act 10 (2011).

15 Sherer, supra note 33.

16 Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, Center for Econ. and Pol'y Research (March 2014), https://cepr.net/documents/state-public-cb-2014-03.pdf.

17 Independence-Nat. v. Independence Sch., 223 S.W.3d 131, 136 (Mo. 2007).

18 Kaitlyn Schallhorn, *Missouri Supreme Court Voids 'Paycheck Protection' Bill*, The Missouri Times (June 1, 2021), https://themissouritimes.com/missouri-supreme-court-voids-paycheck-protection-bill/.

19 Mark Lieberman, *MAP: Where School Employees Can and Can't Strike*, Education Week (March 16, 2023), https://www.edweek.org/leadership/map-where-school-employees-can-and-cant-strike/2023/03.

20 Alexia Fernández Campbell, *Government Workers Don't Have a Federal Right to Unionize. Democrats Want to Change That,* Vox (June 225, 2019), https://www.vox.com/2019/6/25/18715531/public-sector-government-workers-union-bill-congress.

nonmembers; 3) expanding access rights for unions; and 4) limiting the time frame during which membership or dues authorization can be revoked by prescribing a window for such actions.

For example, in Massachusetts, the state legislature overrode the governor's veto to pass a bill permitting unions to require nonmembers to pay reasonable costs and fees associated with grieving or arbitrating a matter under a collective bargaining agreement, including arbitrator fees and reasonable attorney fees.[21] The law also allows the union to refuse to provide such services for employees who refuse to pay the fees. Additionally, it expands unions' access to public employee information and public employer resources, allowing them to meet with all new employees and use the employer's email system to communicate with them. Finally, the law sets new guidelines for the timing and form of revocation of dues authorization.

In New York, the legislature enacted several collective bargaining-related provisions in its 2018 Budget Act, passed just a few months before the *Janus* decision.[22] The Budget Act allows unions to sign up members using an electronic authorization and dues deduction card for the first time. It also allows authorization cards to stipulate yearly windows as the only time when members may withdraw from the union. The New York law also includes provisions similar to those in the Massachusetts law regarding the duty of fair representation amendments and expanded access rights. California,[23] New Jersey,[24] Illinois,[25] Washington,[26] and Oregon[27] have also passed post-*Janus* legislation to enhance public sector collective bargaining rights.

CONSIDERING ASSEMBLY RIGHTS

All but three state constitutions — Maryland, Minnesota, and New Mexico — recognize a right to assemble (see Appendix II, Table 2). Some have argued that assembly rights extend protections to collective worker action, which could be interpreted accordingly at the state level.[28] Indeed, in some states, assembly rights may potentially be interpreted broadly. However, there have not yet been any state court decisions that have interpreted assembly rights provisions as protecting unions, and any such argument would likely raise preemption challenges.

"Where state statutes and ordinances have sought to undermine public sector collective bargaining rights, state constitutions can provide a defense, even in states generally less friendly to worker organizing."

21 Mass. Gen. Laws ch. 73 (2019), https://malegislature.gov/Laws/SessionLaws/Acts/2019/Chapter73.

22 *Report on the State Fiscal Year 2018-19 Enacted Budget*, Office of the New York State Comptroller (April, 2018), https://www.osc.state.ny.us/files/reports/budget/pdf/budget-enacted-2018-19.pdf.

23 Cal. SB-866, ch. 53 (2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB866.

24 Responsible Collective Negotiations Act, NJ S3810 (2021), https://legiscan.com/NJ/bill/S3810/2020.

25 Il. General Assembly, Pub. Act No. 101-0620 (2019), https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0620&GA=101.

26 Wash. Laws 230 (2019), https://app.leg.wa.gov/billsummary?BillNumber=1575&Chamber=House&Year=2019.

27 Or. Stat. ch. 429 (2019), https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/HB2016.

28 Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law,* 4 U.C. Irving L. Rev. 561 (2014).

SPOTLIGHT

ADOPTING BARGAINING FOR THE COMMON GOOD STRATEGIES IN PUBLIC SECTOR CAMPAIGNS

Credit: Ted Eytan / Wikimedia Commons

The National Education Association (NEA), the largest labor union in the United States representing public school teachers and other education workers, has successfully adopted Bargaining for the Common Good principles in their bargaining strategy, focusing on engaging a broad coalition of stakeholders, improving transparency, and creating a common language shared by the educators, their union, and state officials. Bargaining for the Common Good is a strategic approach to organizing and collective bargaining that grew out of the Kalmanovitz Initiative for Labor and the Working Poor at Georgetown University.[29] Common good principles emphasize building coalitions and leveraging collective strength to push for policies that benefit the broader community at the bargaining table. Beyond improved pay and benefits, the NEA has won smaller class sizes, educator recruitment and retention programs, mental health support, and other resources by leveraging this approach.[30]

29 Kalmanovitz Initiative for Labor and the Working Poor, *Bargaining for the Common Good*, https://lwp.georgetown.edu/bcg/.

30 The National Educators Association, *Bargaining for the Common Good*, https://www.nea.org/your-rights-workplace/union-educator-voice/bargaining-common-good.

SECTION II

WORKERS EXCLUDED FROM THE NLRA

Credit: darshika / Adobe Stock

BACKGROUND

The NLRA has been criticized for excluding large categories of workers, some of whom are those most in need of labor law protections. The statute explicitly excludes public employees,[1] supervisors, agricultural workers, domestic workers, independent contractors, employees covered by the Railway Labor Act, and "any individual employed by his parent or spouse."[2] Numerous other workers are partially or completely excluded from the Act's coverage, including undocumented workers, rehabilitation workers, incarcerated workers, and certain student workers.

State and local legislation can serve as an important vehicle to partially remedy these deficits. In fact, several state and local governments have already attempted to provide collective rights to workers excluded from the NLRA. However, much more can still be done. And while federal labor law preemption and antitrust law present some challenges for greater coverage, many of those challenges can be overcome.

OBJECTIVE OF STATE INTERVENTION

Most workers excluded by the NLRA have no collective bargaining rights at all, and many are particularly vulnerable workers who could greatly benefit from the power that collective bargaining provides. Even where states have clear authority to grant labor rights, few have taken action to fill in the gaps. For example, several states ban bargaining altogether for public sector workers, many states do not require districts to bargain with majority unions, and 33 states ban public-sector strikes.[3] For farmworkers, only 14 states provide for collective bargaining rights at all, and some of these states eliminate or limit the right to strike or picket.

States can enact legislation to provide collective bargaining rights for workers excluded from the NLRA.

1 29 U.S.C. § 152(2).

2 *Id.* at § 152(3).

3 *Public-Sector Union Policy in the United States, 2018-2023,* Ballotpedia, https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-present#Relevant_legislation_in_state_legislatures; Priya M. Brannick & Andrew Holman, *Grading State Public Sector Labor Laws,* Commonwealth Found'n (Sept. 2022).

When covering excluded workers, state and local governments can experiment with labor laws that differ from the NLRA model, such as adopting sectoral bargaining systems, providing for majority sign-up, or requiring first contract arbitration.

PREEMPTION RISK

Whether state and local governments can provide collective bargaining rights for a group of workers depends on three questions. The first two concern labor law preemption; the third concerns other forms of federal preemption. First, are the workers actually excluded from coverage of the NLRA? Second, did Congress intend to allow for state or local regulation of the workers' collective bargaining rights, or did Congress intend to deny the workers' right to collective bargaining entirely? Third, is state and local provision of collective rights for these workers foreclosed by any other federal law regime, such as immigration or antitrust law?

Workers outside the NLRA can be sorted into four categories, each with its own preemption risk:

CLEARLY NOT PREEMPTED: PUBLIC SECTOR, DOMESTIC, AND AGRICULTURAL WORKERS

These workers are clearly excluded from the NLRA's definition of "employee." Courts have thus uniformly held that states and localities are free to implement their own laws providing collective rights to these workers.[4]

CLEARLY PREEMPTED: SUPERVISORS AND UNDOCUMENTED WORKERS

State and local labor laws purporting to provide collective bargaining rights to supervisory workers are completely preempted. Courts have inferred a congressional judgment to preclude any labor rights for supervisors in order to avoid putting them "in the position of serving two masters with opposed interests."[5]

Meanwhile, workers lacking work authorization are not entitled to the full protections of the NLRA given that two of the Act's most crucial remedies, the backpay and reinstatement awards, do not apply to them. States cannot fill in this gap by providing for backpay or reinstatement awards because such provisions would be preempted by the Immigration Reform and Control Act of 1986 (IRCA).[6]

PREEMPTION UNCLEAR: STUDENT, REHABILITATION, INCARCERATED, AND WORKFARE WORKERS

For these workers, the possibility of state and local labor law coverage is largely unsettled. Most are likely outside the NLRA's coverage under National Labor Relations Board precedents. But unlike groups of workers expressly excluded from the Act's coverage, neither the Board nor the courts have clarified whether Congress intended to preclude state and local labor law for these workers.

States and cities can resolve some of this uncertainty by petitioning the Board for an advisory opinion (under § 102.98 of the Board's Rules and Regulations) as to whether a given class of workers is covered by the NLRA. However, even when the Board has opined — as it has in the case of medical interns[7] — courts may not necessarily defer to the Board's judgment about the scope of the NLRA's preemptive effect.

4 *See, e.g.*, United Farm Workers of Am., AFL-CIO v. Ariz. Agr. Emp. Rels. Bd., 669 F.2d 1249, 1256–57 (9th Cir. 1982) (agricultural workers); Bud Antle, Inc. v. Barbosa, 45 F.3d 1261, 1274 (9th Cir. 1994) (same); Willmar Poultry Co. v. Jones, 430 F. Supp. 573, 578 (D. Minn. 1977) (same); Greene v. Dayton, 81 F. Supp. 3d 747, 751 (D. Minn.), *aff'd*, 806 F.3d 1146 (8th Cir. 2015) (domestic workers); Jackson Cnty. Pub. Hosp. v. Pub. Emp. Rels. Bd., 280 N.W.2d 426, 430 (Iowa 1979) (public employees).

5 Beasley v. Food Fair of North Carolina, Inc, 416 U.S. 653, 661-62 (1974).

6 *See* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002). But note that this case does not preclude backpay for work actually performed, for example, under the Fair Labor Standards Act. See Wage and Hour Division, 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, https://www.dol.gov/agencies/whd/fact-sheets/48-hoffman-plastics.

7 *See* Kansas City General Hospital & Medical Center, 225 NLRB 108, 109 (1976) (finding that the NLRA preempts state and local jurisdiction over medical interns, residents, and fellows at hospitals).

STATES NOT PREEMPTED, CITIES SOMETIMES PREEMPTED: INDEPENDENT CONTRACTORS

State or local labor laws covering independent contractors must be analyzed separately due to antitrust law. Such laws are not preempted by the NLRA.

Federal antitrust law has often been applied to prevent independent contractors from acting collectively, considering this to be illegal collusion.[8] Since the emergence of the gig economy, however, some have argued that gig workers fall within antitrust law's "labor" exemption.[9] Furthermore, states are completely immune from antitrust liability and can provide collective rights to independent contractors if they actively supervise the contractors' bargaining process and can disapprove of bargaining that results in anticompetitive practices.[10] Municipal governments can avoid antitrust scrutiny by either receiving state authorization to regulate independent contractors' collective bargaining (low preemption risk) or restricting collective bargaining rights to preclude bargaining over wages to avoid allegations of price-fixing (medium preemption risk).

OPTIONS FOR STATE OR LOCAL ACTION

BROAD COLLECTIVE BARGAINING RIGHTS MODELED ON THE NLRA

As noted earlier, state constitutions can be used to establish labor rights for excluded workers. Alternatively, collective bargaining rights can be provided by statute. In either case, state collective bargaining laws could automatically cover any workers excluded from federal labor law. For example, the New York State Employment Relations Act provides collective bargaining rights to all private-sector workers in the state unless the NLRB determines that they are covered by the NLRA. States can also extend collective bargaining rights modeled on the NLRA to particular categories of excluded workers, such as agricultural workers, domestic workers, or independent contractors (subject to the preemption questions above).

COLLECTIVE RIGHTS STRONGER THAN THE NLRA

States and local governments can turn a major downside of federal labor law — its exclusion of large groups of vulnerable workers — into an opportunity by providing collective rights that improve on the deficits of the NLRA.

Public Sector Workers: Many of the innovative features adopted for public sector collective bargaining are addressed in Section I above. Another interesting provision in several public sector bargaining laws is interest-based bargaining and first contract arbitration. Often facilitated by mediators, interest-based bargaining provides an alternative to traditional, positional forms of bargaining by promoting a collaborative, trust-based approach to negotiating contracts. Under a system of interest arbitration applied to first contracts, employers are obligated to start the collective bargaining process within 10 days of receiving a written notice from the union and have 90 days to negotiate a contract before either side may request mediation and arbitration. These provisions are critical to ensuring that public sector workers covered by such laws reach effective collective bargaining agreements, addressing the challenge that many workers face under the NLRA in reaching first contracts.

Agricultural Workers: Fourteen states extend collective bargaining rights to agricultural workers.[11] California's statute departs from the NLRA model in significant ways that make organizing workers easier. California's Agricultural Labor Relations Act (ALRA) explicitly allows workers to unionize through majority card check recognition, permits unions to engage in secondary consumer boycotts, and more generally gives its labor board the power to depart from NLRA precedent whenever necessary to further state labor policy.[12]

8 *See, e.g.*, Chamber of Com. of the United States of Am. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (holding that law creating collective bargaining for gig drivers violated Sherman Act).

9 *See*, e.g., Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306 (1st Cir. 2022) (holding that independent contractors are within the labor-dispute exemption). At least one Commissioner of the Federal Trade Commission has endorsed this view. https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-aiming-dollars-not-men.pdf.

10 *See* N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 507 (2015).

11 Samantha Mikolajczyk, *Collective Bargaining Rights for Farmworkers*, National Agricultural Law Center, https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/.

12 *Agricultural Labor Relations Board, Fact Sheet*, Office of Governor Gavin Newsom, https://www.alrb.ca.gov/forms-publications/faqs-and-guidance/fact-sheet-english/.

Ride-Hail Drivers: In 2016, Seattle passed an ordinance providing ride-hail workers with collective bargaining rights.[13] The ordinance was later amended to limit bargaining to working conditions, rather than wages, to avoid potential antitrust challenges. Notwithstanding this limitation, the ordinance requires ride-hailing, ride-sharing, or taxi companies to supply drivers' names and contact information to unions wishing to contact them about organizing. The ordinance also provides for interest arbitration in the case of impasse, gives the city veto power over approval of collective bargaining agreements, and allows for public hearings on the substance of those agreements.

In the intervening years, a number of states have experimented with legislation to extend collective bargaining rights to ride-hail drivers. Most recently, Massachusetts legislators have taken up a bill to create a sectoral bargaining system for ride-hail drivers in the state.[14] If enacted, the bill would require companies like Uber and Lyft to negotiate as a group with any union that represents at least 25% of drivers. Once an agreement is reached, all drivers with more than 100 trips completed in the previous quarter would be entitled to vote on whether to approve the agreement. If approved, the agreement would go to the Massachusetts Secretary of Labor for a fairness check. If the parties could not reach an agreement, an arbitrator would step in and devise fair terms to submit to drivers for a vote.

Legislating new forms of collective bargaining for ride-hail drivers raises concerns regarding the companies' misclassification of these drivers as independent contractors. With careful drafting and coordination with unions, enforcement authorities, and other organizations advocating for drivers' proper classification as employees, state policymakers can experiment with legislating new rights for drivers without precluding proper classification actions.

Domestic Workers: Led by organizations representing low-wage and immigrant workers, such as the National Domestic Workers Alliance, a number of states have enacted Domestic Workers Bills of Rights in order to extend basic protections to workers excluded from the NLRA and many other labor standards provisions. Domestic Workers Bills of Rights have passed in 10 states, two major cities, and Washington, D.C. Protections included in these laws are the rights to:[15]

- Fair wage and overtime pay
- Rest breaks
- Written agreements
- Freedom from discrimination and harassment
- Safe work conditions
- Privacy for in-home workers
- Days of rest
- Paid leave

"States and local governments can turn a major downside of federal labor law — its exclusion of large groups of vulnerable workers — into an opportunity by providing collective rights that improve on the deficits of the NLRA."

13 Chamber of Com. of the United States of Am. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).

14 Kate Andrias, Sharon Block & Benjamin Sachs, *A New Path for Unionizing Uber and Lyft*, CommonWealth Beacon (December 2023), https://commonwealthbeacon.org/opinion/a-new-path-for-unionizing-uber-and-lyft/.

15 National Domestic Worker Alliance, *Domestic Workers Bill of Rights*, https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/.

SPOTLIGHT

SEATTLE DOMESTIC WORKERS ORDINANCE

Credit: Seattle City Council

Domestic workers are statutorily excluded from a number of federal labor and civil rights laws, including the National Labor Relations Act, the Fair Labor Standards Act, and the Occupational Safety and Health Act. In addition, due to the small size of their employers, they also generally do not qualify for protections under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Family and Medical Leave Act. As such, domestic workers face acute vulnerabilities with few statutory protections in their workplaces, which have been characterized by low pay, long hours, and physical abuses.[16]

Since 2010 after the passage of the first domestic workers' bill of rights in New York, domestic workers have mobilized to pass a number of policies granting them labor protections at the state and local levels. In 2018, Seattle experimented with a sectoral bargaining approach in its Domestic Workers Bill of Rights.[17] Seattle's Domestic Workers Ordinance created a Domestic Workers Standards Board with almost half of its members composed of domestic workers and domestic worker organization representatives. The Board can recommend changes to the city standards governing domestic workers.

16 Linda Burnham and Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, National Domestic Workers Alliance (2012), https://www.domesticworkers.org/wp-content/uploads/2021/06/HomeEconomicsReport.pdf.

17 Aurelia Glass and David Madland, *Workers Boards Across the Country are Empowering Workers and Implementing Workforce Standards Across Industries*, Center for American Progress (Feb. 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries/.

SECTION III

WORKERS' BOARDS

Credit: Natchaya / Adobe Stock

BACKGROUND

Workers' boards — also known as workforce standards boards, industry standards boards, wage boards, or sectoral co-regulation — are government entities that generally consist of workers, employers, and representatives of the public.[1] Since the early 20th century, tripartite boards (focused primarily on setting wages) have existed in a handful of states, including California, Colorado, Massachusetts, and New York. Over the last decade, however, an increasing number of states and cities have established workers' boards across a range of industries, covering domestic work, agriculture, and nursing homes, among others.[2] While details vary from model to model, these standard-setting bodies all give workers a formalized role in setting and enforcing labor standards, wage rates, and benefits across sectors, occupations, and regions.

Simulation of the effects of wage boards on wage distributions suggest that boards more effectively address wage stagnation and inequality than raising minimum pay because boards allow for "raising wages not just for those at the very bottom, but also for those at the middle."[3] By setting standards for pay and benefits across sectors and regions, boards can disincentivize firms from competing with one another by lowering labor standards at the expense of workers.

OBJECTIVE OF STATE INTERVENTION

Our existing system of labor law falls critically short of protecting the right to organize and bargain collectively for better wages and working conditions. Workers' boards can fill in some of the gaps for workers for

1 *See* Kate Andrias, David Madland & Malkie Wall, *"Workers' Boards: A Brief Overview,"* Center for American Progress (Dec. 11, 2019), https://www.americanprogress.org/article/workers-boards-brief-overview/; Cynthia Estlund, *Part I: The Case for Sectoral Co-Regulation*, OnLabor Blog (May 21, 2024), https://onlabor.org/the-case-for-sectoral-co-regulation/.

2 Terri Gerstein & LiJia Gong, *How Local Government Can Protect Workers' Rights Even When States Do Not Want Them To: Opportunities for Local Creativity and Persistence Despite Double Preemption*, 51 Fordham Urb. L.J. 977 (2024).

3 Arindrajit Dube, *"Using Wage Boards to Raise Pay,"* Economics for Inclusive Prosperity (Dec., 2018), https://econfip.org/wp-content/uploads/2019/02/4.Using-Wage-Boards-to-Raise-Pay.pdf.

whom winning union representation under the NLRA is particularly challenging or essentially impossible.[4]

Within sectors with low or no union density, boards can give workers without union representation a voice in determining their workplace standards and conditions.[5] Workers' boards can help close racial and gender pay gaps by implementing sector-wide, measurable standards and thus "reducing opportunities for discrimination both directly and indirectly by addressing other causes of pay gaps, such as inconsistent scheduling or a lack of medical or family leave."[6]

Workers' boards can also help strengthen the capacity of worker organizations to build membership and power in their communities. For example, boards that include a role for worker representatives, mandate hearings at which workers provide testimony, or allow worker organizations to submit positions or data can catalyze organizing campaigns.

In addition, such boards offer a promising path to achieving some of the goals of a broad-based system of sectoral bargaining. Given the shortcomings of decentralized, worksite-level bargaining and the challenges to building union density, bargaining at the sectoral level represents a key way for workers to countervail corporate power.[7] Though not a direct substitute for traditional collective bargaining, boards can enable workers to have a voice in setting standards that apply across sectors and regions, covering categories of workers who might otherwise face challenges to collective bargaining.

PREEMPTION RISK

Since the relatively recent inception of current models of worker boards in the United States, few boards have faced preemption challenges,[8] and none of those challenges have succeeded. However, many cases remain ongoing. Some local laws have been invalidated outside the courts, whether by referendum or superseding state laws. In addition, state preemption of wage- or standard-setting at the municipal level may impact the viability of city-level boards.[9]

Developments surrounding the hotly contested fast-food workers' board in California offer clues about future preemption challenges. California AB 257, known as the FAST Recovery Act, aimed to establish a sector-wide labor council composed of workers, advocates, government officials, and fast-food company representatives within the fast-food industry in the state of California. It was signed into law in September 2022 but suspended in January 2023 after fast-food companies garnered enough signatures to put it to a ballot referendum.

Opponents claimed that the FAST Act would displace the NLRA's collective bargaining process and interfere with the "free play of economic forces," setting grounds for preemption. But such challenges would likely have failed because the council would not have impeded private collective bargaining and minimum labor standards are not preempted by the NLRA.[10] It was ultimately repealed in favor of a new bill, AB 1228, which eliminates some provisions of the former bill but keeps intact the structure of a workers' council that gives workers a seat at the table in determining their wages and working conditions.[11]

The preemption risk also can be lowered by charging the workers' board with making recommendations to a government agency instead of setting standards directly. The more that the workers' board resembles participatory rulemaking, as opposed to direct authority, the more likely it is to survive a preemption challenge.

4 Andrias, Madland & Wall, *supra* note 67.

5 David Madland, *Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States 16* (Cornell University Press, 2021).

6 Aurelia Glass & David Madland, *"Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries,"* Center for American Progress (Feb. 18, 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries/.

7 Sharon Block & Ben Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, Harvard Law School Labor and Worklife Program (2020).

8 Where minimum labor standards laws have been challenged, plaintiffs have alleged a host of claims other than preemption, including Dormant Commerce Clause, Equal Protection Clause, and state constitutional arguments.

9 Terri Gerstein & LiJia Gong, *The Role of Local Government in Protecting Workers' Rights: A Comprehensive Overview of the Ways that Cities, Counties, and Other Localities are Taking Action on Behalf of Working People*, Econ. Pol'y Inst. (June 13, 2022), https://www.epi.org/publication/the-role-of-local-government-in-protecting-workers-rights-a-comprehensive-overview-of-the-ways-that-cities-counties-and-other-localities-are-taking-action-on-behalf-of-working-people/.

10 *Recent Thing - California Law Creates Council to Set Minimum Work Standards for Fast-Food Industry, 136* Harv. L. Rev. 1748 (2023).

11 Julio Colby, *California Fast-Food Workers Secure Big Win in Compromise Deal*, OnLabor Blog (Sept. 18, 2023), https://onlabor.org/california-fast-food-workers-secure-big-win-in-compromise-deal/.

OPTIONS FOR STATE OR LOCAL ACTION

BROADEN THE ISSUES ADDRESSED BY WORKERS' BOARDS

In its narrowest incarnation, a workers' board may engage only in setting wages for a particular sector or category of workers. For example, both New York City and New York State first enacted a $15/hour minimum wage based on the recommendation of a wage board composed of worker representatives, employers, and the public. More ambitious versions of workers' boards, like the original version of the California fast-food workers' council, influence other labor standards, such as scheduling, paid leave, training and education, and safety and health guidelines. Other industry-specific wage orders passed in New York State include overtime rates, spread-of-hours protections, and allowances for meals and lodging.[12] Some boards address even broader issues; in New York City, proposed legislation for a nail salon workers' board includes a provision empowering the board to make pricing recommendations across the industry.[13]

In addition to investigating and recommending wages and standards, workers' boards may play an advisory role in monitoring and enforcing labor standards as well as matters of local governance, including public procurement policies, economic development planning, and funding decisions.[14] For instance, in Houston, Texas, the Harris County Essential Workers Board is empowered to evaluate and provide feedback in these and other areas that are relevant to essential workers' rights.[15] Similarly, workers' boards in Saint Paul,[16] Seattle,[17] and Los Angeles[18] include an advisory function in monitoring compliance with labor standards.

ENSURE DEMOCRATIC SELECTION AND WORKER VOICE

In most cases, a workers' board consists of representatives from the government, employers, and workers themselves. The selection process for these representatives can vary. From a preemption perspective, the safest approach to selecting worker representatives is to allow workers and unions to nominate candidates to the governmental agency convening the board. Another option is to let workers vote for their representatives. This option carries a higher risk of being preempted, however, as it may be construed as functionally akin to voting for union representation in the collective bargaining process.

Workers and their unions can also be empowered through a public hearing process. The statute creating the workers' board can require the board to take testimony from the public — both individuals and organizations — in writing and in person. The statute could even designate organizations with sizable memberships as having special status at hearings. To better facilitate unions' and worker organizations' ability to provide worker witnesses, the statute could require the government agency to cover the costs of workers' appearance before the board, including wage replacement for any missed work and reimbursement for travel expenses.

12 New York Department of Labor, *Wage Orders*, https://dol.ny.gov/wage-orders.

13 New York Assembly Bill A9398 (2021), https://www.nysenate.gov/legislation/bills/2021/A9398.

14 Terri Gerstein & LiJia Gong, *supra* note 75.

15 Harris County Essential Workers Board, *Harris County Essential Workers Board Bylaws* (Nov. 2021), https://ewb.harriscountytx.gov/Portals/ewb/LiveForms/2021.11.30_HCEWB_Bylaws.pdf?ver=HfkgfJYkWgQAIZG7nL3GxQ%3d%3d 2-3.

16 Saint Paul Mayor's Office, *Labor Standards Advisory Committee*, https://www.stpaul.gov/departments/mayors-office/labor-standards-advisory-committee.

17 Seattle Government, *Responsibilities, Policies and Procedures*, Seattle Domestic Workers Standards Board, https://www.seattle.gov/documents/Departments/LaborStandards/DWSB_Bylaws_FINAL.pdf.

18 Ken Jacobs & Tia Koonse, *Workers as Health Monitors*, UC Berkeley Labor Center (July 21, 2020), https://laborcenter.berkeley.edu/workers-as-health-monitors-an-assessment-of-la-countys-workplace-public-health-council-proposal/.

PROTECT EXCLUDED WORKERS

As entities outside of the purview of the NLRA, workers' boards could extend a mechanism for worker voice to workers excluded from collective bargaining rights. For instance, Philadelphia and Seattle have created standards boards for domestic workers, who are explicitly excluded from NLRA protections. In 2022, Seattle passed an ordinance granting ride-hail drivers the right to challenge unwarranted deactivations from transportation network company (TNC) platforms before a panel consisting of representatives of both TNCs and worker-drivers, who are otherwise categorized as independent contractors. In New York and Colorado, agricultural workers — similarly excluded from the NLRA — have secured representation on standards boards as well.

MANDATE WORKERS' RIGHTS TRAININGS

Training and know-your-rights education can be regulated by workers' boards. For example, California, New York, and Minnesota all have local legislation requiring training workers on their rights in the workplace.

Worker organizations are well-equipped to deliver training and education to workers, making them key partners in enforcing standards set by boards. In Minnesota, worker organizations certified by the nursing home standards board provide regular workers' rights training in multiple languages to nursing home workers. The training curriculum must include, at a minimum, information on the standards set by the board, as well as those in federal, state, and local jurisdictions applicable to nursing home workers; how to report violations of these standards; and protections against employer retaliation. Government agencies should consider creating or leveraging existing procurement or grant vehicles to compensate worker organizations for this training, which will make it sustainable for them to provide an important service.

"[Workers'] boards offer a promising path to achieving some of the goals of a broad-based system of sectoral bargaining. Given the shortcomings of decentralized, worksite-level bargaining and the challenges to building union density, bargaining at the sectoral level represents a key way for workers to countervail corporate power."

SPOTLIGHT

MINNESOTA NURSING HOME STANDARDS BOARD

Credit: Jeff Miller for SEIU / Flickr

Workers in the nursing home industry have long faced low wages as well as risks of safety and health harms — including exposure to chemicals, physical demands, and contagious infections.[19] Such challenges were exacerbated during the COVID-19 pandemic, during which staffing shortages contributed to burnout and high turnover rates. In Minnesota, workers and advocates helped pass legislation to address these workplace dynamics and establish a tripartite board structure that empowers workers in the process of setting workplace standards in the industry.

Adopted in 2023, the Minnesota Nursing Home Standards Board conducts investigations and upholds rules that protect the health and economic security of nursing home workers. The Board is composed of nine members: six members (three representing nursing home workers and three representing employer groups) appointed by the governor and three commissioners from the Department of Labor and Industry, Health, and Human Services. The Board has the authority to set standards for wages and benefits in the industry. In April 2024 the Board voted on an industry-wide minimum wage of $22 by 2026, which will increase to $23.49 by 2027.[20]

19 Occupational Safety and Health Administration, *Nursing Homes and Personal Care Facilities*, https://www.osha.gov/nursing-home#:~:text=Health%20care%20workers%20face%20a,and%20respiratory%20and%20other%20infections.

20 Jeremy Olsen, *Minimum Wage Proposed for Minnesota's Nursing Home Workers* (April 29, 2024), https://www.startribune.com/minimum-wage-of-22-proposed-for-minnesotas-nursing-home-workers/600362495/?refresh=true

SECTION IV

STRUCTURAL REFORMS AND STRATEGIC ENFORCEMENT

Credit: mandritoiu / Adobe Stock

BACKGROUND

Effective enforcement of labor standards, such as minimum wage, overtime, paid leave, scheduling, and other basic workplace laws, is critically important for empowering workers. Although effective enforcement alone does not necessarily build worker power, ineffective enforcement and impunity by employers erode it. For example, when workers are not paid the minimum wage to which they are entitled, their lives become more precarious, leaving them with even less capacity to engage in organizing and other power-building activities at work. In addition, the government's failure to protect even these basic standards undermines workers' belief in the government agency's willingness or capacity to protect them in other ways, such as organizing activities. So, adequate funding and staffing of state and local labor standards enforcement agencies can be part of an overall strategy to build worker power.

All states with minimum wage laws except Florida have their own departments of labor, which enforce both federal and state-specific laws. These departments oversee a range of labor and employment-related issues, including wage and hour regulations, paid family leave, workplace safety and health protections, and unemployment assistance programs. However, chronic underfunding has limited these agencies' capacity to fully enforce worker protection laws. This has resulted in myriad adverse impacts to workers, including the inability of agencies to recover thousands of dollars lost to wage theft every year and to investigate critical risks to workers' safety and health on the job.[1] Innovative reforms at the state and local levels, however, have introduced new entities, structures, and enforcement mechanisms to the labor standards enforcement arena. These have effectively enabled cities and states to "not only [plug] gaps in enforcement … but [also fight] back against the labor market imbalances that corporations

1 See Ihna Mangundayao, Celine McNicholas & Margaret Poydock, *Worker Protection Agencies Need More Funding to Enforce Labor Laws and Protect Workers*, Econ. Pol'y Inst. (July 29, 2021), https://www.epi.org/blog/worker-protection-agencies-need-more-funding-to-enforce-labor-laws-and-protect-workers/; Rebecca Rainey, *Inadequate Labor Department Resources Stymie Enforcement Efforts*, Bloomberg Law (Nov. 7, 2023), https://news.bloomberglaw.com/daily-labor-report/inadequate-labor-department-resources-stymie-enforcement-efforts.

have long been driving in myriad ways that hurt worker bargaining power."[2]

OBJECTIVE OF STATE INTERVENTION: STRUCTURAL REFORMS TO GOVERNMENT AGENCIES

In recent years, state and local governments have established a number of entities specifically dedicated to labor standards enforcement. In some states, offices of state attorneys general have created specialized labor bureaus focused on protecting consumer and worker rights. At the municipal level, localities have created specialized agencies (or subunits within other agencies) equipped to administer and enforce labor standards. Such examples — the specifics of which will be explored in detail below — illustrate how cities and states are reimagining the structure of state and local government entities to meaningfully build capacity for robust labor standards enforcement.

The creation of dedicated agencies at the state and local level can help channel resources and build critical capacity for advancing, monitoring, and enforcing worker protections. Dedicated staffing and resources enable agencies to build expertise and foster trust through ongoing relationships with local community and worker organizations. Furthermore, formally establishing such units can lend some stability to the availability of resources for enforcing worker protections, shielding them from the whims of changing legislative priorities.[3]

PREEMPTION RISK

The preemption risk for structural reforms is low. While labor bureaus and agencies may be created and legislatively empowered to enforce a range of workers' rights, efforts to directly impact collective bargaining are likely to be preempted.

OPTIONS FOR STATE OR LOCAL ACTION

LABOR BUREAUS IN OFFICES OF STATE ATTORNEYS GENERAL

In recent years, state attorneys general have played an important strategic role in protecting workers' rights. Some states — most recently Colorado and Delaware — have passed laws explicitly extending the jurisdiction of state attorneys general to include labor-related matters.[4] Specific labor-related areas in which state attorneys general offices have acted include wage theft, payroll fraud, worker misclassification, and noncompete agreements.

A growing number of state attorneys general have established dedicated worker protection bureaus with the authority and resources to pursue workers' rights cases affirmatively — as opposed to solely upon referral by state agencies — in service of the public interest.[5] Though jurisdictional powers and resources vary by state, these bureaus can carry out a range of functions, such as investigating violations of workplace rights, bringing forward civil and criminal charges, and partnering with other agencies as well as peer attorneys general offices in other states to enforce worker protection laws.[6]

Partnerships between state attorneys general labor bureaus, unions, and worker advocacy groups have resulted in effective enforcement outcomes as well as an empowered role for workers' organizations in facilitating these efforts. Workers' organizations can help labor bureaus identify issues that are a priority to workers and assist enforcement efforts by boosting outreach, referring cases, and facilitating engagement with workers throughout investigations.[7]

2 Terri Gerstein, *State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement,* 65 St. Louis U. L.J. 45 (2020).

3 Gerstein, *supra* note 85.

4 Col. SB 22-161, (2023), https://leg.colorado.gov/sites/default/files/2022a_161_signed.pdf; 83 Del. Laws ch. 443 (2022), https://legis.delaware.gov/SessionLaws/Chapter?id=41508.

5 Terri Gerstein & Marni von Wilpert, *State Attorneys General Can Play Key Roles in Protecting Workers' Rights*, Econ. Pol'y Inst. (May 7, 2018), https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/.

6 Gerstein & von Wilpert, *supra* note 88.

7 Jane R. Flanagan, *Alt-Enforcers: The Emergence Of State Attorneys General As Workplace Rights Enforcers*, 95 Chi. Kent L. Rev. 103 (2020).

For example, in 2023, the Massachusetts' attorney general office partnered closely on a wage-and-hour case with IUPAT District Council 35, which helped refer cases in an investigation involving a local contractor that resulted in $500,000 recovered in civil penalties.[8] Workers' organizations can also play an indispensable role as trusted advocates on behalf of vulnerable workers. In New York, immigrant workers' advocates from TakeRoot Justice and National Mobilization Against Sweatshops referred a wage theft case involving immigrant home health aide workers to the New York State Office of the Attorney General's Labor Bureau, which in conjunction with the Office's Civil Enforcement Section recovered $450,000 in backpay for over 100 workers.[9]

MUNICIPAL OFFICES OF LABOR STANDARDS

Local labor standards offices handle a range of functions related to the implementation and enforcement of local labor laws, including community education programs, intake and referral of worker complaints, investigations, and employer compliance assistance. Some offices, including those in New York City, Boston, Chicago, and Seattle, are empowered to draft and propose labor policy to municipal legislative bodies.[10] These offices typically sit within executive or legislative branches of local government. Denver's Labor Office is unique in that it is housed under the city's Auditor's Office, from which it leverages the office's tools and capacity to audit payrolls and investigate wage complaints.[11] In 2022, the Office of the New York City Comptroller established a new Director of Workers Rights position dedicated to labor standards outreach, enforcement, and advocacy.[12]

In some cases, labor standards offices have helped combat employer interference with workers' rights amid union organizing campaigns when companies' tactics violate workplace laws that fall within the offices' enforcement jurisdiction. For instance, the New York City Department of Consumer and Worker Protection (DCWP) successfully filed a complaint against Starbucks for violating just cause protections under the city's fair workweek laws. After the company fired a worker who led unionization efforts at a store in Queens, DCWP helped to recover $21,000 in backpay as well as reinstate the fired worker.[13]

> *"When so many people are excluded or disengaged from participation in the political systems and governments that affect their lives, [strategic enforcement partnerships] provide a concrete method for building community engagement and trust while increasing involvement in government processes and fostering connection to government power."*

8 Press Release, *Democratic Attorneys General, Painters Union Recognize Effective Partnerships to Fight Wage Theft and Worker Exploitation*, IUPAT DC35, (Nov. 15, 2023), https://iupatdc35.org/democratic-attorneys-general-painters-union-recognize-effective-partnerships-to-fight-wage-theft-and-worker-exploitation/.

9 Press Release, *Attorney General James Secures $450,000 For 100 Home Health Aides Threatened With Deportation,* New York Attorney General's Office (Sept. 13, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-secures-450000-100-home-health-aides-threatened.

10 NYC Consumer and Worker Protection, *Office of Labor Policy & Standards for Workers*, Worker Rights, https://www.nyc.gov/site/dca/workers/workersrights/office-of-labor-policy-and-standards-for-workers.page; Workforce Development, *New Worker Empowerment Cabinet to Advance Rights, Well-being of Workers*, City of Boston (Sept. 5, 2022), https://www.boston.gov/news/new-worker-empowerment-cabinet-advance-rights-well-being-workers; Business Affairs and Consumer Protection, *Office of Labor Standards*, City of Chicago, https://www.chicago.gov/city/en/depts/bacp/supp_info/office-of-labor-standards.html; *Office of Labor Standards*, City of Seattle, https://www.seattle.gov/laborstandards.

11 Denver Auditor's Office, *Denver Labor,* City of Denver, https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Auditors-Office/Denver-Labor.

12 Press Release, New York City Comptroller Brad Lander, *Comptroller Lander Appoints Claudia Henriquez as Director of Workers Rights* (December 16, 2022), https://comptroller.nyc.gov/newsroom/comptroller-lander-appoints-claudia-henriquez-as-director-of-workers-rights2/.

13 Janon Fisher, *More Starbucks Baristas File Labor Complaints with NYC Worker Agency as Unionization Effort Grows*, Daily News (Apr. 12, 2023), https://www.nydailynews.com/2023/04/12/more-starbucks-baristas-file-labor-complaints-with-nyc-worker-agency-as-unionization-effort-grows/.

OBJECTIVE OF STATE INTERVENTION: STRATEGIC ENFORCEMENT PARTNERSHIPS

State and local labor standards laws that involve workers and their organizations in enforcement can help those organizations build power. Professors Janice Fine and Jennifer Gordon have articulated a vision of how unions, worker centers, and other worker organizations could partner with government enforcement agencies.[16] Notably, these partnerships provide several power-building advantages for worker organizations. First, partnering with a government agency can play a legitimizing role for a worker organization, encouraging workers to take the organization more seriously. Second, when they are funded, enforcement partnership models provide support and access to resources that can facilitate organizing. Third, workers who are fearful of reaching out to government agencies might be more likely to assert their rights if they can reach out to a worker organization.[17]

This last dynamic is especially important for the most vulnerable and precarious workers, who are the least likely to file individual complaints with government agencies but who may benefit the most from power-building strategies.

We see other potential benefits of strategic enforcement partnerships. When so many people are excluded or disengaged from participation in the political systems and governments that affect their lives, these partnerships provide a concrete method for building community engagement and trust while increasing involvement in government processes and fostering connection to government power. Additionally, involving grassroots worker organizations in the process of enforcement can help develop leadership within low-wage worker communities, including immigrants and people of color. Furthermore, it can enable directly affected workers to participate in key aspects of government enforcement while developing ongoing channels of communication and access for workers to labor agencies and other government agencies and decision-makers. It can also give worker organizations greater leverage and stature when dealing with recalcitrant or exploitative employers.

Moreover, enforcement partnerships can add the critical capacity needed to address the challenge of implementing and enforcing federal investments such as the Inflation Reduction Act (IRA), Infrastructure Investment and Jobs Act, and CHIPS and Science Act at the state and local level. As but one example, the IRA tax credits will likely lead to tens of thousands of distinct energy projects every year across all 50 states. For robust compliance and enforcement of the prevailing wage and apprenticeship requirements for bonus IRA tax credits, it would be beneficial to have strategic enforcement partnerships and mechanisms across multiple levels of government and labor (and labor-adjacent) stakeholders, such as the IRS/Treasury partnering with state DOLs, unions, joint labor-management trust funds, and others.

The objective of the options described below is to provide a role for unions and other worker organizations in state and local labor standards enforcement regimes. We emphasize those enforcement strategies that are most likely to make enforcement more effective while also building worker power.

PREEMPTION RISK

The preemption risk for labor standards enforcement partnerships is very low. Community enforcement models have been tested over many years and have not been the subject of preemption challenges. For the most part, these models involve interactions between government agencies and worker organizations. Because they do not involve direct engagements between worker organizations and employers, they do not resemble collective bargaining, thus avoiding the perception that they are impinging on the jurisdiction of the NLRA. Additionally, strategic enforcement partnership models involve minimum labor standards, further reducing the risk of preemption.

16 Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 Pol. & Soc'y 522 (2010); Seema N. Patel & Catherine Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, Harv. L. & Pol'y Rev (2018).
17 Rachel Deutsch & Terri Gerstein, *Power in Partnership: How Government Agencies and Community Partners are Joining Forces to Fight Wage Theft*, Economic Policy Institute and Harvard Center for Labor and a Just Economy (June 8, 2023).

OPTIONS FOR STATE OR LOCAL ACTION

In this section, we have arranged the options from the least interventionist to the highest.

POLICIES THAT HAVE BEEN IMPLEMENTED:

Support for Training and Education Programs

Provide support to unions and worker organizations for training and education programs focused on workers' rights to enforcement of labor standards and the process for filing complaints and otherwise engaging with enforcement agencies. This type of program could be modeled on the Occupational Safety and Health Administration's (OSHA) Susan Harwood Training Grant program, in which OSHA awards grants to organizations "to provide training and education programs for employers and workers on the recognition, avoidance, and prevention of safety and health hazards in their workplaces and to inform workers of their rights and employers of their responsibilities."[18]

Contracting with Worker Organizations

Contract with worker organizations to conduct outreach and community education regarding state or municipal labor standards laws and to refer cases to the government.[19] In its most developed form, this program could enlist worker organizations to do more than just conduct outreach; they could serve as a bridge to enforcement agencies. Agencies could also contract with worker organizations to meet regularly to discuss trends in specific industries and make referrals not just on specific workers' complaints but also on industry bad actors.

This strategy is modeled on the California Labor Commissioner's Office (LCO), also known as the Division of Labor Standards Enforcement, which has engaged in a multi-year pilot program, the California Strategic Enforcement Partnership.[20] In this pilot, a foundation has funded community-based worker organizations to partner with the LCO in the enforcement of labor and employment laws.

Worker Representation During Inspections

Give workers the right to have representatives from unions or other organizations with them during worksite inspections. This policy could be modeled on the Mine Act regime, which allows two or more workers to identify a representative (either a person or an organization) to accompany a Mine Safety and Health Administration inspector anytime they inspect a mine. Two or more workers can also trigger an investigation into whether a mine should be shut down in the case of serious threats to miners' health and safety. Recent OSHA rules also formalize workers' rights to choose a representative to accompany an OSHA compliance officer during an inspection, even if that representative is a non-employee from a union, worker center, or other third-party.[21] This right could be adapted by state or local labor standards enforcement agencies to apply to wage and hour on-site investigations as well.

Create requirements for developing plans that require worker input

Recent federal regulations have required worker input into the development of worksite plans that may affect their safety, health, and working conditions in the workplace. OSHA's emergency temporary standards protecting healthcare workers from COVID required employers to develop a COVID prevention plan, and required worker input in development of that plan and any subsequent changes.[22] OSHA's proposed standards protecting workers from heat and protecting emergency responders, respectively, have similar requirements.[23] Even final regulations from the Department of Health and Human Services require that employers develop a staffing plan, and seek the input of workers and their representatives (broadly defined) in the development of those plans.[24]

POLICIES THAT HAVE NOT YET BEEN IMPLEMENTED:

Full-Party Status

Give workers and worker organizations full-party status in administrative proceedings.

18 Occupational Safety and Health Administration, *Susan Harwood Training Grant Program*, U.S. Department of Labor, https://www.osha.gov/harwoodgrants/overview.

19 Deutsch & Gerstein, *supra* note 98.

20 California Department of Industrial Relations, "Labor Commissioner's Office," https://www.dir.ca.gov/dlse/.

21 Occupational Safety and Health Administration, *Final Rule Clarifies Employee Representation During OSHA Inspections*, https://www.osha.gov/worker-walkaround/final-rule.

22 29 CFR 1910.502(c)(5) (since expired).

23 Proposed 29 CFR 1910.148(c)(6); proposed 29 CFR 1910.156(e).

24 42 CFR 483.71(b)(1).

SPOTLIGHT

BOSTON'S CABINET OF WORKER EMPOWERMENT

Credit: Joshua Qualls / Massachusetts Governor's Office

In 2022, City of Boston Mayor Michelle Wu established the Cabinet of Worker Empowerment. Devoted to "advancing the well-being of all working residents in both the public and private sectors," the Cabinet is tasked with carrying out the following goals:[14]

- Setting the City's future policy and vision for workers;
- Regulating, overseeing, and improving workplace conditions and health for workers, and;
- Expanding economic opportunities for workers through quality jobs, skills training, and career pipelines.

The Cabinet exemplifies how structural reforms can strengthen capacity and facilitate better coordination of resources to enforce worker-empowering policies. For example, the Cabinet has leveraged the City's procurement, permitting, and licensing processes to drive higher labor standards by promoting prevailing wage laws, safety ordinances, and hiring goals on development projects. Partnerships with other municipal departments have strengthened the capacity to monitor and enforce labor standards as well — in working with the Inspectional Services Department to implement the City's 2023 Construction Safety Ordinance, the agencies built "much-needed enforcement capacity … [to] now issue violations, stop work, revoke permits, and impose fines up to $300 on permit holders, developers, general contractors/construction managers, and subcontractors found to be win non-compliance."[15]

14 City of Boston, *New Worker Empowerment Cabinet to Advance Rights, Well-Being of Worker* (September 5, 2022), https://www.boston.gov/news/new-worker-empowerment-cabinet-advance-rights-well-being-workers.

15 City of Boston, *City to Begin Implementing Ordinance to Ensure Safety on Construction and Demolition Sites* (October 23, 2023), https://www.boston.gov/news/city-begin-implementing-ordinance-ensure-safety-construction-and-demolition-sites.

SECTION V

BENEFITS ADMINISTRATION

Credit: Michele Evermore

BACKGROUND

By formalizing the role of unions in administering public benefits, cities and states can strengthen government capacity to deliver public services as well as support worker power-building. In several countries, unions play a role in administering publicly funded unemployment benefits — a model known as the Ghent system, named after the city in Belgium, where it originated. In recent years, U.S. states and cities have adopted similar policy models, incorporating unions and worker organizations in the delivery of government services.

Too few eligible beneficiaries successfully access social safety net benefits, but evidence suggests that unions make a crucial difference. For instance, in 2022, only about a quarter of unemployed workers in the United States who were potentially eligible for unemployment insurance (UI) applied for benefits; of those who did not apply, over half were unaware that they could have qualified.[1] However, unemployed workers who had previously been covered by a union contract were more than twice as likely to apply for UI benefits compared to their non-union counterparts.[2] Moreover, take-up rates as well as cost-efficiency measures of UI benefits have been found to trend higher in Ghentcountries than in the United States and other European countries.[3]

Research on the impact of the Ghent system in countries where union-administered benefits programs have been implemented suggests that such policies have helped maintain high union membership rates, even in right-to-work countries such as Sweden and Finland.[4] As such, giving unions and worker organizations a role in benefits administration may help to mitigate the "free-rider problem" American unions face as a result of right-to-work laws impacting the private sector. This has been further exacerbated by the Supreme Court's decision in *Janus v. AFSCME* banning union security agreements in the public sector.[5] Under a Ghent-like system, workers who receive assistance and support from unions throughout the often-arduous process of accessing public benefits may in

1 Bureau of Labor Statistics, *Characteristics of Unemployment Insurance Applicants and Benefit Recipients Summary*, Economic News Release (March 29, 2023), https://www.bls.gov/news.release/uisup.nr0.htm.

2 BLS, *supra* note 104.

3 Jochen Clasen & Elke Viebrock, *Voluntary Unemployment Insurance and Trade Union Membership: Investigating the Connections in Denmark and Sweden*, 37 J. Soc. Pol'y 433, 437.

4 David Madland & Malkie Wall, *American Ghent*, Center for American Progress (September 18, 2019), https://www.americanprogress.org/article/american-ghent/.

5 Matthew Dimick, *Union Membership and the Ghent System*, in The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century (Richard Bales and Charlotte Garden eds., 2019).

turn feel more inclined to join and support a union.[6] Furthermore, unions could help workers outside their bargaining unit access benefits, which can spread awareness of the union advantage to communities unfamiliar with unions.

OBJECTIVE OF STATE INTERVENTION

There are numerous obstacles to accessing public benefits, including lack of information about the existence of such benefits programs, misinformation about eligibility standards, and complexity of the application process. Unions and worker organizations are well positioned to serve as trusted sources to provide guidance and information on how to navigate these obstacles.

Another advantage of formalizing the role of worker organizations in administering public benefits is the opportunity it provides for working people to come in direct contact with the labor movement, some for the first time. From the worker perspective — as discussed in Section IV on strategic enforcement — such partnerships can help to legitimize worker organizations. Since workers typically do not experience the tangible benefits of having a union until they overcome the hurdles between the decision to organize and securing a first contract, Ghent-like models can give workers a sense of how unions and worker organizations support and empower working people. Critically, this occurs before workers are subjected to employers' anti-union campaigns during organizing drives.

PREEMPTION RISK

The preemption risk is similar to that discussed in Section IV on strategic enforcement partnerships. Policies formalizing the role of unions in benefits administration do not facilitate interaction between unions and employers in a way that resembles collective bargaining, and therefore carry a low risk of preemption.

OPTIONS FOR STATE OR LOCAL ACTION

UNEMPLOYMENT INSURANCE

Unemployment insurance (UI) provides temporary cash assistance to workers who become unemployed through no fault of their own. In most states, UI is funded through employer contributions and administered at the state level.[7] Requirements for eligibility as well as payment amounts vary by state.

During the COVID-19 pandemic, the U.S. Department of Labor awarded Unemployment Insurance Navigator Grants through the American Rescue Plan Act (ARPA), disbursing more than $18 million to seven states partnering with community and worker organizations to provide training, education, and general assistance to workers applying for UI benefits.[8] The UI Navigator Program's goals focus on improving timely benefits delivery while addressing barriers to equitable access for underserved and historically marginalized communities.

Across the selected seven state agencies, UI Navigator Grants fund activities supporting UI benefits access at the individual, community, and systems levels, including conducting digital and in-person outreach, providing one-on-one assistance to claimants, training staff, increasing language access/translation support, and strengthening feedback loops with state agencies.[9] While the unions and worker organizations involved in the UI Navigator Program do not directly engage in recruiting new members or organizing campaigns as part of the process, the program nonetheless provides an opportunity for workers to have a positive interaction with the labor movement.

6 Dimick, *supra* note 105.

7 Employees contribute to UI in three states: Alaska, New Jersey, and Pennsylvania.

8 *US Department of Labor Awards More than $18M in Grants to Address Disparities in Delivery of Unemployment Benefits, Services in 7 States*, U.S. Department of Labor (June 10, 2022), https://www.dol.gov/newsroom/releases/eta/eta20220610-0.

9 Karen Needels, Briana Starks, Marina Gorzig, Kristen Joyce & Jillian Berk, *Unemployment Insurance Navigators Implementation Study: Design Report*, Mathematica (August 18, 2023), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/UI-Navigators-External-Report.pdf.

HEALTH CARE BENEFITS

In 2013, the Affordable Care Act (ACA) — which sought to expand access to affordable health insurance and reduce health care costs through measures such as Medicaid expansion, health insurance marketplaces, and consumer tax subsidies — established a health care Navigator program. It funded trained individuals or organizations, including unions, to help consumers understand and enroll in marketplace coverage. In June 2024, the Biden administration announced an additional $500 million in funding for the Navigator program, which helped enroll over 20 million people through the 2024 enrollment period.[11]

Unions and worker organizations serving as ACA Navigators have helped thousands of workers access health insurance through ACA marketplaces. For example, Service Employees International Union-United Healthcare Workers West (SEIU-UHW) sponsored and helped enroll over 10,000 Californians at community-wide enrollment events.[12] This model provides an opportunity for worker organizations to support worker power-building in several ways, including creating more worker-oriented transparency in the system and building stronger relationships with those workers by addressing their needs outside the workplace. Unions have also played a role in supporting health care benefits delivery through public sector training partnerships with state agencies. For instance, through the RISE Partnership, the Oregon Department of Administrative Services partnered with local unions, including SEIU 503 and American Federation of State, County and Municipal Employees (AFSCME) Council 75, to provide training and education to public sector employees on navigating public benefits administration.[13]

"Since workers typically do not experience the tangible benefits of having a union until they overcome the hurdles between the decision to organize and securing a first contract, Ghent-like models can give workers a sense of how unions and worker organizations support and empower working people."

11 U.S. Department of Health and Human Services, *Biden-Harris Administration Releases Data Showing Historic Gains in Health Care Coverage in Minority Communities* (June 7, 2024), https://www.hhs.gov/about/news/2024/06/07/biden-harris-administration-releases-data-showing-historic-gains-health-care-coverage-minority-communities.html.

12 SEIU-UHW, *SEIU-UHW enrolls 11,000 Californians in health coverage* (April 2, 2014), https://web.archive.org/web/20190224205210/http:/www.seiu-uhw.org/archives/18262.

13 RISE Partnership, https://www.risepartnership.com/introducing-uplift-oregon/.

SPOTLIGHT

MAINE PEER WORKFORCE NAVIGATOR PROGRAM

Credit: Michele Evermore

Maine was one of the seven recipients of the ARPA UI Navigator Grants. In 2022, the state launched the Maine Peer Workforce Navigator (PWN) program, a partnership between the Maine Department of Labor and a coalition of unions and community organizations, providing assistance to any and all eligible workers in navigating the UI system as well as other public benefits programs.[10]

The program helped thousands of people apply for unemployment as well as access critical wraparound support, such as reemployment, housing, and nutrition assistance. In alignment with the goals of the UI Navigator Program, the PWN program leveraged the capacity of its coalition — including 160 unions affiliated with the Maine American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) across the state — to reach workers in rural, immigrant, and low-income communities as well as communities of color.

Credit: Michele Evermore

10 26 MRSA §1046 as amended by S.P. 507 (2021), https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0507&item=1&snum=130.

SECTION VI

GOVERNMENT PROCUREMENT AND SPENDING AUTHORITY

Credit: The Picture House / Adobe Stock

BACKGROUND

As the largest purchaser of goods and services in the world, spending over $2 trillion annually, the U.S. government wields considerable leverage at all levels of the economy.[1] Many of the core activities of government at the state and municipal level, such as building and maintaining infrastructure, involve purchasing goods and services from the private sector. By conditioning subsidies and bids for public contracts on compliance with strong labor standards, cities and states can procure quality goods and services on a timely basis while supporting high-quality jobs.

OBJECTIVE OF STATE INTERVENTION

States and cities can condition the award of public money on transparency requirements, compliance with labor standards, and other measures to assure timely, quality performance by the contractor. In designing these requirements, it is important to ensure they promote the state or city's procurement interest for quality, cost-effective provision of goods or services. If a city or state is using the procurement system to accomplish labor policy objectives beyond its procurement interests, it runs the risk of having the initiative invalidated in a legal challenge on preemption grounds.

PREEMPTION RISK

State action designed to promote the state or city's procurement interest in providing quality, cost-effective goods or services has generally survived preemption review when the ordinance, project labor agreement, request for proposal, or other action has applied to public projects, financed by the locality or state (whether through bonds, tax increment financing, or otherwise). In order to avoid preemption, states and localities stipulating pro-worker conditions that implicate the NLRA's jurisdiction in grants, subsidies, or contracts must establish that they are not acting in a

1 Maureen Conway & Mark G. Popovich, *Procurement with Purpose: Improving Job Quality and Equity Through Public Procurement Reform*, The Aspen Institute (Dec. 2022), https://www.aspeninstitute.org/wp-content/uploads/2022/12/Procurement-with-Purpose-Improving-Job-Quality-and-Equity-Through-Public-Procurement-Reform.pdf.

regulatory capacity. They most often do so by showing that they are acting in a proprietary capacity. In *Boston Harbor*,[2] the Supreme Court established a two-pronged test for determining proprietary interest: 1) whether the action furthers a state's interest in efficient procurement of goods or services, or addresses conduct unrelated to that interest; and 2) whether the action seeks to set a broad policy in the state or is sufficiently narrow to foreclose that inference.

OPTIONS FOR STATE OR LOCAL ACTION

Examples of pro-worker initiatives that promote the state and city's procurement interests include the following.

PROJECT LABOR AGREEMENTS (PLAS)

PLAs are agreements between construction contractors and building trades unions that establish the terms of employment for a particular construction project. PLAs are "pre-hire" agreements, meaning that they are negotiated before workers are hired and work begins on a project. By establishing terms and conditions of employment in advance, contractors — and cities and states — have more control over their labor costs and supply, allowing projects to be completed in a timely and cost-effective manner. Because of these advantages, cities and states can (and do) condition awards for construction projects on the use of PLAs.

PREVAILING WAGE LAWS (PWLS)

PWLs — which are in effect in 26 states, some municipalities, and at the federal level — set wages and benefits for a number of similarly employed workers in a given geography. In the context of public projects, PWLs aim to ensure that the government's procurement power does not undermine local wages and benefits or provoke a race to the bottom among contract bidders.[3] As a result, these laws can protect worker power by safeguarding standards negotiated within the private sector.[4]

COMMUNITY BENEFIT AGREEMENTS

These agreements between a contractor or developer and community organizations contain the contractor/developer's commitments to benefit the community through the project in question, such as hiring locally and addressing other community impacts. Community benefit agreements often include important transparency requirements, allowing the public to monitor whether the contractor's commitments to the community are being met. To ensure the responsible use of public funds, cities and states can require bidders to have community benefit agreements as a condition of public funding.

LABOR REQUIREMENTS LINKED TO FINANCING MECHANISMS

Cities and states have also conditioned labor requirements on projects where governments use contracting or financing mechanisms — such as tax abatements, tax increment financing, and other tax advantages — that establish proprietary interest in a project. For example, in *Hotel Employees & Restaurant Employees Union v. Sage Hospitality Resources*, the city survived preemption review in making tax increment financing conditional on the acceptance of a labor peace agreement.[5]

JOB QUALITY CONSIDERATIONS

State and local governments can also build job quality considerations into the procurement process. Indeed, the Departments of Commerce and Labor specifically include worker empowerment and representation (as defined by the ability to "form and join unions ..., engage in protected, concerted activity without fear of retaliation ..., [and] contribute to decisions about their work, how it is performed, and organizational direction") in their Good Jobs framework for publicly funded projects.[6] Federal agencies have required, incentivized, or simply encouraged a number of good jobs provisions in their grant agreements, ranging from Project Labor Agreements and Community Benefits Agreements to Joint Labor-Management Training or

2 Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. (Boston Harbor), 507 U.S. 218 (1993).
3 Malkie Wall, David Madland & Karla Walter, *Prevailing Wages: Frequently Asked Questions*, Center for American Progress (Dec. 22, 2020), https://www.americanprogress.org/article/prevailing-wages-frequently-asked-questions/.
4 Karla Walter, Malkie Wall & Alex Rowell, *A How-To Guide for Strengthening State and Local Prevailing Wage Laws*, Ctr. for Am. Progress (Dec. 22, 2020), https://www.americanprogress.org/article/guide-strengthening-state-local-prevailing-wage-laws/.
5 Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (2004) (ordinance conditioning grant of TIF financing on acceptance of a labor neutrality agreement was proprietary).
6 *Good Jobs Principles,* U.S. Department of Labor (2022), https://www.dol.gov/sites/dolgov/files/goodjobs/Good-Jobs-Summit-Principles-Factsheet.pdf; Karla Walter, *Government on Workers' Side: How State and Local Policymakers and Advocates Can Raise Standards for Publicly Supported Work*, Ctr. for Am. Progress (Jan. 31, 2024), https://www.americanprogress.org/article/government-on-workers-side/.

Health-and-Safety Plans and neutrality provisions.[7] Policy tools such as facility workforce plans or U.S. employment plans allow governments to include job quality as a factor when evaluating bid proposals for public contracts.[8] As such, companies that plan to provide higher wages and benefits or commit to abiding by workers' right to organize and bargain collectively without interference can earn extra credit in the procurement process. Commitments companies make in their bids can then become part of the contract with the government, allowing the government to hold the company accountable to their job quality commitments.

STATE AND LOCAL CONTRACT LABOR ADVISERS

In February 2023, following a recommendation from the White House Task Force on Worker Organizing and Empowerment, the Office of Management and Budget and Department of Labor issued a memo requiring all federal agencies to designate agency labor advisers within their procurement offices. This aimed to improve the implementation of contract labor standards, as regulated by laws including the Service Contract Act (SCA), the Contract Work Hours and Safety Standards Act (CWHSSA), and Davis-Bacon and Related Acts, and facilitate greater coordination with enforcement agencies across the government. This approach could be replicated to support state and local governments working with contractors to ensure compliance with contract labor standards and regulations.

OTHER RECOMMENDATIONS

Adopt "little service contract acts" at the state and local levels equivalent to the federal SCA, which extends prevailing wage requirements to service contractors and subcontractors working under public contracts.[9] This would ensure workers are paid fairly for their work on publicly funded projects.

Extend provisions similar to the General Services Administration's (GSA) final rule, which grants union and worker organizations access to federal contractor workforces for state and local contracts, facilitating better communication and support.[10]

Implement rules promoting the retention of incumbent contract workers at the state and local level, per the DOL's rule requiring federal contractors to offer first right of refusal to incumbent workers when a contract expires and a follow-on contract is awarded for similar services.[11] This would ensure greater stability for existing workers.

> *"Federal agencies have required, incentivized, or simply encouraged a number of good jobs provisions in their grant agreements, ranging from Project Labor Agreements and Community Benefits Agreements to Joint Labor-Management Training or Health-and-Safety Plans and neutrality provisions."*

7 *The Good Jobs Initiative Impact,* U.S. Department of Labor (2024), https://www.dol.gov/general/good-jobs/gji-impact.

8 CHIPS Program Office, *Workforce Development Planning Guide: Guidance for CHIPS Incentives Applicants*, https://www.nist.gov/system/files/documents/2023/03/30/CHIPS%20Workforce%20Development%20Planning%20Guide%20%281%29.pdf; Jobs to Move America provides language for incorporating job quality and equity into the procurement process — including provisions obligating employers to report wages and benefits — in their federally-approved policy tool, the U.S. Employment Plan (USEP). See U.S. Employment Plan, *Jobs to Move America* (2020), https://jobstomoveamerica.org/resource/u-s-employment-plan-2/.

9 *Wage and Hour Division, McNamara - O'Hara Service Contract Act,* Department of Labor, https://www.dol.gov/agencies/whd/government-contracts/service-contracts.

10 Soliciting Union Memberships Among Contractors in GSA-Controlled Buildings, 87 Fed. Reg. 54,116 (2022), https://www.federalregister.gov/documents/2022/09/02/2022-17949/federal-management-regulation-soliciting-union-memberships-among-contractors-in-gsa-controlled.

11 Nondisplacement of Qualified Workers Under Service Contracts, 88 Fed. Reg. 86 736 (2023), https://www.federalregister.gov/documents/2023/12/14/2023-27072/nondisplacement-of-qualified-workers-under-service-contracts.

SPOTLIGHT

BUILDING WORKER POWER THROUGH ENFORCING TRANSPARENCY: JOBS TO MOVE AMERICA

Credit: Jobs to Move America

High-road job quality standards in federal grants are of limited use if employers are not obligated to clearly disclose whether they meet contract terms. In cases where contracts mandate transparency and employers do not comply, workers and their organizations may file fraud claims on behalf of the government. In 2018, Jobs to Move America (JMA) brought a whistleblower lawsuit under the False Claims Act against bus manufacturer New Flyer of America. JMA alleged that New Flyer overstated the wages and benefits paid to its workers under its contract to supply up to 900 buses to the Los Angeles Metropolitan Transportation Authority. New Flyer was found to have violated the terms of their contract related to wages and benefits. The company subsequently reached a settlement with JMA that included a community benefits agreement covering the company's workers in both California and Alabama.

Credit: makedonski2015 / Adobe Stock

SECTION VII

INDUSTRIAL POLICY

Credit: Artsistra / Wikimedia Commons

BACKGROUND

The first two years of the Biden administration saw unprecedented levels of federal investment in our communities. Between the American Rescue Plan Act (ARPA),[1] the Infrastructure Investment and Jobs Act (IIJA),[2] the CHIPS and Science Act (CHIPS),[3] and the Inflation Reduction Act (IRA),[4] trillions of dollars will flow to both private and public entities:

- $1.9 trillion in ARPA funds directly invested in communities to prevent economic collapse during the COVID-19 pandemic.
- $1.2 trillion in IIJA funds, focused on rebuilding and strengthening the nation's infrastructure while creating good jobs.
- $369 billion in IRA funding to make significant investments to address climate change and the transition to a clean energy economy.
- $280 billion in CHIPS dollars, including major funding to build and grow the domestic semiconductor industry and strengthen science and technology research and development.

The passage of this once-in-a-generation slate of industrial policy bills gives state and local recipients a historic opportunity to enable worker power-building. Strategies that can be leveraged to empower workers who work on IIJA, CHIPS, or IRA funded projects include:

- Project labor agreements
- Prevailing wage requirements
- Labor peace agreements

1 *American Rescue Plan,* The White House, https://www.whitehouse.gov/american-rescue-plan/.
2 *Fact Sheet: The Bipartisan Infrastructure Bill,* The White House (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.
3 *Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China,* The White House (Aug. 9, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/.
4 *Inflation Reduction Act Guidebook,* The White House, https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/.

- Local and targeted hiring authorities
- Workforce development and apprenticeships
- Place-based "energy community" tax credits
- Domestic content requirements
- Childcare provisions
- A scoring system for competitive, discretionary grants and loans that incentivizes the use of Community Benefit Plans that encourage the free and fair choice to join a union

Federal funding is distributed in a number of ways:

- *Formula funding to states*: A large percentage of the funding, especially from the IIJA, will move automatically to the states according to a statutorily defined formula. These funds are designated for purposes specified in the statute, with few other constraints on how the states choose to allocate and disburse the funds.
- *Competitive funding*: Federal agencies — in particular, the Department of Transportation, the Department of Commerce, the Department of Energy, and the Environmental Protection Agency — will have discretion to set up competitive grant programs to achieve statutory purposes through another pot of money. Several of these competitive programs require or permit agencies to attach job quality standards.
- *Tax credits*: Another large chunk of the funding in these bills will be expended through tax credits for private sector companies undertaking projects that align with the legislation's objectives.

While all these funding streams have the potential to support worker organizing and empowerment, this section outlines how states and localities can leverage the money flowing from the federal government to maximize worker power-building.

OBJECTIVE OF STATE INTERVENTION

The objective of state intervention in this area is to condition the expenditure of funds authorized by the IIJA, CHIPS, and IRA on adoption of pro-worker policies by fund recipients. During congressional negotiations over these bills, many potential conditions on state spending were dropped from the legislation. However, with advocacy from the labor movement and other progressive organizations, these kinds of conditions can be adopted at the state level. State legislatures can be encouraged to require companies receiving federal funds passed through the states to adopt pro-worker policies as well as set strong climate and clean energy goals through strategies such as project labor agreements, prevailing wages, and apprenticeships.

PREEMPTION RISK

The preemption risk is the same as that described in Section VI of the toolkit on procurement.

OPTIONS FOR STATE OR LOCAL ACTION

WORKER-EMPOWERING CONDITIONS ON THE DISBURSEMENT OF FUNDS

As discussed above, the largest pot of money from these three pieces of legislation goes to the states based on a statutory formula. There are few constraints on how it is spent, beyond the general purpose of the programs, such as providing weatherization services or replacing aging roads and bridges. The discretionary grant programs, however, include a number of worker-empowering conditions that federal agencies are already attaching to their grants.

One option for state or local action is for states to pass legislation imposing the same worker-empowering conditions on their disbursement of the formula funds as federal agencies are imposing through their discretionary grant programs. For example, Maryland's Promoting Offshore Wind Energy Resource (POWER) Act promotes the inclusion of labor standards in proposals for the use of federal funds for the state's offshore wind and related transmission projects, aligning the state's energy procurement goals with the federal provisions outlined in the IIJA and the IRA.[5]

Another example is the Department of Energy's Funding Opportunity Announcements (FOAs) for funding under IIJA discretionary grants, which require applicants to complete a community benefit plan (CBP).[6] CBPs must include a description of plans to engage with labor unions, worker organizations, workforce development organizations, and community organizations. Applicants can also get credit for having a CBP by reaching a

5 *Maryland Commits to 8.5 GW of Offshore Wind by 2031, Looks Ahead to Offshore Wind Transmission*, Perkins Coie (April 7, 2023) https://www.perkinscoie.com/en/news-insights/maryland-commits-to-85-gw-of-offshore-wind-by-2031-looks-ahead-to-offshore-wind-transmission.html.

6 CBPs have also been included in the Department of Energy's IRA grants, and similar approaches have been undertaken by other agencies for IIJA, IRA, and CHIPS. For example, the EPA's IRA Greenhouse Gas Reduction Fund applications required a "Labor and Equitable Workforce Development Plan."

Community Benefits Agreement, Good Neighbor Agreement, Project Labor Agreement, or a Community Workforce Agreement.[7]

The FOAs require the applicant to complete a CBP detailing their approach and commitments to: 1) community and labor engagement; 2) investment in the American workforce; 3) advancing diversity, equity, inclusion, and accessibility; and 4) the Justice40 Initiative target delivering at least 40% of the overall benefits from federal investments to disadvantaged communities. The CBP is evaluated as 20% of the applicant's overall merit review. In addition, the FOAs require applicants to discuss how they will support their workers' free and fair chance to join a union, bargain collectively, and have a voice in the design and execution of workplace decisions that affect them, such as workplace safety and health plans.

States could enact legislation that requires any applicants for the state's IIJA formula funding to meet the same standards that are included in the Department of Energy's FOAs.

PROJECT LABOR AGREEMENTS (PLAS)

Another possible model can be found in the CHIPS Incentive Program Notice of Funding Opportunity (NOFO),[8] which "strongly encourages" the use of PLAs for construction projects. The NOFO goes on to assert that the use of a PLA indicates compliance with the requirement for a construction workforce plan. If an applicant in this discretionary grant program does not use a PLA, the applicant must comply with more onerous reporting requirements, such submitting workforce continuity plans. States could use this program's provisions as a blueprint for embedding encouragement of PLAs in legislation, setting forth conditions on how state agencies disburse any construction funding.

WORKFORCE DEVELOPMENT

The bills each include a great deal of funding for workforce development programs. States can use these funds to support and ensure enforcement and oversight of apprenticeship programs.[9] Furthermore, they can limit such funding to registered apprenticeship programs, thereby ensuring that primarily union-sponsored programs get support.

States can pass bills requiring that certain projects participate in apprenticeship programs that meet specific labor-related criteria. For example, Connecticut's Climate and Community Investment Act requires large-scale renewable energy projects to pay prevailing wages and support workforce development through participation in apprenticeship programs.[10]

STRATEGIC ENFORCEMENT PARTNERSHIPS

State agencies, unions, and labor-adjacent organizations can partner to enforce high-road labor requirements in the IRA, IIJA, and CHIPS (see Section V). This would require information sharing notice or registration (of intent to leverage credits) requirements to be functional.

OVERSIGHT

Finally, states can also use state or federal funding to oversee compliance with these pro-worker requirements. Although the federal Office of Management and Budget is statutorily tasked with tracking the labor, equity, and environmental standards and performance under IIJA, states may be better equipped to track compliance with these provisions due to their closer relationships with local unions.

OTHER RECOMMENDATIONS

- Coordinate efforts to educate state and local lawmakers on existing incentives in the bills.
- Build coalitions of expertise in both the labor and clean energy transition spaces to promote worker empowerment.
- Explore siting and permitting reforms that enable community and worker organizations to engage in policy implementation.[11]
- Incorporate labor standards into just transition frameworks.

7 Department of Energy, *About Community Benefits Plans*, https://www.energy.gov/infrastructure/about-community-benefits-plans.
8 CHIPS for America, *CHIPS Incentives Program Portal*, National Institute of Standards and Technology, https://www.nist.gov/.
9 U.S. Department of Labor, *Apprenticeship*, https://www.dol.gov/general/topic/training/apprenticeship.
10 Connecticut General Assembly, SB 999 (2021), https://www.cga.ct.gov/2021/TOB/S/PDF/2021SB-00999-R01-SB.PDF.
11 For example, Michigan's recently passed HB 5120 creates a regulatory framework for the certification, zoning, and workforce requirements for large-scale solar, wind, and energy storage facilities (https://www.legislature.mi.gov/documents/2023-2024/publicact/pdf/2023-PA-0233.pdf).

SPOTLIGHT

BLUE BIRD CORPORATION – FORT VALLEY, GEORGIA

Credit: U.S. Department of Labor

In 2024 – a year after voting to unionize and affiliate with the United Steelworkers – workers at Blue Bird Corp. in Fort Valley, Georgia, approved a first contract securing wage increases, health and safety protections, and enhanced benefits for more than 1,500 workers.

This historic win was significant for a number of reasons. For one, the Blue Bird workers won the largest union organizing campaign at an auto manufacturing plant in 15 years in a right-to-work state with a union density rate of 4.4%. The bus manufacturer was also selected to receive up to $80 million in federal aid to build manufacturing capacity for electric school bus production. The grant they received was a part of the Department of Energy's Domestic Automotive Manufacturing Conversion Grants program, which requires that applicants include descriptions of commitments to creating high-quality and/or high-paying jobs, supporting organizing and collective bargaining, and entering into labor and community benefits plans.[12] As Acting Secretary Julie Su remarked to Blue Bird workers at their contract signing in Fort Valley, "the almost $80 million from a Department of Energy investment is going to allow [Blue Bird]... to expand, to build out, and to create 400 new union jobs right here in this great city."[13]

12 U.S. Department of Energy, Office of Manufacturing and Energy Supply Chains, *Domestic Automotive Manufacturing Conversion Grants*, https://www.energy.gov/mesc/domestic-manufacturing-conversion-grants.

13 Press Release, U.S. Department of Labor, *Remarks by Acting Secretary of Labor Julie Su at Blue Bird First Contract Signing* (July 19, 2024), https://www.dol.gov/newsroom/speech/20240719.

SECTION VIII

REGULATING AI IN THE WORKPLACE

Credit: Gorodenkoff / Adobe Stock

BACKGROUND

Across different sectors of the economy, the integration of artificial intelligence (AI) and algorithmic management tools is changing the experience of work. At present, these technologies' impacts on workers' autonomy, health, and safety are still being assessed and understood. They have increased employers' capacity to surveil and collect data on their workers, with a growing number of unfair labor practice charges and worker complaints revealing how employers are leveraging these tools in ways that affect organizing and collective bargaining.

Although there is currently no legislation at the federal level explicitly regulating the use of AI in workplaces, policymakers and regulatory agencies have recognized the risks such technologies can pose to workers' rights.[1] National Labor Relations Board General Counsel Jennifer Abruzzo has called for more robust enforcement of existing labor law to protect workers from intrusive surveillance practices, citing concern over how such practices could interfere with workers' Section 7 rights. In October 2023, the Biden administration issued Executive Order 14110 (*Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*), directing federal agencies to guide the responsible development and use of AI. Accordingly, the Department of Labor released a set of guidelines on the ethical development and implementation of AI systems in the workplace, outlining principles that center worker empowerment for developers and employers.[2]

OBJECTIVE OF STATE INTERVENTION

A number of cities and states have proposed or passed legislation to regulate the use of algorithmic tools in the workplace, primarily to mitigate bias and discrimination in hiring and decision-making. However, states and localities can go further by implementing

1 In 2023, two federal bills regulating automated decision-making systems in the workplace were introduced: the No Robot Bosses Act and the Stop Spying Bosses Act.

2 *Artificial Intelligence and Worker Well-being: Principles for Developers and Employers,* U.S. Department of Labor, https://www.dol.gov/general/AI-Principles.

a framework for joint decision-making, oversight, and accountability in the deployment of algorithmic technologies, which can help protect and strengthen worker voice and agency.

Cities and states can regulate the use of AI in the workplace in order to protect workers' right to engage in protected concerted activity without employer interference. At a minimum, policies can and should ensure that workers have access to secure channels of communication, information, and transparency around the use of AI-enabled technologies in workplaces. Moreover, states and localities can explore options that empower workers and their organizations to monitor and enforce AI governance laws.

PREEMPTION RISKS

By focusing on states' authority to protect other realms of workers' rights (such as privacy or civil rights) at risk in AI-enabled workplace environments, states may be able to regulate the use of digital surveillance and algorithmic management tools to prevent anti-union surveillance and automated employment decision-making without running afoul of National Labor Relations Act preemption.

OPTIONS FOR STATE OR LOCAL ACTION

REGULATING ELECTRONIC MONITORING AND AUTOMATED DECISION-MAKING TOOLS

A number of states, including California,[3] Illinois,[4] New Jersey,[5] New York,[6] and Vermont,[7] have proposed laws regulating the use of automated tools in employment-related decisions such as hiring, firing, and compensation. A Massachusetts bill introduced in 2023 regulates the use of automated decision-making tools and worker data collected through electronic surveillance tools; it also includes a private right of action for workers.[8] In cases where automated systems result in consequential employment-related decisions, workers should have the opportunity to appeal and submit corrections or relevant information as applicable.

Most bills regulating the use of AI tools and automated systems include provisions mandating impact assessments. States should require that these assessments be conducted by a certified, independent third-party. Whenever AI or automated systems are involved in making material employment-related decisions, employers should provide the results of impact assessments to workers and their organizations in a timely manner. Information disclosed in an assessment could include:

- The design and functionality of the technology being used,
- Types and sources of data being collected,
- Possible risks of unlawful discrimination, and
- Intended use of the data in decision-making processes in the workplace.

States may also regulate the use of automated decision-making systems where workers are impacted under different legal and regulatory areas, such as privacy and civil rights. In 2008, Illinois enacted the first biometric data privacy law in the United States, the Biometric Information Privacy Act (BIPA), which applies to data collected using AI technologies and also includes a private right of action for those seeking recourse.[9] In 2023, workers became entitled to data privacy protections under the California Consumer Privacy Act (CCPA), which include provisions such as the right to know when employers are collecting workers' data; the right to access, correct, and delete data; and protections from retaliation for exercising these rights.[10] The law also enables unions and worker organizations to file such requests on behalf of workers. California's Civil Rights Department has also proposed regulations to protect against discrimination from automated decision-making systems, based on protected characteristics in the workplace.[11]

3 California State Legislature, AB 1651 (2023), https://legiscan.com/CA/bill/AB1651/2023.

4 Illinois General Assembly, HB 3773 (2024), https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3773&GAID=17&DocTypeID=HB&SessionID=112&GA=103.

5 N.J.S.A. 1588 S. 1588 (2024), https://www.njleg.state.nj.us/bill-search/2024/S1588.

6 New York State Assembly, A. 7895 (2024), https://www.nysenate.gov/legislation/bills/2023/A7859.

7 Vermont Legislature, H. 114 (2023), https://legislature.vermont.gov/bill/status/2024/H.114.

8 Massachusetts Legislature, H. 1873 (2024), https://malegislature.gov/Bills/193/H1873.

9 Illinois General Assembly, 740 ILCS 14 (2008), https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57.

10 Kung Feng, *Overview of New Rights for Workers under the California Consumer Privacy Act,* UC Berkeley Labor Center (December 6, 2023), https://laborcenter.berkeley.edu/overview-of-new-rights-for-workers-under-the-california-consumer-privacy-act/.

11 Press Release, *Civil Rights Council Releases Proposed Regulations to Protect Against Employment Discrimination in Automated Decision-Making Systems*, California Civil Rights Department (May 17, 2024), https://calcivilrights.ca.gov/2024/05/17/civil-rights-council-releases-proposed-regulations-to-protect-against-employment-discrimination-in-automated-decision-making-systems/.

AI PROCUREMENT POLICY

In recent years, state and local governments have implemented AI systems operated by private companies to facilitate automated decision-making across a range of government service programs, from allocating public benefits to managing traffic to policing communities. While these tools have been touted for their potential to build service delivery capacity (particularly for under-resourced state and local agencies), reports suggest a critical lack of transparency and oversight around the use of such technologies when governments outsource data-handling and automated decision-making processes to private vendors.[12] Moreover, where courts find governments' use of AI systems violates civil liberties by impacting the lives of their residents, the costs of litigation may far outweigh the benefits of automated processes in government service delivery.[13]

State and local AI procurement policy could act as a lever for greater oversight and accountability by mandating vendor standards that ensure transparency and auditability in the design and operation of AI products. These standards could be baked into multiple junctures within the procurement process, from setting high standards in the bidding process to mandating worker protections in contract language and implementing monitoring mechanisms to ensure contract terms are being met. From the outset, public sector workers could be empowered in initial procurement decision-making processes through contract provisions establishing joint labor management committees or similar mechanisms. In the auditing process, strategic enforcement partnerships between agencies and worker organizations could strengthen the capacity to conduct regular compliance checks as well as empower workers and their representatives to monitor and assess the impacts of AI-enabled public systems on working people and their families.

AI STANDARDS-SETTING BOARDS AND STANDARDS ENFORCEMENT

In recent years, a number of cities and states have established standards-setting boards, typically consisting of government, employer, and worker representatives. As discussed in Section III, such entities give workers a voice in the process of setting wages, benefits, and labor standards. AI standard-setting boards could set guardrails for the introduction of AI in workplaces, including impact assessment mandates, transparency and consent requirements, and ethics frameworks that state and local governments could apply to AI procurement.

These AI standards boards could be established on a sectoral basis. For example, a city or state could create separate AI boards for each sector within the jurisdiction where the use of AI in the workplace is most prevalent or anticipated. As with the other labor standards boards addressed in Section III, the state or local government agency overseeing the board could be directed to include participation by representatives from unions and worker organizations.

These boards could not only establish initial guardrails and ethics frameworks for AI implementation by sector but also play an ongoing monitoring role for workplaces that use AI software. They would act as a mechanism for trained and well-informed worker committees to engage directly with employers and states to make decisions regarding AI integration into workflows and to evaluate impact over time. Additionally, they would provide a trusted third-party entity for individuals or groups of workers to seek recourse in cases where AI is used to evaluate performance, allocate tasks, or perform other roles traditionally held by managers and human resources employees.

STATE OSHA PROTECTIONS

Currently, 28 states and Puerto Rico have plans approved by the Occupational Safety and Health Administration (OSHA) that allow them to regulate job safety and health standards within their jurisdictions. States are allowed to set their own OSHA standards, so long as the protections are at least as effective as those promulgated by the federal law. As such, they are also permitted to set standards that are more protective than those set at the federal level. In addition, states can develop plans that are inclusive of state and local public sector workers, who are excluded from federal OSHA protections.

12 Grant Fergusson, *Outsourced and Automated: How AI Companies Have Taken Over Government Decision-Making*, Electronic Privacy Information Center (September 2023), https://epic.org/outsourced-automated/.

13 *Michigan Supplemental Nutrition Assistance Program Terminations*, Benefits Tech Advocacy Hub, https://www.btah.org/case-study/michigan-supplemental-nutrition-assistance-program-terminations.html.

States can clarify within their OSHA plans that the right to a safe workplace includes the right to be free from harm caused by AI in the workplace and establish specific standards to address those harms accordingly. Standards should ensure, at a minimum, that the conditions under which workers can organize are protected from AI-enabled interference.

Cities and states could also create grant programs modeled on OSHA's Susan Harwood Training Grant program. It awards grants to qualifying organizations to provide training and education programs for employers and workers on workplace safety and health-related issues. To address AI's potential harms to workers, grants could be awarded to qualifying unions and worker organizations to drive compliance with AI-related safety and health standards. It could also serve as a direct point of reference for workers covered by the AI-related standards, particularly marginalized workers.[16] Through such a grant program, worker organizations could educate workers on identifying AI-related harms and provide know-your-rights trainings.

STATE AI BILLS OF RIGHTS

States could adopt AI bills of rights modeled after the White House Office of Science and Technology Policy's (OSTP) "Blueprint for an AI Bill of Rights." The OSTP blueprint puts forth principles and practical approaches to guide the regulation of AI-enabled systems in an equitable, safe, and responsible manner. Principles outlined in the blueprint include promoting safe and effective systems, protecting against algorithmic discrimination and abusive data practices, and providing clear notice and explanations as well as options for human intervention. Definitions of what constitutes "harm" caused by AI, informed by experiences and input from workers and their organizations, should be clearly articulated.

New York and Oklahoma have both proposed bills of rights patterned after the OSTP blueprint,[17] providing residents within their jurisdictions certain rights and protections when interacting with AI-enabled decision-making systems. In the workplace context, such bills should deter employers' use of electronic surveillance and AI tools in unlawfully interfering with labor organizing efforts.

> *"States and localities can go further.... [to implement] a framework for joint decision-making, oversight, and accountability in the deployment of algorithmic technologies, which can help protect and strengthen worker voice and agency."*

16 Occupational Safety and Health Administration, *Susan Harwood Training Grant Program*, U.S. Department of Labor, https://www.osha.gov/harwoodgrants/.

17 New York State Assembly, A. 8129 (2024), https://www.nysenate.gov/legislation/bills/2023/A8129; Oklahoma Legislature, H.B. 3453 (2024), http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3453&Session=2400.

SPOTLIGHT

GOVERNORS TAKE ACTION ON AI SAFETY AND TRANSPARENCY

Credit: Office of the Governor of California

In a number of states, governors have issued executive orders to guide the procurement and use of AI in state governments in a safe and ethical manner. In California, Governor Gavin Newsom signed an executive order outlining a process for evaluating the responsible deployment of AI. It includes provisions for public procurement to address "safety, algorithmic discrimination, data privacy, and notice of when materials are generated by AI."[14] In 2024, Governor Glenn Youngkin issued a similar executive order in Virginia, promulgating a set of AI safety and transparency standards that state agencies must follow in their procurement policies.[15]

Credit: Virginia Office of the Governor

14 California Exec. Order N-12-23 (2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/AI-EO-No.12-_-GGN-Signed.pdf.

15 Virginia Exec. Order 30 (2024), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-30.pdf.

SECTION IX

ESG AND RESPONSIBLE INVESTMENT PRACTICES

Credit: golfloiloi / Adobe Stock

BACKGROUND

The past few years have seen a coordinated attack on responsible investment and the associated practice of incorporating Environmental, Social, and Governance (ESG) information into investment decision-making.[1] These attacks have included public outcry over ESG as so-called "woke investing" in public media, congressional hearings targeting responsible investment practices as misguided and pernicious, and, most relevant for this forum, state legislation and other efforts restricting or banning the use of ESG in public investment vehicles such as public pension plans. Coordination comes from funder networks and think tanks, including the American Legislative Exchange Council, the State Financial Officers Foundation, and the National Center for Public Policy Research.[2]

OBJECTIVE OF STATE INTERVENTION

The discrediting of responsible investment, backed by fossil fuel and anti-labor advocates, is meant to constrain investors from integrating environmental and social issues into their investment and shareholder engagement strategies. This is despite the fact that many of those issues, such as fair labor practices, carbon mitigation strategies, or diversity in investment management, are often seen by investors themselves as presenting material long-term and systemic challenges for investment performance. State protections for responsible investment strategies that consider labor standards in investment decisions can play important roles in ensuring pension funds' ability to manage risk and invest successfully. They can also align pension fund investments with better outcomes for the workers and communities they are built to serve.

1 For one example of such a policy, the DOL's Employee Benefits Security Administration (EBSA) recognized in its ESG rule that unions and workers' voice can result in material financial benefits for employee engagement and representation. See 87 Fed. Reg. 73,822, 73,869, https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf.

2 *Investors Appeal to Legislators to Safeguard Workers' Pensions by Opposing Politically Motivated Threats to ESG Investing*, Interfaith Center on Corporate Responsibility (June 5, 2023), https://www.iccr.org/investors-appeal-to-legislators-to-safeguard-workers-pensions-by-opposing-politically-motivated-threats-to-esg-investing/.

This section outlines policies states and cities can adopt to guide the development of responsible investment practices that support workers' rights as well as protect such practices from anti-ESG attacks.

PREEMPTION RISK

As long as state protections for pro-worker responsible investment strategies do not interpose the state in the relationship between employers and employees, the preemption risk is low. States have broad authority to account for risk and return strategies for public investment funds, such as state employee pension funds.

OPTIONS FOR STATE OR LOCAL ACTION

PENSION INVESTMENT PRINCIPLES

At the pension fund level, whether public or private, it is important to have active and enforceable investment principles that support the investment beliefs of the fund and its members.[3] Both private industry pension funds and public pension funds have adopted investment principles and policies that consider labor standards as a material factor in investment decision-making. Most recently, concerned about the growing asset allocation to alternative investments, funds have begun to adopt labor principles for specific asset classes, like private equity.

In 2021, the Maryland State Retirement and Pension System adopted a new Responsible Contractor Policy that applies to their operations as well as construction of their real estate and infrastructure assets. The policy encourages neutrality during union organizing campaigns. In 2023, the National Electrical Benefit Fund (NEBF) adopted the Principles of Responsible Workforce Management in Private Equity.[4] That same year, California Public Employees' Retirement System also adopted their own Labor Principles for Private Equity.[5] Other funds and asset managers are poised to adopt similar principles in 2024. Key provisions of the NEBF principles include:

- General Partners will adopt policies covering all portfolio companies and their supply chains to guarantee respect for the International Labour Organization's (ILO) Core Conventions on freedom of association and effective recognition of the right to collective bargaining, elimination of all forms of forced or obligatory labor, the effective abolition of child labor, and the elimination of discrimination in employment and occupation.
- General Partners shall direct management teams of portfolio companies to maintain a position of neutrality when workers seek to exercise their freedom to join together in a union, and when applicable, will enter into neutrality agreements with labor organizations that contain the following provisions:
  - A commitment to non-interference in union organizing, including a prohibition on the use of "union avoidance" persuaders and captive audience meetings;
  - Reasonable accommodations for unions to access worksites and to communicate with employees;
  - A voluntary recognition or expedited election procedure for determining majority support for a union; and Arbitration of disputes and first contract
  - if no agreement is reached after a specified period of time.
- General Partners shall direct the management teams of portfolio companies to negotiate in good faith with their union-represented workforces to reach mutually beneficial collective bargaining agreements.

3 Steve Lydenberg, *Investment Belief Statements*, Institute for Responsible Investment Working Paper (Oct. 30, 2011).
4 National Electric Benefit Fund, *Principles of Responsible Workforce Management in Private Equity* (May 11, 2023).
5 California Public Employees' Retirement System, *Revisions to the Total Fund Policy: Governance and Sustainability Principles First Reading* (September 18, 2023), https://www.calpers.ca.gov/docs/board-agendas/202309/invest/item05a-01_a.pdf

PROACTIVE ESG PROTECTIONS THAT STATES CAN ADOPT

Advocates for responsible investment have organized stakeholders to resist anti-ESG attacks on the grounds that they may create costs and constrain investment choices, harming fund performance. For instance, studies have pointed to potential costs to state and municipal budgets if ESG boycotts restrict the pool of potential underwriters.[6] The Kentucky Bankers Association and Kentucky Teachers Pension Fund both resisted anti-ESG efforts by the state attorney general, arguing that climate risk is a material concern for investors and that anti-ESG rules unnecessarily restrict investors' ability to do their work.[7]

As Lenore Palladino, Jordan Haedtler, and Kristina Karlsson write regarding climate finance, states have the potential to "strengthen state pension codes to incorporate systemic risks into the definition of fiduciary duty," which would ensure that longer-term risks are considered alongside immediate "pecuniary" interests. Further, they argue, state laws can "clarify that pension funds can and should act in the interests of the workers who pay into them … [and] affirm and codify federal court rulings that have found that pension funds may consider factors relevant to the economic interest of fund beneficiaries beyond maximizing returns."[8]

These authors and others lay the groundwork for affirmative ESG protections that do not depend on cost/benefit analysis of particular state legislation. Rather they authorize an expanded scope for investor attention and action, in line with financial theory that emphasizes the importance of longer time horizons and health of economic systems for sustainable long-term investment.[9]

PROXY VOTING AND WORKER RIGHTS

In recent years, shareholders like the New York City Employees' Retirement System have filed resolutions to support the rights of workers. Shareholder resolutions are a powerful way for worker-owned pension funds to hold companies in their portfolio accountable or to call for change company governance. New York City Comptroller Brad Lander, along with other investors from the religious and labor communities, has been an outspoken supporter of resolutions calling for audits of company practices on freedom of association, racial equity, and other workplace issues considered "material factors relevant to the sustainability of business."[10]

In 2024, a legislative initiative related to worker rights and proxy voting was initiated in Colorado. The legislature considered language requiring pension funds to develop and publish proxy voting guidelines that commit the board to support certain shareholder resolutions related to freedom of association, collective bargaining, and climate-risk mitigation, unless there are extraordinary circumstances. It also requires pension funds to consider these issues when making decisions about director votes.[11]

> *"State protections for responsible investment strategies that consider labor standards in investment decisions can play important roles in ensuring pension funds' ability to manage risk and invest successfully."*

6 *See e.g., Daniel Garrett & Ivan Ivanov, Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies*, Brookings (Apr. 12, 2023), https://www.brookings.edu/articles/gas-guns-and-governments/.

7 Tom Sanzillo, "*Kentucky Bankers Sue State Over Right to Classify Climate Risk as Financial Risk,*" Institute for Energy Economics and Financial Analysis (Dec. 2, 2022), https://ieefa.org/resources/kentucky-bankers-sue-state-over-right-classify-climate-risk-financial-risk.

8 Palladino et al, *"State Pension Funds and Climate Risk: A Roadmap for Navigating the Energy Transition,"* Roosevelt Institute (Mar. 7, 2023), https://rooseveltinstitute.org/publications/state-pension-funds-and-climate-risk/.

9 *See e.g.,* Jon Lukomnik and James Hawley, *Moving Beyond Modern Portfolio Theory: Investing that Matters* (Routledge 2021).

10 Press Release, New York City Comptroller Brad Lander, *NYC Comptroller Lander and City Pension Funds' 2023 Shareowner Initiatives Postseason Report Highlights Leadership on Responsible Investment* (December 27, 2023). https://comptroller.nyc.gov/newsroom/nyc-comptroller-lander-and-city-pension-funds-2023-shareowner-initiatives-postseason-report-highlights-leadership-on-responsible-investment/#:~:text=In%20a%20joint%20statement%2C%20the,is%20not%20political%20or%20ideological.

11 New York City Government, New York City Retirement Systems 2023 Shareowner Initiatives Postseason Report, Office of the Comptroller (Dec. 2023), https://comptroller.nyc.gov/reports/shareholder-initiatives-postseason-report/.

SPOTLIGHT

INTEGRATING SUSTAINABILITY IN INVESTMENT POLICY: AMERICANS FOR FINANCIAL REFORM MODEL BILL

Credit: Tookapic / Wikimedia Commons

Proactive ESG legislation in states more favorable to responsible investment may strengthen existing defenses against anti-ESG legislation in other states and send signals that counteract the potential chilling effects of anti-ESG discourse and political activity. Natalia Renta, senior policy counsel at Americans for Financial Reform (AFR), and attorney Beth Young drafted legislative language that can be adapted and used for state-level efforts. The bill clarifies fiduciary duty to align investment decision-making wwith long-term viability of pension funds, creates a process for funds' consideration of sustainability factors, and requires disclosures from the asset managers that contract with the fund. This effort was based on the Illinois Sustainable Investing Act, which requires pension funds to have a sustainable investment policy integrating sustainability factors in five categories:

- Corporate governance and leadership
- Environmental
- Social
- Human capital
- Business model and innovation

In 2023, the Illinois bill was amended to include annual disclosures from asset managers on how they integrate sustainability factors. The AFR model broadens the Illinois bill.[12] Key recommendations include:

- Considering both sustainability factors that may impact individual investments and those that may impact the fund as a whole.
- Adding specific sustainability factors, including compliance with fundamental the labor rights of freedom of association, collective bargaining, and the elimination of forced labor, child labor, and employment discrimination.
- Requiring further disclosures from asset managers that work for pension funds and those being considered for retention and making them publicly available.

12 The full AFR model bill is available here: https://ourfinancialsecurity.org/wp-content/uploads/2024/05/4.12.24-Model-state-bill-on-consideration-of-sustainability-factors.pdf.

SECTION X

PROTECTING UNIONS FROM TORT LIABILITY AND CIVIL RICO SUITS

Credit: Emin / Adobe Stock

BACKGROUND

While much of this toolkit focuses on how state and local legislation can empower workers, this section focuses on preventing abuses of state law that could undermine worker power. The Supreme Court's 2023 decision in *Glacier Northwest v. International Brotherhood of Teamsters* appears to have had minimal effects on existing law.[1] However, if the Court opens up tort law as a new frontier to harm unions in a future case, the proposals in this section could help minimize the damage. This section also proposes state-level reforms that could help unions defend against civil RICO suits, which are increasingly misused against labor organizing.

OBJECTIVE OF STATE INTERVENTION: PROTECT STRIKING WORKERS FROM TORT LIABILITY

Far from gutting labor law preemption, the *Glacier* Court appears to have made, at most, two small changes to existing law. The first is procedural and could increase the likelihood that employers who sue striking unions for property damage will survive initial motions to dismiss. *Garmon* preemption holds that an employer cannot sue over a strike that is even "arguably" protected by the NLRA until the National Labor Relations Board (NLRB) has ruled. However, *Glacier* ruled that when a union presents a *Garmon* preemption argument on a motion to dismiss, courts should only consider the facts alleged by the employer. This could delay dismissing cases like *Glacier*, where a union details the steps it took to avoid damaging employer property on preemption grounds.

1 143 S. Ct. 1404 (2023).

The second potential change is substantive, as *Glacier* suggests that a narrow range of strike actions may be unprotected by the NLRA. Striking workers who take "reasonable precautions" to avoid damaging employer property are protected, even if the strike leads to loss of perishable products, such as milk that expires during a strike at a grocery store. But the Court implied that a strike in which workers "prompt" the creation of a perishable product, thereby risking aggravated damage to employer property, is not protected. This ill-defined "prompting" test could create additional liability for striking unions in specific factual contexts, but its applications remain unclear. The discussion of "prompting" also signals the Court's willingness to wade into murky factual questions, typically left to the NLRB's expertise.

While these developments may be modest, they could herald future changes from the anti-labor Court, making it important to define available tort claims against unions. Even in cases where the NLRB eventually intervenes and triggers preemption, the increased early-stage viability of employers' claims could run up unions' legal fees. Although tort law is a creature of state common law, it is not out of the ordinary for state legislatures to amend and refine the scope of tort liability.[2] For example, states often pass statutes to limit the tort liability of physicians, product manufacturers, and Good Samaritans. States could do likewise by enacting statutes to limit the liability of striking unions.

PREEMPTION RISK

State-level tort reforms aimed at protecting strikes may be vulnerable to challenge under *Machinists*[3] preemption. States generally cannot regulate strikes, lockouts, or other forms of economic self-help by unions and employers. According to *Machinists*, Congress intended for the NLRA to be the only limitation on the "free play of economic forces" in the self-help arena. A state reform that specifically shields strike activity from tort liability may be struck down if a court interprets it as putting a thumb on the scale in favor of unions.[4]

OPTIONS FOR STATE OR LOCAL ACTION

STAYING STATE COURT CASES PENDING THE RESOLUTION OF RELATED NLRB PROCEEDINGS

States could stay property damage claims arising from a strike (such as the conversion and trespass to chattels claims in *Glacier*) until any ongoing NLRB litigation concerning the same strike is exhausted. Exhaustion requirements, which necessitate completing an administrative process before proceeding to court, are found in myriad settings, from employment discrimination to ERISA. Claimants must often exhaust state processes before proceeding to federal court; these reforms would require exhaustion of a federal process (an NLRB proceeding) before pursuing a claim in state court.

In the medical malpractice context, several states have passed laws requiring a "medical review panel" to screen plaintiffs' claims before they can proceed to court. These panels have been struck down in some states and upheld in others, with the cases often hinging on issues including state constitutional provisions and the right to a jury trial.

LIMITING DAMAGES AND ATTORNEYS' FEES FOR STRIKE-RELATED PROPERTY DAMAGE

States could limit the damages and attorneys' fees available for strike-based property damage claims. In 2023, Illinois passed an amendment to its Labor Dispute Act limiting damages awarded in cases involving unintentional property damage resulting from legal strike activity.[5] However, past attempts to limit damages and fees (e.g., medical malpractice suits and noneconomic damages) have frequently been struck down on various grounds, including due process, the right to a jury trial, and equal protection. Narrowly tailored state reforms focused on strike-related suits would risk preemption, while broadly worded reforms could prevent deserving plaintiffs from being made whole in other settings.

Another strategy less vulnerable to preemption could involve limiting tort damages stemming from any protest activity protected by law, similar to how recent state-level captive audience bans have also prohibited forced meetings about politics and religion. These reforms could be framed as protecting "expressive

2 *Introduction to Tort Law,* Congressional Report Service (May 26, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11291.
3 Machinists v. Wis. Emp. Rel. Comm'n, 427 U.S. 132 (1976).
4 *See* Rum Creek Coal Sales, Inc. v. Caperton, 971 F.2d 1148 (4th Cir. 1992).
5 Ill. Pub. Act No. 103-0040 (2024), https://ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0040.

conduct" in general, taking advantage of any state constitutional protections associated with the term. Another possibility is to limit liability stemming from any type of strike (e.g., debt strike, rent strike, or labor strike), thus avoiding the appearance of favoring labor relations specifically.

DENYING A CAUSE OF ACTION FOR STRIKE-RELATED PROPERTY DAMAGE

The employer in *Glacier* accused the union of "intentional property destruction," which is not a traditional tort cause of action (its actual claims were for conversion and trespass to chattels). As two tort scholars observed in an amicus brief, intentional property destruction is the (entirely legal) goal of much economic competition between firms.[6] Furthermore, the scholars argued, conversion and trespass to chattels are ill-suited to complex relationships like employment, where an employer willingly gives possession of goods to its employees under some circumstances but not others.

States could adopt the tort scholars' view and clarify their tort definitions to exclude claims arising from relationships like employment, where possession of certain goods changes hands according to contract. Applying this reform broadly across multiple contexts — not just employment — would once again lower the risk of preemption.

CREATING JUDICIAL PRESUMPTIONS THAT FAVOR UNIONS

Unions (not employers) are typically the parties accused of strike-related property damage, so a rebuttable presumption of non-intent in such cases could benefit unions without changing any party's substantive rights or responsibilities, potentially dulling the threat of preemption. States could also adopt a rebuttable presumption that employers assume certain risks relevant to strikes, such as the spoilage of goods.

ENABLING ROBUST MOTIONS TO DISMISS

Some labor advocates think that unions may avoid retaliatory state tort suits through vigorous motions to dismiss for lack of jurisdiction. In Washington, a party filing a 12(b)(1) motion can attach "jurisdictional facts" showing why the case lacks jurisdiction. So, in a case like *Glacier*, a union could attach facts showing the reasonable precautions it took and any other grounds for "arguable" protection under the NLRA, invoking *Garmon* preemption. Allowing unions to attach jurisdictional facts could expedite the dismissal of frivolous anti-union suits quickly, and as a generally applicable reform to state civil procedure, poses little to no preemption risk.

OBJECTIVE OF STATE INTERVENTION: PROTECT UNIONS FROM CIVIL RICO SUITS

Title IX of the Organized Crime Control Act of 1970,[7] otherwise known as the Racketeering Influenced and Corrupt Organizations (RICO) Act, bans racketeering activities by organizations and individuals as part of a broader national policy to combat organized crime. While legislators intended RICO to fulfill a rather narrow crime-fighting objective, the Act's sweeping language has since led to a proliferation of RICO litigation against organizations well beyond the orbit of the mob.[8] Labor organizations have become a major target of RICO, which not only establishes criminal penalties but also enables private litigants like employers to seek recovery of civil damages. These latter "civil RICO" suits prove especially threatening in the context of so-called "corporate" or "comprehensive" campaigns, where unions seek concessions from employers through disruptive activities like shareholder protests and client-directed actions.[9] While employers often struggle to establish liability, the mere threat of treble damages and reputational injury posed by RICO lawsuits can have a chilling effect on organizing campaigns.[10]

The critical elements of a RICO violation are (1) investments in, acquisition of, control of, or conduct of (2) an enterprise (3) through a pattern of (4)

6 Brief of Tort Scholars as *Amici Curiae* in Support of Respondent, Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404 (2023) (No. 21-1449).

7 18 U.S.C. § 1964(1).

8 James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731, 744-47 (2009) (outlining the original intent of RICO as expressed in the legislative history of the law).

9 *See* Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 Indus. & Lab. Rel. Rev. 505, 505-506 (1990).

10 *See* Tom Juravich & Kate Bronhenbrenner, *Ravenswood: The Steelworkers' Victory and the Revival of American Labor* 86 (ILR Press1999); *Extortion, Blackmail*, Am. Jur. (2d).

racketeering activity.[11] The first two elements are defined broadly by federal statute; an enterprise, for example, can include not only companies but also labor organizations, other legal entities, or other "groups of individuals associated in fact."[12] Meanwhile, a plaintiff need only present two related instances of racketeering activity over a 10-year period to establish a "pattern" — the third element — under the statute.[13]

In defining the final element, "racketeering activity," Section 1961(1) of RICO provides a long list of so-called "predicate acts" that can form the basis of an actionable pattern under the law. Subdivisions B-G list 70 federal offenses, including bribery, embezzlement, Hobbs Act extortion, and wire fraud. Subdivision A includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing in a controlled substance ... *chargeable under state law*" (emphasis added) with a maximum punishment of one year or more in jail.[14] Though Subdivision A does not list any specific statutory offense, courts have held that a state crime can constitute a predicate act under this subdivision if it falls under the "generic" definition of one of the referenced offenses and was outlawed when the defendant committed the act.[15]

While most civil RICO claims derive from a federal cause of action, state law often determines whether so-called "predicate acts" exist to support a claim against a union or other worker organization. In a few cases, state laws have allowed courts to apply RICO broadly over a wide array of union comprehensive campaign activities. In *Smithfield Foods Inc. v. UFCW*,[16] agricultural mega-processor Smithfield filed a civil RICO action against UFCW Local 400 after the union embarked on a self-proclaimed "corporate campaign." As in many comprehensive campaigns, the union undertook actions designed to undermine Smithfield's public image, damage its relationship with clients and financial analysts, and impose legal and regulatory hurdles, all in the hopes of securing a pre-recognition agreement that would allow UFCW to more easily unionize Smithfield's massive Tar Heel plant.[17]

Smithfield based its RICO claim on multiple predicate acts of extortion, derived not from the federal Hobbs Act but from Virginia and North Carolina state law.[18] The district court granted the plaintiffs' motion to dismiss multiple union defenses on the pleadings, noting that even statements that were truthful or made in an effort to influence public officials were not immune from either state's extortion law, preserving the potential for RICO liability.[19] While the *Smithfield* case ultimately settled favorably for the union, other employers could apply broad state extortion laws through RICO to suppress a wide array of worker organizing and speech in the future.[20]

States therefore can play an important role in protecting union organizing by either reforming state RICO statutes or limiting the potential predicate acts under state law that could support a RICO claim.

11 *See* Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985).
12 18 U.S.C.§ 1964(1).
13 *Id.* at § 1961(5).
14 *Id.* at § 1961(1)(A).
15 *See*, e.g., United States v. Kirsch, 903 F.3d 213, 225–26 (2d Cir. 2018) (extortion under New York statute satisfied generic definition); United States v. Ferriero, 866 F.3d 107, 115 (3d Cir. 2017) (bribery under New Jersey statute was generic); United States v. Adams, 722 F.3d 788, 802 (6th Cir. 2013).
16 593 F.Supp.2d 840 (E. D. Va. 2008).
17 Smithfield Compl. § 1-3, *id.*
18 N.C. Gen. Stat. Ann. § 14-118.4; Va. Code Ann. § 18.2-59 (West).
19 Smithfield Foods, 593 F.Supp.2d at 845-47.
20 Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 624-26 (2012).

PREEMPTION RISK

The preemption risk is likely low, but this is an untested area.

OPTIONS FOR STATE OR LOCAL ACTION

AMEND STATE RICO AND PREDICATE-ACT STATUTES

Most obviously, states could amend their own RICO laws to provide broad and express immunity for unions for predicate acts committed in furtherance of legitimate union objectives — much as federal lawmakers have proposed. While this would not address labor unions' risk of federal liability, it would help to insulate them from prosecution by state officials and shield them from liability under state law.[21]

As mentioned, state laws prohibiting extortion, bribery, or other predicate acts listed under Subdivision A f Section 1961(1) can form the basis of a federal civil RICO claim. States could amend predicate-act statutes, such as existing extortion and blackmail laws, to clarify that the state extortion act shall reach no further than the federal Hobbs Act's definition of extortion as interpreted by the U.S. Supreme Court in *United States v. Enmons*.[22] Given that the Supreme Court has established that limiting extortion in this matter is compatible with federal labor law, the risk of preemption is low.

CREATE DEFENSES FOR LABOR ORGANIZING IN PREDICATE-ACT STATUTES

State lawmakers could also protect worker organizing by mitigating the weaponization of state predicate-act laws under the federal RICO statute. Creating labor-organizing exemptions or defenses for these predicate state offenses could help insulate union organizing from federal RICO liability. However, exemptions tailored specifically toward unions could raise preemption risks. To reduce these risks, lawmakers could create broader exemptions, declaring that public speech — by anyone, not just a union — about corporate wrongdoing is not a crime under state law.

"While these developments may be modest, they could herald future changes from the anti-labor Court, making it important to define available tort claims against unions."

Credit: Brooke Anderson / Flickr

21 U.S. Department of Justice (report), *Local Prosecution of Organized Crime: The Use of State RICO Statutes*, October 1993. https://bjs.ojp.gov/content/pub/pdf/lpocusricos.pdf. Florida's state RICO law, for example, maintains a five-year statute of limitations, compared to the implied four-year limitations period in federal civil RICO cases. See 2022 Fla. Stat. § 895.05(11).

22 410 U.S. 396 (1973).

SECTION XI

REGULATION OF THE EMPLOYMENT RELATIONSHIP AND MISCELLANEOUS POWER-BUILDING POLICIES

Credit: Bob Simpson / Flickr

BACKGROUND

This section outlines miscellaneous policies that may deter union-busting, reduce incentives for employers to fight unionization, establish higher negotiating positions, and remove other obstacles to building worker power.

OBJECTIVE OF STATE INTERVENTION

Cities and states can regulate terms of employment in creative ways to better protect workers from retaliation, reduce employer coercion, make the right to strike more accessible, and disincentivize union-busting. Setting and enforcing labor standards that raise the floor for workplace standards while creating conditions more favorable for organizing can help to balance the power dynamic between workers and employers.

PREEMPTION RISK

Creating just cause dismissal standards, providing unemployment benefits for striking workers, and allowing unionized workers to deviate from minimum labor standards all carry a low risk of preemption. Courts could preempt state efforts to ban captive audience meetings, although states have framed these bans broadly to cover non-labor issues to minimize the preemption risk. The preemption risks associated with each of these policies are detailed below.

OPTIONS FOR STATE OR LOCAL ACTION

JUST CAUSE DISMISSAL STANDARDS

Despite the NLRA's explicit goal of encouraging collective bargaining, employees face multiple forms of intense interference from employers. Under the employment-at-will doctrine, for example, employers can fire employees for any or no reason (as long as it is not an explicitly unlawful reason, such as one based on racial or sex discrimination), without any warning. This exacerbates the imbalance of power between workers and their employers, resulting in a range of

harmful effects including perpetuating systemic racism in unequal labor market outcomes for Black and Latino workers.[1]

While the NLRA prohibits firing workers in retaliation for concerted activity, the at-will rule makes this difficult to enforce. Because *almost* any reason for firing is allowed by the at-will rule, workers and unions responding to an unlawful retaliatory firing must expend great resources in litigation to show that the employer's proffered reason is pretextual. A just cause standard would make it harder for employers to come up with pretextual excuses for firing union supporters, thus helping workers benefit from the protections of the NLRA.

Machinists preemption prohibits state regulation of any labor relations areas that Congress intended to be left to the "free play of economic forces." This doctrine does not apply to laws that "[impose] minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the [regulation] is not incompatible with the general goals of the NLRA."[2] A minimum labor standard affects union and nonunion employees equally and neither encourages nor discourages collective bargaining.[3] Laws that set minimum standards for working conditions and benefits are typically not preempted, provided they are generally applicable and do not interfere with the collective bargaining process.

A growing number of cities and states have implemented just cause termination protections for workers, challenging the norm of at-will employment. In 2021, New York City passed legislation protecting 70,000 workers in the fast-food industry from being terminated or having hours reduced by more than 15% without just cause.[4] This law was modeled after a similar ordinance passed in 2019 in Philadelphia, which became the first city in the United States to pass just cause legislation covering parking lot workers.[5] And the US Department of Labor defined "termination for just cause" for temporarily nonimmigrant guest workers in a way that protects them from losing certain benefits due to a for-cause termination, going so far as to mandating progressive discipline.[6]

In the face of preemption challenges, just cause laws have generally prevailed where courts have deemed the statutes broad enough to qualify as a minimum labor standard.[7]

BANNING CAPTIVE AUDIENCE MEETINGS

Many workers receive far more information from their employer about why they should *not* join a union than they ever receive from their coworkers or union organizers about the benefits of unionization. Federal labor law protects some employer speech in the workplace, and employers routinely use that protection to engage in coercive acts, including captive audience meetings, where employees are forced to listen to anti-union speech during work time. These meetings are meant to discourage employees from building collective power. While NLRB General Counsel Jennifer Abruzzo is seeking to make captive audience meetings unlawful, the NLRA, as currently interpreted, does not prohibit them.

In recent years, eight states have enacted prohibitions on captive audience meetings in the workplace[8]:

- New York Labor Law § 201-d
- Minnesota Statutes § 181.941
- Connecticut General Statutes § 31-51q

1 Irene Tung and Paul K. Sonn, *Just Cause Job Protections: Building Racial Equity and Shifting the Power Balance between Workers and Employers*, National Employment Law Project (Apr. 30, 2021), https://www.nelp.org/publication/just-cause-job-protections-building-racial-equity-and-shifting-the-power-balance-between-workers-and-employers/.

2 Metropolitan Life Ins. Co. v. Massachusetts., 471 U.S. 724, 754 (1985).

3 Metropolitan Life, 471 U.S. at 755.

4 Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, But a New Law in New York Could Change That*, Bloomberg Businessweek (June 21, 2021), https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire.

5 Julie Blust, *Philadelphia Becomes The First City In The Nation To Pass Industrywide 'Just Cause' Legislation*, SEIU 32BJ (May 17, 2019), https://www.seiu32bj.org/press-release/philadelphia-becomes-the-first-city-in-the-nation-to-pass-industrywide-just-cause-legislation/.

6 U.S. Department of Labor Wage and Hour, Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States, https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule; see also 20 CFR § 655.122(n), at 89 Fed. Reg. at 34,061.

7 *See* Nathaniel Kazlow, *Just Cause We Can: Ending At-Will Employment and Avoiding Preemption*, 56 Colum. J.L. & Soc. Probs. 607 (2023). Cases that have upheld just cause or other similar laws setting minimum standards include *R.I. Hosp. Ass'n v. City of Providence*, 667 F.3d 17, 35 (1st Cir. 2011); *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77 (2d Cir. 2015); *St. Thomas-St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000).

8 In addition, the Department of Labor protects workers in the H-2A temporary agricultural guestworker program from retaliation because they exercised their right to refrain from listening to employer speech related to their right to organize. See *20* CFR § 655.135(h)(2)(i), 89 Fed. Reg. at 34,010.

- Maine Revised Statutes Annotated § 26:10-A
- Oregon Revised Statutes § 659A.840
- Washington Revised Code § 49.44
- Wisconsin Statutes § 111.36 (enjoined)
- Illinois Compiled Statutes 820 ILCS § 57

Crucially, none of these states' bans are limited to speech about collective bargaining or unionization. State attempts to ban captive audience meetings that focus exclusively on labor would run a high risk of preemption. However, these eight states have attempted to lessen that risk by extending the ban to mandatory meetings covering other subjects, such as the employer's opinions on religious or political matters. In these broadly framed anti-captive audience laws, the decision to join or support a labor organization is only one of many prohibited topics.

Business groups challenged Wisconsin's captive audience ban on NLRA preemption grounds shortly after it took effect in 2010. But the state did not contest the case and entered into a settlement in which it acquiesced to the preemption charge. As of May 2024, similar challenges are ongoing in Connecticut and Minnesota, where business groups allege the laws violate employers' First Amendment rights as well.[9] Although the Oregon law has survived challenges initiated by the U.S. Chamber of Commerce and the NLRA, it did so on procedural rather than substantive grounds.[10] Because no challenge to a state ban has been fully litigated, the case law is of limited value in assessing a preemption challenge to these kinds of statutes.

UNEMPLOYMENT BENEFITS FOR STRIKERS

A key hindrance to workers leveraging their strike power is the loss of income that accompanies a strike. In contemporary America, most households do not have sufficient savings to withstand even a short period without their regular income. One in four Americans has no emergency savings, and about half of all Americans have zero to three months' expenses in savings. In contrast, most businesses have access to bank loans, diversified revenue streams, or private loans from other companies — avenues that are not available to most workers and allow them to withstand a temporary labor stoppage or slowdown. Almost every state, however, denies striking workers or workers who have been locked out access to any unemployment insurance (UI) benefits.

To level the playing field for collective bargaining and restore the right to strike, states could extend eligibility for unemployment insurance benefits to any worker affected by a labor dispute, whether by strike or by lockout. These workers could be subject to the same eligibility requirements as other workers, where appropriate. For example, a requirement to demonstrate that they are actively seeking new employment should not apply to striking or locked-out workers, but earnings and time-on-the-job thresholds could apply.

Though several states allow UI benefits for striking workers under specific circumstances — namely in cases where the employer has broken labor laws, violated terms of a contract, or initiated a lockout — only New York and New Jersey unilaterally extend UI eligibility to striking workers.[11] The California legislature recently passed a bill to do the same, but it was vetoed by the governor, who cited budgetary concerns. In New York, strikers become eligible for benefits after 14 days on strike, and they must repay their UI benefits if they receive backpay from their employer after the strike ends. In New Jersey, workers also become eligible for UI benefits after 14 days on strike. There are similar bills pending in the Connecticut and Massachusetts legislatures.

The preemption risk for providing unemployment benefits is nonexistent under current precedent. The Social Security Act of 1935 ("the Act") directs the states to establish unemployment insurance programs and grants them broad authority to set rules for eligibility for benefits. State programs only need to meet minimal criteria to obtain federal approval. Interpreting the Act as currently written, the Supreme Court in *N.Y. Telephone Company v. N.Y. State Department of Labor*, 440 U.S. 519, 541-42 (1979) held that eligibility for striking and locked-out workers is a matter of state law and payment of unemployment insurance to them is not preempted by the NLRA.

9 Laura Brown, *Businesses Challenge State's 'Captive Audience' Law*, Finance & Commerce (Feb. 26, 2024), https://finance-commerce.com/2024/02/businesses-challenge-states-captive-audience-law/.

10 Jonathan J. Spitz, Richard F. Vitarelli, Richard I. Greenberg, Michael J. Moberg & Lorien E. Schoenstedt, *Legislation Banning 'Captive Audience' Meetings Enacted in Minnesota, Awaiting Enactment in New York*, Jackson Lewis (June 16, 2023), https://www.jacksonlewis.com/insights/legislation-banning-captive-audience-meetings-enacted-minnesota-awaiting-enactment-new-york.

11 Dept. of Labor Employment and Training Administration, *Nonmonetary Eligibility*, https://oui.doleta.gov/unemploy/pdf/uilawcompar/2022/nonmonetary.pdf.

DEROGATION

Laws that set minimum labor standards, like minimum wage and overtime laws, play an incredibly important role in setting a floor of basic protections for workers. These standards are designed to ensure some measure of economic security for all working people while also leveling the competitive playing field for employers. It is beyond dispute that nonunion workers, especially low-wage vulnerable workers, rely on having the labor-standards floor to prevent the worst forms of exploitation.

Questions arise, however, as to whether workers who have chosen to be represented by a union need the same floor beneath their negotiations. The term "derogation" refers to creating exceptions to government regulation of labor standards for workers covered by a collective bargaining agreement, thereby allowing workers to negotiate labor standards beneath legislated levels. The argument for derogation is twofold. First, application of those standards in the context of a represented workforce constrains the scope of bargaining. Second, employers may be less likely to fight union organizing if they believe they have more regulatory flexibility with a unionized workforce.

Courts have found that state or local statutes that allow for exceptions to basic labor standards for workers covered by collective bargaining agreements are not preempted. These statutes have been upheld because their purpose is not to encourage collective bargaining but to provide an alternative means of regulating employers. For example, in *Fort Halifax Packing Co., Inc. v. Coyne,* the Supreme Court held that although a mandatory severance pay statute could be a subject of bargaining, it was not preempted by the NLRA, as it did not interfere with the collective bargaining process.[12] In another example, the Ninth Circuit upheld a California statute that permitted unionized mine workers to enter into collective bargaining agreements that waived the statutory prohibition on workdays over eight hours long.[13]

Areas in which derogation by state statute may be appropriate include state minimum wages above the federal minimum wage, overtime guarantees that kick in before 40 hours, paid leave mandates, and constraints on scheduling. At the municipal level, numerous living wage laws for government contractors have allowed for derogation. State and municipal statutes cannot allow for derogation of federal labor standards.

> *"Because almost any reason for firing is allowed by the at-will rule, workers and unions responding to an unlawful retaliatory firing must expend great resources in litigation to show that the employer's proffered reason is pretextual. A just cause standard would make it harder for employers to come up with pretextual excuses for firing union supporters, thus helping workers benefit from the protections of the NLRA."*

12 Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987).
13 Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1995).

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