



Compliance with Select County Workplace Protection Laws

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Executive Summary

Since 2002, Montgomery County has enacted nine workplace protection laws to regulate aspects of employer/employee relationships. These laws address wage standards, paid leave, and protections for specific worker groups such as domestic workers or displaced service workers. The County is home to about 33,000 business establishments, 512,000 wage and salary workers and 205,000 self-employed workers.

This study responds to the Council's interest in understanding how well employers comply with County workplace laws, what happens when noncompliance occurs and what this says about how these laws are being enforced. OLO's study focused on County practices for administering the following four County workplace protection laws:

- The County's Wage Requirements Law (enacted in 2002) is administered by the County's Office of Procurement.
- The County's Minimum Wage Law (enacted in 2013) and the Minimum Wage for Tipped Employees Law (enacted in 2015) are jointly administered by the County's Office of Human Rights ("Human Rights") and the State's Employment Standards Service in Maryland's Department of Labor, Licensing and Regulation (DLLR).
- The County's Earned Sick and Safe Leave Law (enacted in 2015) is administered by Human Rights.

Research Highlights on Business Compliance with Employment Law Standards

OLO's review of the Offices of Procurement's and Human Rights' practices did not find any data about business compliance levels with any of the four laws OLO examined. To fill this void for the minimum wage laws, OLO reviewed labor standards compliance research, including efforts to develop compliance estimates using census data. The research shows business compliance with workplace protection laws is highly uneven. Most businesses comply voluntarily but, in certain low-wage industries, noncompliance is severe and pervasive. In brief:

- Research to estimate compliance with minimum wage standards using U.S. census data found estimated violations rates for covered jobs in New York and California of 3.5% and 3.8% respectively; however, for workers in low-wage jobs, the violation rates increased to just over 11% for New York and 12% for California.
- Research to estimate a covered, non-exempt worker's risk of a minimum wage violation for the ten largest states estimated the average risk at 4.1%. The risk for a worker in the food and drink industry was 14.3%.
- A landmark survey of workplace violations in Chicago, Los Angeles and New York City used an innovative methodology to generate a representative worker sample. It found 26% of low-wage workers were not paid the minimum wage. Nearly 20% of the sampled workers were eligible for overtime; 76% experienced a violation.
- The same survey examined whether employer and job characteristics or worker demographics explained differences in violation patterns. The results showed employer and job characteristics were more predictive. Firms that paid on a non-hourly basis, that paid in cash, and small firms had higher violation rates. Firms that did not offer raises or benefits, e.g. health insurance or paid leave, had higher noncompliance rates than those that did.
- Another study looked at violations experienced by low-wage, frontline workers to understand how reliance on private parties to enforce their own workplace rights (also called private rights of action) works in practice. Researchers found that private lawsuits vastly outnumber government enforcement actions; they state that in the current system "workplace rights ... are generally enforced from the bottom up." They concluded "there is good reason to believe that the system ... fails particularly badly in the case of workers who are most vulnerable to workplace violations."

Systems to Promote Compliance and Enforce Statutory Workplace Protections

Systems to promote compliance and enforce statutory worker protections consist of federal and state regulatory agencies and federal and state courts. Systems typically use five compliance and enforcement strategies, listed below.

Compliance and Enforcement Strategies for Statutory Workplace Protections

	Strategy	Key Features	Federal		State	
			Agency	Court	Agency	Court
Compliance	Self-enforcement through persuasion	Low cost; culture of compliance	√		√	
	Information and capacity building campaigns	Training seminars	√		√	
	Monitoring to detect noncompliance	Routine monitoring; targeted inspections	√		√	
Enforcement	Individual & collective rights to pursue legal remedies	Administrative remedies; Private rights of action	√	√	√	√
	Legal sanctions	Fines, penalties, license suspension	√	√	√	√

Source: OLO.

In the U.S., federal and state regulatory agencies can use all five strategies. In the U.S., a private right of action empowers individuals to enforce their rights in federal and state courts. Highlights from OLO's review found:

- Public agencies are often underfunded. Most rely heavily on low-cost, complaint-driven systems which can create barriers for workers to file claims. Complaints may not correspond to actual workplace violations.
- The use of private rights of action is growing. Private rights of action are self-funding; they place the initiative for enforcement with an employee. They relieve underfunded agencies, but they fail low-wage workers.
- In Maryland, DLLR discontinued active enforcement of its minimum wage law in 1991 and again in 2006 but re-instated it in 2014. DLLR has continuously enforced the state's Wage Payment Collection Law.
- Aspects of Maryland's system, e.g. its resource issues, its focus on enforcing the state's payment law, its use of written complaints and its emphasis on voluntary compliance, appear to be widely shared across the states.

Employment Standards' Completed Wage Claim Forms and Wages Recovered Per Claim

	CY2011	CY2012	CY2013	CY2014	CY2015	CY2016	CY2017
Completed wage claim forms	1,172	849	907	1,061	967	812	736
Claims with wages recovered	581	343	339	552	503	503	435
% of claims with wages recovered	50%	40%	37%	52%	52%	62%	59%
Avg. wage recovery per claim	\$1,573	\$1,239	\$1,534	\$1,595	\$1,472	\$1,201	NA

How County Departments Promote Compliance and Enforce Workplace Protection Laws

How well the existing workplace regulation systems work to ensure County businesses' compliance with the new minimum wage and safe and sick leave laws is unknown. Specifically, for the minimum wage laws (and the safe and sick leave law to a lesser extent), Human Rights reports a minimal number of claims filed and wages recovered; but research suggests worker claims alone are not a useful measure of compliance. More is known about compliance with the Wage Requirements Law because Procurement monitors payrolls and conducts audits.

To promote compliance and enforce the **Wage Requirements Law**, Procurement currently uses a comprehensive set of monitoring, compliance and enforcement practices:

- Regularly screens and reviews vendor payroll reports;
- Responds to issues raised by contract administrators and others;
- Relies on in-house auditors under contract to conduct investigations if it suspects non-compliance; and
- Offers vendors an opportunity to cure violations, followed by more formal enforcement actions, if needed.

To promote compliance with the **Minimum Wage Law** and the **Minimum Wage Law for Tipped Employees**, Human Rights relies on persuasion to encourage voluntary compliance:

- Undertook an initial education and outreach campaign and now offers bi-annual seminars;
- Launched an online form for businesses with tipped employees to submit certified payrolls;
- Does not regularly review the certified payroll submissions to detect noncompliance; and
- Refers complainants to Employment Standards in DLLR which is responsible for enforcement.

To promote compliance and enforce the **Earned Sick and Safe Leave Law**, Human Rights uses a complaint-based system. So far, Human Rights has received a few complaints, held a few mediation sessions and handled one retaliation claim.

Recommended Discussion Issues

Research suggests that most businesses will comply voluntarily with the County's higher wage standards. OLO recommends that the Council adopt a strategic oversight approach that focuses both on those workers most at-risk of experiencing a violation and on those businesses most at-risk of noncompliance. The multi-year transition to higher County minimum wage standards offers the Council an opportunity to address issues raised by this study. OLO proposes the following three issues to structure a Council discussion of compliance and enforcement.

- Issue 1: Discuss with Executive representatives their views about complaints as a proxy for compliance, their practices for monitoring business compliance and their suggestions for ways to strengthen monitoring. Since research shows food and drink workers face high risks of violations and Human Rights has its online reporting system in place for businesses with tipped employees, ask Human Rights how it can use these reports to strengthen its efforts to detect noncompliance.
- Issue 2: Discuss with Executive, business and non-profit representatives their suggestions for a system to monitor the ongoing effects of implementing the County's minimum wage laws, particularly on the County's small businesses and non-profits. The Council may wish to ask representatives to address the need for more proactive technical assistance or other efforts to monitor the ongoing effects of implementation on compliance among small businesses and non-profits.
- Issue 3: Discuss with representatives from the Executive, legal aid organizations and worker advocacy groups the role of private rights of action in the County's system of protections for low-wage workers. In particular, the Council may wish to discuss: how well private rights of action currently work to protect workers; the capacity of the current system; and the merits or drawbacks of shifting to a system that places a greater reliance on private rights of action.

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Table of Contents

Executive Summary	i
I. Introduction	1
II. Background	3
III. Regulatory Approaches to Labor Standards Compliance.....	28
IV. Labor Standards Compliance in Maryland and Other States	40
V. County Workplace Protection Laws and Practices	57
VI. Labor Standards Compliance Research Surveys and Estimates	77
VII. Findings and Recommended Discussion Issues	87

List of Tables

Table Number	Title	Page
2-1	Provisions of Business and Workplace Mandates in Six Federal Employment Laws	5
2-2	Benefit Access and Use – Full-time and Part-time Standard Employees by Benefit Type	7
2-3	Organizing Production, Work Arrangements and Employment Relationships	9
2-4	BLS Estimates: Alternative Work Arrangements as a Percentage of the Total Workforce, May 2017	10
2-5	Comparing Estimates of Nonstandard and Standard Work Arrangements	13
2-6	Fissured Employment in Selected Industries	16
2-7	Enforcement Agencies and Private Rights of Action for Major Federal Workplace Laws	25
3-1	Implementation Practices for Minimum Wage Compliance Systems	30
3-2	Changes in FLSA Complaint Rates From 2001-02 and 2007-09, Overall and by Sector	34
3-3	Eight Elements of the Wage Hour Division’s Strategic Approach to Enforcement	38
4-1	Employment Standards and Classification (ES&C) Position and Expenditure Trends	41
4-2	Employment Standards’ Completed Wage Claims and Investigations (All Types), CY2009 to CY2017	45
4-3	Employment Standards’ Wage Claims with Recovered Wages and Amounts (All Types), CY2009-CY2016	46
4-4	Employment Standards’ Minimum Wage and Overtime Complaint Data, FY 2014 to FY2017	46
5-1	Wage Rates for Montgomery County’s Wage Requirements Law, FY2004-FY2019	57
5-2	Wage Requirements Law: Exempt and Covered Contracts, FY2011 – FY2016	58
5-3	Contracts Exempt from Wage Requirements Law, by Reason, FY2014 – FY2016	59

Compliance with Select County Workplace Protection Laws

Table Number	Title	Page
5-4	Summaries of OBRC's Wage Requirements Law Investigations, Oct. 2007-Feb. 2014	61
5-5	Summaries of OBRC's Wage Requirements Law Audits, October 2007-February 2014	62
5-6	WRL Audits and Investigations from December 2014 through August 2018	67-68
5-7	Minimum Wage Required Under Transition Provisions of Enacted Bill 28-17	71
5-8	Estimates of Covered Establishments and Jobs Subject to County Minimum Wage by Firm Size	71
5-9	Montgomery County Leave Accrual Rates by Employer Size	75
5-10	List of County Workplace Protection Laws Enacted Since 2002	79
6-1	FLSA Noncompliance Rates: Skilled and Intermediate Care Nursing Homes and Other Personal Care (1997 & 2000)	82
6-2	FLSA Noncompliance Rates for Restaurants, Fast Food Outlets and Supermarkets (2000)	82
6-3	Summaries of Convenience Sample Worker Surveys for Select Areas and Industries	83
6-4	Industry Segments and Occupations with Systemic Patterns of Workplace Violations	84
6-5	Noncompliance Rates by Violation Type Among At-Risk Low-Wage Workers	85
6-6	Variations in Workplace Violation Rates by Employer Benefit Characteristics	86
6-7	Variations in Workplace Violation Rates by Job and Employer Pay and Size Characteristics	86
6-8	Patterns of Workplace Violations by Type and Industry Tiers	87
6-9	Estimates of Minimum Wage Violation Rates by Industry and Occupation	89
6-10	State Estimates of Workers at Risk of Experiencing a Minimum Wage Violation by Industry	91
7-1	Noncompliance Rates by Violation Type Among At-Risk Low-Wage Workers	94

Table Number	Title	Page
7-2	Fissured Employment in Selected Industries	95
7-3	The U.S. System of Compliance and Enforcement for Statutory Workplace Protections	96
7-4	Employment Standards' Completed Claims and Wages Recovered, 2009 - 2017	98
7-5	Employment Standards' Minimum Wage Complaint Data, FY2014 - FY2017	98

List of Exhibits

Exhibit Number	Title	Page Number
4-1	Steps in Employment Standards' Wage Claim Process	48-49
4-2	Steps in Maryland's Wage Lien Process	51

I. INTRODUCTION

Federal labor and employment laws establish a set of minimal workplace protections such as a minimum wage and an overtime wage premium and give workers minimal social protections such as unemployment, social security and disability insurance.

Despite these laws, workers' eligibility for and access to these protections is neither universal nor automatic. Instead, the reality of these protections depends on the legal recognition of an employer/employee relationship, including a shared understanding of the employer obligations it creates, an employer who complies with these obligations and a worker who is willing to take action if they believe these protections are at risk. Problems such as nonpayment or underpayment of wages or employee misclassification are particularly acute for individuals working in low-wage industries or working for under-capitalized employers.

The institutional arrangements established during the New Deal that provided minimal workplace and social protections and more generous collective bargaining protections have not aged well. Governance models that authorized unions to set "the law of the workplace" through collective bargaining agreements have all but disappeared in the private sector, leaving common law doctrines and employment law provisions to set wage floors and other job standards. As a result, today when a break occurs in the terms of an employer/employee relationship and a worker pursues a public or private claim, the remedy a worker receives generally rests with an administrative agency's settlement or a court's interpretation of legally established protections in statute and/or common law.

Besides these changes to the systems of worker protections, New Deal protections established to ensure a floor of minimal social insurance have eroded due to an increasingly competitive business environment, business practices that optimize flexible work arrangements and deregulation.

Today, labor experts and policymakers use terms such as "the precarious workforce" to refer to workers in low quality, low-wage jobs who can no longer access the levels of economic and social protections established during the New Deal. Unlike standard work arrangements¹ that were the norm, precarious workers often are either permanent employees with part-time hours, unpredictable schedules and limited access to employer benefits; or, they work independently as contract workers or freelancers. If permanent, part-time workers are included, some researchers estimate that "precarious workers" account for up to 40 percent of today's workforce.

As the effects of the unravelling of federal labor protections and increasing worker precarity take root, many states and local jurisdictions are enacting local standards to raise minimum wages or regulate other aspects of the employment relationship. In Montgomery County, nine laws in effect since 2003 supplement standards found in federal and state employment laws.² Most recently, the Council enacted a minimum wage law in 2013, a minimum wage law for tipped employees in 2015 and an earned sick and safe leave law in 2015. A subsequent amendment to the County minimum wage law, effective as of July 1, 2018, phases-in further increases based on firm size and ownership.

¹A "standard work arrangement" refers to a permanent job where an employer controls the manner and means by which a worker provides services for an employer. Compared to today's contingent or precarious worker, an individual in a "standard work arrangement" typically has the option to work a predictable fulltime or part-time schedule with paid time off and access to retirement, healthcare and other insurance benefits.

² See Table 5-8 for a list of County Workplace Protection Laws enacted since 2002.

Authority, Scope and Organization. Labor mandates enacted by states and local jurisdictions pose compliance questions for legislators and administrators. This report responds to the Council’s request for a better understanding of the structures and practices that support implementation and enforcement of federal, state and County workplace protections. It reviews three recent County laws that mandate minimum wage standards for nontipped and tipped employees and paid leave benefits for nearly all employees. It also reviews the Wage Requirements Law, a “living wage” law that establishes wage standards for County service contractors which took effect in 2003.

The Council is interested in understanding what is known about how well employers comply with these County laws, what happens when noncompliance occurs and what this says about how the laws are being enforced. To answer these questions, this report offers a research synthesis and describes how County departments are implementing the County’s newest worker protection laws and the Wage Requirements Law. The Council requested this study in the Office of Legislative Oversight’s FY18 Work Program, in Council Resolution 18-882. This report has seven chapters organized as follows:

Chapter II provides background information about the structure of U.S. social and workplace protection laws and vulnerable workers, about workplace changes due to economic restructuring and describes a shift to an individual rights regime of statutory protections and private rights of action;

Chapter III presents an overview of agency approaches to labor standards compliance and describes the federal regulatory practices for administering compliance with workplace wage hour standards;

Chapter IV describes the regulatory practices for administering wage hour standards in Maryland and other states;

Chapter V describes the implementation history and administrative practices for the four County workplace protection laws that are the subject of this study;

Chapter VI presents research about compliance measures and estimates; and

Chapter VII presents OLO’s findings and recommended discussion issues.

Methodology and Acknowledgments. OLO staff member Sue Richards conducted this study with assistance from Tori Hall and Kelli Robinson. OLO conducted online research and interviewed staff in Montgomery County’s Office of Procurement and Office of Human Rights and staff in the Maryland Department of Labor, Licensing and Regulation (DLLR).

OLO appreciates everyone who contributed their time. In the Office of Procurement, OLO would like to acknowledge the contributions of Cherri Branson, Director; Grace Denno, Chief, Division of Business Relations and Compliance; Jack Gibala, Program Manager; and Kerri Albright, Program Specialist. In the Office of Human Rights, OLO appreciates the assistance of James Stowe, Director, and Loretta Garcia, Manager of Enforcement Programs. At DLLR, OLO appreciates the help of Michael L. Harrison, Policy Director, Office of the Secretary and Allen Griffith, Jr. Investigator, Employment Standards Service. OLO also appreciates the contributions of Sierra S. Boney, Policy Analyst in the Maryland Department of Legislative Services.

II. BACKGROUND

Developed economies operate within a complex set of laws and institutions that impose legal rules and constraints in order to balance businesses' rights to freedom of contract, workers' rights to fair and just treatment in the workplace and households' needs for minimum levels of social protection. Ideally, minimum social insurance standards give households protections to weather economic shocks that arise due to conditions such as old age, sickness, disability and unemployment. In a recent paper, Sandra Polaski lists many benefits of what she calls a "social floor":

A social floor serves numerous social policy and economic purposes. It can smooth income across economic cycles or individual setbacks and thus prevent or reduce poverty. It can insure individuals and households against risks that could otherwise have long-term deleterious effects on their incomes, well-being and productivity. It enables workers to invest in education and training and make decisions on employment and mobility based on a set of expectations about the likely returns to their effort. It constrains firms to respect certain rights and standards and prevents externalization of their costs to society or beggar-thy-neighbor approaches toward competitor firms. It can help ensure that wages and living standards rise in line with productivity growth for the broad population. These microeconomic effects then contribute to macroeconomic outcomes by way of channels that include income distribution, consumption and further productivity increases. An adequate and credible social floor also builds social and political cohesion by fostering public confidence that government and society can be counted on to ensure basic economic fairness.³

The benefits of an effective social floor can yield growing economic productivity, rising living standards and higher levels of social cohesion. Whether these benefits are realized; however, depends on many factors: work arrangements, productivity trends, and how the institutional arrangements in labor and employment law statutes and common law resolve conflicts of efficiency, equity and voice that are inherent in the employment relationship. Generally, together with common law doctrines such as at-will employment:

- Labor or industrial relations law addresses the power imbalance between workers and their employers by regulating the organization of trade unions and industrial actions by workers and employers and the adoption and enforcement of collective agreements. Labor laws empower labor unions to represent workers collectively and favor certain union strategies in negotiations with employers.
- Employment law addresses the employer/employee power imbalance on an individual basis. It establishes a set of discrete individual protections for workers by regulating specific activities of the employment relationship. Employment statutes may establish procedural mandates related to hiring or firing processes or substantive mandates related to wages, hours or benefit levels or impose restrictions on workplace conditions and practices.

³Sandra Polaski, "Building an adequate U.S. labor and social protection system for the 21st century" (Working Paper No. 60, International Labour Organization, 2018), 4; retrieved from https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_631509.pdf.

In the United States, concerns exist that the effects of economic restructuring have dismantled and/or overwhelmed the New Deal institutions that were created to enforce labor market regulations, protect workers' interests and establish a social floor. The starting point for this OLO review of businesses' compliance with various employment laws is a recognition that these County mandates affect business activity while also operating within the broad context of the labor market and the institutional framework of social insurance taxes and workplace protection laws. While this study examines public agencies' regulatory performance and enforcement practices and measures of businesses' labor standards compliance, it aims to view these matters within this broader context.

This chapter provides readers with a working understanding of the history of how U.S. institutional arrangements were intended to provide a social floor and minimal worker protections and how these institutional arrangements have evolved. This chapter has four parts, organized as follows:

- Part A** describes the existing framework of social and workplace protections for U.S. workers;
- Part B** describes how economic restructuring has affected work arrangements and industries;
- Part C** explains the types and sources of rights in the current system of workplace protections; and
- Part D** describes a shift in workplace enforcement from public agencies to private parties.

A. The Framework for Workplace Mandates and Social Insurance Protections

The mix of workplace protections and social insurance benefits that are the subject of this OLO study are established in federal and state labor and employment law and administered and enforced by federal and state government agencies or through the courts. The U.S. system of worker protections consists of three parts:

- Federal labor and employment law mandates that regulate employer workplaces;
- Federal and state employment taxes that fund social insurance protections; and
- A suite of voluntary employer-provided benefits and/or subsidies.

1. Federal Regulation of the Workplace

Table 2-1, from a General Accountability Office (GAO) report about the contingent workforce, displays summaries of six federal employment laws that regulate employer/employee relationships in business workplaces. These laws obligate employers to pay their employees a minimum wage and an overtime wage premium, to provide unpaid medical leave and to provide a safe workplace. They also protect employees from employment discrimination in hiring based on race, color, religion, sex, national origin, disability or age. GAO notes that the scope of coverage differs from one law to the next based on the particular facts and circumstances of a worker's employment arrangement with his or her employer.

Table 2-1. Provisions of Business and Workplace Mandates in Six Federal Employment Laws

Law	Key Provisions
Fair Labor Standards Act of 1938 (FLSA)	<ul style="list-style-type: none"> Establishes minimum wage, overtime, and child labor protections for most private and public sector employees. Certain employers and employees are exempt from either the minimum wage or overtime standards of the act or both, and Child labor provisions do not apply to children employed in certain industries.
Title VII of the 1964 Civil Rights Act of 1964	<ul style="list-style-type: none"> Protects employees and job applicants from discrimination in employment based on race, color, religion, sex, or national origin. Applies to employers that have 15 or more employees for each working day in each of 20 or more calendar weeks in a year.
Age Discrimination in Employment Act of 1967	<ul style="list-style-type: none"> Protects employees and job applicants 40 years of age or older from discrimination in employment based on age. Applies to employers that have 15 or more employees for each working day in each of 20 or more calendar weeks in a year.
The Occupational Safety and Health Act of 1970 (OSHA)	<ul style="list-style-type: none"> Requires employers to furnish their employees with a workplace free from recognized hazards that are causing or likely to cause serious physical harm. Requires employers and employees to comply with applicable occupational health and safety standards. The U.S. Department of Labor sets and enforces standards for certain private sector employers in about half the states; the remaining states operate their own occupational safety and health programs under Department of Labor approved state plans. State plans must cover state and local government employers. In Maryland, the U.S. Department of Labor has approved the Maryland Occupational Safety and Health Plan and authorized the state to be the enforcement agency.
Title I of the American with Disabilities Act of 1990 (ADA)	<ul style="list-style-type: none"> Protects qualified employees and job applicants with disabilities from discrimination based on disability. Applies to employers that have 15 or more employees for each working day in each of 20 or more calendar weeks in a year.
Family and Medical Leave Act of 1993 (FMLA)	<ul style="list-style-type: none"> Requires private sector employers who employ at least 50 employees for 20 weeks or more in the current or preceding calendar year and public sector employers of any size to allow employees to take up to 12 weeks of unpaid, job protected leave during any 12 month period for medical reasons related to a family member's or the employee's own health, or for a qualifying exigency arising out of a family member's covered active duty in the Armed Forces. An eligible employee may also take up to 26 workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent or next of kin of the service member. Employees are eligible if they worked for the employer for at least 12 months and for at least 1,250 hours in the 12 months prior to the start of leave.

Sources: U.S. Government Accountability Office (GAO), *Contingent Workforce: Size, Characteristics, Earnings and Benefits*, GAO-15-168R (Washington, DC: Government Accountability Office, 2015), 64-65; retrieved from <https://www.gao.gov/products/GAO-15-168R>.

2. Federal and State Employment Taxes

Besides complying with the federal mandates in Table 2-1, employers must also withhold and forward employment taxes that fund social security and unemployment benefits. The social security benefits include an old-age pension and health and disability insurance for retirees, their spouses and their dependents.

For each employee, an employer must withhold and forward their employees' income taxes and pay a set of federal and state employment related taxes that match their employees' share of these taxes. These employer taxes include: a contribution to the Federal Insurance Contribution Act (FICA) that matches each employee's share, a Medicare payroll tax, a Federal Unemployment Insurance Tax (FUTA) and a State Unemployment Insurance Tax (SUTA).

Employers must also purchase no-fault insurance to pay compensation to employees for work related injuries, occupational diseases or death. Premiums vary based on an industry's accident rate and an employer's history.

3. Voluntary Employer Provided Benefits

No federal law requires any employer to provide benefits as part of its employment agreement; however, employers often offer benefits and/or cost subsidies as part of a total compensation package. Benefits typically include a health care plan, a retirement plan, paid vacation, paid holidays, a disability benefit and paid sick leave. Two federal laws regulate employers who do offer benefits:

- **The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)** – Under COBRA, covered employees and their family members who would lose coverage under employer sponsored group health plans as a result of certain events, such as being laid off or changing jobs, must be offered temporary continuation of the group health plan coverage; and
- **The Employee Retirement Income Security Act of 1974 (ERISA)** – Under ERISA, employee pension and welfare benefit plans sponsored by employers or employee organizations must meet certain requirements to qualify for tax preferences.

Employment Status Determines Access to Voluntary Employer Benefits. The availability and use of employer-provided benefit packages varies based on factors such as an employee's work status, whether the participation costs are affordable or whether more affordable options are available.

Data from a recent National Compensation Survey in Table 2-2 highlight differences in the percentages of full-time and part-time employees who have access to benefits and their participation and take-up rates by type of benefit.⁴ Compared to their full-time co-workers, part-time workers have access to:

- Paid sick leave about one-third as often (26% versus 78%);
- Health benefits about one-fourth as often (22% versus 89%); and
- Retirement benefits roughly half as often (38% versus 78%).

Take-up rates for all benefit types are 50% or higher regardless of worker status. This suggests that voluntary employer benefits make a significant contribution to workers' economic security.

Table 2-2. Benefit Access and Use – Full-time and Part-time Standard Employees by Benefit Type

Benefit Type	Access		Participation		Take-up	
	Full-time	Part-time	Full-time	Part-time	Full-time	Part-time
Paid Sick Leave	78%	26%				
Paid Vacation	87%	33%				
Health Benefits	89%	22%	73%	14%	82%	64%
Retirement	80%	38%	64%	20%	81%	54%
Life Insurance	75%	14%	74%	12%	98%	89%
Short term Disability	45%	14%	44%	13%	98%	93%

Sources: OLO based on Congressional Research Services analysis of U.S. DOL; BLS, National Compensation Survey: Employee Benefits in the US, March 2015, Bulletin 2782, Washington, DC, September 2015; retrieved from <http://www.bls.gov/ncs/ebs/benefits/2015/ebb10056.pdf>. Accessed 5/23/2018.

B. Economic Restructuring, Nonstandard Work Arrangements and Fissured Workplaces

Economic restructuring refers to the long-term transformation of the American economy in response to the growth of globalized markets, increased financialization, technological change and deregulation. The result is an economic order today that differs significantly from the one that existed from the New Deal through the 1960s. In *The New Labor Law*, Kate Andrias provides the following description of economic restructuring:

Over the course of the 1970s, 80s, and 90s, American businesses, faced with increased domestic and international competition, as well as restive capital markets and a push for higher profits, reshaped themselves. Capital moved—both down South and overseas. Manufacturing and industrial sectors of the economy shrank. And corporations “fissured.” They shed activities deemed peripheral to their core business models and contracted out work to domestic and foreign subcontractors. They also shrunk the portion of their labor force that enjoyed full-time work, vastly increasing their use of “contingent” workers—part-time and temporary workers and independent contractors—as well as automated technology.

⁴ Under the National Compensation Survey's criteria, an employee has “access” to a benefit plan if it is available for their use. They are deemed a “participant” if they made required contributions and met the service requirements.

Multiple factors drove the economic restructuring, including the desire to increase efficiency and reduce labor costs by focusing on core business competencies. Avoiding unionization became a primary goal for many businesses. Following the lead of President Reagan in his fight against the air traffic controllers, employers began to retaliate aggressively against employees who exercised their right to strike. Employers permanently replaced striking workers. They also closed union plants and opened up low-wage nonunion plants in other locations; double breasting and subcontracting allowed employers to bypass existing collective bargaining arrangements. They developed sophisticated campaigns to try to stop workers from organizing new unions.

The courts largely permitted these tactics, privileging employers' managerial and property rights over employees' rights to organize, bargain, and strike. In a series of cases, for example, courts ruled that employers were not required to bargain over entrepreneurial decisions, including where to operate. They also permitted the use of permanent replacements, the National Guard, and state police against striking workers who sought to resist concessionary contracts. Meanwhile, deregulation reduced barriers to entry by nonunion, lower-wage firms, particularly in industries like transportation and telecommunication, resulting in more competitive markets but further contributing to unions' declining power.

The trends of deindustrialization, outsourcing, and antiunion campaigning continued during subsequent decades, resulting in a contemporary American economy almost unrecognizable from the one that defined the New Deal. Business gained more flexibility and higher profits, although disintegration of the production process meant that firms often had less control over their labor forces and decreased ability to achieve brand consistency and market power. The effect on workers was substantial. New jobs were created, and prices on many consumer goods decreased. But wages stagnated. Workers increasingly came to fill contingent, nontraditional positions. And as a proportion of the entire workforce, union membership declined from twenty-nine percent in 1973 to about fifteen percent in the early 1990s, even though more than sixty percent of workers continued to report a desire for collective representation.⁵

According to Andrias, the factors that drove economic restructuring and weakened or dismantled most of the New Deal standards and institutional structures included: businesses' focus on reducing labor costs and moving to nonunion plants, courts deciding in favor of employers' property rights versus employees' organizing rights, and deregulation.

The significance of economic restructuring for this OLO study is two-fold. A general issue concerns the contribution of economic restructuring to higher levels of worker precarity and more unregulated work. A more specific concern is a belief that changes in the organization of work (from standard to nonstandard work arrangements) and in the organization of production (from vertical firms to networked supply chains) due to economic restructuring are responsible for growing levels of worker precarity and unregulated work because these new models allow businesses to exploit weaknesses in the structure of employment law. Table 2-3 shows how contracting out and flexible work

⁵ Kate Andrias, "The New Labor Law," *The Yale Law Journal* 126,1 (2016): 21-24; retrieved from <https://www.yalelawjournal.org/article/the-new-labor-law>. (Footnotes omitted.)

arrangements expand businesses' options for managing their labor costs. The next two sections summarize research that examines changes in work arrangements and businesses' contracting practices and their relationships, if any, to concerns about worker precarity and unregulated work.

Table 2-3. Organizing Production, Work Arrangements and Employment Relationships

Choices about how Production is Organized	Types of Work Arrangements	
	<i>Standard Work Arrangements</i>	<i>Independent Work (Nonstandard Work Arrangements)</i>
In-house jobs	<ul style="list-style-type: none"> • Permanent employees (vertical firms) 	<ul style="list-style-type: none"> • On-call • Direct-hire temporary
Contracted jobs (on-site and off-site)	<ul style="list-style-type: none"> • Permanent employees 	<ul style="list-style-type: none"> • Independent contractors • Temporary agency workers • Leased/professional employer organization workers

Sources: OLO based on Annette Bernhardt et al. "Working Paper: Domestic Outsourcing in the United States: A Research Agenda to Assess Trends and Effects on Job Quality" (Center for Economic and Policy Research, March 2016), 8; retrieved from <http://cepr.net/images/stories/reports/working-paper-domestic-outsourcing-2016-03.pdf>.

1. Standard and Nonstandard Work Arrangements and Contingent Work

Researchers use the terms "standard employment relationship" and "nonstandard work arrangements" to distinguish a full-time, permanent, direct employment relationship from other types of work arrangements, such as temporary agency workers. In a standard work arrangement, workers are employees hired by a private or public entity with an implicit contract of permanent employment.

Standard employment relationships were the predominant business model for much of the past century. At mid-century, they were common among large firms such as General Motors, U.S. Steel, Kodak, Xerox, IBM, Marriott, Hilton, Sears and Macy's which employed thousands. The direct relationships that existed between a company and its workforce along with the career opportunities and financial security these arrangements provided were key features of the internal labor markets that characterized these businesses.⁶ The standard work arrangement continues to set a benchmark for today's workforce despite the growth of business models that rely on contracting and franchising.

Nonstandard Work Arrangements. Data to understand the prevalence of alternative work arrangements and how they differ from standard work is inconsistent and difficult to interpret. This is due to a lack of consistently used terms, definitions, and data sources and categories that group workers with diverse characteristics. This section reviews studies by the federal Bureau of Labor Statistics (BLS), by Bernhardt, by economists Katz and Krueger and by the GAO to describe nonstandard work and contingent work and their relationship to labor market protections.

⁶ Stephen Befort states that "[t]he rise of internal labor markets ... fostered the development of an extra-legal social contract in which employers and employees possessed legitimate expectations of a long-term relationship." For a history of internal labor markets, see Stephen F. Befort, "Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work," *Berkeley J. Emp. & Lab. L.* 24, 1 (2003): 157; retrieved from http://scholarship.law.umn.edu/faculty_articles/22.

The Federal Bureau of Labor Statistics’ (BLS’) Contingent Worker Survey (CWS). Concerns about changing work arrangements and their effects are not new. In the 1990s, the Bureau of Labor Statistics (BLS) fielded a Contingent Worker Survey (CWS) as a supplement to its Community Population Survey to collect data on alternative employment arrangements and contingent work. In June 2018, BLS released its 2017 Contingent Worker Survey, the sixth iteration of this survey.⁷

Table 2-4 shows the percentages of workers BLS found in four categories of alternative employment arrangements. BLS reported a slight drop in the percentage of workers in alternative work arrangements, from 10.7% in 2005 to 10.1% in 2017.

Table 2-4. BLS Estimates: Alternative Work Arrangements as a Percentage of the Total Workforce, May 2017

Type	Definition	% of total employed
Independent contractors ⁸	Includes workers identified as independent contractors; independent consultants or freelance workers, regardless of whether they are self-employed (unincorporated) or wage and salary workers (incorporated).	6.9%
On-call workers	Includes workers who are called to work only as needed, although they can be scheduled to work for several days or weeks in a row.	1.7%
Temporary help agency workers	Includes workers who are paid by a temporary help agency, whether or not their job is temporary.	0.9%
Contract workers	Includes workers who are employed by a company that provides them or their services to others under contract, are usually assigned to only one customer, and usually work at the customer’s worksite.	0.6%
Total		10.1%

Source: OLO and BLS Contingent Worker Survey, June 2018.

Bernhardt. In 2014, Annette Bernhardt reviewed the sources and reliability of data used to measure long term trends in nonstandard work arrangements.⁹ Given concerns about changing work arrangements and eroding labor standards, she first identified types of work arrangements and then examined available prevalence estimates. Bernhardt defined nonstandard work arrangements broadly to include any type of job including part-time work, that was not a standard employment relationship:

Nonstandard work arrangements “[depart] from the standard employment relationship on at least one dimension: (1) the job is temporary; (2) the job is part-time; (3) the worker is employed by an intermediary; or (4) there is no employer at all.”¹⁰

⁷ Department of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements-May 2017*, News Release, June 7, 2018; retrieved from <https://www.bls.gov/news.release/pdf/conemp.pdf>.

⁸ Independent contractors include workers in the gig economy which refers to task work by workers who access job opportunities through an online platform. It appears to account for a small share of alternative work arrangements.

⁹ Annette Bernhardt, “Labor Standards and the Reorganization of Work: Gaps in data and Research” (IRLE Working Paper No. 100-14, 2014); retrieved from <http://irle.berkeley.edu/files/2014/Labor-Standards-and-the-Reorganization-of-Work.pdf>.

¹⁰ Ibid., 2.

Based on her review of data for three types of nonstandard work, temporary agency work, part-time work and independent contractors, Bernhardt concluded:

[I]t has been hard to find evidence of a strong, unambiguous shift toward nonstandard or contingent forms of work – especially in contrast to the dramatic increase in wage inequality. ...[F]or enforcement agencies and policymakers, it may be more fruitful to focus on specific industries and regions in assessing when and where pernicious forms of nonstandard work have grown, and which groups of workers have been most impacted.¹¹

Bernhardt offered preliminary observations about the reliability of the data sources and useful highlights from four decades of prior research for the three types of work she examined. She identified data needs and research tasks to address gaps in the existing knowledge base. The bullets below summarize some highlights from Bernhardt’s review for each work arrangement.

- The category of **temporary work** covers workers employed by temporary agencies or professional employment organizations, on-call workers such as day laborers or substitute teachers, and direct-hires or workers an employer hires for a temporary assignment. Estimates vary by dataset. Bernhardt thinks BLS’ establishment survey data are more reliable than BLS’ CWS estimates, which depend on workers’ accurately identifying their employer. But, CWS estimates of on-call and direct hire workers are useful because other sources do not report them.
- The category of **part-time workers** includes those who work less than 35 hours a week as either primary or secondary wage earners. Within each group, most prefer a part-time arrangement, but some would prefer full-time work. Bernhardt finds no change in the long-term trends for either the percentage of overall part-time employment or the percentage of involuntary part-time employment, except for increases due to recessions. Bernhardt suggests more research is needed to assess whether these trends are masking other changes such as trends in the prevalence of part-time work that are diverging by industry. Bernhardt also observes that part-time work is highly diverse. She notes, on one hand, many jobs “are low-wage, do not offer benefits, are subject to volatile schedules, and result in high rates of poverty.”¹² On the other hand, Bernhardt highlights research by Schaefer that found “54% of part-time workers in 2007 were secondary wage earners who voluntarily worked part-time with no detrimental economic security.”¹³
- The category of **independent contractors** includes the self-employed, both incorporated and unincorporated. Bernhardt observes that this category has complex definitional issues. She notes “[i]n the legal context, several different tests exist to distinguish employees from independent contractors; the ultimate designation can differ depending on the test used, the particular employment law in question, and state law.”¹⁴ According to Bernhardt, in 2013, the self-employed accounted for 10.2 percent of the workforce and its share has remained stable over time. Like the subset of part-time workers, this category encompasses a highly diverse set of workers, with occupations ranging from highly paid professionals, e.g. lawyers and doctors and management consultants, to low-wage jobs such as “landscapers, cab drivers, caregivers, and

¹¹ Ibid., 15.

¹² Ibid., 7.

¹³ Ibid., 7.

¹⁴ Ibid., 7.

truck drivers.”¹⁵ Again, like some workers in the part-time category, this arrangement can signal poverty wages, no benefits and an unstable job. Bernhardt states misclassification data is sparse, particularly as it applies to workers. She estimates it affects one to two percent of the workforce.

Katz and Krueger. In 2016, two economists, Lawrence F. Katz and Alan B. Krueger conducted a version of the BLS Contingent Work Survey based on a RAND American Life Panel Survey.¹⁶ Katz and Krueger fielded the survey in part because of researchers’ divergent views about whether a dramatic increase in alternative work arrangements had occurred since the 2005 BLS survey.¹⁷ Katz and Krueger reported that their results met tests of statistical significance; however, they cautioned that their sample sizes were much smaller than those in the BLS Contingent Worker Survey.

Based on their analysis, Katz and Krueger found the percentage of workers in alternative work arrangements rose from 10.1% in February 2005 to 15.8% in late 2015. They found that the category of workers hired through contract companies showed the greatest overall increase, growing from 0.6% in 2005 to 3.1% in 2015. Finally, they estimated that all net employment growth in the U.S. economy from 2005 to 2015 had occurred in alternative work arrangements (narrowly defined).

When BLS’ release of the 2017 CWS showed a slight drop in alternative employment arrangements, Katz and Krueger re-visited their study to examine why their results differed. In a 2019 paper, they revised their estimates downward, finding instead that the percentage of workers in alternative work arrangements rose modestly by one or two percentage points. They stated that the differences between the 2017 CWS estimates and their original estimates were due to the effects of cyclical economic conditions, different survey methods and sampling issues.¹⁸

Aligning Work Arrangement and Prevalence Estimates. Table 2-5 (on the next page) provides an overview of types of work arrangements and prevalence estimates for nonstandard and standard jobs. The work arrangements (in the first column) and estimates (in the last two columns) combine categories and estimates from BLS’ CWS and Bernhardt’s research.

Table 2-5 highlights some issues created by differences in research terms and measures. For example, BLS’ CWS estimates of temporary help agency workers (0.9%) and BLS’ CES estimates (from Bernhardt) (2.5%) differ significantly. Similarly, defining part-time workers as part of the nonstandard workforce increases the percentage of the workforce in nonstandard work arrangements from 10% to 30%.

¹⁵ Ibid., 8.

¹⁶ Lawrence F. Katz and Alan B. Krueger “[The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015](http://www.nber.org/papers/w22667)” (Working Paper No. 22667, National Bureau of Economic Research, September 2016); retrieved from <http://www.nber.org/papers/w22667.pdf>.

¹⁷ Ibid., 2.

¹⁸ Lawrence F. Katz and Alan B. Krueger, “Understanding Trends in Alternative Work Arrangements in the United States” (Working Paper No. 25425, National Bureau of Economic Research, January 2019); retrieved from <http://www.nber.org/papers/w25425.pdf>.

The columns under the question about the standard employment relationship in Table 2-5 highlight differences between types of alternative work arrangements and standard jobs. For example:

- The percentage of temporary jobs, i.e., those that are time-limited, vary by type of nonstandard work, accounting for 42% of temporary help agency jobs but only 3% of independent contractor jobs;
- Part-time jobs account for 25% of all temporary help agency jobs;
- Workers with a temporary help agency or those who have a contract job have an intermediary employer; and,
- Workers classified as independent contractors are self-employed or not in a legally recognized employment relationship.

Table 2-5. Comparing Estimates of Nonstandard and Standard Work Arrangements

Types of Work Arrangement	How does this work arrangement differ from a standard employment relationship?				BLS CWS	Bernhardt (2013)
	Is it temporary? ¹⁹	Is it part-time? ²⁰	Is the employer an intermediary?	Is the worker self-employed?		
Non-Standard Work Arrangement ²¹						
Temporary help agency workers ²²	42%	23.1%	Yes	No	0.9%	2.5%
On-call workers ²³	20%	44.6%	Not addressed	No	1.7%	
Part-time ²⁴	9%	Yes	Not addressed	No	N. A	19.2%
Independent contractors ²⁵	3%	29.5%	No	Yes	6.9%	10.2%
Contract workers ²⁶	15%	15.9%	Yes	No	0.6%	
Subtotals					10.1	31.9
Standard Work Arrangement ²⁷						
Part-time					15.2%	See above
Full-time					74.7%	69.5%

Source: OLO, Bernhardt, and BLS, June 2018.

¹⁹ Source is BLS' 2017 CWS data on contingent work which is a job that is not expected to last or that lasts for only a limited period of time.

²⁰Source is BLS' 2017 CWS, Table 6.

²¹ BLS' 2017 CWS found variations in the demographic characteristics of independent workers among the four subgroups as compared to workers in traditional arrangements. The footnotes in this column provide these details.

²² BLS' 2017 CWS results found temporary help agency workers were more likely to be Black, Hispanic or Latino. By industry, they were more likely to be in production, transportation and material moving and manufacturing.

²³ BLS' 2017 CWS results found on-call workers were more likely to be older and to work part-time. By industry, on-call workers were more likely to work in education, health services and construction.

²⁴ <https://www.bls.gov/spotlight/2018/contingent-workers/pdf/contingent-workers.pdf>

²⁵ BLS' 2017 CWS results found independent contractors were more likely: to be older, to be men and to be in management, sales and construction. By industry, independent contractors were more likely to be in construction, and professional and business services.

²⁶ BLS' 2017 CWS results found contract workers were more likely to be men; by occupation, to be computer professionals or security guards; and, by industry, to be in public administration.

²⁷Per BLS, workers in traditional arrangements are those not in any of the "alternative arrangement" categories. The BLS estimates apply the percentages for part-time (16.9%) and full-time (83.1%) workers to 90.1% of the workforce

GAO Report on Contingent Work. In a 1996 article for BLS' Monthly Labor Review, Anne Polivka describes the evolution and confusion around the use of the term "contingent work." She explains:

The term "contingent work" was first coined ...[at] a 1985 conference on employment security to describe a management technique of employing workers only when there was an immediate and direct demand for their services. Within a few years of its initial usage, however, the term came to be applied to a wide range of employment practices, including part-time work, temporary help service employment, employee leasing, self-employment, contracting out, employment in the business services sector, and home-based work. In fact, to some, virtually any work arrangement that might differ from the commonly perceived norm of a full-time wage and salary job would fall under the rubric of contingent work. Although these employment practices are interesting to study in their own right, referring to them as contingent work causes many workers to be misclassified and many analysts to be confused about what exactly is being described or studied. ... For instance, while working part-time certainly is different from working 40 hours a week from nine to five, being part time does not in [and] of itself denote a contingent employment relationship.²⁸

In 2015, GAO released a report on the contingent workforce to address concerns about the growing number of contingent workers following the recession and their limited access to retirement and health insurance benefits.²⁹ GAO analyzed contingent worker counts from several surveys, interviewed experts and reviewed prior studies.³⁰ Of note,

- Using a broad definition of alternative work and data from the General Social Survey, GAO estimated contingent workers were 35.3% of the workforce in 2006 and 40.4% in 2010. GAO found most of this growth was in standard part-time jobs, likely due to the recession.³¹
- GAO estimated the "core contingent workforce" – its term for workers who lack job stability and/or those with unpredictable work schedules – at nearly 8% of the 2010 workforce. Compared to standard full-time workers, this group was younger, more often Hispanic, more likely not to have a high school degree and more likely to have low family income.³²

Contingent Work, Legal Employment Relationships and Labor Standards Compliance. An employment relationship is a legally defined relationship that is created when a person performs work or services under certain conditions in return for remuneration. For legal purposes, an individual is either in an employment relationship or self-employed.

²⁸ Anne E. Polivka, "Contingent and alternative work arrangements, defined," *Monthly Labor Review*, (October 1996): 3; retrieved from <https://www.bls.gov/opub/mlr/1996/article/contingent-and-alternative-work-arrangements-defined.htm>.

²⁹ GAO, Contingent Workforce, 1.

³⁰ GAO's data sources included BLS' Contingent Worker Survey (CWS), BLS' Current Population Survey (CPS), the General Social Survey (GSS) administered by NORC at the University of Chicago and the Census Bureau's Survey of Income and Program Participation (SIPP).

³¹ GAO, Contingent Workforce, 4.

³² GAO, Contingent Workforce, 3.

A legal employment relationship is significant because it is a pre-requisite to accessing workplace protections and the costs they impose. Stephen Befort, an authority on labor and employment law, explains that “most statutes governing the workplace only apply within the context of the employment relationship” and “business entities are responsible for payroll taxes and contributions to unemployment insurance and workers compensation plans only for their employees.”³³ Predicating the framework of labor market protections on the traditional employer-employee relationship leaves firms free to use contingent workers (broadly defined) instead of or in addition to standard workers to manage their labor costs in response to changing economic circumstances.

Businesses’ use of contingent employment relationships can also create labor standard compliance and enforcement issues specifically related to the employment relationship. For example:

- The **misclassification issue** concerns whether an individual is in a legally recognized employment relationship or working as an independent contractor. Classifying nonstandard workers as independent contractors significantly reduces an employer’s labor costs. Since an employer typically determines a worker’s legal status, workers must be aware of the issue and willing to raise it to ensure that they receive the protections to which they are entitled.
- The **joint employer liability issue** concerns whether liability for complying with labor mandates rests with a lead employer and/or their subcontractor when a worker is not in a direct employment relationship. Workers subcontracted to another company may not know which employer is legally responsible for compliance; or, if a subcontractor goes out of business whether the lead employer is jointly responsible for compliance.

The expansion of the contingent workforce did not create these longstanding legal problems, but the proliferation of these arrangements exacerbates the enforcement of worker protection statutes.³⁴

Fissured Workplaces and the Rise of Low-Wage Industries

David Weil, a professor who previously served as Administrator of the Wage and Hour Division in the U.S. Department of Labor, argues that the effects of economic restructuring include:

- outsourcing,
- the splintering of companies,
- downward pressure on wages due to more competitive environments among subcontractors and franchisees, and
- the concentration of low-wage, vulnerable workers in a subset of industry sectors with distinct characteristics.

This section briefly describes Weil’s views.

³³ Befort, *Revisiting the Black Hole of Workplace Regulation*, 162.

³⁴ For a history of legal issues and work arrangements, see Emily Spieler, “Employment Law and the Evolving Organization of Work – A Commentary,” *Northeastern University Law Journal* Vol. 6, No. 2, (2014): 287-309. Spieler states “definitional boundary-drawing dilemmas started to appear in cases and the legal literature soon after the first direct regulatory interventions in the employment relationship in the early 20th century – and have continued to this day ... Since the 1940s, workers have challenged their classification as non-employees under federal laws in many industries. Similarly, workers have sought responsible parties to pay wages or other benefits when their direct employer could not-or would not – live up to its obligation to pay compensation.”

An Economy of Fissured Workplaces. Weil uses the term “fissuring” to describe how outsourcing due to economic restructuring led to the splintering of vertical firms and the offloading of employer responsibilities that previously attached to the standard employer/employee relationship. In Weil’s view, as companies across the economy were pressured to improve their financial performance, they responded initially by outsourcing internal business activities like payroll, publications, accounting and human resources. Next, they outsourced employment functions of their core business activities. For example, hotels outsourced housekeeping, restaurants outsourced cooking and retail distribution centers outsourced loading and unloading. Finally, these outsourced businesses hired smaller businesses to provide workers.

Weil notes that lead businesses had diverse motivations for outsourcing. For some, it allowed them to shed costs associated with unemployment insurance and payroll taxes; others were able to avoid liability for workplace injuries; and for still others, outsourcing was a business strategy enabled by technology that allowed them to focus on core business activities. But regardless of the underlying motivation, Weil views the effect as an economy that “rests on a bed of fissured workplaces.”

Weil notes that as lead firms devolved their hiring and employment responsibilities to independent business entities, they nonetheless retained control over operational details and specifications including quality and price through brand or franchise agreements. Thus, fissuring not only replaced the standard employer/employee relationship with an arrangement that put more layers between the employer and the worker, but it also isolated labor costs and placed them in a more competitive environment. This dynamic put downward pressure on wages.

Weil explains that, in contrast to vertically organized firms that manage revenue and cost across a mix of in-house activities, financial returns in a fissured workplace must be extracted separately by each firm at each level. This not only reduces profit margins for firms that are steps removed from the original contract, it also pressures these firms to cut corners and violate wage hour and workplace safety standards, particularly when labor is one of the few costs over which they have direct control.

Table 2-6 shows how the arrangements of lead firms and lower level entities vary by industry. The left-hand column shows industries that may face the greatest pressure to violate workplace standards to manage their labor costs. The third column shows the entities that face these pressures.

Table 2-6. Fissured Employment in Selected Industries

<i>Industry</i>	<i>Lead firm/organization</i>	<i>Lower level entity</i>
Eating and drinking	Brands (franchisors)	Franchisees/outlets
Hotel and motel	Brands (franchisors)	Hotel/motel properties
Residential construction	Major homebuilders	Contractors/subcontractors
Janitorial services	Building service providers/franchisors	Contractors/franchisees
Moving companies/logistics providers	Branded national moving companies	Subcontracted local movers; interstate trucking companies; warehouses
Agricultural products – multiple sectors	Food retailers	Farms; farm labor contractors
Retail food stores (prepared foods)	Major food processors	
Home health care services	Major food retailers	Franchised prepared food providers
	Major purchasers of home health care services	Health care intermediaries; home health care providers

Source: Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, July 2011.

C. Workplace Governance Models and the Current “System” of Worker Protections

In the 1930s, four “legislative pillars” enacted as part of the New Deal, created a system of worker rights and social insurance benefits that set a highwater mark for the protection of American workers and their families. At the time:

- The National Labor Relations Act (NLRA) established a protected right of workers to form independent unions and engage in collective bargaining;
- The Fair Labor Standards Act (FLSA) established a national minimum wage and an overtime pay requirement for a work week of more than 40 hours;
- Unemployment Insurance authorized the provision of income to unemployed workers for a temporary period of time with the expectation they would either be rehired or find a new job as the economy improved; and
- Social Security and Disability Insurance established the provision of retirement benefits to employees and their families who meet a minimum number of years worked and benefits to workers who become disabled and unable to work.

Together, these four pillars created a two-tiered system of workplace protections and a floor of minimal social protections.³⁵ In an article about self-regulated workplaces, Cynthia Estlund, a labor law scholar, explains the ordering of social and worker protections embedded in the four pillars of the New Deal:

The FLSA was seen as secondary to and largely supportive of collective bargaining, which was to be the primary vehicle for improving wages and working conditions in the leading economic sectors. Similarly, the Social Security Act established a minimal system of retirement security, leaving individuals and unions to bargain with employers for more generous retirement benefits. Taken together, the New Deal legislation established a floor on some basic economic terms of employment but left most terms and conditions to the newly established regime of collective bargaining or, outside the union sector, to individual contract.³⁶

The New Deal’s Two-Tiered Labor Law Regime. The NLRA (1935) and the FLSA (1938) embodied very different answers to the issue of how best to protect and regulate workers’ interests in the employment relationship. In *Labor & Employment Law at the Millennium*, Stephen Befort portrays an American workforce in the 1950s that had a “unionized” and an “at-will” sector.³⁷ The unionized sector was governed by the legal regime of the NLRA, and the at-will sector was governed by the legal regime of the employment at-will doctrine, supplemented by the FLSA.

Befort’s descriptions, summarized below, highlight the stark contrasts between the two sectors regarding their governance attributes, worker protections and enforcement methods:

³⁵ As explained in Part A, the U.S. system of skeletal workplace protections and a minimal social floor relies on a mix of tax mandates and *voluntary* employer benefits. Other developed economies place a greater reliance on state funding for social benefits, particularly for health care and/or long term disability insurance.

³⁶ Cynthia Estlund, “Rebuilding the Law of the Workplace in an Era of Self-Regulation,” *Columbia Law Review* Vol. 105, No. 2 (2005): 328-329.

³⁷ Stephen Befort, “Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment,” *Boston College Law Review* Vol. 43, No. 2 (2002): 351-460.

- **The “Unionized Sector.”** The primary governing sources for this sector were the National Labor Relations Act (NLRA) and contractual rules established via collective bargaining agreements. According to Befort, the four governance attributes that define this sector are: 1) that it is subject to greater governmental regulation than the at-will sector, although this regulation has been largely indirect and procedural in nature; 2) that management and labor bilaterally establish terms and conditions of employment through collective bargaining; 3) that most employees are subject to discharge only upon an employer’s showing of “just cause;” and 4) that “unions can enforce job security standards in a relatively expeditious and inexpensive arbitration forum.”³⁸
- **The “At-Will Sector.”** The primary governing source for this sector was the employment at-will rule which is premised on the theory that an employer and employee have equal rights in an employment relationship such that either one has the right to terminate an employment relationship at any time for any reason. The justification for this rule is that it promotes overall economic efficiency while minimizing administrative costs. According to Befort, the two defining characteristics of this sector in 1950 were: 1) that employers had “virtually unfettered discretion over both the existence and terms of the employment relationship;” and 2) that “beyond the basic at-will principle itself, this sector was essentially free of any governmental regulation.”³⁹

Befort observed that, in 1950, roughly 31.5% of the nonfarm workforce belonged to a union and more than two-thirds belong to the “at-will” or “regulation-free” sector. Union membership peaked at 34.7% in 1954 and has since declined to 10.7% of the present-day workforce.

The Collective Bargaining Approach to Workplace Protections in the NLRA. The NLRA established a workplace-based, democratic governance model for organized workers. Those directly covered by this model included the unionized work force within large firms who benefited from collective bargaining and a set of union-developed compliance and enforcement mechanisms that were expeditious and inexpensive.

Per Katherine V. W. Stone, “the primary objective function of the NLRA was to promote the self-regulation of the workplace by organized labor and management.”⁴⁰ Benjamin Sachs explains that it did this by “granting workers the right to organize and act collectively in their dealings with management and by prohibiting employers from coercively interfering with their employees’ collective activity.”⁴¹ Sachs characterizes the Act as sweepingly broad and aggressively exclusive.⁴²

³⁸ Befort, *Labor and Employment Law at the Millenium*, 357-360

³⁹ *Ibid*, 355-357.

⁴⁰ Katherine V.W. Stone, “Legal Regulation of the Changing [Employment] Contract,” *Cornell Journal of Law and Public Policy* Vol. 13, No. 3 (2004): 572.

⁴¹ Benjamin Sachs, “Employment Law as Labor Law,” *Cardoza Law Review* Vol. 29, No. 6 (2008): 2694.

⁴² Per Sachs, “The National Labor Relations Act (NLRA or the Act) was designed to be sweepingly broad, dictating the kinds of employees who could organize, the types of organizations workers could form, and the subjects over which labor and management had to negotiate. The statute was also aggressively exclusive: neither other federal laws, nor state and local enactments were to interfere with the operation of the NLRA or its administrative agency, National Labor Relations Board (NLRB or Board.)” 2685.

Congress established the National Labor Relations Board (NLRB) as an independent authority to centralize administration and enforcement of the NLRA. Under this system, a worker, at no charge, can lodge a claim with the NLRB which takes over the claim. The statute concentrates all enforcement power in the NLRB. It empowers the NLRB to order an employer to pay back wages to employees who are discharged in retaliation for engaging in protected activity, although damages may only be compensatory. It also empowers the NLRB to seek reinstatement of workers discharged for engaging in protective activity; however, the Act denies workers a private right of action and it contains no mechanism by which workers can enforce its statutory provisions.⁴³

Workers may also file a grievance for violations of their collective bargaining agreements. Issues are often decided by a neutral arbitrator or board. A limitation of this process is that grievances typically belong to the union and a worker has no right to compel a union to take up his grievance.

In 1947 and 1959, major amendments to the NLRA upheld a right of employees not to organize, thus limiting union power. These amendments marked a shift in federal policy that rolled back worker protections and were one of several factors that led to the steady decline of unions.⁴⁴

The Command and Control Approach to Workplace Protections in the Fair Labor Standards Act. The Fair Standards Labor Act (FLSA), enacted in 1938, establishes a minimum wage, sets a limit on regular work week hours and establishes a premium wage rate for overtime work. The intent of the law at that time was that these standards would extend a minimal level of protection to unorganized workers or those at the periphery of the labor market. In a review of the FLSA's legislative history, Charles Craypo, a professor of labor economics, explains that "New Deal economists were aware of the possible unemployment effects of minimum wage laws, but that contingency did not override their primary objective of driving the low-wage worker and employer out of the market. ... Their reasoning was that if a job does not afford a customary living standard, then it should not exist; it causes or is caused by negative market externalities and unequal bargaining power and is both socially and economically destructive."⁴⁵

The enactment of the FLSA in 1938 conferred modest protections to about 20% of the workforce (or an estimated 30% of workers in the at-will sector).⁴⁶ But, while Congress expanded FLSA protections to cover more workers over the ensuing decades, the substantive value of the minimum

⁴³ Sachs, 2696.

⁴⁴ See Kenneth G. Dau Schmidt, "Meeting the Demand of Workers into the Twenty-First Century: The Future of Labor and Employment Law," *Indiana Law Journal* Vol. 68, No. 3 (1993): 685-703; retrieved from <http://www.repository.law.indiana.edu/ilj/vol68/iss3/7>. Dau-Schmidt explains that currently "the National Labor Relations Act does not adequately protect employees from employer strategic behavior or adequately encourage employers to negotiate collective agreements ... once the employees have decided to organize. Penalties under the Act are too small to act as an adequate deterrent and there are just too many opportunities under the Act for employers to delay or avoid bargaining responsibilities."

⁴⁵ Charles Craypo, "Alternative Perspectives on the Purpose and Effects of Labor Standards Legislation," in *Government Regulation of the Employment Relationship*, ed. Bruce E. Kaufman (Ithaca, Cornell University Press, 1997): 227.

⁴⁶ In Estlund's review of labor history, she states that the original FLSA law covered only about twenty percent of the workforce since it excluded agricultural, household, and retail workers, as well as the entire public sector. These exclusions were in addition to the longstanding exclusion of Executive, Administrative and Professional (EAP) employees. See Note 32.

wage rate declined relative to the cost of living.⁴⁷ Despite 22 separate rate increases⁴⁸, the real value of the federal minimum wage peaked in 1968. At its peak, the minimum wage was 54% of the average wage; today it is 27% of the average wage, reflecting the fact that periodic increases did not keep pace with inflation.⁴⁹

Congress placed responsibility for FLSA administration in the Employment Standards Administration in the Department of Labor (DOL), giving it the power to conduct investigations and seek voluntary settlement agreements for back wages and damages. DOL was granted the authority to file suit on behalf of employees in federal district court to recover back wages and to sue for an injunction to prohibit an employer from selling goods produced in violation of wage hour restrictions. The FLSA also gave workers a private right of action in court.

Approaches to Workplace Protections and Benefits in the Aftermath of the New Deal. When the pillars of the New Deal were established, legislators expected the collective bargaining model of workplace intervention to be “the primary vehicle for improving wages and working conditions.”

Viewed against the backdrop of economic restructuring, hindsight suggests that workers’ conditions improved through the 1970s due to a mix of collective bargaining agreements, steady economic growth and strong internal labor markets that large firms established to maintain control over all aspects of their operations. Then, as growth slowed and businesses abandoned unions and their internal labor market practices in the face of economic restructuring, it was only the minimal protections of the at-will sector plus the implicit terms and conditions of the employment relationship that prevailed. Subsequently, an explosion of employment law protections and a few court-based exceptions to the at-will doctrine strengthened this skeletal workers’ rights framework.

Internal Labor Markets. To implement the concept of internal labor markets, firms offered workers a system of job structures, career ladders and regular promotions; an explicit or implicit promise of lifetime employment; and, a generous package of benefits. Thus, large firms with nonunion workforces were able to replicate the approach to employee relations that legislators had used to structure the NLRA. Without the legal foundation of a collective bargaining agreement, the underlying legal basis for these implied employment contracts was the employment at-will doctrine which, as Befort noted earlier, gave employers “virtually unfettered access over the terms of the employment relationship.”

Thus, when nonunion firms decided to abandon their reliance on internal labor markets, they could also easily abandon the related workplace practices of career ladders, regular promotions and implicit contracts of long-term employment. This left workers in nonunion firms with only the bare legal protections that existed under the common law employment at-will doctrine plus the protections of the FLSA, one of the few employment statutes at the time that directly regulated the terms and conditions of the employment relationship.

⁴⁷ As Craypo explains: “Until the 1960s the minimum rate remained close to the accepted definition of a living wage – enough for a full-time worker to support a family of three or four. But the act covered only about half the eligible work force and specifically exempted many of the lowest wage industries. During the next three decades FLSA coverage was expanded to include most workers, but the mandated rate fell much below the living wage.” 222.

⁴⁸ D. H. Bradley, “The Federal Minimum Wage: In Brief,” *Congressional Research Service*, CRS Report R43089 (2017):1; retrieved from <https://fas.org/sgp/crs/misc/R43089.pdf>.

⁴⁹Polaski, 9.

The Rise of Employment Law. Three periods of employment law changes have extended protections in the at-will sector:⁵⁰

1. The establishment and expansion of anti-discrimination laws and court cases in the 1960s and 1970s;
2. The adoption of new statutory laws and programs to address serious workplace issues in the 1970s; and
3. A series of state court decisions in the mid-1970s and 1980s that limited the common law doctrine of employment at-will.

As a result of these changes, employment law today exists as “an individual rights” regime that has workplace standards established by statute and granted to individual workers, regardless of the extent of their collective organization and strength.⁵¹ This “basic suite of worker protections” offers an impressive array of minimum wage and maximum hour protections, occupational health and safety protections, anti-discrimination protections and a right to (unpaid) family medical leave.

In *Rebuilding the Law of the Workplace*, Estlund argues that these employment law protections fall far short of the New Deal vision of a privately-funded, self-governing network of unions, collective bargaining agreements and workplace intermediaries. In terms of workers’ rights, Estlund states that the expansion of employment law led to the creation of two new domains, that of judicially enforceable individual rights and of administratively enforced regulatory standards. But, for her, a more significant concern is the vacuum created by the decline of unions and not filled by the rise of employment law, or what she terms “the democratic deficit.” She suggests this void, created when the responsibility for protecting worker interests was transferred from unions to regulatory agencies and the courts, can be particularly troublesome when it comes to issues of enforcement. As Estlund states:

The domain of collective bargaining and industrial self-governance established by New Deal labor law has shrunk in its reach and in its stature as the constitutive law of the workplace. In its wake has arisen a growing array of statutes and common law doctrines governing various terms and conditions of employment. Those laws and doctrines do nothing to fill the vacuum – the democratic deficit – left by the decline of unionization and collective bargaining. They appoint regulatory agencies and courts, rather than unions, as the primary guardians of employee interests. More recently, we find regulatory agencies and courts ceding some of their regulatory authority to employers themselves. ... That democratic deficit has become particularly disquieting as the enforcement of rights and regulations has been pulled increasingly into the firm itself, through parallel trends toward self-regulation and internalization in the enforcement of both labor standards and employee rights.⁵²

⁵⁰ The Dunlop Commission on the Future of Worker-Management Relations, Final Report (1994):105-111; retrieved from https://digitalcommons.ilr.cornell.edu/key_workplace/2/

⁵¹ Sachs, 2689

⁵² Estlund, 333

For Estlund, another aspect of the “serious democratic deficit” created by the shift in workplace governance is that it fundamentally alters the law’s conception of employees as citizens. As Estlund explains:

[T]he law of the workplace, once dominated by New Deal labor law and the collective bargaining model it established, is now dominated by regulatory statutes administered by government agencies and by individual rights enforceable through private litigation. This shift has fundamentally altered the law’s conception of employees. The rights litigation model of wrongful discharge law casts employees as rights bearers, but also, and perhaps more visibly, as victims seeking redress for past wrongs. The regulatory model renders employees the passive beneficiaries of the government’s protection. Neither conceives of employees, as the NLRA does, as citizens who actively participate in the government of the workplace.⁵³

The Current Mixed System of Workers’ Rights and Workplace Protections. Kenneth Dau-Schmidt, in a review of U.S. efforts to address workplace protections, identifies three primary approaches to protect workers’ interests, each with its advantages and disadvantages.⁵⁴ Briefly:

- **Individualized bargaining** provides “the most individualized solution,” “relatively low administrative costs” but “often results in an impoverished solution for many workers that fails to address many of their basic needs;”
- **Collective bargaining** provides a solution that “can solve many of the market imperfection problems of individual bargaining;” but, with so few workers organized in the current era, it “leaves the vast majority of employees without an effective way to address their needs in the employment relationship;” and
- **Protective federal and state legislation** provides a solution that offers “the least individualized way of addressing employees’ needs” and is “administratively costly” but “can be used to provide all workers with at least some relief” and “coincides well with ... American ideals of individualism.”

In a 1997 essay, Richard Edwards explains that these three governance models treat workplace rights differently because they hold different assumptions about the appropriateness or adequacy of marketplace bargaining alone to determine workplace rights. The individual bargaining regime assumes that marketplace bargaining alone is adequate. The collective bargaining and protective legislation regimes assume that additional interventions are needed to address market imperfections.⁵⁵

⁵³ Estlund, 333.

⁵⁴ Kenneth G. Dau-Schmidt and Carmen L. Brun, “Individual Bargaining, Collective Bargaining and Protective Legislation: Determining the Terms and Conditions of Employment in the Modern American Employment Relationship,” retrieved from https://www.jil.go.jp/english/events/documents/cils04_dauschmidt1.pdf. Dau-Schmidt identifies the common law of individual contracts as a secondary means of addressing workers’ needs. He states it falls short of being a primary solution due to the cost of litigation and inconsistent application of the law across the states.

⁵⁵ Richard Edwards, “Alternative Regulatory Approaches to Protecting Employees’ Workplace Rights,” in *Government Regulation of the Employment Relationship*, ed. Bruce E. Kaufman (Ithaca, Cornell University Press, 1997): 403-427.

Workplace Rights. Edwards defines workplace rights as “legitimated claims or privileges ... that an employee may exercise as a result of being an employee and that he or she may use as protection from the established workplace governance.”⁵⁶ Edwards distinguishes workplace rights from a worker’s contractual benefits which he defines as benefits such as wages that are earned in return for some performance. He notes that an unusual but significant feature of workplace rights (in the at-will sector) is that an employer may fire the worker and thereby deprive an employee of the opportunity to exercise his or her workplace rights.

Edwards recognizes three types of workplace rights:

- **Statutory rights** derive from law and typically are identified with direct government regulation of the labor market. The source of these rights is broadly defined to include rights found in statutes, constitutional protections and common law.
- **Collective contract rights** are those found in collective bargaining agreements. At the level of the individual worker, these rights are comparable to statutory rights because they are non-negotiable and not related to individual performance. These are in decline.
- **Enterprise rights** are claims or privileges that a firm’s management establishes that are particular to each firm. They are typically expressed in an employee handbook. They have aspects of local public goods which means comparable levels would not be likely to be achieved through individual bargaining.

Edwards’ assesses the enforceability of workplace rights based on their source. He echoes Dau-Schmidt’s belief that unions can no longer serve as general agents in bargaining for workers’ rights because they represent too few workers. He offers mixed views about the enforceability of statutory and enterprise rights.

Limitations of the Statutory Rights Approach. Edwards identifies multiple benefits to the statutory rights approach. Statutory rights provide broad coverage, are publicly known and legally unambiguous, and they shift enforcement costs from an individual worker to a public entity to ensure an employer’s de facto compliance. By setting a socially optimal level of rights directly, they create public goods.

On the other hand, Edwards thinks that workplace regulation is “an intrinsically difficult task” due to the breadth and diversity of the economy. In complex situations, he thinks direct regulation is a “highly faulty protection device.”⁵⁷ Moreover, because most workplace phenomena that need

⁵⁶ Edwards, 407

⁵⁷ Edwards states, “Workplace regulation is an intrinsically difficult task: The U.S. has somewhat more than five million job sites, and they are all different, with different technologies, workforces, management philosophies, physical layouts, and workplace cultures. When regulators in Washington ... write rules to cover this myriad of workplaces, they confront a difficult choice. Either the rules must be made very complicated to fit the differences among many workplaces, in which case the rules become extremely complex to administer, impose a large regulatory burden, and are susceptible to lengthy challenges, or the regulations are made simple enough to be easily administered but then are frustratingly inappropriate (and costly) when applied to such differentiated workplaces. Neither approach serves well.” 415.

adjudication are highly complex, he advises that relying on protective legislation is typically “too clumsy, remote and inefficient to be useful.”

He suggests that protective legislation is best suited to workplace situations that are simple, transparent, easily monitored and available for after-the-fact reconstruction from records. But these conditions make its regulatory effectiveness limited. He argues that the legislative record of workplace regulation shows a disconnect between its passage versus its job-site impact that yields “remarkably few benefits for workers.”⁵⁸

The Enterprise Rights Approach. As compared to the decline of collective bargaining and the limits of protective legislation, Edwards sees enterprise rights as gaining practical importance. This view takes into account changes to the at-will doctrine instituted by state courts that have increased worker protections. These changes include: a public policy exception, an implied contract exception and, in some states, an implied covenant of good faith and fair dealing exception. Edwards observes that these changes have led the courts to play a growing role in administering workplace relations.

On the other hand, Edwards’ view is that the courts are “an extremely poor mechanism for administering industrial relations” because they are costly, they have long delays, they require lawyers and other expensive legal personnel, they are overly formal, they produce capricious awards and they create winners and losers rather than mediating disputes so that the parties can go back to working together. He cautions that, despite more involvement by the courts, the enforceability of enterprise rights remains legally ambiguous.

In seeking a win-win solution to the ineffectiveness of collective bargaining and the enfeeblement of protective legislation, Edwards suggests efforts to find common ground must balance a recognition that employees need and deserve some special workplace protections with an understanding that the conservative impulse to rely on markets to deliver workplace rights is often correct because it promotes flexible and highly differentiated arrangements.

D. Judicial Enforcement of Individual Workers’ Rights

The plethora of federal, state and local laws that regulate U.S. workplaces creates a complex web of compliance obligations.⁵⁹ Table 2-7 on the next page displays the major labor and employment laws that create the federal framework of workplace regulations. A mix of public and private entities are responsible for enforcing these rules. At the federal level, divisions in the U.S. Department of Labor (DOL) enforce most workplace regulations. Other federal enforcement entities include the Equal Employment Opportunities Commission or the National Labor Relations Board.

The Rise of Private Enforcement. The changing of the guard from labor law to employment law not only substituted individual worker rights for collective organization and strength; it also created private rights of action that shift the responsibility for regulatory enforcement from public agencies to private parties.⁶⁰ (Table 2-7 shows workplace laws that have a private right of action.)

⁵⁸ Edwards, 416.

⁵⁹ For a description of this regulatory framework based on a review of over 200 federal statutes, see GAO’s report, *Workplace Regulation: Information on Selected Employer and Union Experiences*.

⁶⁰ Clyde W. Summers, “Labor Law as the Century Turns: A Changing of the Guard,” *Nebraska Law Review* Vol. 67, 1 (1988): 7-27; retrieved from <https://digitalcommons.unl.edu/nlr/vol67/iss1/3>.

Table 2-7. Enforcement Agencies and Private Rights of Action for Major Federal Workplace Laws

Area of Concern	Federal Statutes	Principal public enforcement agency	Private right of action:	
			Available to employee	Available after admin. Remedies exhausted
Labor Standards	• Fair Labor Standards Act (FLSA)	Labor-WHD	√	
	• Davis Bacon Act	Labor-WHD	√	
	• Service Contract Act	Labor-WHD		
	• Walsh Healy Public Contracts Act	Labor-WHD		
	• Contract Workhours and Safety Standards Act (CWSSA)	Labor-WHD	√	
	• Migrant and Seasonal Agricultural Worker Protection Act (MMSPA)	Labor-WHD	√	√
Benefits	• Employee Retirement and Income Security Act (ERISA)	Labor-PWBA, PBGC, IRS	√	√
	• Group health plan continuation coverage provisions under The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)	Labor-PWBA Treasury -IRS	√	√
	• Unemployment Compensation provisions of the Social Security Act	Labor-ETA		
	• Family and Medical Leave Act (FMLA)	Labor-WHD	√	
Civil Rights	• Title VII of the Civil Rights Act	EEOC	√	√
	• Equal Pay Act (which amended the Fair Labor Standards Act)	EEOC	√	
	• Executive Order 11246	Labor-OFCCP		
	• Age Discrimination in Employment Act (ADEA)	EEOC	√	
	• Americans with Disabilities Act (ADA)	EEOC	√	√
	• Section 503 of the Rehabilitation Act, and	Labor-OFCCP		
	• Anti-retaliatory provision of the Surface Transportation Assistance Act (STAA)	Labor-OSHA		
Occupational Health and Safety	• Occupational Safety and Health Act	OSHA		
	• Federal Mine Safety and Health Act, and	MSHA		
	• Drug Free Workplace Act	OFCCP		
Labor Relations	• National Labor Relations Act	NLRB	√	
	• Labor management Reporting and Disclosure Act, and	Labor-OAW	√	√
	• Railway Labor Act	NMB		
Employment Decisions:	• Employee Polygraph Protection Act	Labor-WHD	√	
	• Veterans' Reemployment Rights law as enacted by the Selective Training and Service Act and subsequent amendments	Labor-VETS	√	
	• Employment provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act, and	Labor-WHD	√	
	• Worker Adjustment and Retraining Notification Act	None	√	

Source: OLO, GAO's Report, *Workplace Regulation: Information on Selected Employer and Union Experiences*.

In contrast to a more traditional view of enforcement as a public responsibility, an emerging body of research instead sees a diffuse set of private party regulators and private enforcement as an institutional feature of public law.⁶¹ Maria Glover, professor of law at Georgetown University, explains the contribution of private enforcement to the regulatory system as follows:

The American regulatory system is unique in that it expressly relies on a diffuse set of regulators, including private parties, rather than on a centralized bureaucracy for the effectuation of its substantive aims. In contrast with more traditional conceptions of private enforcement as an ad hoc supplement to public law ... private regulation through litigation is integral to the structure of the modern administrative state.⁶²

This view sees the private enforcement approach as “an outgrowth of America’s inherited regulatory design, which relied largely on private suits brought pursuant to common law doctrines, as opposed to the ex-ante public regulation of wrongdoing by governmental bodies.”⁶³

Proponents of this view argue that Congress’ shifting of enforcement responsibilities from public regulators to private parties has been deliberate. Glover’s explanation cites two federal employment statutes – Title VII and the FLSA – as examples of this intentional approach:

In various domains of public law, as in Title VII and the FLSA, Congress has vested in private parties a great deal of responsibility for enforcement by extending the statutory mechanisms provided to private parties in order to facilitate and incentivize private suits; Congress has correspondingly decreased the enforcement mechanisms available to relevant public regulatory bodies, which have suffered budget cuts and have decreased their enforcement efforts, even as the number of employers covered by these laws has grown significantly.”⁶⁴

For some, the sharp increase in private actions since the 1970s is evidence that heavy reliance on private enforcement is a pre-requisite to realize the substantive outcomes of the regulatory system.

Bottom Up Workplace Law Enforcement. In 2014, Charlotte S. Alexander and Arthi Prasad published research that looked at wage hour violations experienced by low-wage, frontline workers to better understand how reliance on private parties to enforce their own workplace rights functions in practice.⁶⁵ They support Glover’s view about the growing significance of private party enforcement, reporting that between fiscal years 2000 and 2011, private plaintiffs filed 38 times more federal Fair Labor Standards Act cases than did the U.S. Department of Labor.⁶⁶

⁶¹ See Stephen B. Burbank, Sean Farhang and Herbert Kritzer, “Private Enforcement,” *Faculty Scholarship*, Paper 448 (2013): 637-721; retrieved from http://scholarship.law.upenn.edu/faculty_scholarship/488.

⁶² J. Maria Glover, “The Structural Role of Private Enforcement Mechanisms in Public Law,” *Wm. & Mary L. Rev.* 53 (2011-12): 1137; retrieved from <http://scholarship.law.georgetown.edu/facpub/1874>.

⁶³ Glover, 1147.

⁶⁴ Glover, 1151.

⁶⁵ Charlotte S. Alexander and Arthi Prasad, “Bottom Up Workplace Law Enforcement: An Empirical Analysis,” *Indiana Law Journal*: Vol. 89 Iss. 3 (2014): 1069-1131; retrieved from <http://www.repository.law.indiana.edu/ilj/vol89/iss3/2>.

⁶⁶ Alexander and Prasad, 1070. Over the 11-year period Alexander and Prasad found there were 1,382 cases with the FLSA Nature of Suit code filed in federal court by the U.S. Secretary of Labor versus 52,865 cases filed by private plaintiffs.

Alexander and Prasad’s description of the current enforcement system for workplace rights explains the rationale behind the reliance on private parties or what they call “bottom-up” enforcement:

Workplace rights in the United States are generally enforced from the bottom up. With few exceptions, labor and employment laws contain private rights of action that enable workers themselves to bring lawsuits when their rights are violated. These private lawsuits vastly outnumber government enforcement actions against law-breaking employers. Even what seems to be a top-down government enforcement is often bottom-up enforcement in disguise as government agencies depend in large part on worker complaints to direct their enforcement activity. Workplace law enforcement therefore depends significantly on worker “voice” with workers themselves identifying violations of their rights and making claims to enforce them.

In theory, a bottom up system should produce an accessible, responsive, and efficient workplace law enforcement regime. The parties with the most information about violations and the greatest incentive to correct them – the workers – drive the enforcement process. Workers need not wait on cumbersome, budget strapped, or politically hamstrung government agencies, but can take enforcement duties into their own hands. And when government agencies do act, the bottom up system should allow them to allocate resources efficiently: the “market” in complaints should signal to agencies which employers are bad actors and in need of reform.⁶⁷

Alexander and Prasad used data that a team of researchers collected as part of a 2008 landmark survey of low-wage, front-line workers in New York, Chicago and Los Angeles to analyze issues such as how often workers pursued a claim, workers’ understanding of their rights and the characteristics of workers who chose to pursue a claim.⁶⁸ Based on their work, they concluded:

“[H]owever elegantly designed, there is good reason to believe that the system fails in practice and that it fails particularly badly in the case of workers who are most vulnerable to workplace rights violations. [T]he system fails these workers because it is built on two foundational misplaced assumptions: (1) that workers have the substantive and procedural legal knowledge to identify violations of their rights and access the proper enforcement procedures, and (2) that workers have sufficient incentives to file suit or make agency complaints. ... [F]or many low-wage, front-line workers – those who earn below the median wage for the city where they live and hold nonmanagerial, nonsupervisory, or nontechnical jobs – neither assumption applies. ... Our analysis reveals gaps in workers’ legal knowledge and powerful incentives to stay silent in the face of workplace problems.”⁶⁹

⁶⁷ Alexander and Prasad, 1070-1071.

⁶⁸ See Chapter VI, Part C, 2008 Unregulated Work Study, for more details about this landmark study.

⁶⁹ Alexander and Prasad, 1071.

III. REGULATORY APPROACHES TO LABOR STANDARDS COMPLIANCE

The Council's enactment of higher minimum and subminimum wage standards and paid sick and safe leave benefits adds statutory protections to a body of employment law comprised of numerous federal, state and local statutes, administrative rules and interpretations, case law, and judicial opinions from the adjudication of private party filings.

The effect of these new statutory protections on the County's 32,000+ workplaces varies widely because the County's businesses and workplaces are themselves highly varied. Thus, large firms in industries with relatively few low-wage workers are likely to be less affected and more able to comply voluntarily with new County standards compared to small firms (old and new) or businesses where low-wage workers account for a majority of the workforce.

Agencies charged with enforcing statutory employment standards have a role to play in furthering higher levels of business compliance. The more an agency's monitoring and enforcement practices increase the likelihood noncompliant businesses will be detected and penalized, the more likely it is that businesses will make efforts to comply. The more an agency has resources to assist businesses, to respond strategically to workers' complaints or to partner with workplace intermediaries, such as a union or a workers' advocacy group, the more likely it is that workers' protections will be realized.

As described in Chapter II, the growth of fissured workplaces has created new low-wage industry structures. These structures can pressure small businesses and subcontractors on the lower tiers of these industries to evade labor standards on one hand and shield lead employers from their compliance responsibilities on the other hand. As cost pressures on the lower tiered firms increase due to higher minimum wage standards, they are less and less likely to comply voluntarily. Absent a union or workplace agent, low-wage workers are less likely to step forward to exercise their rights.

For labor standard enforcement agencies, the workplace impacts of economic restructuring raise a threshold question of what changes to agency practices, if any, are warranted to address these new realities. At the federal level, efforts to shift agency practices to a strategic enforcement approach at the Department of Labor's (DOL's) Wage Hour Division (WHD) offer one answer to this question.

This chapter and the next respond to the Council's request for a better understanding of the federal and state regulatory systems that exist to administer and enforce the County's new minimum wage laws, including what happens when businesses fail to comply. This chapter describes federal compliance and enforcement practices. It has three parts, organized as follows:

- **Part A** describes agencies' options for administering labor standards compliance programs;
- **Part B** describes the compliance and enforcement practices of the Wage Hour Division (WHD) in the U.S. Department of Labor (DOL); and
- **Part C** offers an overview of practices that characterize a strategic approach to enforcement.

Chapter IV describes Maryland's wage compliance and enforcement practices. It also highlights compliance and enforcement practices in other states.

A. The Compliance Enforcement Pyramid and System Implementation Practices

This section describes seven practices that enforcement agencies pursue to achieve employer compliance with minimum wage standards. Various combinations of these practices can shift the balance in an agency between compliance and enforcement. These concepts are described in *The Implementation of Minimum Wage: Challenges and Creative Solutions*, an International Labour Office (ILO) report about minimum wage implementation systems (“the ILO Report”).⁷⁰

The Pyramid of Compliance and Enforcement. Programs to achieve compliance with legislative minimum wage standards are multi-pronged efforts. These programs reflect different underlying assumptions about what motivates businesses to comply with labor standards. The mix of strategies an agency selects reflects these beliefs. In the ILO Report, Chiara Benassi identifies three general approaches to labor standards compliance:

- A **persuasive approach** relies on techniques that address shared values and norms and emphasize voluntary compliance. Persuasive strategies are often recommended as a first step, even under the other two approaches.
- A **management approach** relies on technical assistance, capacity building, transparency and monitoring. The management approach assumes that noncompliant employers may be unaware of a particular regulation. Monitoring is a necessary part of a management approach because it provides a mechanism for detecting capacity issues (among workers and businesses) and puts social pressure on noncompliant employers.
- An **enforcement approach** relies on monitoring and sanctioning to achieve compliance. This approach assumes employers are rational actors and that non-compliance occurs when the benefits of noncompliance outweigh the costs of compliance and detection is unlikely. Monitoring is necessary to detect non-compliance and sanctioning is necessary to increase the businesses’ costs of non-compliance.

These approaches are not mutually exclusive; in fact, research suggests the most effective systems are organized as a pyramid with cooperative strategies or preventative measures as the foundation layer building up to sanctioning for severe offenses as the top layer.

Benassi notes that one of the strongest arguments for a cooperative strategy initially is that persuasion is cheaper than setting up monitoring and sanctioning mechanisms. But, when non-compliance occurs, escalation to punishment needs to be certain to create a credible deterrent. If inadequate funding for monitoring reduces the chances of finding noncompliance or weak penalties applied haphazardly reduce the perceived costs of noncompliance, deterrence will not work.

Benassi also highlights the value of worker empowerment, noting that it “is both a preventative strategy and ... a form of enforcement by a non-state actor. ... Strong and well-organized workers are more likely to monitor non-compliance and denounce it [and] they can use their power through

⁷⁰ Chiara Benassi, “The Implementation of Minimum Wage: Challenges and Creative Solutions,” (Global Labour University, Working Paper No. 12, International Labour Office (ILO), 2011); retrieved from http://www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.12.pdf.

industrial or legal action, thus activating the more traditional state-led or top-down enforcement mechanisms.”⁷¹

Implementation Practices. Table 3-1 displays seven practices commonly used to enact, design and enforce minimum wage laws. These strategies underscore the range of options available to establish standards and promote compliance.

Table 3-1. Implementation Practices for Minimum Wage Compliance Systems

<ol style="list-style-type: none"> 1) Facilitate self-enforcement through persuasion. This low-cost implementation strategy relies on persuasive arguments and appeals to common values to create a “culture of compliance” among employers. ILO’s review identified the use of persuasive processes at the interpersonal level and/or at the societal level as two main implementation strategies. ILO cites the adoption of living wage legislation in the nineties as an example of public discourse that had a political and social outcome. 2) Institute a participative wage setting process. This design strategy rests on the belief that shared rules are more likely to be complied with than top-down regulation and it aims to avoid non-compliance due to rule ambiguity. A wage board is an example of this strategy. 3) Institute information and capacity building campaigns. This implementation strategy sees general awareness of the law, specific knowledge about rules, and training to spread this information as keys to achieving compliance. Examples of this strategy include information campaigns that target employers, workers and other social organizations, and training seminars for employers and workers. 4) Institute monitoring to detect non-compliance. This implementation strategy is a critical piece of the management and enforcement approaches. Labor inspections are the primary monitoring method. Other monitoring practices rely on self-monitoring, record-keeping and self-reporting by workers or practices that denounce non-compliant employers.¹ When limited agency resources or the costs of inspections limit the use of this strategy, agencies implement practices to prioritize inspection resources or they initiate inspections only based on worker complaints. For those systems that rely heavily on worker complaints, ILO recommends techniques that guarantee easy and safe access to complaint procedures such as confidential hotlines, online questionnaires or online complaint forms. 5) Establish individual and collective rights to pursue legal remedies. This strategy empowers workers to take action against an employer; however, since it poses considerable risks to the worker, systems that use this strategy must also include measures to protect individual workers such as legislative guarantees against retaliation or mechanisms that authorize collective actions. Legal provisions that establish compensation systems for underpayment of wages, provisions that provide for full reimbursement of the difference between the paid wage and the minimum wage and provisions that reduce the waiting time for compensation can empower individual workers.¹ 6) Establish legal sanctions. This strategy consists of provisions for fines, for suspending a business operating license or for a penalty system that increases the severity of sanctions for repeat offenders or for egregious violations. 7) Use of public awareness and boycott campaigns by third party actors. This strategy, which falls under the purview of non-governmental organizations or other third-party actors, has been adopted to pressure companies into compliance.
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Source: OLO and the ILO Report, 2011.

⁷¹ Benassi, 10.

As minimum wage campaigns suggest, use of and responsibility for these practices can vary. Legislators usually set wage standards (Practice #2) and assign the authority for remedies and sanctions in statute (Practices #5 and 6). Advocacy groups use public awareness practices (Practice #7). Administrative enforcement practices emphasize a combination of: self-enforcement (#1) information campaigns (#3), monitoring (#4), pursuit of legal remedies (#5) and legal sanctions (#6).

B. Federal Compliance and Enforcement Practices: The Wage Hour Division (WHD) at the U.S. Department of Labor

For some statutory employment standards, including those for minimum wage and overtime, the federal and state standards and regulatory structures intersect and overlap. For example, a provision in the Fair Labor Standards Law (FLSA) allows higher standards in state or local laws to prevail over lower federal standards. Other provisions allow private parties to initiate enforcement actions with federal or state agencies or in federal or state courts.⁷² The rest of this chapter describes federal compliance and enforcement practices; chapter IV looks at state compliance and enforcement practices.

The mission of the Wage Hour Division (WHD) in the U.S. Department of Labor (DOL) is “to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation’s workforce.”⁷³ To do this, WHD administers and enforces over 180 federal workplace regulations including the Fair Labor Standards Act (FLSA). This section describes WHD’s practices to enforce the FLSA.⁷⁴

1. WHD’s Organizational Structure, Authority and Resource Trends

WHD employs roughly 1,000 investigators in 400 offices who conduct fact-finding investigations and gather payroll records. WHD investigators are authorized to settle claims administratively and enter into settlement agreements with employers to supervise payment of unpaid minimum wages or overtime compensation. If WHD investigators are unable to resolve issues administratively, they may refer matters to attorneys in the Office of the Solicitor of Labor’s Fair Labor Standards Division to bring various administrative and civil enforcement actions.

WHD resources were severely constrained when it began operations in 1939. Over its 80-year history, resources have ebbed and flowed, despite steady increases in the numbers of covered employees and establishments due to workforce growth and amendments that expanded FLSA’s coverage.⁷⁵ As a result, the adequacy of WHD resources for FLSA enforcement has steadily declined.

⁷² 29 U.S.C. §218(a)

⁷³ U.S. Department of Labor, Wage Hour Division, <https://www.dol.gov/whd/about/mission/whdmiss.htm>

⁷⁴ As Table 2-7 at the end of Chapter II shows, WHD is charged with administering and enforcing several other federal labor and employment laws, such as those covering family and medical leave, migrant farm work, the terms employment conditions of certain temporary non-immigrant workers, and the wages and benefits received by construction and service workers fulfilling government contracts.

⁷⁵ As noted in Chapter II, when the FLSA was first enacted, it covered about 20% of the workforce. In 2017, David Cooper and Teresa Kroeger estimated that the federal minimum wage covered about 72% of the civilian, noninstitutionalized workforce in the 10 largest states. They also noted coverage was extended to service sector and hospitality workers in 1966 and to home care workers in 2015. See David Cooper and Teresa Kroeger, “Employers steal billions from workers’ paychecks each year,” (Report, Economic Policy Institute, May 10, 2017), 5; retrieved from <https://www.epi.org/files/pdf/125116.pdf>

In 1948, WHD had roughly one investigator for every 22,600 covered workers compared to roughly one inspector for every 135,000 workers in 2017.⁷⁶ In 1948, the ratio was roughly twice the ILO benchmark for an industrialized economy (1 inspector for every 10,000 workers). It would take a six-fold increase to return to WHD's 1948 resource levels. That level would have to double again to meet the ILO benchmark for an industrialized economy.

2. Compliance Through Self-Reporting: WHD's PAID Pilot Program

Since 2016, the WHD has increased its efforts to persuade employers to self-report violations. One such effort is the Payroll Audit Independent Determination or PAID pilot program.

Under PAID, employers are encouraged to conduct audits, to self-report violations that they find and to work in good faith with WHD to pay 100% of back wages due. WHD reviews cases and works with employers to collect any additional documentation it needs to verify information that employers submit about employees who are due wages and the amount of wages due. Consistent with its practices, WHD's review will encompass former employees paid during the period covered by the statute of limitations. If, during its review, WHD identifies other issues it will expand its review to address those as well.

After WHD completes its review, it will provide employers with a summary of unpaid wages. The employer is responsible for making payments before the end of the next full pay period. WHD will also provide information about the settlement terms to each affected employee. Employees receive 100% of the back wages owed and a commitment from WHD to follow up with enforcement action if an employer does not pay promptly. WHD anticipates the entire process to take 90 days. In exchange for an employer's participation in PAID, WHD agrees to forego requiring an employer to pay interest on back wages, liquidated damages or the assessment of any civil monetary penalties.

In April 2018, attorneys general in ten states (including Maryland) wrote the Secretary of Labor to express several concerns about the PAID pilot program. They noted, for example, that by waiving interest charges the PAID program was, in effect, allowing employers to seek unlawful, interest-free loans from their (low-wage) workers. They also raised concerns about language that addressed the relationship of the PAID program to state law violations, suggesting that "it invites employers to require employees, who may be unaware of their rights under more protective state labor laws, to sign separate state-law releases in order to receive their wages under the PAID program."⁷⁷

In June 2017, DOL also reinstated the practice of issuing opinion letters which had been suspended since 2010. DOL opinion letters respond to requests from employers about particular fact situations. They can also be used in litigation to shield employers from liability.

3. WHD's Monitoring Practices to Detect Non-Compliance

As the ILO Report states, monitoring activities to detect non-compliance are a critical component of an enforcement-based compliance approach but limited agency resources frequently limit their effectiveness. WHD's history of inadequate funding severely constrains its capacity to detect noncompliance. One statistic puts an employer's risk of being investigated at less than a 1 in 10,000

⁷⁶ David Cooper and Teresa Kroeger, 5.

⁷⁷ https://ag.ny.gov/sites/default/files/program_multistate_letter_to_acosta.pdf

chance.⁷⁸ Another study found the inspection risk among the 20 largest fast food companies was 0.008.⁷⁹ Consistent with the ILO Report's observations, WHD relies on both worker complaints (complaint investigations) and targeting (directed investigations) to extend the reach of its resources.

Targeted Investigations. Historically, WHD directed its inspection and fact-finding resources to industries with concentrations of low-wage or undocumented workers. For example,

- In the 1980s, WHD's Special Targeted Enforcement Program (or "STEP") investigated industries with high concentrations of undocumented workers because they were more likely to accept substandard employment conditions and less likely to report wage violations.
- In the 1990s, WHD targeted industries with high concentrations of low-wage workers such as produce growers, nursing homes, restaurants and garment manufacturers.
- In 2010, WHD allocated 25% of its investigative resources to sectors with large, low-wage immigrant workforces, targeting industries such as agriculture, landscaping, construction, child care, eating and drinking establishments, hotel-motels and nursing facilities.

Complaint-Driven Investigations. Intake and complaint systems help an agency recover back wages for workers. WHD provides multiple ways for workers to file a complaint, including a toll-free hotline, email or a visit to an office. As the ILO Report advises, WHD complaints are mostly confidential. WHD's website notes that it does not address issues that fall outside of its regulatory purview, such as violations related to rest or meal breaks, vacation or sick pay, discharge notices or pay stubs. It notes employer/employee agreements or state laws may cover these matters.

Before 2011, roughly 75% of WHD cases were triggered by complaints. A 2010 report explained complaint cases were more likely than directed cases to find a violation, partly because WHD triaged minor complaints for resolution through conciliation and prioritized significant complaints for investigation.⁸⁰ In 2009, GAO reported that WHD's response to complaints was inadequate due to "sluggish response times, a poor complaint intake process and failed conciliation attempts."⁸¹

Worker Complaint Research, Industry Variations and Violation to Complaint Ratios. Studies into complaint activity find complaint rates relate to workplace conditions but they are also influenced by other factors. Complaint rates also vary widely by industry. A 2006 study of FLSA overtime complaints found an average rate of 25 complaints for every 100,000 workers. By industry:

- Private households had the lowest rates (3.8 complaints per 100,000 workers);
- Eating and drinking places had moderate rates (54 complaints per 100,000 workers); and
- Gas stations had the highest rates (195 complaints per 100,000 workers).

This research also found, on average, 130 overtime violations for each FLSA complaint.

⁷⁸ David Weil, "Public Enforcement/Private Monitoring," *Industrial and Labor Relations Review*, Vol. 58, No. 2 (January 2005): 242.

⁷⁹ David Weil, "Improving Workplace Conditions Through Strategic Enforcement," (Boston U. Sch. of Management Research Paper No. 2010-20, May 1, 2010), 51; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623390

⁸⁰ Weil, "Improving Workplace Conditions," 12.

⁸¹ U.S. Government Accountability Office (GAO), "Department of Labor: Wage Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft," GAO-09-458T (Washington, DC: Government Accountability Office, 2009), 2; retrieved from <https://www.gao.gov/products/GAO-09-458T>

This research also compared complaint rates and violations by industry to examine whether agencies' use of worker complaints to set their inspection priorities was appropriately directing resources to industries with the highest violation rates. A comparison of industries that ranked highest in either complaint rates or violations found little overlap between the two lists. For example, gas stations were ranked first for complaints but nearly last (173 out of 176) for violations.

In 2011, an examination of FLSA complaint activity over eight years found a 26% decline (from 21 to 15 complaints per 100,000 workers).⁸² Table 3-2 displays variations in complaint rates by industry. In the 2007-2009 period, those who worked in retail, health care services, grocery stores, logistics, home health care, salons and landscaping were among the least likely to file an FLSA complaint.

Table 3-2. Changes in FLSA Complaint Rates From 2001-02 and 2007-09, Overall and by Sector

Industry ^{83a}	2007-2009 Total Employment (Average) ^{10b}	2007-09 Complaint Rate: (Cases/Emp) x 100,000 ^{10c}	2001-02 Complaint Rate: (Cases/Emp) x 100,000 ^{10d}	% Change, 2001-02 to 2007-09
Total Weighted Average, whole economy	111,175,322	15.6	21.1	-26.4%
Retail – All	15,120,711	13.7	20.5	-33.2%
Health care services (Not state hospitals)	13,196,814	11.6	16.3	-28.9%
Retail: mass merchants; department stores; specialty stores	9,315,599	10.2	16.2	-37.1%
Restaurants: Limited and full service	7,968,326	30.4	35.2	-13.5%
Construction	6,879,048	26.2	30.7	-14.8%
Grocery stores	2,484,572	10.2	15.0	-32.2%
Gasoline stations/Auto repair	1,687,929	42.3	52.5	-19.4%
Hotel and motel	1,459,546	37.9	47.0	-19.4%
Recreation	1,418,641	14.7	19.8	-26.0%
Trucking	1,364,638	48.4	54.4	-11.0%
Agriculture	1,159,168	13.7	16.0	-14.4%
Moving companies/logistics providers	1,017,273	9.0	14.3	-37.0%
Home health care	966,772	14.7	21.3	-31.0%
Janitorial services	934,009	39.6	42.7	-7.2%
Residential construction	796,325	47.6	24.3	95.5%
Landscaping services	647,415	20.7	27.3	-23.9%
Nail, barber and beauty shops	490,139	16.7	13.9	20.2%
Apparel manufacturing	193,367	44.1	35.7	23.5%
Car washes	140,657	44.3	45.3	-2.1%

Source: Weil, Broken Windows, 11.

⁸² David Weil, “Broken Windows, Vulnerable Workers, and the Future of Worker Representation,” (Boston University School of Management Research Paper Series No. 2012---23, August 9, 2012), 1-21.

⁸³ ^a Industry based on 3-, 4- and/or 5-digit NAICs. ^b Total Employment: Extract from BLS Quarterly Census of Employment and Wages (QCEW), Private Employment Only, 3-digit industries with more than 100,000 employees 2007-09; ^c Complaint rate based on average annual number of complaints lodged with WHD classified as pertaining to Fair Labor Standards Act. Includes all full and partial investigations, conciliations, and audits in 2007-2009 and closed by third quarter 2010 (June 10, 2010); ^d Complaints registered in 2001-2002 and closed by third quarter 2010.

4. WHD's Options to Pursue Legal Remedies.

Under the FLSA, WHD can pursue claims filed by workers through the exercise of its administrative authority, through civil litigation or through criminal prosecution.

- **Administrative options.** The FLSA authorizes WHD to seek settlement agreements for back wages and liquidated damages against employers and to seek civil money penalties from an administrative law judge in the DOL.
- **Civil Litigation options** If an employer refuses to pay back wages after a WHD investigation, the FLSA authorizes DOL to file a suit on behalf of employees in federal district court to recover back wages owed and for liquidated damages.

DOL can also sue for an injunction that orders an employer to pay back wages due or to keep accurate payroll records or to prohibit an employer from shipping or selling goods produced in violation of FLSA wage and hour restrictions.⁸⁴

- **Federal Criminal prosecutions.** Under the FLSA, DOL has the authority to bring criminal cases against employers. An employer may be sentenced to a fine of up to \$10,000 and repeat and willful violators may also be sentenced to up to six months in prison.

5. Wage Recovery, Sanctions and Penalties

If violations are found, the FLSA authorizes penalties and sanctions that can include: 1) the recovery of back wages with interest; 2) payment of an equivalent amount in liquidated damages; and 3) a civil monetary penalty for repeat or willful violators.⁸⁵ Wage recovery is limited to two years under the statute of limitations; however, it can be extended to three years, if an employee can prove that his or her employer willfully violated the law.

In contrast to other federal employment laws, the FLSA's statute of limitations runs until a worker either files suit or is included in a suit filed by the DOL. This structure creates an incentive for WHD to settle because a worker can lose back wages while he or she waits for a WHD investigator to complete their fact-finding and decide whether to sue. WHD may ask employers to waive the statute of limitations; however, it is rare that an employer will agree. As a result, it can make sense for WHD to negotiate a settlement agreement with an employer for back wages plus interest owed or often for less than what is owed.

The payment of back wages can occur from the employer to the employee or WHD can collect payments from the employer and distribute them to the employee. A 2015 audit by the Office of the Inspector General in DOL examined back wage payments from FY09 through FY13. The OIG found 76% of assessed back wage payments were distributed directly from employers to employees. The OIG's examination of the remaining 24% (\$264 million) that was sent to WHD to be distributed

⁸⁴ As WHD Administrator, Weil used the authority of this "hot goods" provision to pressure garment manufacturers that were relying on products from subcontractors that were flagrantly violating FLSA provisions.

⁸⁵ § 16(e)(2) authorizes a monetary penalty for a "repeated" or "willful" violation of that law's minimum-wage or overtime requirements and, as of 2015, these penalties are adjusted annually. In 2018, DOL can impose a monetary penalty of up to \$1,964 per violation.

found WHD did not follow its own policies or make sufficient efforts to locate employees. The OIG also stated that if WHD is unable to locate employees after three years, it must transfer unclaimed payments to the Treasury. The OIG's review of WHD's data found WHD had transferred \$60 million to Treasury from FY10 to FY14 and estimated it would transfer \$12 million in FY15.⁸⁶

WHD assesses penalties on a per-person basis, so the total penalty reflects the violation amount times the number of employees who were affected. As the ILO Report explains, credible deterrence depends on the consistent use of strong penalties. In theory, WHD's consistent use of liquidated damages and civil monetary penalties could create a deterrent effect and increase voluntary compliance:

- The FLSA authorizes **liquidated damages** at an amount equal to the back-wage payment with interest. If WHD consistently seeks liquidated damages and they are perceived as doubling the costs of noncompliance, they may increase the likelihood of voluntary compliance for some businesses.⁸⁷ Liquidated damages are also especially beneficial to low wage workers because they are paid directly to employees.
- The FLSA authorizes **civil monetary penalties** (CMPs) for repeat or willful violators. Again, if these penalties are applied consistently so they are perceived to raise the costs of noncompliance, they may create a deterrent effect and encourage voluntary compliance.

As a practical matter, most of the employers WHD investigates are first time offenders and this means relatively few WHD investigations offer an opportunity to assess CMPs. The 2010 Report to the WHD examined agency practices for assessing CMPs between 1998 and 2008. It found:

- Less than three percent of all WHD's investigations were assessed CMPs, partly because most of these were investigations of first-time violators;
- Only 43% of WHD's re-investigations of repeat offenders had CMPs assessed; and
- WHD collected only 61% of the assessed amount for cases where CMPs were assessed.

The Inadequacy of WHD's Regulatory System. WHD's practices of settling for wage recovery amounts that are equal to or less than back wages owed and rarely assessing penalties combined with very low risks of detection demonstrate the inadequacy of the federal regulatory system as it currently operates. Without the monitoring resources to increase the likelihood of detection and a penalty regime to raise the costs of noncompliance, the federal wage hour system does nothing to establish a rational basis for compliance.

In *Rebuilding the Law of the Workplace*, Estlund cites a 2002 study by Weil that found that the basic cost of noncompliance in the apparel industry was less than twelve percent of the cost of paying employees the required minimum wage. As Estlund observes, "ignoring the law is an especially tempting strategy for marginal producers at the bottom of the production chain, who have little fixed

⁸⁶ U.S. Department of Labor, Office of the Inspector General – Office of Audit, *Wage and Hour Division Needs to Strengthen Management Controls for Back Wage Distributions*, March 31, 2015, Report Number: 04-15-001-04-420, 2; retrieved from <https://www.oig.dol.gov/public/reports/oa/2015/04-15-001-04-420.pdf>

⁸⁷ If an employer can prove to a court that the s/he acted in good faith or had reasonable grounds to believe the act was not a violation, the court has the discretion to forego an award of liquidated damages.

capital or stake in their reputation, who tend to operate under the regulatory radar, and who often rely heavily on undocumented immigrant workers who are too fearful or desperate to complain.”⁸⁸

Private Rights of Action. Under the FLSA, an employee can sue an employer either individually or as part of a collective action to seek the recovery of back wages, awards of liquidated damages or payment of attorney’s fees and court costs. There has been more than a fourfold increase in federal court filings of wage and hour lawsuits since 2000 – from less than 2,000 per year to almost 8,500 in 2017. Most of these lawsuits are brought as collective or class actions.

A collective action under the FLSA requires that one or more employees be “similarly situated.” It also requires that an employee give his consent in writing to participate.⁸⁹ This “opt-in” requirement differs from “opt-out” procedures established for class actions in other areas of employment law such as Title VII of the Equal Employment Opportunity Law. It can also conflict with state wage and hour laws. Litigators generally agree that the FLSA’s opt-in rule limits the size of a plaintiff group. According to one estimate, the rule limits participation rates to 20% of the workforce or less.⁹⁰

A Supreme Court decision in *Epic Systems Corp. v. Lewis* held that employers may require employees to settle collective disputes through individual arbitration agreements. This ruling may further limit workers’ ability to have their claims heard in court. An Economic Policy Institute report estimates that over half of non-union, private sector workers nationally are subject to an individual arbitration agreement; and, of these workers, 41% have waived their right to class action litigation.⁹¹

C. Moving from Conventional to Strategic Enforcement

Weil defines strategic enforcement as an approach to enforcement that “seeks to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way.”⁹² Whereas a conventional approach to enforcement has a short-term, customer service orientation that focuses on resolving individual workplace violations, a strategic approach adopts a long-term view that aims to leverage industry structures and maximize the ripple effects of deterrence across all enforcement activities.

Table 3-3 identifies eight elements of strategic enforcement that WHD implemented during Weil’s tenure. These elements provide useful examples of strategic practices that Weil used to extend and leverage WHD’s public enforcement resources. For example, by specifying a position to oversee compliance or establishing data sharing requirements and worker complaint systems, WHD’s regulatory agreements not only establish mandates for a firm’s compliance with labor standards but

⁸⁸ Estlund, 330.

⁸⁹ 29 U.S.C. § 216(b)

⁹⁰ Gregory K. McGillivray, “Opt-Out Wage and Hour Class Actions Under State Law: The Next Big Increase in Litigation to Enforce Workers’ Rights?” (August 6, 2006): 1; retrieved from <http://apps.americanbar.org/labor/lel-aba-annual/papers/2006/19.pdf>

⁹¹ Alexander J.S Colvin, “The growing use of mandatory arbitration,” (Report, Economic Policy Institute, September 27, 2017), 1; retrieved from <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>. According to Colvin, the use of agreements varies by state, industry and employer size. By state, use is most widespread in California and Texas; by industry, education and health and business services have the highest rates. Rates rise with employer size.

⁹² David Weil, “Creating a strategic enforcement approach to address wage theft: One academic’s journey in organizational change,” *Journal of Industrial Relations*, Vol 60. No. 3 (June 2018):1.

also provide public agency access to data and an internal worker complaint system to provide oversight. Moreover, as the Subway agreement shows, by holding the corporate owner accountable for the operation of all its outlets, the WHD agreement addresses the issue of fissuring.

Table 3-3. Eight Elements of the Wage Hour Division’s Strategic Approach to Enforcement

Element	Description
Move from a reactive to a proactive approach	WHD shifted resources to directed investigations and emphasized improved compliance over the long term. WHD established new methods for triaging complaints and new procedures for addressing complaints related to singular problems. Directed investigations grew from 24% in 2008 to over 50% in 2017.
Set industry priorities based on an explicit method	WHD established a priority list of low-wage, high-violation industries where workers historically were unlikely to step forward based on estimates of the prevalence of FLSA violations and estimates of the likelihood of worker complaints.
Use all enforcement tools	Fully use all enforcement tools to create credible deterrents that increase the costs of noncompliance. WHD increased its use of liquidated damages and civil monetary penalties and developed protocols for its hot goods provision.
Outreach - employers	Recognize differences in employer compliance due to industry structure and practice, ownership structure, geography, competitive dynamics and specific company history.
Outreach - workers	WHD created community outreach positions to establish trusting relationships with worker centers, community organizations and immigrant rights groups to make workers aware of their rights and to increase the likelihood they will exercise them.
Strategic communications	Communicate often about what WHD is doing and why. This complements a robust enforcement approach and can also amplify the effects of deterrence.
Regulatory agreements	Develop methods to resolve investigations that reach beyond direct settlements for affected workers. WHD used voluntary arrangements or enhanced compliance agreements to establish new positions to oversee compliance, to mandate supervisor training or to require the provision of internal mechanisms for worker complaints. For example, a WHD agreement with the corporate owner of Subway that covered 13,000 outlets provided for training, data sharing and joint problem solving.

Source: OLO based on Weil, “Creating a strategic approach to address wage theft,” 2018.

Strategic Enforcement as An Intermediate Step to New Approaches to Labor Standards Enforcement. WHD's use of regulatory agreements marks a change in the agency's oversight structure, from a command and control system or a conventional approach to enforcement to a decentralized system or a strategic approach.

In a recent article, Janice Fine borrows the concepts of police patrol oversight and fire alarm oversight developed by Matthew McCubbins and Thomas Schwartz to conceptualize the conventional and strategic approaches to compliance.⁹³ As McCubbins and Schwartz explain:

- **Police patrol oversight** is comparatively centralized, active and direct: at its own initiative, Congress examines a sample of activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations. An agency's activities might be surveyed by any number of means, such as reading documents, commissioning scientific studies, conducting field observations, and holding hearings to question officials and affected citizens.⁹⁴
- **Fire alarm oversight** is less centralized and involves less active and direct intervention than police patrol oversight; instead of examining a sample of administrative decisions, looking for violations of legislative goals, Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions, charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself.⁹⁵

Fine sees the conventional compliance approach of a public agency deploying a field team of investigators as police patrol oversight. She sees strategic enforcement with its reliance on industry structures and employer networks as fire alarm oversight. As Fine explains:

[WHD's] strategy targets highly non-compliant industries and takes advantage of industry specific dynamics and structures to impact networks of interconnected employers. In strategic enforcement, the agency also analyzes the regulatory regimes under which specific industries operate and retrofits the enforcement approach to utilize the specific pressure points created by these laws and regulations.⁹⁶

Fine sees WHD's efforts to move strategic enforcement (as measured by directed investigations) into "a co-equal position with complaint-based enforcement" as "a major step forward" but, she also advocates for "a serious reconsideration of a formal role for workers and worker organizations in government enforcement efforts."²⁷ Research by Fine, Estlund, Weil and others shows that efforts to create new workplace regulation structures and the best practices to accompany them are a work in progress as public agencies, high road firms and worker organizations continue to experiment with various approaches to address labor standard noncompliance and issues of worker representation.

⁹³ Janice Fine, "New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward," *University of Chicago Legal Forum*: Vol. 2017, Article 7, 150.

⁹⁴ Matthew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science*, Vol. 28, Iss. 1 (1984): 166.

⁹⁵ McCubbins and Schwartz, 166.

⁹⁶ Fine, 145

IV. LABOR STANDARDS COMPLIANCE IN MARYLAND AND OTHER STATES

States make a significant contribution to the laws and standards that establish protections for workers and the regulatory systems that promote compliance with these laws. As of 2018, 30 states have enacted minimum wage standards that exceed the federal minimum wage;⁹⁷ 49 states have state payday laws;⁹⁸ and, 46 states have an entity or unit that enforces state wage hour laws.⁹⁹ This chapter responds to the Council's request for a better understanding of Maryland's compliance system for wage hour laws and highlights relevant practices in other states.

A. Characteristics of Maryland's Wage Hour and Workplace Fraud Compliance and Enforcement System

Staff in Employment Standards & Classification in the Division of Labor and Industry in the Maryland Department of Labor and Licensing Regulation are responsible for enforcing many state employment laws, including the Maryland Wage Hour Law (MWHL) and the Maryland Wage Payment and Collection Law (MWPCCL). This section describes Maryland's compliance and enforcement system for wage hour laws and workplace fraud activities.

1. Organizational Structure and Scope of Enforcement Responsibilities

Maryland's Commissioner of Labor and Industry has the authority to investigate all labor laws enacted in Title 3 of the Labor and Employment Article as well as labor laws involving the employment of minors, the State's Wage and Hour Law and workplace fraud. Under an administrative procedure established in Chapter 151 of 2010 to resolve wage complaints of \$3,000 or less, the Commissioner has the authority to issue a wage order requiring an employer to pay a wage claim. The Commissioner may refer other matters for enforcement of the Equal Pay Act, the Wage Hour Law and the state's Occupational Safety and Health Act to the Attorney General.

Employment Standards and Classification (ES&C). As of July 2018, Employment Standards and Classification (ES&C) is one of five divisions in the Division of Labor and Industry (DLI) in Maryland's Department of Labor, Licensing and Regulation (DLLR). ES&C has the authority to enforce many employment laws related to earned but "unpaid" wages, workplace fraud and the Maryland Healthy Working Families Act. Its organizational structure consists of two units:

- The **Employment Standards Service (Employment Standards)** resolves wage disputes among Maryland workers and employers and collects wages owed to employees; and
- The **Worker Classification Protection Unit (WCPU)** enforces the Workplace Fraud Act which applies to certain workers in the construction and landscaping industries.

⁹⁷ STATE MINIMUM WAGES | *State Minimum Wage Legislation*, National Conference of State Legislatures, (Table as of 7/1/2018); retrieved from www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx

⁹⁸ *State Payday Requirements*, U.S. Department of Labor, Wage Hour Division, (Table as of January 1, 2018); retrieved from <https://www.dol.gov/whd/state/payday.htm>

⁹⁹ Jacob Meyer, Esq. and Robert Greenleaf, Esq., "Enforcement of State Wage and Hour Laws: A Survey of State Regulators," *Columbia Law School, National State Attorneys General Program* (April 2011): 16. Alabama, Florida, Georgia, Louisiana and Mississippi reported they do not have a state entity that engages in meaningful enforcement of state statutes.

Table 4-1 shows changes in ES&C's positions and expenditures since FY2012. In State Fiscal Year 2017, ES&C had 18 positions and its expenditures were \$702,825, which was slightly below the six-year average.

Table 4-1. Employment Standards and Classification (ES&C) Position and Expenditure Trends

	FY2012	FY2013	FY2014	FY2015	FY2016	FY2017	Avg.
Authorized Positions	17	15	16	20	20	18	17.66
Expenditures	\$722,985	\$660,994	\$698,335	\$739,527	\$806,364	\$702,825	\$721,838

Source: OLO and DLLR Personnel Detail for Employment Stds., Vol. II, Proposed Operating Budgets, FY14-FY19.

2. ES&C's Employment Standards Service (Employment Standards)

The Employment Standards Service in the ES&C administers and enforces several employment laws, including a state minimum wage law and a state wage payment law:

- The Maryland Wage Hour Law (MWHL) requires payment of a minimum wage rate and an overtime wage rate. Like its federal counterpart, the FLSA, the MWHL only applies to certain categories of employees.¹⁰⁰
- The Maryland Wage Payment and Collection Law (MWPCCL) regulates when and how often employees must be paid. It also establishes guidelines for wage deductions and procedures for employees to enforce their rights.

In addition to the MWHL and the MWPCCL, Employment Standards oversees and enforces several other laws enacted over the years, often without a corresponding increase in resources. These laws include: Employment of Minors Act, Equal Pay for Equal Work, Medical Questions, Lie Detector Tests, Healthy Retail Employees Act, Job Applicant Fairness Act, Farm Labor Contractor's Law.

Employment Standards' Resources Prior to the Maryland Minimum Wage Act of 2014.

Employment Standards was created in 1965 to enforce the State's Minimum Wage Law. Since then, its funding was eliminated twice – once in 1991 due to a State fiscal crisis and again in 2006.¹⁰¹ In 1994, funding for six Employment Standards' positions was restored to enforce the MWPCCL. Employment Standards' funding stayed relatively constant until 2006 when it was eliminated again. Beginning in 2007, Chapter 444 of 2005 mandated an annual appropriation for Employment Standards of at least \$315,000. The source of funding is the State General Fund.¹⁰²

Given its ongoing resource constraints, Employment Standards varied its approach to enforcement based, in part, on whether a state law had a federal counterpart or not. As the Department of Legislative Services' (DLS) explained in 2012, enforcement policy for the State's Wage Hour Law, the Employment of Minor Law and the Farm Labor Contractor's Law was driven by the similarity of

¹⁰⁰ For example, both the FLSA and the MWHL exempt executive, administrative and professional employees.

¹⁰¹ Before funding was eliminated due to the 1991 recession, Employment Standards had 34 funded positions to enforce the MWHL. (Department of Legislative Services, Office of Policy Analysis, *Preliminary Evaluation of the Division of Labor and Industry and Associated Boards and Councils*, December 2011, 18; retrieved from http://dlslibrary.state.md.us/publications/OPA/S/P/DLIABC_2011.pdf)

¹⁰² *Preliminary Evaluation of the Division of Labor and Industry*, 18.

federal and state labor laws and limited state resources. By comparison, enforcement of laws like the Healthy Retail Employees Act or the Job Applicant Fairness Act were “minimal” or “virtually nonexistent” because they had no federal counterpart and Employment Standards’ resources were severely constrained. DLS noted that in many cases employees had a private right of action.¹⁰³

Thus, in 2014, when the General Assembly was considering the Maryland Minimum Wage Act, DLS reported that Employment Standards had not enforced the MWHL since its resources were cut significantly in 1991. Instead, Employment Standards’ routinely referred claims to the federal WHD¹⁰⁴ so that Employment Standards’ scarce resources could be used to actively enforce the MWPCCL.¹⁰⁵

The 2007 mandate helped stabilize Employment Standards’ funding, however, DLS’ review of Employment Standards’ active enforcement of the MWPCCL from FY2007 to FY2012 found that Employment Standards’ and ES&C (its parent division) struggled with staffing issues. For example:

- In 2011, DLS stated that a shortfall in Employment Standards’ expenditures compared to its mandated funding in FY2007 and FY2009 was “likely due to vacant positions within the unit during those years” and that “the current funding and staffing levels – four full-time investigators and no clerical or administrative support – limit[ed] the scope and effectiveness of the unit’s enforcement abilities.”
- In 2012, DLS noted that, between FY2007 and FY2012, the ES&C division had five or six authorized investigator positions but routinely had vacancies; and, over a similar period, it had three managers in a four-year period.

In terms of enforcing the MWPCCL, in 2011 DLS reported that Employment Standards’ investigators responded to written complaints from employees for unpaid wages. According to DLS, investigators placed telephone calls and sent letters requesting documentation from employers because the MWPCCL does not authorize the Commissioner to conduct unannounced on-site record reviews. DLS reported the most common types of MWPCCL complaints were not receiving reimbursement for vacation, not receiving a last paycheck or other issues due to termination of employment.

¹⁰³ In its 2012 sunset review, DLS commented on compliance with state labor laws that did not have a federal counterpart. It observed, “[I]t has been and remains difficult to determine whether employers are complying with these laws. Aggrieved employees are not without options, however; many of the laws of Title 3 of the Labor and Employment Article explicitly authorize an employee to go to court, and employers are often explicitly prohibited from violating these laws. Regardless, from the State end, without a significant increase in funding and staff for the unit, enforcement will continue to be virtually nonexistent.” (Department of Legislative Services, Office of Policy Analysis, *Sunset Review: Evaluation of the Division of Labor and Industry and Associated Boards and Councils*, October 2012, 19); retrieved from http://dls.maryland.gov/pubs/prod/SunsetRevLab/LaborIndustry/2012-Sunset-Review_Evaluation-of-the-Division-of-Labor-and-Industry_October-31-2012_web-version.pdf

¹⁰⁴ According to DLS, in 2011 and 2012, 1,417 or 3% of ES&C’s 43,525 phone inquiries were wage and hour matters that the Employment Standards Service referred to the federal Wage Hour Division. See *Sunset Review*, 16.

¹⁰⁵ In 2011, Irene Lurie interviewed staff in 18 states to examine their practices for administering their wage hour laws. She cited Maryland as one of four states that allocated over 80% of its resources to enforcing the state’s wage payment law and comparatively few resources to minimum wage enforcement. Lurie found 85% of claims were for wage payment in Maryland; 90% of claims were for wage payment in Hawaii; 99% of claims were for wage payment or overtime in Montana; and 100% of claims were for wage payment in Texas, which did not enforce its minimum wage law. (Irene Lurie, “Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures and Outcomes,” *Employees’ Rights and Employment Policy Journal*, Vol. 15, No. 2 (2011): 420.)

DLS noted that investigators often resolved disputes informally and that existing penalties for wage payment violations were limited. DLS reported that after the administrative wage order in Chapter 151 of 2010 was established, Employment Standards' was processing 10 to 15 wage orders per week. In 60% of the cases, employers remitted owed wages shortly after they received the order.

In terms of Employment Standards' enforcement of the MWHL, in 2012, DLS reported that Employment Standards did not track the number of referrals or complaint outcomes resulting from federal DOL investigations on behalf of Maryland workers.

Employment Standards' Resources Since the Adoption of the Maryland Minimum Wage Act.

In FY2015, with the enactment of the Maryland Minimum Wage Act of 2014¹⁰⁶ and House Bill 579¹⁰⁷ granting the Commissioner the authority to enforce local minimum wage standards, funding was authorized to address expected increases in complaints and enforcement responsibilities. Specifically, Employment Standards received mid-year funding for six new positions, including three investigators, one clerk, an assistant attorney general and an administrator, to investigate complaints and enforce local minimum wage increases.

Employment Standards reports the added responsibility of enforcing local minimum wage standards has become a burden on the state. For example, Employment Standards states that it incurred charges for additional work hours and changes to materials because changes were made to county laws without communicating them to the state or because the counties' interpretation of their laws has been inconsistent.

In October 2017, a DLLR organizational chart submitted in response to an information request from the Joint Chairmen, showed two sections in Employment Standards with 16 authorized positions:¹⁰⁸

- The **Wage and Hour** section, with six authorized positions (a supervisor and five investigators) enforces underpayment of minimum wage and overtime complaints; and
- The **Employment Standards** section, with ten authorized positions (a supervisor, eight investigators and an administrative specialist), focuses on wage payment complaints related to unpaid, earned wages.

¹⁰⁶ House Bill 295 phased-in five increases to the state minimum wage resulting in a final rate of \$10.10 per hour effective July 1, 2018. It also authorized a youth wage rate for six months and a base wage rate of \$3.63 per hour for a tipped employee. It repealed exemptions for individuals 62 and older who work less than 25 hours a week and various other exemptions from overtime requirements. It mandated an appropriation beginning in 2016 for community service providers funded by the Department of Health and Mental Hygiene (DHMH) Developmental Disabilities Administration (DDA) and provided that a portion of funds may be used to address the impact of the State's minimum wage increase on the wages and benefits of direct support workers.

¹⁰⁷ House Bill 579 requires the Commissioner of Labor and Industry to enforce a local minimum wage law. It provides that the Commissioner may, on his own initiative or on receipt of a written complaint, investigate whether a local minimum wage law has been violated under the same powers and duties as the State's Wage and Hour Law.

¹⁰⁸ In 2016, DLLR reported the Wage and Hour Unit had 11 full-time staff, including three office staff and eight investigators. The office staff included a Program Manager (for ES&C), a Program Administrator and an Administrative Assistant. In 2017, the organizational chart depicted a Program Manager (for ES&C) and for ESS, a Program Administrator, an Administrative Assistant, a Wage & Hour Supervisor and an Employment Standards Supervisor.

In 2017, there were eight investigators in Employment Standards. Three were assigned to the Wage & Hour section and, five were assigned to the Employment Standards section. This left two investigator vacancies for minimum wage complaints and four vacancies for wage payment complaints. In 2018, Employment Standards reports that staffing vacancies continue to be an issue because salaries are not conducive to the requirements of their positions.

3. Employment Standards' Information Campaigns and Capacity Building

Prior to FY2016, DLI conducted one or two outreach events per year for the Employment Standards, the Living Wage and the Worker Classification Protection programs. Since then, DLI has stepped up its outreach efforts, conducting nine events in FY2016 (including two in Montgomery County) and 33 events in FY2017 (including events in Gaithersburg, Wheaton and Germantown).¹⁰⁹

Employment Standards has written and posted on its website page *The Maryland Guide to Wage Payment and Employment Standards*, a booklet that serves as a general reference source on wages and employment in Maryland. It explains key aspects of Maryland employment law and provides contact information for wage and hour offices in neighboring states since claims must be brought in the state where the work is performed.¹¹⁰

Employment Standards also responds to email and phone call inquiries related to all of the employment laws it enforces and serves as a general clearinghouse for information. In FY2017, it responded to 40,056 inquiries. Employment Standards currently has three Spanish speaking investigators. A lack of bi-lingual investigators is an ongoing concern, particularly for the WCPU.

4. Employment Standards' Monitoring Practices to Detect Non-Compliance

ES&C uses the same set of monitoring practices for detecting non-compliance with the MWHL and the MWPCCL. ES&C aligns its practices for detecting non-compliance and its practices for tracking complaints with state laws and its organizational structure. ES&C reports there are three categories of wage complaints that are handled by the Wage & Hour and Employment Standards sections in Employment Standards, plus a fourth category of misclassification complaints that are handled by the WCPU. (See part six of this chapter for a discussion of the Worker Classification Protection Unit.) The three categories of wage complaints that Employment Standards tracks are:

- Wage and Hour complaints regarding minimum wage or overtime rates of pay;
- Wage Payment complaints regarding unpaid earned wages; and
- Combined Complaints, which are complaints containing elements of both wage and hour and wage payment issues.

Mix of Targeted Versus Complaint Driven Inspections. Employment Standards relies primarily on written complaints to promote compliance and enforce the MWHL and the MWPCCL; however, it will occasionally conduct random compliance reviews with employers. As of 2018, the MWHL authorizes on-site reviews of employer records but the MWPCCL does not.¹¹¹

¹⁰⁹ Department of Labor, Licensing and Regulation (DLLR), Response to The Joint Chairmen's Report (JCR), October 1, 2017; retrieved from http://dlslibrary.state.md.us/publications/JCR/2017/2017_114-115.pdf.

¹¹⁰ *The Maryland Guide to Wage Payment and Employment Standards*, Maryland Department of Labor, Licensing and Regulation; retrieved from <https://www.dllr.state.md.us/labor/wagepay/>.

¹¹¹ MHWL 3-425

Practices for Collecting Information about a Case. The Commissioner is authorized to ascertain wages and negotiate with employers to obtain evidence of a wage and hour violation. As explained below, if either Employment Standards' Wage & Hour section or its Employment Standards section receives a written complaint, it will conduct an investigation to recover any wages due to an employee and also counsel complainants about rights that may be available under other federal laws.

Due to its limited resources, Employment Standards accepts written claims by mail only. Since 2012, it screens complaints for completeness and jurisdiction before they are logged in and returns those it does not pursue. In FY2017, Employment Standards reported 1,051 written complaints were filed; and, it did not investigate 292 (28%) due to incomplete information, a lack of jurisdiction or because the parties resolved the matter on their own.

5. Employment Standards' Wage Claim Data (Underpayment of Wages, Unpaid Wages and Combined)

Table 4-2 displays Employment Standards' activity data for wage claims with and without wages recovered and the investigations conducted. Of note,

- In CY2017, there were 736 completed claims of all types, (i.e., unpaid and underpayment of wages). This was below the nine-year average of 1,048.;
- In CY2017, wages were recovered for 435 claims or 59% of completed claims. On average, over the nine-year period, wages were recovered for 47% of completed claims.
- After investigations (of completed claims) reached a low point in CY2013 (at 682), they peaked at 1,048 in CY2015 and fell slightly to 900 in CY2016.

Table 4-2. Completed Claims, Wages Recovered and Investigations (All Types), 2009 to 2017

	CY2009	CY2010	CY2011	CY2012	CY2013	CY2014	CY2015	CY2016	CY2017	Avg.
Completed Wage Claim Forms	1,545	1,383	1,172	849	907	1,061	967	812	736	1,048
Claims with-wages recovered	469	661	581	343	339	552	503	503	435	487
Wage recovery claims as a percentage of all claims	30%	48%	50%	40%	37%	52%	52%	62%	59%	47%
Investigations	1,430	1,780	1,235	694	682	895	1,048	900	NA	1,083

Source: OLO, DLI Annual Reports & DLLR's Oct 2016 and Oct. 2017 responses to Joint Chairmen's Reports

Table 4-3 displays data for the annual amounts of wages recovered between 2009 and 2016. The average wages recovered per claim varied from roughly \$1,200 per claim in 2010 and 2016 to nearly \$1,600 per claim in 2011 and 2014.

Table 4-3. Wages Recovered (All Types), 2009-2016

	CY2009	CY2010	CY2011	CY2012	CY2013	CY2014	CY2015	CY2016
Wages recovered	\$651,328	\$787,856	\$913,820	\$424,851	\$519,879	\$880,332	\$740,541	\$603,915
Avg. wage recovery per claim	\$1,389	\$1,192	\$1,573	\$1,239	\$1,534	\$1,595	\$1,472	\$1,201

Source: OLO and DLI Annual Reports¹¹²

Minimum Wage and Overtime Data (Underpayment of Wages). Table 4-4 displays fiscal year data for Wage and Hour complaints. These data are a subset of the wage claims in Table 4-2 and 4-3 that address underpayment of minimum wage or overtime. The data show Wage and Hour complaints received grew from 111 in FY2014 to 162 in FY2016, before falling in FY17. The monies collected spiked in FY2015, before falling to about \$58,000 in FY2016. The average amount recovered per complainant ranged from a high of \$782 in FY2015 to \$357 in FY2016. Montgomery County's percentage of complaints grew from under 3% to over 7% in FY2015 and FY2016.

Table 4-4. Employment Standards' Minimum Wage and Overtime Complaint Data, FY2014 to FY2017

	FY2014	FY2015	FY2016	FY2017
# of Wage and Hour Complaints Received ¹¹³	111	125	162	89
Monies Collected	\$63,531	\$97,755	\$57,825	NA
Average \$ collected per complaint received	\$572	\$782	\$357	NA
Montgomery County Wage and Hour Complainants	3	9	12	NA

Source: OLO & DLLR.

In 2016, DLLR stated that Employment Standards collects some demographic information, but this data is not available for every complaint. A year later, DLLR stated that it has plans to purchase software to improve its data collection efforts. With this software improvement, DLLR anticipates it will add fields to track complaint information by county and worksite location.

¹¹²Maryland Department of Labor, Licensing and Regulation, Division of Labor and Industry, Annual Reports retrieved from Maryland Legislative Library and Information Services, Mandated Reports Search; http://mlsd.ent.sirsi.net/client/en_US/catalogs/

¹¹³ Source is Department of Labor, Licensing and Regulation (DLLR), Response pursuant to the 2016 Joint Chairmen's Report (JCR), October 13, 2016; retrieved from http://dlslibrary.state.md.us/publications/JCR/2016/2016_94b.pdf and DLLR Response pursuant to the 2017 Joint Chairmen's Report, October 1, 2017.

Reliance on Informal or Formal Methods to Resolve Complaints. If the Commissioner determines specified labor laws have been violated, he must try to resolve the issue informally by mediation or ask the Attorney General to bring action on behalf of an applicant or employee. In an October 2017 report, Employment Standards stated that if a complaint reveals an employer is in violation, an employer may voluntarily comply or a “Demand for Payment” letter is issued to resolve the complaint. Employment Standards reported that most cases are resolved at this level.

In FY2017, Employment Standards recovered \$515,819 in wages for 441 claims, for an average recovery of about \$1,169 per claim. On average, it took 46 calendar days to process a complaint from intake to closure. DLLR also reported that in FY2017, enforcement action was necessary to resolve 146 wage and hour and wage payment complaints against companies.

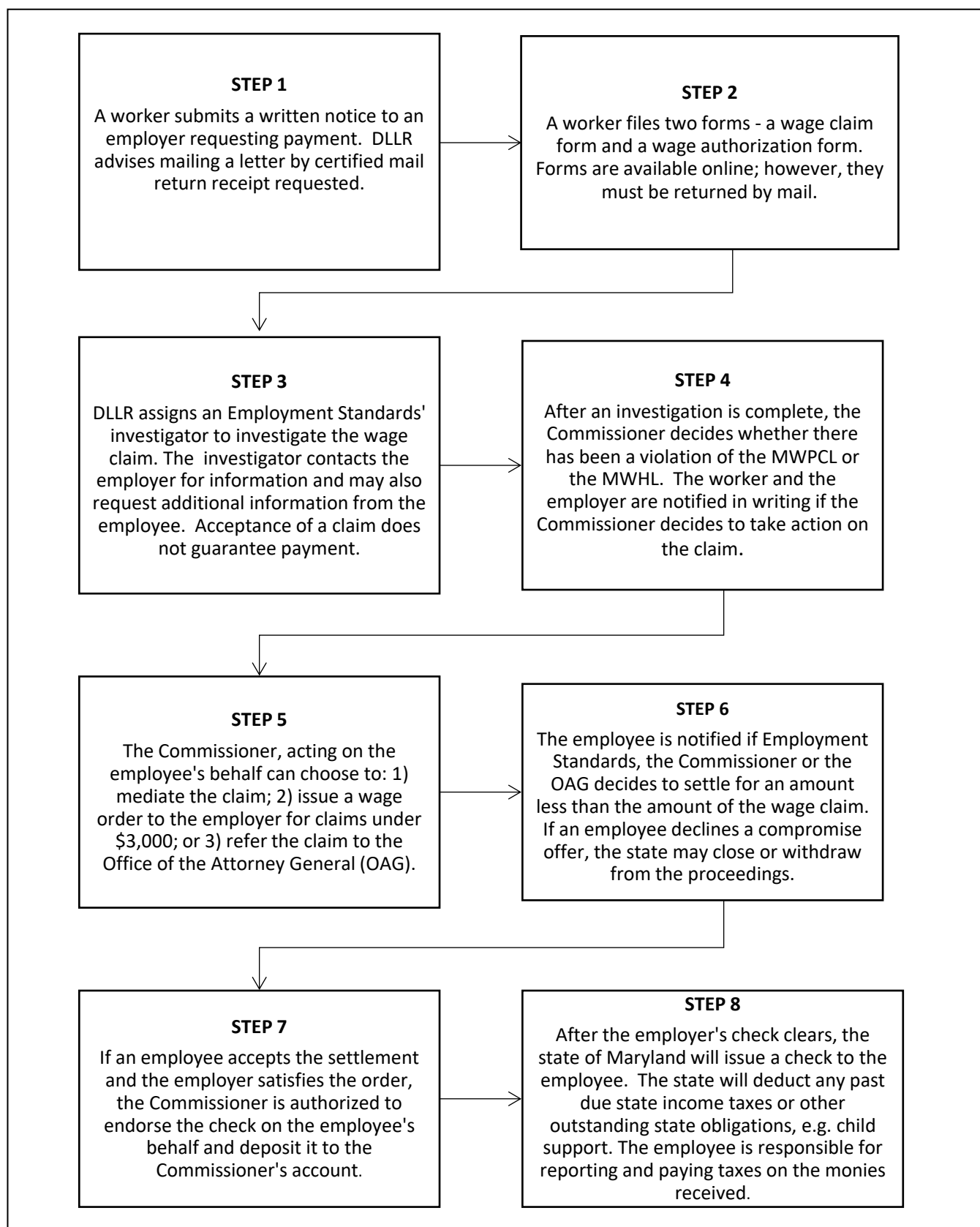
6. Options to Pursue Legal Remedies

Under the MWPCCL, a worker who wishes to pursue a claim for unpaid wages has the option to file a claim with Employment Standards, to file a private lawsuit or to file criminal charges.

Filing a wage hour claim with Employment Standards in DLLR. OLO prepared Exhibit 4-1 on the next page and the Notes on the following page to diagram and explain the steps in the Employment Standards claim process. The information Employment Standards provides on its website about the claims process acknowledges key features that may be especially significant for vulnerable workers:

- The DLLR wage claim process expects the active involvement of a worker at the beginning of a process. As the Notes for Steps 1 and 2 explain, DLLR requires an employee to have asked an employer for wages and been denied. DLLR encourages employees to send a demand letter to their employer by certified mail and provide DLLR the receipt for documentation. A worker can download an online form, but DLLR only accepts completed forms through the mail, stating explicitly that it does not accept faxes or email.
- The DLLR wage claim process has the potential to expose a worker to a countersuit from an employer. In its information about the process, DLLR discloses that if this happens the worker is responsible for obtaining private legal representation.
- The DLLR wage claim process authorizes Employment Standards to reach settlement agreements to resolve claims informally. DLLR also has the authority to close a case if a worker opts not to accept the terms of the settlement.
- Since 2010, DLLR has had expanded authority to recover small wage claims of \$3,000 or less. DLS’ 2012 sunset review found preliminary evidence that wage orders had a modest effect on ESS’ backlog of cases. In FY2013, out of 887 claims, Employment Standards filed 89 wage orders; in FY2017, out of 1,051 claims, Employment Standards filed 146 wage orders. (See Step 5 in the Notes for more details about the wage order process.)

Exhibit 4-1. Steps in Employment Standards' Wage Claim Process



Notes for the Department of Labor, Licensing and Regulation (DLLR) Claim Process

STEP 1. For quickest results, DLLR suggests that the employee send a CERTIFIED letter RETURN RECEIPT REQUESTED to the employer stating the amount of money owed, identifying the hours and days or commissions this money represents, and requesting payment by a specific deadline (such as 10 days from receipt of the certified letter). Once mailed, the employee will receive a green receipt indicating that his/her letter was received by the employer. It will be signed by the employer and will serve as proof at a later date that the employer did, in fact, receive the employee's letter and will help DLLR collect the claim.

STEP 2. Wage claim form: DLLR does not accept faxed or emailed forms. Workers without online access must call DLLR to request that a form be mailed out. The wage claim asks the worker for personal information, for information about his or her employer including the type of business, their supervisor's name, the rate of pay and hours worked. It asks a series of eligibility questions, e.g. if the individual is employed by a federal, state or local government. (The MWHL covers state and local government employees; but the MWPCCL does not. Neither the MWHL nor the MWPCCL cover federal government workers.) The form provides a menu of 16 wage types, e.g. hourly wages, salary, overtime, etc, and asks the claimant to specify the types of wages they are claiming. The form also asks whether an employee has retained an attorney previously. The wage claim form must be signed under oath.

STEP 2. Wage authorization form: By signing DLLR's wage authorization form, the employee agrees to cooperate with the investigation. This includes promptly returning phone calls and email messages; participating in any settlement proceedings, keeping DLLR informed of any contact information changes; and informing DLLR if the employee decides to retain a private attorney.

STEP 3. If an employer decides to countersue, the employee will be responsible for finding legal representation and for the legal fees associated with his or her representation in court. The Maryland Office of the Attorney General is not required to take the case and may or may not file a lawsuit.

STEP 4. MWPCCL is the Maryland Wage Payment Collection Law and MWHL is the Maryland Wage Hour Law. Simply put, the Maryland Wage Hour Law addresses the right to be paid and the Maryland Wage Payment Collection Law addresses how you must be paid. The MWHL parallels the Federal Labor Standards Act (FLSA). Before 2014, ESS referred MWHL complaints to the U.S. Department of Labor for enforcement because the federal and state wage standards were the same. ESS began staffing up to investigate and enforce the MWHL on January 1, 2015 after state and county minimum wage standards were raised above the federal wage standard.

STEP 5. The Commissioner's authority to issue an administrative wage order instead of referring a matter to the OAG was established in 2010 (HB404). According to the Fiscal Policy Note, it was justified in part because it would reduce the OAG's workload and improve the commissioner's ability to investigate, enforce and recover small wage claims. An administrative wage order may include a 5% interest charge assessed from the date the wages should have been paid. An employer who receives a wage order may request a hearing before the Office of Administrative Hearings to dispute the order to pay. If no hearing is requested the order becomes final. If an employer does not file a petition for review by circuit court within 30 days after the final order is issued, the Commissioner may proceed to District Court to enforce payment.

STEP 6. Settlement of a claim may not include any damages that a court may award under the Maryland Wage Payment Collection Law.

STEP 7. In 2013, an advocate in favor of a bill to create an unpaid wage lien stated that DLI received 887 wage payment claims in 2012. Most were resolved informally but the Commissioner issued 89 orders for small claims. Of this total, nearly 90% (79) were referred to the state's Central Collection Unit due to nonpayment.

Source: OLO based on DLLR Wage Claim Form retrieved from <https://www.dllr.state.md.us/labor/wages/essclaimform.shtml>

Filing a private lawsuit. An employee may file a lawsuit in court to recover unpaid wages. Wage claims for \$5,000 or less can be filed in District Court. Claims between \$5,000 and \$30,000 can be heard in District Court or Circuit Court and claims for over \$30,000 must be filed in Circuit Court.

Collective Actions. Collective actions under state wage hour laws may be more advantageous than a similar action under the FLSA because claims may be higher and/or class sizes could be larger. A 2006 survey to assess which states permitted “opt-out” class actions sorted states into four categories. States in the most protective category clearly permitted class actions to enforce minimum wage and overtime laws while states in the least protective category prohibited class actions to enforce state wage laws. Maryland was ranked in the second category where class actions were likely permitted but where there were few reported decisions certifying these types of lawsuits.¹¹⁴

The Maryland Wage Lien Law. Since 2013, under the Maryland Wage Lien Law, employees have been able to place a lien on their employers’ property when they have not been paid for their work. Advocates of this mechanism suggest that a wage lien can offer a quicker and more accessible option for some workers to recover unpaid wages. It could work particularly well for low-wage workers with small claims that are unlikely to be picked up by a private lawyer. It could also protect workers from employers who attempt to transfer or hide their assets. A 2011 report by the National Employment Law Project (NELP) identified six states with wage lien laws.¹¹⁵ Much like a mechanic’s lien, the Wage Lien Law entitles employees to place a lien on employers’ personal or real property. It can be used on its own or in conjunction with remedies available through the FLSA, the MWHL or the MWPCCL. Exhibit 4-2 on the next page diagrams the steps in the wage lien process.

7. Sanctions, Penalties and Collections

Advocates of stronger wage enforcement laws argue that strong penalties make it more worthwhile to file a complaint and may also deter employer violations. For example, NELP states that the best state laws require treble damages in all wage claims.¹¹⁶ NELP further explains that some state laws automatically award treble damages while others impose additional conditions such as requiring proof that an employer’s violation was willful.

In Maryland, if a court finds that wages were withheld in violation of the MWPCCL and not as a result of a bona fide dispute, the court may award damages of up to three times the amount of the unpaid wages plus attorney’s fees. If criminal charges are filed, an individual who is found to have violated the State’s Wage and Hour Law is guilty of a misdemeanor and on conviction subject to a fine of up to \$1,000. Finally, The Public Justice Center’s Workplace Justice Project has compiled an online guide of tools and strategies to educate advocates and others about the collection process.¹¹⁷

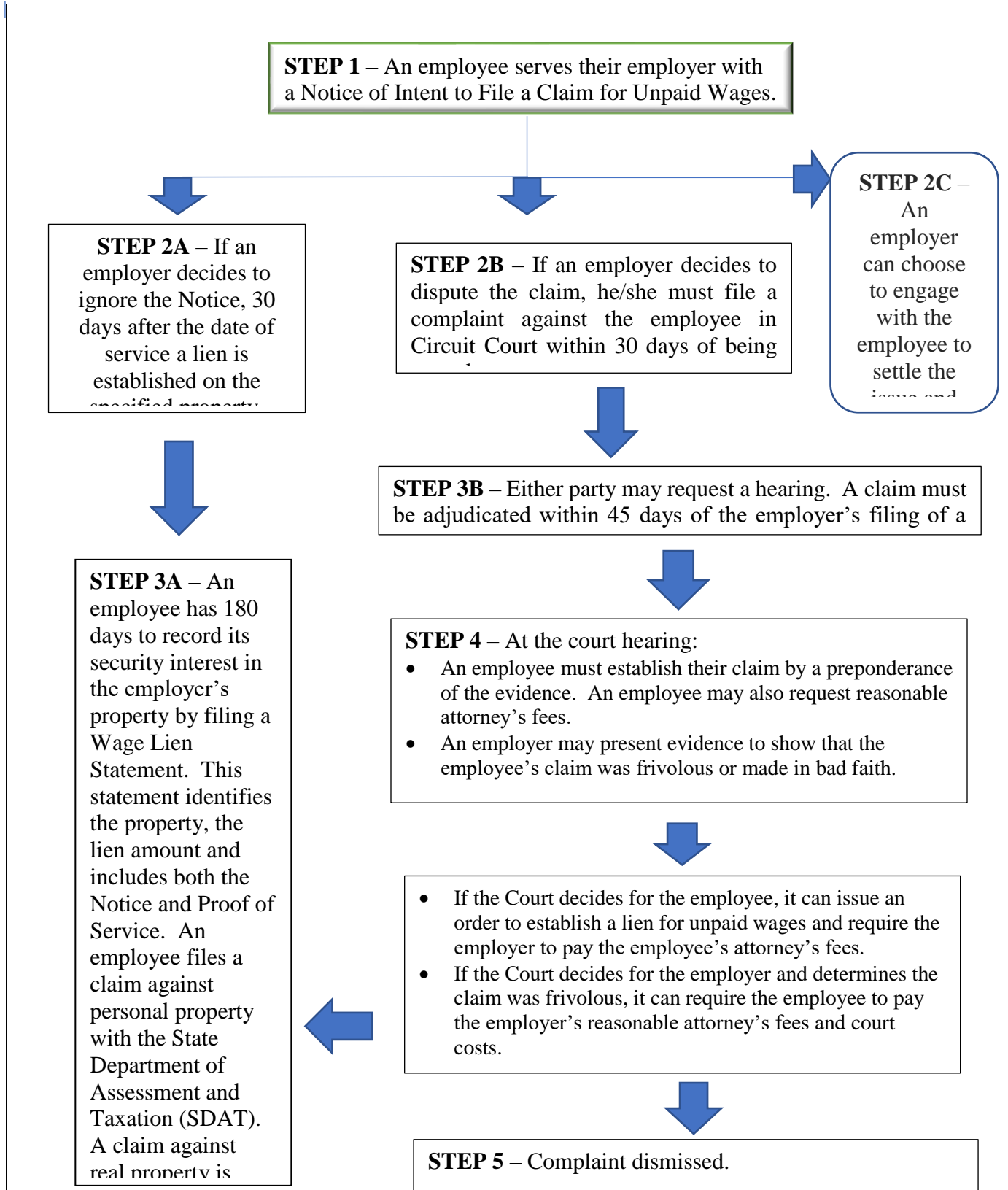
¹¹⁴ McGillivray, “Opt-out Wage and Hour Class Actions Under State Law,” Chart B, 348.

¹¹⁵ “Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft,” *National Employment Law Project*, January 2011, 113; retrieved from <https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf>. The six states are:

¹¹⁶ “Winning Wage Justice,” 21.

¹¹⁷ Jonathan Harris and Molly Theobald, “Collecting Unpaid Wages and Enforcing Judgments in Maryland: A Guide to Judgment Enforcement, Asset Investigation and Employer Accountability,” *Public Justice Center* (2012): 1-83; http://www.publicjustice.org/uploads/file/pdf/MD_Wage_Collection_Judgment_Enforcement_Guide_PJC_FINAL.pdf.

Exhibit 4-2. Steps in Maryland's Wage Lien Process



8. ES&C's Worker Classification Protection Unit (WCPU)

As noted in Chapter II, misclassification refers to the practice of an employer improperly classifying an employee as an independent contractor to avoid paying employment taxes. Concerns about misclassification stem from DOL research in 2000 that found 10% to 30% of the employers they audited misclassified workers. A 2009 Maryland study put that estimate at 20%.

In 2009, Maryland passed the Workplace Fraud Act and Governor O'Malley established a multi-agency Joint Enforcement Task Force.¹¹⁸ The Act establishes the presumption of an employer-employee relationship, subject to four exemptions, and puts the burden on an employer to rebut the existence of an employment relationship. The Act gives the Commissioner of DLI statutory authority to investigate compliance matters in the construction and landscaping industries. Employers found to have intentionally misclassified an employee have 45 days to pay restitution to the employee and come into compliance with all labor laws. The Commissioner has the authority to issue a citation with a fine of up to \$1,000 per employee for a first offense, up to \$5,000 per employee for a second offense and up to \$20,000 per employee for a third and subsequent offenses.

WCPU investigators initially acted on complaints from workers and business partners; however, following changes to the legislation in 2012, WCPU investigators now rely on site visits, field interviews with employers and workers and spot checks of ongoing projects. The Unit also conducts regular outreach events. The majority of complaints are submitted by third parties. The Unit received 77 complaints in 2014, 104 in 2015 and 97 in 2016.

If violations are found, investigators issue citations and forward the information to the Joint Enforcement Task Force. This approach allows misclassified workers to benefit from protections across multiple laws, such as anti-retaliation and anti-discrimination laws, unemployment insurance, workers compensation and workplace safe and health laws. Funding for WCPU, which has a staff of nine, comes from the Workers Compensation Commission.

B. Highlights from Other States

A growing body of research recognizes the significance of states' regulatory workplace protection systems and the variety of enforcement structures and practices. This section offers a brief review of states' practices, based on research by Irene Lurie and Jacob Meyer and Robert Greenleaf.

1. Organizational Structure and Lead Enforcement Responsibility

Among the 46 states that actively enforce wage hour laws, all but one locate the responsibility in their labor department.¹¹⁹ The exception is Massachusetts' Fair Labor Division in the Attorney General's Office which has handled wage hour enforcement for 25 years.¹²⁰ The Division has express statutory authority to enforce laws and regulations regarding prevailing wage, minimum wage, payment of wages, overtime, retaliation, misclassifying workers, tip pooling and child labor.

¹¹⁸ The Joint Enforcement Task Force membership includes: the Secretary of Labor, Licensing and Regulation; the Attorney General; the Comptroller; the Chair of the Worker's Compensation Commission; the Insurance Commissioner; the Commissioner of Labor and Industry; and the Assistant Secretary for Unemployment Insurance.

¹¹⁹ Meyer and Greenleaf, "Enforcement of State Wage and Hour Laws," 13. Five states (Alabama, Florida, Georgia, Louisiana and Mississippi) reported they do not enforce state wage hour laws and did not complete the survey.

¹²⁰ Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 9. The responsibility was moved in 1993.

It has civil and criminal jurisdiction and the authority to investigate work sites, issue civil citations and bring criminal charges.

In other states, where labor departments are the lead enforcement agency, cases are commonly referred to the attorney general for enforcement. However, Lurie's 2010 study found that few claims progressed to the point where the attorney general's office took an employer to court. A June 2018 Bloomberg article suggests this trend may be changing in California and New York.¹²¹

2. Information Campaigns and Capacity Building

Meyer and Greenleaf's research surveyed states about their education and outreach methods such as the use of a website, outreach to churches, employee or advocacy groups, public speaking engagements, telephone hotlines, required posting of notices in the workplace and distribution of education and public relation materials. They found all states rely on a website and nearly all states undertake public outreach. The most common outreach methods are public speaking events, distribution of education and public relations materials and required posting of notices. Most states have resources for non-English speakers including written materials in other languages and access to bilingual staff or interpreters.

3. States' Monitoring Practices to Detect Non-Compliance

Resource Trends and Staffing Levels. State resources are an important supplement to those at the federal level. In 2010, a 43-state survey reported there were 659 state investigators working on wage hour enforcement, among other issues.¹²² In 2011, based on responses from 37 states, Meyer and Greenleaf's survey reported hearing from many respondents about staffing and/or budget shortages. When they extrapolated data from their respondents to all 50 states and compared it to federal levels, they characterized states' staffing levels as "a significant but insufficient dedication of resources."¹²³

Staffing levels and configurations vary widely by state. In 2010, of the 659 state level staff, 112 were in California and 95 were in New York.¹²⁴ These two states were also more likely than other states to have specialized units, including field offices. California's field office had a unit assigned to an interagency partnership that targeted types of employers with a history of violations related to tax withholding, workers compensation, unemployment insurance and health and safety laws.

Meyer and Greenleaf cautioned that states' staffing numbers could be misleading because they may have counted unfilled positions, or the numbers may be imprecise because some states' investigators enforce multiple laws. Not only were states with smaller staff complements less likely to be specialized, they were also more likely to investigate many different types of laws. On the other hand, in Texas, all staff time was spent on wage payment because Texas does not enforce its state minimum wage law and it does not have a state overtime law.

¹²¹ Opher, Chris, "Prosecutors Treating 'Wage Theft' as a Crime in These States," *Bloomberg*, June 26, 2018; retrieved from <https://www.bna.com/prosecutors-treating-wage-n73014476875/>. Accessed September 19, 2018.

¹²² Zach Schiller and Sarah DeCarlo, "Investigating Wage Theft: A Survey of the States 2010," *Policy Matters Ohio* (November 2010): 4.

¹²³ Meyer and Greenleaf, "Enforcement of State Wage and Hour Laws," 7.

¹²⁴ Schiller and DeCarlo, "Investigating Wage Theft," 8-9. California's total includes 23 staff who investigate prevailing wage. New York's total does not.

Meyer and Greenleaf's review of states' workforce statistics from 2005 to 2009 reported most states saw large increases in the number of low-wage workers in 2008 that coincided with cuts or freezes to resources for wage and hour enforcement. They observed that if an increase in low-wage workers generates a corresponding increase in wage hour violations, then states' enforcement efforts must stretch even further if demand grows as resources decline.

Mix of Targeted Versus Complaint-Driven Inspections. Meyer and Greenleaf found that most enforcement across the country was complaint-driven, likely due to the low upfront cost of this approach.¹²⁵ Lurie also found states generally took a more reactive approach to enforcing the law compared to the federal government.

- **Complaint-Driven Systems.** Most agencies conducted a preliminary review of incoming complaints and then use a first-come, first-served process for establishing priorities among complaints. Some agencies gave priority to child labor cases and/or to cases that were coming up against the statute of limitations. Lurie's study identified three state enforcement agencies that lacked the authority to initiate an investigation. Nine states, including Maryland, had the authority to initiate investigations, but relied on complaint systems.¹²⁶
- **Targeted Investigations.** Meyer and Greenleaf's survey results showed only five states - Kansas, Kentucky, Maine, New York and Massachusetts - devoted 5% or more of their resources to procedures other than complaint-based enforcement. Among states that had some proactive enforcement, Meyer and Greenleaf reported that states had different practices for how they targeted their efforts. Some directed their resources at particular industries while others targeted particular employers or types of laws. Their examples cited Arizona's focus on mom and pop businesses not covered by the FLSA, Alaska's focus on prevailing wage enforcement in the construction industry and Connecticut's focus on worker misclassification in the construction and restaurant industries.¹²⁷

Lurie identified four states - California, Massachusetts, New Jersey and New York – that administered a mix of targeted and complaint-driven investigations. For example, in California, field inspectors conducted surveillance inspections and sweeps and partnered with worker centers to uncover violations, educate workers and help with filing of claims.

Practices for Collecting Information about a Case. Lurie's review examined how states collected case information from an employer. She found three states that conducted initial site visits,¹²⁸ one state that hosted visits from employers and employees; and eight states (including Maryland) where investigators relied almost exclusively on telephone and mail, with occasional field visits.¹²⁹

States' Reliance on Informal or Formal Methods to Resolve Complaints. Meyer and Greenleaf's survey found that most states relied on a combination of techniques to resolve complaints. These included informal mediation between the employer and employee, administrative hearings, civil

¹²⁵ Meyer and Greenleaf, "Enforcement of State Wage and Hour Laws," 26, Table 6.

¹²⁶ Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 422. The three states that lack the authority to initiate an investigation were Michigan, Oklahoma and Texas.

¹²⁷ Meyer and Greenleaf, "Enforcement of State Wage and Hour Laws," 27.

¹²⁸ Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 425. The states were Connecticut, New Jersey and New York.

¹²⁹ Lurie, "Enforcement of State Minimum Wage and Overtime Laws," 425-426.

lawsuits by labor agencies or the attorney general and private rights of action. Lurie found most states resolved complaints informally during the investigation process. Two exceptions to this were New York, which resolved less than a quarter of its cases informally, and Massachusetts which also resolved a small share of cases informally.¹³⁰

4. Options to Pursue Legal Remedies

States' Administrative Authority to Resolve Complaints. When an informal process fails, a state's ability to resolve a case administratively depends on the type of administrative authority the law gives an agency. Lurie identified eight states— including Maryland – where the lead enforcement agency lacked independent administrative authority to recover unpaid wages.¹³¹

- In six states, including Maryland, the Labor Commissioner must ask the attorney general to take the case to court to obtain a final order. This approach requires the agency to send a demand letter to the employer that informs them of the amount owed. If the employer does not pay, DLLR refers the case to the attorney general which files suit on behalf of the agency.
- In Nebraska (the 7th state) the process was similar, except that the labor agency also had the option to refer a case to a county prosecutor. Lurie reports this was faster and done more often. In Alaska (the 8th state), the labor agency generally did not send the case to the attorney general because it could also file the case in small claims court.
- Three of the eight states gave employers an opportunity for an informal hearing or a conference conducted by the agency.

In five of eight states, agencies reported referring less than 10% of their cases to the attorney general.

States' Criminal Prosecutions. Both Meyer and Greenleaf and Lurie reported that legal action by states against violators is rare. In response to one of Meyer and Greenleaf's open-ended questions about enforcement, Connecticut, New York and Massachusetts were the only states that mentioned the possibility of criminal prosecution; but, California, Utah, New York, Ohio and Oregon mentioned criminal prosecution in their responses to a different question. Meyer and Greenleaf noted the data suggests only California appears to make regular use of criminal procedures.¹³²

Private Rights of Action. According to Meyer and Greenleaf, all but four states provide a private right of action for the enforcement of one or more wage hour laws, including two states - Louisiana and South Carolina – that do not have state minimum wage laws.¹³³

The various state surveys suggest states have different ways of incorporating a private right of action into the overall enforcement system. For example, in Georgia and Texas, private lawsuits are the only enforcement mechanism. In Indiana and South Dakota, supplementary state resources exist for employer notification when a complaint is received but otherwise these states appear to rely

¹³⁰ Meyer and Greenleaf found Indiana appears to rely exclusively on voluntary compliance and Maine and Missouri make referrals to employees for a private civil action if they are unable to convince an employer to pay.

¹³¹ Note that Lurie's research pre-dates the 2010 law that gave Maryland's Labor Commissioner the authority to issue wage orders for claims of \$3,000 or less.

¹³² Meyer and Greenleaf, "Enforcement of State Wage and Hour Laws," 24.

¹³³ Meyer and Greenleaf "Enforcement of State Wage and Hour Laws," 9.

exclusively on voluntary compliance or referral to the employee for private action. Conversely, in California and Massachusetts, cases must first be submitted to the lead agency which then decides whether to investigate the case or release it for private action.

Meyer and Greenleaf's assessment of private enforcement lists numerous benefits, including that it is self-funded, that it puts the initiative for enforcement with employees and that it may be more efficient and lead to speedier resolution of claims. They recognize it may offer fewer benefits to low-wage employees because potential recovery amounts are likely to fall below the threshold that would attract an attorney to take these cases. Meyer and Greenleaf observe that private enforcement lacks transparency, public shaming and the potential for criminal penalties. As such, they think it may offer less of a deterrent than public enforcement. Finally, because few cases are resolved through judgment on the merits and other cases have confidential settlements, they note that it can be challenging to measure the results of private enforcement.

Collective Actions. A 2006 review by McGillivray of the permissibility of class action lawsuits under state laws found:

- 15 states were in the top category, Class Actions Viable;
- 12 states (including Maryland) were in the second category, Class Actions Probably Viable;
- 10 states were in the third category, Class Actions Unlikely and
- 9 states were in the fourth category, Class Actions Not Possible Under Statute.¹³⁴

5. Sanctions, Penalties and Collections

A 2016 study by Daniel Galvin, a professor at Northwestern University, coded states' wage and hour laws, developed estimates of states' minimum wage violations based on census data and ran statistical tests to assess states' regulations and penalty regimes. Galvin found stronger penalty regimes can be an effective deterrent, but they must have an effective enforcement system too.¹³⁵

States generally rely on investigators to attempt collection from employers, with an option of a referral to the attorney general if payment is not received. Meyer and Greenleaf reported some states, including Texas, California, New York, Minnesota and North Dakota, have dedicated collection staff.

Meyer and Greenleaf found that a significant number of states could not provide data on the fines, wages and penalties that went uncollected by the state or an employee. They argue that this is a significant shortcoming if collection is meant to achieve deterrence or if the system is meant to achieve justice and vindicate a worker's right to expect protection by making them whole.¹³⁶

A POLITICO survey of 15 states with comparable data found, on average, 51% of the money assessed as a result of violations was recovered, but rates varied widely by state. Montana had a 24% recovery rate compared to a 54% recovery rate for Texas and a 75% recovery rate for Missouri.¹³⁷

¹³⁴ McGillivray, Chart B, p. 348.

¹³⁵ Daniel Galvin, "Deterring Wage Theft: Alt-Labor, State Politics and the Policy Determinants of Minimum Wage Compliance," *Perspectives on Politics*, Vol. 14, No. 2 (June 2016), 324-350.

¹³⁶ Meyer and Greenleaf, p. 37

¹³⁷ <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

V. COUNTY WORKPLACE PROTECTION LAWS AND PRACTICES

Since 2003, the County Council has enacted nine laws that establish or amend workplace protection standards found in federal and state employment laws. Examples include: higher minimum wage and leave standards, prohibitions against the use of criminal records in the hiring process for certain positions and prohibitions against employer retaliations if employees disclose wage information to other employees.

The laws assign the administration and enforcement of these laws to various County departments, including the Office of Consumer Protection, the Office of Human Rights, the Office of Procurement, and the State Department of Labor, Licensing and Regulation. (Table 5-10 at the end of this chapter summarizes these laws.) This chapter describes the County's implementation practices for the four laws that are the subject of this study. Given the Council's interest in compliance, this chapter describes the information various offices use to monitor employers' compliance and how offices respond when compliance is questioned.

A. The County's Wage Requirements ("Living Wage") Law

Living wage laws set wage and benefit standards for companies that do business with a local jurisdiction or a specific employer such as a university.¹³⁸ Like minimum wage laws, living wage laws are intended to improve the quality of jobs and raise the living standards of low-income workers. Unlike minimum wage laws, the coverage of living wage laws is more narrowly targeted. The City of Baltimore enacted the country's first living wage law in 1994. Since then, over 140 large and small cities have followed suit. The County Council enacted Bill 5-02, Montgomery County's Wage Requirements Law (WRL) or living wage law, on June 11, 2002; it was signed by the County Executive on June 20, 2002; and it took effect July 1, 2003.

1. Legal Provisions

Wage Rates. Under the WRL, after the Chief Administrative Officer (CAO) sets the annual wage requirement¹³⁹, vendors bidding on a subset of County service contracts must certify, as part of the bidding and contract process, that they will pay their employees' wages that meet the wage standard. In FY2004, the wage amount was set at \$10.50 per hour; in FY2019, the rate is \$14.75 per hour. Table 5-1 shows the yearly changes to the required wage rate.

Table 5-1. Wage Rates for Montgomery County's Wage Requirements Law, FY2004-FY2019

Fiscal Year	Rate /Hour	Fiscal Year	Rate /Hour	Fiscal Year	Rate /Hour	Fiscal Year	Rate /Hour
FY2004	\$10.50	FY2008	\$11.95	FY2012	\$13.20	FY2016	\$14.35
FY2005	\$10.75	FY2009	\$12.40	FY2013	\$13.65	FY2017	\$14.40
FY2006	\$11.15	FY2010	\$12.95	FY2014	\$13.95	FY2018	\$14.55
FY2007	\$11.60	FY2011	\$13.00	FY2015	\$14.15	FY2019	\$14.75

Source: OLO

¹³⁸ Based on a review of several living wage laws, Jared Bernstein concluded the use of the term "living wage" is a misnomer. A "living wage" implies the value of the wage standard is set high enough to provide for a recipient's basic living needs, but Bernstein found the basis for the wage amount in many ordinances is the U.S. federal poverty level for a specific family size. Thus, the standard many ordinances specify is not in fact a "living wage" but what researchers refer to as a "poverty wage." (Jared Bernstein, "The Living Wage Movement: What It Is, Why It Is and What's Known About Its Impact," in *Emerging Labor Market Institutions for the Twenty-First Century*, eds. Richard B. Freeman, Joni Hersch and Lawrence Mishel (National Bureau of Economic Research, 2004): 109.

¹³⁹ The CAO must adjust the rate each July 1 by the annual average increase, if any, in the Consumer Price Index for all urban consumers for the Washington-Baltimore metropolitan area.

Covered Businesses. The WRL covers professional and nonprofessional service contractors; however, it also establishes a series of exceptions to the wage requirement standard. Covered services include information technology contractors; certified public accountants (CPAs); legal services; trash collection; custodial services; landscaping services and bus cleaning services. The law does not cover construction contractors because they are covered under standards set in the County’s prevailing wage law.

Exceptions to Coverage. When the WRL was enacted it authorized exceptions to coverage that included: businesses with fewer than 10 employees; businesses with revenues of less than \$50,000 over a 12-month period; contract awards with public entities or nonprofits; noncompetitive contracts; emergency service contracts; contracts funded with grants and bridge contracts or cooperative procurement contracts. In 2014, the Council discontinued the exception for businesses with fewer than 10 employees; however, it retained the others – i.e., for vendors with contracts under \$50,000, for tax-exempt organizations and for bridge contracts.

In 2017, Procurement estimates that about 450 contractors are subject to the WRL.¹⁴⁰ Procurement does not collect data on the number of workers that a contractor employs; however, it estimates the WRL extends wage protections to roughly 6,000 workers. Table 5-2 shows six years of trend data regarding use of the law’s exemption provisions. There was a marked increase in the percentage of covered contracts between FY11 (28%) and FY12 (41%). Since then, the coverage rate has fluctuated between 40% and 44%. In FY16, 469 (56%) of the 831 contracts potentially subject to the law were exempt, leaving 362 contracts (or 44%) subject to the wage requirement.

Table 5-2. Wage Requirements Law: Exempt and Covered Contracts, FY2011 – FY2016

	Contracts potentially subject to the Wage Requirements Law	Exempt contracts		Covered contracts	
		#	%	#	%
FY2011	673	483	72%	190	28%
FY2012	615	361	59%	254	41%
FY2013	641	384	60%	257	40%
FY2014	413	244	59%	169	41%
FY2015	659	385	58%	274	42%
FY2016	831	469	56%	362	44%

Source: OLO and FY16 Annual Report for the Wage Requirements Law

¹⁴⁰ In 2017, a DataMontgomery dataset of Living Wage contracts listed 459 contracts, including 155 Department of Transportation contracts, 63 Department of Housing and Community Affairs’ contracts, 46 Department of General Services contracts, 44 Department of Health and Human Services’ contracts and 33 contracts each for the Departments of Environmental Protection and Technology Services.

The Council eliminated the exemption for vendors with fewer than 10 employees in 2014. Table 5-3 displays common reasons for exemptions since 2014. The data show low-value contracts (under \$50,000) routinely account for 70% of exemptions and contracts with nonprofit entities account for another 28% of exemptions.

Table 5-3. Contracts Exempt from Wage Requirements Law, by Reason, FY2014 – FY2016

	Total Exempt Contracts	Number of Contracts by Reason for Exemption				% of Exempt Contracts *	
		<i>Under \$50,000*</i>	<i>Non-profits</i>	<i>Public entity</i>	<i>CAO Waiver</i>	<i>Under \$50,000</i>	<i>Non-profits</i>
FY2014	244	172	68	3	1	70%	28%
FY2015	385	269	107	7	2	70%	28%
FY2016	469	329	129	8	3	70%	28%

Source: OLO

Adjustment Options for Covered Businesses. Two provisions in the original WRL authorized certain contractors to adjust either their wages or their bid prices in response to other factors in the bid. Specifically,

- The **Wage Reduction Requirement** allowed a covered employer to reduce its required hourly rate by an amount equal to or less than the per employee hourly cost of the employer’s share of the health insurance premium; and
- The **Non-Profits Comparison Price** allowed a non-profit contractor to opt to pay its covered employees the Wage Law specified hourly rate and not have the pricing implications of that additional amount count against its solicitation offer.

As explained on page 65, as of February 2016, Bill 43-15 eliminated the Wage Reduction Requirement as part of a set of changes enacted to simplify the Office of Procurement’s administration of the WRL.

Enforcement. The County’s current options for enforcing a vendor’s compliance with the WRL include remedies specified in the General Conditions of a contract or enforcement remedies specified in the WRL, that were put in place as part of Bill 43-15.

The General Conditions of a contract expressly require a contractor to comply with all applicable federal, State, and local laws, in general, and Procurement law and regulations in particular. Thus, any WRL violation would also constitute a contract breach and permit the County to seek legal and equitable remedies for that breach against the noncompliant contractor, including seeking damages, seeking injunctive relief, or terminating the contract for default.

The WRL requires the Director of Procurement to impose appropriate sanctions when a violation is found. Specifically, the Director may withhold from the contractor’s payment an amount sufficient to: 1) pay the wages owed for each employee; 2) satisfy a liability for liquidated damages; and 3) reimburse the County for the cost of the audit.¹⁴¹

¹⁴¹ “Audit of Wage Requirements Law Compliance CAMCO, LLC” (MCIA-16-2), Montgomery County, Maryland Office of the County Executive, Office of Internal Audit, November 16, 2015. Each contract, at General Conditions Attachment C specifies that the County may assess liquidated damages of 1% of the contract value, per day, for each violation of the WRL

Under the WRL, the contract must specify that an aggrieved employee, as a third-party beneficiary, may take civil action to enforce the payment of wages due under the WRL and recover any unpaid wages with interest, a reasonable attorney's fee, and damages for any retaliation for asserting a right under the WRL.

2. The Office of Procurement's Implementation and Enforcement Practices

The WRL requires the CAO to enforce the law; to perform random audits; to investigate any complaints and to file reports on various operation and compliance matters.¹⁴² The CAO delegates these responsibilities to the Office of Procurement.

The Director of Procurement views two phases to the Office's practices to implement and enforce the WRL: Phase One covers the ten-year period from 2003 to 2013 and Phase Two extends from 2013 to the present.

- In Phase One, Procurement's Office of Business Relations and Compliance (OBRC) relied on complaints, investigations and audits conducted by the Office of Internal Audit to carry out its enforcement responsibilities.
- In Phase Two, beginning in 2013, Procurement significantly changed its practices based on employee complaints brought against CAMCO, LLC a cleaning services vendor that had been awarded a contract in 2012 with the Montgomery County Department of Transportation (MCDOT).

Pre-CAMCO (Phase One) Compliance and Enforcement Practices. Procurement's administration of the WRL from 2003 to 2013 relied on employee complaints to monitor compliance. If Procurement determined a complaint merited further investigation, it relied on the Office of Internal Audit ("Internal Audit") to conduct a follow-up audit. In March 2014, as part of a Government Operations and Fiscal Policy Committee discussion about the enforcement of the WRL, the Department of General Services (DGS)¹⁴³ reported it had received 12 complaints since the law became effective in 2003. In response, it had conducted seven investigations and five audits.

Table 5-4 on the next page summarizes five of the investigations and Table 5-5 on the following page summarizes three of the audits.¹⁴⁴ Among these eight summaries:

- Seven reviews found issues of noncompliance;
- The reviews highlight varying levels of noncompliance, ranging from minor violations that were cured to serious violations that led to large amounts of back wages paid and/or contract terminations;
- The reviews show record keeping was also an issue;
- The independent audits' wage payment details were usually based on a sample of payroll records; and
- The audit costs ranged from roughly \$30,000 to \$50,000 per audit.

and resulting breach of the contract. These liquidated damages include the amount of any unpaid wages, with interest that results from the noncompliance.

¹⁴² Section 11B-33A. (i) Report, requires the CAO to report annually to the Council and Executive on the operation of and compliance with this Section. In addition, the report filed under Section 11B-61(a) each year must compute the number of contracts and subcontracts with minority owned businesses that are subject to the requirements of this Section, and how that number has changed since the year before those requirements took effect. (2002 L.M.C., ch. 17,'1)

¹⁴³ Until March 2015, the Division of Business Relations and Compliance (DBRC) in the Office of Procurement (Procurement) was in the Department of General Services (DGS). Following a reorganization, DBRC became part of a newly established Office of Procurement in the Executive Branch. When Procurement was in DGS, it had one staff that managed the WRL.

¹⁴⁴ A payroll investigation of Ecology conducted as a result of Potomac Disposal's strike found the firm in compliance. A second investigation was ongoing. See Table 5-6 for details of the audits of CAMCO, LLC and Potomac Disposal.

Table 5-4. Summaries of OBRC's Wage Requirements Law Investigations, Oct. 2007-Feb. 2014

Wage Requirements Law Investigations (7)	Outcome
<p>Professional Hispanic Contractors (PHC) – On October 10, 2007, the County requested payroll records from PHC. A review of these records showed some minor noncompliance with the County's Living Wage law. Consequently, additional records were requested. Again, some minor deficiencies were discovered. On December 14, 2007, PHC retroactively paid the among of \$221.25 to its employees.</p>	<p>County took informal action that resulted in \$221 in back wages paid.</p>
<p>Potomac Disposal, Inc. – On July 25, 2007, the County received information that Potomac was not paying the Living Wage hourly rate. The County requested payroll records on August 6, 2007. The County received some records on August 22, 2007, but the records were insufficient to determine if the proper Living Wage rate was being paid to the employees. On January 15, 2008, the County received adequate records to show compliance with the Living Wage Law. The County notified Potomac on February 4, 2008 that they were in compliance.</p>	<p>County took informal action that showed business was in compliance.</p>
<p>Tito Contractors, Inc. – On October 10, 2007, the County requested payroll records from Tito in order to determine if Tito was in compliance with the County's Living Wage Law. In the course of the investigation, the County discovered that a Tito subcontractor kept virtually no payroll records. In addition, Tito's records were lacking in many aspects. On January 24, 2008, the County issued a Notice of Termination for Default letter to Tito. Subsequently, the County cited Tito for violations of the County Code. On November 25, 2008, the District Court of Maryland entered an Order of Abatement. Also, Tito retroactively issued checks totaling \$48,720.55.</p>	<p>County took formal actions that resulted in \$48,720 in back wages paid.</p>
<p>CAMCO, LLC – On November 17, 2007, DHCA contacted DGS/OBRC concerning CAMCO after a conversation with the President of CAMCO. On December 1, 2007, the County sent a request for payroll records to CAMCO. The County received some records on January 10, 2010, but in no way did they demonstrate compliance and CAMCO refused to send additional records to show compliance. Consequently, on February 5, 2010, the County issued a "Notice to Cure Prior to Termination for Cause" letter. The contract was terminated on February 19, 2010.</p>	<p>County took formal action that resulted in contract termination.</p>
<p>Allied Barton Security Services – In a letter to the Assistant Account Manager, 24 employees inquired when they could expect the increase due from the July 1, 2012 Wage Requirements Law's rate adjustment. The County sent a letter to the District Manager with the same question. The company corrected the hourly rate and issued retroactive checks on December 12, 2012.</p>	<p>County took informal action in response to employees request that resulted in back wages paid.</p>

Table 5-5. Summaries of OBRC’s Wage Requirements Law Audits, October 2007-February 2014

Wage Requirements Law Audits (3)	Outcomes
<p>Cruz Cleaning Services, Inc. – A local attorney wrote a letter in November 2004 to a council member accusing Cruz of violating the WRL based on his own investigations. The May 2005 audit found Cruz to be in violation of the WRL. The County sent Cruz a “Notice to Cure Prior to Termination for Cause” letter on April 6, 2005, with a termination date of April 20, 2005, should Cruz not cure. Cruz failed to cure and the contract was terminated on April 20, 2005. Audit cost was approximately \$40,000.</p>	<p>County initiated an audit in response to citizen complaint and took formal action that resulted in contract termination.</p>
<p>Crissol Contractors, Inc. – A local attorney wrote a letter in November 2004 to a council member accusing Crissol of violating the WRL based on his own investigations. The June 2006 audit found Crissol to be in violation of the WRL. The County sent Crissol a “Notice to Cure Prior to Termination for Cause” letter on June 26, 2006, with a termination date of July 16, 2006. The contract was terminated on July 16, 2006. Crissol submitted falsified documents on July 17, 2006 to attempt to cure. The County kept the termination decision. Audit cost was approximately \$30,000.</p>	<p>County initiated an audit in response to citizen complaint and took formal action that resulted in contract termination.</p>
<p>JRP Management Resources, Inc. – The County’s Parking Management Division emailed DGS/OBRC with concerns about the veracity of an invoice from JRP. An Entrance Conference was held with the outside auditors on February 27, 2009. The audit revealed that JRP was in violation of the County’s Wage Requirements Law. The audit also showed that JRP made cash payments to employees and did not report them to the IRS and that JRP, in some cases, failed to pay its employees for overtime worked. The County issued a “Notice to Cure Prior to Termination for Cause” letter on April 1, 2010, with a termination date of May 1, 2010. It should be noted that as a result of the audit, JRP issued retroactive checks to its employees totaling \$22,053.24. The cost of the audit was \$40,320.</p>	<p>County initiated an audit in response to contract monitor request and took formal action. The audit resulted in \$22,053 in back wages paid.</p>

Source: Memorandum to Government Operations and Fiscal Policy Committee, March 6, 2014.

The text box below summarizes OBRC's procedures for undertaking an audit. OLO's review of OBRC's practices, based on the history in several Internal Audit reports shows:

- OBRC received complaints that prompted investigations or audits from multiple sources including vendors' employees, County staff and concerned citizens.
- OBRC relied on informal and formal actions by staff and outside auditors to investigate and review vendors' payroll records.
- When noncompliance issues arose, OBRC offered vendors' an opportunity to cure their violations, followed by more formal enforcement actions such as Notices of Termination for Default or court orders of abatement.

Summary of the Auditor's Procedures for the Compliance Audit of JRP Management Resources

- The audit reviewed three contracts with JRP Management Resources, two for grounds maintenance and one for mowing and vegetation control services.
- Because the basis of the audit was a sample of payroll data, the auditor could not determine the extent of total noncompliance.
- The auditor identified the following types of noncompliance:
 - Not maintaining required records about work locations;
 - Not paying a required overtime wage rate per the FLSA;
 - Not paying workers the County's wage requirement rate;
 - Discrepancies between the company payroll register and Procurement's reporting form for employee hours;
 - Employees paid incorrect amounts due to them, based on hours worked as recorded on their time sheets; and
 - Incorrectly reporting wage information on IRS forms.
- The auditor calculated a variance rate of nearly 22% between the employee hours reported on the required payroll report forms and the employee hours on the company time sheets.
- To address its findings, the auditor recommended that the Using Departments require JRP Management Resources:
 - To review and correct all forms they had submitted;
 - To pay workers the amounts owed following determinations and reconciliations by the Using Departments that identified the total hours worked on all contracts by each employee and the difference between the actual amounts earned including any cash payments and the amounts owed;
 - To retroactively record the payments; and
 - To recalculate the wages paid and report the error in its underreporting to the IRS.

Source: OLO and MCIA 10-3.

The 2012 CAMCO Case. In February 2012, CAMCO, LLC was awarded the bid for a County contract to provide miscellaneous cleaning services at County parking garages and facilities. The contract began in June 2012 and was administered by the Parking Division in the Montgomery County Department of Transportation (MCDOT). In mid-July of 2012, DGS/OBRC received 14 calls from CAMCO employees complaining that they were not receiving the proper hourly rate under the WRL. DGS asked Internal Audit to undertake an audit. On September 4, 2012, outside auditors were engaged. The initial audit, which cost \$29,760 and covered 26 employees, showed that CAMCO was not in compliance with the WRL.¹⁴⁵

In October 2013, the auditor reported, at a minimum, CAMCO had inappropriately reduced 14 of its employees' hourly wages for health insurance costs by \$2 to \$3 below the minimum required by the WRL. The auditor noted that since these deductions were on a per hour basis they seemed to indicate no relationship to CAMCO's internal costs. The auditor reported they confirmed with CAMCO representatives that the costs of the health insurance premiums were borne entirely by the employees. The auditor noted if CAMCO had sought approval for the wage reduction, as required by the WRL, the reduction would have applied only to premiums actually funded by the employer.

In December 2014, Procurement asked Internal Audit for a second audit of CAMCO covering 100% of the pay periods from June 2012 through January 2015. The auditor was able to obtain documentation for 72% (46 of 64) of the payroll periods. The auditor's comparison of CAMCO's payroll registers with the County records showed 28% (121 of 439) of the entries showed a discrepancy between County's record of hours worked and the employer's payroll record. This further limited the scope of the auditor's testing.

The auditor found underpayment in 20 of 318 instances it was able to test. The underpayment amounted to \$1,808 and it affected 12 employees for an average underpayment of \$150 per employee. The auditor also found that Camco did not submit certified quarterly payrolls for any of the ten payroll periods the audit covered. Following the results of this audit, Procurement forwarded the case to the Office of the County Attorney (OCA) and OCA forwarded the case to the State's Attorney. When the State's Attorney indicated there was a lack of evidence to pursue charges, Procurement encouraged the workers to file a private lawsuit.

The CAMCO Employees' Private Right of Action. In April 2014, with Procurement's encouragement, eight workers filed a complaint in Montgomery County Circuit Court alleging breach of contract, fraud and violations of the County's WRL and the MWPCCL because CAMCO had made unlawful deductions from their paychecks. The workers requested the Court grant a judgment for \$407,680 or three times their unpaid wages plus their unpaid wages of \$135,895 plus attorney's fees.

In early 2015, the workers amended their complaint twice to add the County as a joint employer to the suit.¹⁴⁶ In April 2015, the County filed motions either to bifurcate or to dismiss the workers' complaint and the Court granted the County's motion to dismiss in June 2015.¹⁴⁷

¹⁴⁵ This was OBRC's second review of CAMCO. As shown in Table 5-4, the County had investigated CAMCO in 2007 after DHCA had contacted DGS/OBRC. That review eventually led to the termination of CAMCO's contract in February 2010.

¹⁴⁶ In their statement of facts, the workers alleged that Montgomery County and CAMCO were joint employers, that the County was aware of CAMCO's improper deductions from the workers' paychecks and that as a joint employer the County had a contractual duty to the workers to ensure that they were paid their earned wages.

¹⁴⁷ In its motion to dismiss, the County argued that the County was not a joint employer, that the workers had failed to establish negligence and that the workers had failed to state a claim on which relief could be granted because the County is immune from liability for governmental functions, including the alleged failure to enforce a statute.

In July 2015, the Court entered a consent judgment against CAMCO in the amount of \$110,000. In October 2015, the County, which had withheld payment to CAMCO for the final two months of its contract, pending completion of an audit, filed a consent motion for an order entering judgment and directing payment of its garnishee share to the workers or alternatively to the Court. In November 2015, the Court granted the County's motion and entered the judgment.

CAMCO Follow-up and Lessons Learned. Procurement states that the CAMCO investigation uncovered a lack of payroll records and that experience along with the haulers' strike in the Fall of 2014 changed the tide of the Office's enforcement practices. Procurement advocated for amendments to the WRL and it re-directed its resources to initiate routine screening of vendor payrolls supplemented by audits.

Amendments to the County's WRL. Because Procurement's investigation of CAMCO found a failure to maintain payroll records, Procurement requested amendments to the WRL to add enforcement provisions and a transition from a complaint-driven system to a reporting and oversight system. Bill 43-15, Contracts and Procurement – Wage Requirements – Amendments, was introduced in October 2015 and enacted in February 2016. The WRL amendments strengthened Procurement's enforcement authority by:

- Establishing the Director's authority to require contractors and subcontractors to submit quarterly payroll reports;
- Specifying the details of the wage and payroll records a vendor must maintain, requiring they be maintained for a period of five years and establishing the County's authority to inspect the records;
- Giving the Director authority to issue written decisions and impose sanctions that include: withholding of payment due the contractor in an amount sufficient to pay each employee the full amount of wages due; satisfying a contractor's liability for liquidated damages; and, reimbursing the County for the cost of the audit.

Other amendments simplified Procurement's administration of the WRL. These included: the elimination of the Wage Reduction Requirement (which had allowed a vendor to pay a lower rate if they opted to provide health insurance) and the elimination of a provision that had exempted employees covered by a collective bargaining agreement from the WRL. As a result of that amendment, the WRL now applies to employees that also have a collective bargaining agreement.

The Post-CAMCO (Phase Two) Monitoring and Oversight Program. In addition to these legislative amendments, Procurement took a series of actions that changed its administration of the WRL following the CAMCO case. These included:

- Adding a half-time staff to assist the WRL program;
- Contracting out on-site interviews for the prevailing wage program;
- Dedicating staff time to review vendor payroll submissions; and,
- Retaining two auditors with expertise in payroll audits on contract with an annual budget of \$100,000.

The contract for in-house auditors gives Procurement resources to conduct routine monitoring as well as in-house capacity to audit vendors subject to the WRL.

Under the current arrangement, a part-time Program Specialist is dedicated to tracking the submission of quarterly vendor payroll reports and reviewing and analyzing the reports that are submitted. Procurement estimates that it routinely receives reports from about 60% to 70% of the vendors who are subject to the law. Procurement sends out two automated reminder notices to vendors that have not submitted payroll reports and maintains a list of vendors with outstanding reports. As time permits, the Program Specialist contacts vendors on this list by phone or email to request that they submit their report. Procurement estimates that it receives reports from about 85% of vendors subject to the law due to these efforts.

The Program Specialist reviews the submitted reports and looks for items that raise red flags such as: inconsistencies between the gross wages, hourly rates and hours worked; pay rates lower than the mandated living wage; inconsistencies between the Office of Procurement Wage Requirements Law Payroll Report Form and any payroll journals submitted with that form; and, any other missing or questionable information reported by the vendors.

When staff becomes aware of evidence of noncompliance, there are two potential methods that may be used to bring the vendor back into compliance. If the issues appear to be an oversight, staff may give the vendor an opportunity to correct the situation, which would include retroactive payments for any workers not paid the mandated rate. If the discrepancies need a more in-depth analysis, the Office of Procurement notifies the vendor that they will be audited.

If the subsequent audit shows evidence of noncompliance, Procurement sends a Director's memorandum to the contractor asking that they show restitution. Procurement may also request reimbursement for its audit costs. Procurement states that it can spread out the reimbursement payments for the audit costs, if necessary. The audit costs are reimbursed to the General Fund. Procurement's highest priority is to ensure that employees receive back pay for the wages they are owed.

Procurement states that its ability to punish a business is limited because Procurement law operates within the framework of contract law which emphasizes curing a breach instead of taking punitive action. The Director's view is that it's not realistic to terminate a contract because that action would put employees who had not received back wages out of work. Alternatively, when a contract comes up for renewal, an incidence of noncompliance will be considered as part of Procurement's determination about whether a vendor can be deemed a responsible bidder. Similarly, every two-year renewal period provides an opportunity to address any issues of noncompliance.

The Post-CAMCO (Phase Two) Chronology of Audits and Investigations. Procurement has conducted 11 audit and investigations (in addition to the CAMCO audit) since it revised its implementation practices in response to the CAMCO case. Table 5-6 details these activities. In addition to initiating investigations in response to its ongoing screening activities, Procurement has initiated investigations based on complaints from employees and from other sources including 311. Of note,

- In the summer of 2016, Procurement announced the recovery of over \$300,000 in unpaid wages for 318 workers employed by five County contractors. This total reflects actions brought against CAMCO (\$110,000 for 8 workers); LT Services (\$17,631 for 60 workers); Potomac Disposal (\$5,342 for 47 workers); Securitas (\$53,837 for 94 workers)¹⁴⁸ and Unity, Inc (\$113,260 for 109 workers).

¹⁴⁸ Following the release of the October 2015 audit, Procurement initiated a follow-up audit that investigated both Securitas and its subcontractor BTI. The audit found unpaid wages for 64 Securitas employees and 30 BTI employees which led to

- A year later, in 2017, the amount of recovered wages declined to just under \$51,000. According to Procurement, this decline shows the deterrent effect of the payroll monitoring practices that it has implemented.
- Procurement initiated investigations of two vendors in FY17 and four vendors in FY18. Of this group, four have had compliance issues and Procurement's actions have led to the recovery of \$50,839 in unpaid wages for 78 FTEs from one vendor and \$346 in unpaid wages from a second vendor.

Table 5-6. WRL Audits and Investigations from December 2014 through August 2018

Wage Requirements Law Audits (3)	Outcome
<p>CAMCO, LLC – In November 2015, based on a second audit initiated by the County, the auditor reported finding underpayment for 12 employees totaling \$1,808. The case was forwarded to the Office of the County Attorney and the State's Attorney and the County helped the employees find legal representation to file a private lawsuit in April 2014. In July 2015, the court entered a judgment against CAMCO for \$110,000. The cost of the audit was \$41,262 and the County was reimbursed for the audit cost.</p>	<p>The employees' claims were resolved through a private action when the Court entered a judgment against CAMCO for \$110,000.</p>
<p>Potomac Disposal, Inc. – In October 2013, Potomac Disposal workers went on strike. Among the complaints, some employees claimed that they were not paid the wage requirement rate. The County conducted a payroll investigation and found 22 violations in 390 payroll records examined. As a result, a formal wage audit covering all employees for all pay periods between May 2011 and November 2013 was initiated. The audit found 29 drivers and 20 helpers were underpaid a total of \$5,394 and proper records were not retained. The total audit cost was \$56,080 (for 33 employees which was half of the workforce.)</p>	<p>The County initiated an investigation and audit in response to employee complaints and found noncompliance.</p>
<p>Ecology – As a result of Potomac Disposal's strike in 2013, the County conducted a payroll investigation into Ecology Services. They were found in compliance with the Wage Requirements Law.</p>	<p>County initiated an investigation that showed business was in compliance.</p>
Investigations Closed in FY2016	Outcome
<p>Unity Disposal and Recycling, LLC – In May 2014, the County initiated an audit of Unity Disposal for all of its employees, covering a 25% sample of pay periods from May 1, 2010, through May 28, 2014. The auditor report was released in July 2015. Unity did not provide payroll records for 21 of the 53 payroll periods and determinations of compliance were complicated by trash hauling and recycling payment practices that relied on a daily, per route rate, regardless of the hours worked. Based on the records provided, the audit found evidence of underpayment in 763 of 2,415 instances (40%). Procurement reached a settlement agreement for the documented underpayment plus an additional amount for the missing records. In its pre-cure letter, Procurement requested Unity to provide documentation for the basis of an hourly rate to address the payment practices issue. The County was reimbursed for the cost of the audit which was \$33,520.</p>	<p>County initiated an audit that led to an award of \$113,260 in back wages for 109 workers.</p>

payment of \$50,274 in unpaid wages for Securitas employees and \$3,563 in unpaid wages for BTI employees. The cost of the audit, which was reimbursed, was \$27,904.

Table 5-6 (continued). WRL Audits and Investigations from December 2014 through August 2018

Wage Requirements Law Audits	Outcome
<p>Securitas USA – In February 2015, in response to concerns raised by a County contract administrator, the County initiated an audit covering all employees who worked in the County in June, July and December 2014 and January 2015. The audit report was released in October 2015. The audit’s review of 365 instances found 6 instances of underpayment and total underpayment of \$34.47. In a follow-up review of the auditor’s documents, Procurement identified issues with claims for employee health insurance that could not be verified. Procurement and the vendor could not come to an agreement on the amount or allowability of the deduction. On the advice of the County Attorney, Procurement asked for the \$34.47 that the auditor identified.</p>	<p>The County initiated a request to Internal Audit for an audit in February 2015. A follow-up review led to issues related to deductions for health insurance. The amount substantiated by the auditor was recovered and the contract was not renewed.</p>
<p>LT Services – Procurement staff flagged an issue as part of its routine payroll screening. When Procurement contact the vendor, they resolved the issue immediately.</p>	<p>Worker was reimbursed.</p>
Investigations Closed in FY2017	Outcome
<p>Xerox. – This investigation, which was initiated in response to screening, found the company was in compliance. The cost of the audit was \$15,000.</p>	<p>Vendor was in compliance.</p>
<p>Maryland Treatment Center. – This investigation by HHS was initiated by public concern. The investigation identified unpaid back wages of \$16,782 for FY14, \$27,120 for FY15 and \$6,591 for FY16. The vendor submitted payment to come into compliance in December 2016 and April 2017.</p>	<p>Vendor paid \$50,493 in back wages for 78 FTEs.</p>
Investigations Closed in FY2018	Outcome
<p>Specialty Care. This audit was initiated in response to screening. It found unpaid wages for two employees of \$346. The audit cost of \$16,215 was not reimbursed.</p>	<p>Vendor paid \$345.60 in back wages for two employees.</p>
<p>CER Lawn. This audit, initiated in response to screening, found insufficient records for 17 employees. Procurement sent a letter requesting compliance and the vendor took corrective action to come into compliance as of December 2017. The audit cost of \$32,609 was reimbursed by the vendor.</p>	<p>Vendor made corrections to record keeping practices.</p>
<p>CT Stanley. This audit, initiated in response to screening, found the vendor was in compliance. The audit cost was \$5,771.</p>	<p>Vendor was in compliance.</p>
<p>Brave Management. This audit initiated in response to screening.</p>	<p>Procurement requested vendor improvements to record keeping practices.</p>

Source: OLO and Office of Procurement, 2018

Procurement's Practices to Detect, Monitor and Report Noncompliance. Procurement uses a comprehensive set of monitoring, compliance and enforcement practices to administer the WRL and it has strengthened these practices since 2014. Procurement regularly screens and reviews vendor payroll reports to detect noncompliance and routinely responds to concerns raised by County contract administrators and others. Procurement has established in-house auditors that it uses to conduct in-depth investigations of issues identified by its monitoring activities. Finally, when Procurement finds noncompliance, it offers vendors an opportunity to cure the violation followed by more formal enforcement actions.

Procurement uses an internal spreadsheet to maintain a running summary of the contractors it has audited and the audit outcomes. This spreadsheet tracks contractor names, the total amounts of back pay awards, the numbers of affected employees, audit costs and whether the County was reimbursed for these costs. Procurement does not routinely collect or report data about businesses' compliance levels.

CountyStat's Reporting on WRL Enforcement. CountyStat, the Executive branch analytics team, uses an outcome-focused performance framework to improve the efficiency and effectiveness of County services. CountyStat's headline performance measure for Procurement's administration of the WRL, shown in the text box, tracks the number of instances that employees/workers are found to be underpaid.

Headline Performance Measure for Procurement's Administration of the WRL

Enforcement: Number of instances that employees/workers are found to be underpaid under the Wage Requirements Law (WRL)

	FY2016	FY2017	FY2018
Workers found to be underpaid	310	95	

Why is this measure important?

The Wage Requirements Law makes sure that the employees of County contractors are able to earn a livable wage. This applies to all services (other than construction services) contractors that receive more than \$50,000 from the County in 12 months. Enforcing this law and keeping contractors in compliance is in line with the County Executive's vision to provide "Vital Living for All of Our Residents, Healthy and Sustainable Communities and A Strong and Vibrant Economy."

Factors contributing to current performance:

- Monitor quarterly payroll reports from 400+ contractors that are subject to the Wage Requirements Law (WRL);
- Conducted 6 wage audits in FY17;
- Work actively with departmental Contract Admins to keep contractors in compliance; and
- Conduct random site visits to ensure the wage rate notification is posted at contractors' sites.
- The law was originally designed as complaint driven. Bill 43-15 added enforcement measures to the WRL. In FY16 Division of Business Relations and Compliance started implementing more proactive enforcement.

Factors restricting performance improvement:

- Limited resources (part time Program Specialist) makes it hard to check on every contractor more often;
- Paper payroll submission makes it harder to keep track of and run reports; and
- Sometimes issues are only revealed through complaints.

Performance improvement plan: Research to find an online solution for payroll submission and reporting

B. The County's Minimum Wage Law including Minimum Wages for Tipped Employees

Minimum wage laws establish wage standards that can replace standards found in federal or state wage laws. In 2013, the Council joined several other jurisdictions that had recently enacted higher state or local minimum wage rates.

Bill 27-13 adopted a schedule that increased wage rates over a three-year period from an initial rate of \$8.40 per hour which took effect October 1, 2014 to a final rate of \$11.50 per hour which took effect July 1, 2017. The higher wage rates cover County Government employees and private sector employees who work at business establishments in the County.

The law is intended “to promote the health and welfare of County residents; safeguard employers and employees against unfair competition; increase the stability of industry in the County; increase the buying power of employees in the County; and decrease the need for the County to spend public money for the relief of employees who also live in the County.”¹⁴⁹

Bill 24-15, Minimum Wage Law for Tipped Employees, defines tipped employees as individuals who earn more than \$30 per month in tips. The law establishes a base wage rate of \$4.00 per hour and a tip credit. Together the base wage rate and the tip credit must be equal to or higher than the County minimum wage rate. This law was enacted to reconcile the wage rate with increases in the State's minimum wage rate.

Bill 28-17, passed in November 2017, instituted a new set of scheduled rate increases. These provisions and the County's implementation practices are described below.

1. Legal Provisions of Bill 28-17

Wage Rates. The current law phases in wage rate increases that vary the amount of the increase based on employer size. Table 5-7 shows the schedule of annual rate increases by employer size. Under the definitions in the law, a large employer employs 51 or more employees; a mid-size employer employs between eleven and 50 employees and a small employer has 10 or fewer employees. In addition, the mid-sized employer group also includes a tax-exempt employer who employs eleven or more employees and provides home health services and receives at least 75% of gross revenue through the state or federal Medicaid programs.

¹⁴⁹ Bill 27-13

Table 5-7. Minimum Wage Required Under Transition Provisions of Enacted Bill 28-17

Effective date	Large employer (51+)	Mid-size employer (11-50) ¹⁵⁰	Small employer (0-10)
July 1, 2018	\$12.25	\$12.00	\$12.00
July 1, 2019	\$13.00	\$12.50	\$12.50
July 1, 2020	\$14.00	\$13.25	\$13.00
July 1, 2021	\$15.00	\$14.00	\$13.50
July 1, 2022	\$15.00 + CPI-W ¹⁵¹	\$14.50	\$14.00
July 1, 2023	Increased annually by	\$15.00	\$14.50
July 1, 2024	CPI-W	\$15.00 + CPI-W + 1% **	\$15.00
July 1, 2025		Increased annually by CPI-W + up to 1%, until equal to large employers	\$15.00 + CPI-W + 1% ***
July 1, 2026 and beyond			Increased annually by CPI-W + up to 1% until equal to large employers

Source: http://www.montgomerycountymd.gov/humanrights/Resources/Files/Minimum_Wage_Transition_Table.pdf

The law's provisions for different wage rate schedules reflects Council efforts to balance the interests of minimum wage workers with those of County businesses that must accommodate the effects of higher wage rates. These effects can pose challenges for smaller business establishments and non-profits.

Table 5-8 shows the number of private sector establishments in Montgomery County grouped by size and based on the number of jobs. While there is not a one to one correspondence between jobs and the number of employees, if jobs are used as a proxy for employees, the data show that large employers account for roughly 4% of establishments and nearly 55% of jobs while small employers account for over 80% of establishments and less than 20% of private sector jobs.

Table 5-8. Estimates of Establishments and Jobs Subject to County Minimum Wage by Establishment Size

Establishment Size	Number of Establishments	Percent of Total	Number of Jobs	Percent of Total
10 or fewer jobs	26,457	81.1%	63,069	17.1%
11 to 25 jobs	3,384	10.4%	54,874	14.9%
26 to 50 jobs	1,408	4.3%	49,702	13.5%
51 to 99 jobs	752	2.3%	52,240	14.2%
100 to 499 jobs	568	1.7%	100,723	27.4%
Greater than 500 jobs	43	0.1%	47,361	12.9%

Source: 2017Q1 QCEW; County, private establishments only¹⁵²

¹⁵⁰ This group also includes tax-exempt, home health service providers as defined by 42 C.F.R. § 440.180. and receives at least 75% of gross revenue through state and federal Medicaid programs.

¹⁵¹ For large employers, as of July 1, 2022, the minimum wage required under County Code Section 27-68 must be adjusted annually to the nearest five cents, according to the average increase, if any, in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for Washington-Baltimore, or a successor index, for the previous calendar year. For mid-sized employers, as of July 1, 2024, and for small employers, as of July 1, 2025, the rate must be adjusted annually to the nearest five cents, by the annual average increase, if any in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for Washington-Baltimore, or a successor index, for the previous calendar year plus, if the CPI-W increase is less than \$0.50, by one percent of the minimum wage required for the prior year, up to a total increase of \$.50.

¹⁵² Josh Hamlin, Legislative Attorney, and Gene Smith, Legislative Analyst, to the Montgomery County Council, Nov. 7, 2017, 11, https://www.montgomerycountymd.gov/council/resources/files/lms/bill/2017/Action/pdf/3302_1454_Action_11062017.pdf

Indexing. As shown in Table 5-7, Bill 28-17 expands the scope of protections included in the original law by adding a provision that indexes the wage rate to inflation. Increases will be based on the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for Washington-Baltimore.

Coverage and Exemptions. Bill 28-17 recognized new classes of employers by size as the basis for phased-in rate increases, but it did not change the coverage and exemption provisions that were in the law as originally enacted.¹⁵³ The law continues to cover employees of County government and private sector businesses located in Montgomery County; it exempts: individuals who are exempt from State or Federal minimum wage requirements; individuals subject to a State or Federal opportunity wage; and youth workers, defined as individuals under 19 years of age employed for fewer than 20 hours per week.

Authorizing a Temporary Suspension of the Scheduled Annual Increase. The law gives the Executive the authority to temporarily suspend scheduled minimum wage increases if the Director of Finance determines that there have been specified decreases in private employment, the Gross Domestic Product of the U.S. has had negative growth, and the National Bureau of Economic Research has determined that the U.S. economy is in recession.

Designation of Enforcement Authority. During its discussion of the original minimum wage law, the Council decided to assign authority to investigate complaints about the County's minimum wage law to the Maryland Department of Labor, Licensing and Regulation (DLLR). The Council based its decision on staffing limitations in the Office of Human Rights and the complexity and special training required to conduct wage hour investigations. Maryland House Bill 579, which was enacted in the 2014 Session, requires the State Commissioner of Labor and Industry to enforce a local minimum wage law. The law took effect on June 1, 2014.

2. County Implementation Practices

Human Rights' General Education and Outreach Practices. Human Rights undertook education and outreach to all employers to promote compliance. In the Fall of 2015, Human Rights held an initial employer seminar to explain the County's new minimum wage laws. The message Human Rights conveyed was that it wanted County employers to pay their employees at the correct rate of pay. Human Rights did not conduct any worker outreach sessions or educational efforts.

Because its business outreach efforts were well-received, Human Rights now offers seminars to County businesses twice a year. One session focuses on County anti-discrimination and worker protection laws. A second session invites representatives from federal and state agencies such as the federal Equal Employment Opportunity Commission (EEOC) and the Maryland Department of Labor, Licensing and Regulation (DLLR) to attend. Human Rights reports about 30 employers attended the initial session and 30 to 60 employers have attended subsequent sessions.

Requirement for Quarterly Wage Reports from Tipped Employee Employers. In 2015, the Council adopted Bill 24-15E, Human Rights – Minimum Wage – Tipped Employee – Amendments to add provisions for tipped employees to the Council's original minimum wage law (Bill 27-13). Bill 24-15E established a requirement that County employers of tipped employees send a quarterly payroll report to the Office of Human Rights that certifies that each tipped employee was paid the County minimum wage. Bill 24-15E required the Executive to establish an internet-based reporting system so that an employer of a tipped employee would have an option to complete and submit these reports online. The bill took effect on July 1, 2015.

¹⁵³ Bill 43-15 extends coverage to sole employees. It was enacted in November 2018 and will take effect on July 1, 2019.

Human Rights' Implementation of the Online Reporting Form for Employers of Tipped Employees.

The provisions in County law included one mandate that required employers with tipped employees to submit quarterly payroll reports and a second provision that required the Executive to establish an online reporting system. In 2017, the Director of Human Rights expressed the view that initially these provisions plus ongoing questions and discussion about Human Rights' progress in instituting an online reporting form conflated the reporting requirement with the method of reporting. As a result, employers of tipped employees were confused about when the reporting requirements took effect.

In the three plus years since the law took effect, Human Rights has received a handful of payroll reporting forms from employers of tipped employees. Human Rights reported that it received a few dozen forms shortly after the law was enacted in 2015. Two years later, in the fall of 2017, Human Rights confirmed that it had received only a trickle of reporting forms. At that time, Human Rights attributed this low volume to the fact that it had posted a prototype online and that posting had created an expectation that the reporting requirements were temporarily delayed. In April 2018, Human Rights went live with its online reporting form.¹⁵⁴ As of early 2019, Human Rights has yet to tally information about the forms, such as the number of forms received, since the online form was launched. Currently, Human Rights does not actively monitor the submission of the payroll forms and it does not have a reporting system in place to compile these data.

The Practices of the Office of Human Rights' to Detect, Monitor and Report Noncompliance. The enforcement authority for the County's minimum wage laws rests with the State Commissioner of Labor and Industry. When Human Rights receives an inquiry, it refers complainants to the Employment Standards Service ("Employment Standards") in the Maryland Department of Labor, Licensing and Regulation (DLLR). As described in Chapter IV, Employment Standards promotes compliance through a complaint-based compliance and enforcement system.

During the discussion of Bill 24-15, the Council recognized that Human Right's ability to follow-up on any issues it identified through its monitoring of these reports was limited because DLLR only accepts requests to initiate an investigation of an employer from an affected employee. This means that if Human Rights' review of a payroll record were to indicate a violation, the County would have to either investigate the employer itself or ask an affected employee to file a complaint with the State directly. Human Rights reports that based on its experiences to date with both the general minimum wage law and the law for tipped employees it has not found this limitation to be a problem.

Human Rights does not conduct any routine monitoring to detect noncompliance beyond its outreach activities. It does not routinely monitor or review the online payroll submissions it receives; however, the Manager of Enforcement Programs reports these submissions are useful because businesses must certify them. This means that if Human Rights receives an inquiry or a complaint, Human Rights can access the necessary payroll data to conduct an informal investigation. In the nine months since the activation of the online form, Human Rights reports it has not yet received an inquiry or complaint that has required its review a certified payroll report.

Human Rights does not maintain or report data about businesses' compliance with the County's minimum wage laws because Employment Standards administers these activities. As described in Chapter IV, DLLR collects and reports data about Employment Standards' activities, including the number of wage hour claims it receives for each county. DLLR does not report data about businesses' compliance levels.

¹⁵⁴ <http://www.montgomerycountymd.gov/humanrights/min-wage.html>

C. The County's Earned Sick and Safe Leave Law

In 1993, adoption of the federal Family Medical Leave Act (FMLA) set a national baseline for unpaid job-protected leave so that workers could attend to medical issues and care for family members.¹⁵⁵ According to an evaluation by Abt Associates, the unpaid job protected leave available under the federal FMLA covers 59% of the workforce and not all covered employees can afford to take the leave that is offered.¹⁵⁶

Since the FMLA was adopted, states and local jurisdictions have enacted employment laws that establish employer mandates for sick and safe leave. Many of these laws, including Montgomery County's Earned Sick and Safe Leave Law, enacted in October 2015, and the Maryland Healthy Working Families Act, enacted in February 2018, establish employer mandates for paid or unpaid leave. This section summarizes the provisions in the County's law and describes the County's implementation practices.

1. Legal Provisions

The Montgomery County Council passed the Earned Sick and Safe Leave Law, (Bill 60-14) on June 23, 2015 with an effective date of October 1, 2016. The law requires most employers to provide their employees who have regular work schedules with paid leave or paid time off. The Office of Human Rights states the law is intended to provide support to "our lowest income and most vulnerable workers."¹⁵⁷ The law also states that minimum earned leave standards are necessary to promote the health and welfare of County residents; safeguard employers and employees against unfair competition; and stabilize industry.¹⁵⁸

Coverage. The law covers most employees, including domestic workers and County government workers; however, it excludes other local governments' employees, state government employees and federal government employees. It also does not cover independent contractors, and part-time employees who regularly work only 8 hours or less each week.

Use of Leave. An employee can use earned leave for self-care for an illness or injury; to obtain preventive care; or to care for a family member. An employee can also use leave to provide care for a family member if a school or child care center is closed for an emergency. An employee may also use earned leave for a work absence due to a domestic violence incidence for oneself or a family member.

The law requires an employee to request leave from their employer as soon as practical. An employer may not request specific details about an employee's or family member's injury or illness; however, an employer may require an employee who uses more than three consecutive days of leave to provide reasonable documentation to verify appropriate use of the leave.

¹⁵⁵ "Raising Expectations: A State-by-State Analysis of Laws That Help Working Family Caregivers," (National Partnership for Women & Families, (August 19, 2018): X, retrieved from <http://www.nationalpartnership.org/research-library/work-family/raising-expectations-2018.pdf>.

¹⁵⁶ According to the Abt Report, to be covered by the FMLA, a worker must be an eligible employee at a covered worksite. A covered worksite must be part of a firm with at least 50 employees. To be an eligible employee, a worker must work for a firm with 50 employees within 75 miles of the employee's worksite; have 12 months of tenure and have 1250 service hours within the past year (about 24 hours per week). Roughly 59% of employees report meeting all three of these conditions. (Jacob Alex Kerman, Kelly Daley and Alyssa Pozniak, "Family and Medical Leave in 2012: Technical Report," *ABT Associates Inc.*, Cambridge, MA, (September 7, 2012, revised April 18, 2014): i, retrieved from <https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf>.

¹⁵⁷ Montgomery County, Maryland Office of Human Rights website (<https://www.montgomerycountymd.gov/humanrights/divisions/compliance.html>) . Accessed June 6, 2018.

¹⁵⁸ §27-76(a)(3)

An employer may not require an employee who has requested leave to find a replacement worker; however, if an employer and employee mutually agree an employee may work additional hours or trade shifts during a pay period to make up work hours instead of using earned leave.

Accrual Rates. Under the law, all employees accrue leave at the rate of one hour for every 30 hours worked; however, the mix of paid and unpaid leave an employee accrues varies by employer size. As shown in Table 5-9, the law provides that small employers, defined as those with fewer than five employees, can limit an employee's accrual of leave to 32 hours of paid leave and 24 hours unpaid leave.

Table 5-9. Montgomery County Leave Accrual Rates by Employer Size

Employer Size	Accrual Rate	Calendar Year Limit for Leave Earned	Calendar Year Limit for Use of Leave
1 to 4 employees	1 hour per 30 hours	32 hours paid leave 24 hours unpaid leave	Up to 80 hours
5 or more employees	1 hour per 30 hours	56 hours of paid leave	Up to 80 hours

Source: OLO and Chapter 27 of the Montgomery County Code.

http://www.montgomerycountymd.gov/humanrights/Resources/Files/Clean_Art_XIII_EarnedSafeandSickLeave.pdf
_ Accessed June 6, 2018.

Notice and Record Requirements. The law requires an employer to notify employees that they are entitled to earned leave, including information about how it is accrued and how it is permitted to be used. An employer must provide an employee with a written statement of earned leave that is available for use with each wage statement. The law also requires an employer to keep three years of employee records; and gives the Director of Human Rights the authority to inspect a record for the purposes of determining compliance, after giving an employer notice.

Enforcement. The County's Earned Sick and Safe Leave Law was codified as Article XIII in Chapter 27, Human Rights and Civil Liberties. By amending Section 27-7, Bill 60-14 incorporated the administration and enforcement of the law into the Office of Human Rights' existing administration and enforcement procedures. This complaint-based enforcement process includes the following steps:

- An employee may file a written complaint with the Director stating the particulars of the alleged violation;
- The Director must conduct an investigation and make a determination whether reasonable grounds exist to believe a violation occurred; and the Director must notify the employee and the employer of the determination;
- If there are reasonable grounds to believe a violation occurred, the Director must attempt to conciliate the matter; and
- If the Director determines there are not reasonable grounds and the employee files an appeal, the Director must certify the complaint to the Commission.

2. Office of Human Rights' Implementation and Enforcement Activities.

Human Rights undertook an extensive outreach and education process before and after implementation of the County's Sick and Safe Leave Law. Human Rights worked closely with the Council's attorney during this process. Altogether, Human Rights estimates that they have had contact with 75% of County employers subject to the law. This section provides details about Human Rights' implementation of the law.

During the consideration of Bill 60-14, the Council delayed enforcement for a year to give employers time to comply. This delay also gave Human Rights time to build its inventory of resource materials for the website and to develop the necessary posting notices.

Human Rights' direction from the County Executive was to do what was needed to enable voluntary compliance among County employers. Human Rights reports that they researched other places around the country to find examples of other jurisdictions' implementation experiences; however, they did not find a lot of examples.

Initial Outreach and Education Activities. Human Rights spent the year before the law became effective conducting workshops throughout the County. Human Rights held meetings with the Wheaton Chamber of Commerce and the Apartment and Building Owners Association. Human Rights made sure to have the Council's attorney available to provide advice on the law's intent whenever possible. Education was spread informally, primarily by word of mouth.

Human Rights reported that its approach to outreach and education was to lend support to people who raised questions to help businesses comply with the law's new standards. Human Rights advised businesses to continue their usual business practices and to view the law's provisions as guidelines that were intended to set a floor, not a ceiling. Human Rights advised that the law's intent was not to establish restrictions on an employers' benefits.

Outstanding Issues List. Human Rights reported that an outcome of their education and outreach work was a list of issues that needed to be addressed or clarified. Since Human Rights was charged with implementing the law's complaint and enforcement process, Human Rights undertook to maintain a working list of these questions and issues. Human Rights indicated a lot of questions came from employers with fewer than five employees and payroll agencies were another common source of questions.

In some cases, Human Rights felt comfortable providing an interpretation of the law; however, in other cases Human Rights was more reticent about providing advice because of the potential for a conflict of interest created by its statutory charge to enforce the law. To minimize these situations, the Director of Human Rights took the lead in explaining the law and providing technical assistance and that the Manager of Enforcement Programs took the lead on any complaints or complex enforcement issues.

In the Fall of 2018, a Business Liaison Officer was hired in the Office of the County Executive to provide outreach to businesses. Now, Human Rights provides an initial explanation of the law and copies the Business Liaison Officer in case a business has follow-up questions or needs more assistance.

Examples of some of the technical issues Human Rights has addressed are highlighted below:

- One issue that generated questions from agencies that administer payrolls for multiple small businesses concerned whether there were rules that specified how employers should calculate how sick leave is earned. Human Rights advised employers that an explanation of the calculation was something that should appropriately be included in an employee manual, but Human Rights intentionally did not provide advice about the substance of the calculation itself. Human Rights' view was that it was not its role or intent to dictate to employers the specifics of their business operations.
- Another question from some businesses concerned the treatment of employees who work on commission. Human Rights' interpretation is that the law did not intend to cover this class of employees.
- Another area that raised questions concerned the treatment of employees who work at different sites throughout the region within a given work week. Since the law only applies to employees who work in the County, Human Rights advised that an employee who works a portion of their week in different jurisdictions will likely accrue their hours worked over the course of several weeks.
- A fourth source of questions was from large businesses such as big box retailers who have employees nationwide.
- Another outstanding issue was the definition of a regular work week. A significant percentage of hourly wage workers work a regular work week defined as a 40-hour week of five eight-hour days, but this practice is not as prevalent as it used to be. This issue is relevant because as currently defined the County's Sick and Safe Leave Law excludes employees who do not work a regular work schedule.

Ongoing Practices. The Director of Human Rights reports that they continue to hear from businesses about the difficulties they face in making the law work. He continues to field follow-up emails and phone calls. He refers outside-the-box questions to the Council's attorneys and the Office of the County Attorney.

Human Rights notes that it is helpful that they are one of the few County offices that still has a front desk presence and a customer service phone option that is advertised on its website. This allows businesses that have questions to reach out to Human Rights directly instead of having their call handled through the 311 system.

When someone contacts Human Rights with a question, a Human Rights investigator will provide links to the law or to the Human Rights website where the law is posted online. Human Rights has also posted a list of Frequently Asked Questions on the website that were culled from the list of outstanding issues. If there is a follow-up call or email after that step, Human Rights' Manager of Enforcement Programs responds. Per the Manager, most calls and emails with questions about the law are received via the Human Rights' phone line and website; fewer calls are received via 311.

Compliance and Complaint Data. The Director of Human Rights observed a drop-off in phone calls in the Fall of 2017 and viewed this as an indication that businesses were now aware of the law and adjusting their practices to come into compliance. Over a year later, the Manager of Enforcement Programs reports that some employers continue to call with questions, especially after the state passed its own sick leave law. The Manager estimates that Human Rights' receives three to six inquiries per week, especially from small employers.

Human Rights reports that in some instances they have seen companies reducing benefits to comply with the law although they caution it is not clear whether this is an employee's perception or has in fact occurred. For example, instead of adding sick leave to existing benefits, some employers complied with the law by pooling benefits, e.g. vacation and paid sick leave, that had previously been treated separately. For some employees, converting leave previously allocated only for vacation leave into pooled leave instead of increasing leave overall was perceived as a benefit reduction.

Human Rights' Monitoring Data and Actions in Response to Complaints. Human Rights does not collect data about businesses' compliance with the law. As of Fall 2018, Human Rights reports they have received about a dozen Sick and Safe Leave complaints which have resulted in a few mediation sessions and one retaliation claim

Enactment of the Maryland Healthy Working Family's Act. House Bill 1 (HB1), the Maryland Healthy Working Families Act, was introduced during the 2017 session of the Maryland General Assembly. The General Assembly voted to pass the bill but the Governor vetoed it. When the General Assembly convened for the 2018 session it voted to override the Governor's veto. The law took effect 30 days after the vote on February 11, 2018.

State law provisions in HB1 do not preempt County law, except where the HB1 provisions are more generous. For example, the list of allowable uses in state law include a provision for maternity or paternity leave that is not specified in County law. Human Rights prepared a document, *Sick & Safe Leave Guidance for Employers with Workers in Montgomery County*, that highlights provisions in State law that are more generous than those in County law.¹⁵⁹

D. Summary Chart of Recent County Workplace Protection Laws

Since 2002, Montgomery County has enacted several laws (with amendments) to extend statutory protections to employees of firms and businesses located in the County or protections to County service contractor workers. The County was one of the first local jurisdictions (along with Baltimore City) to adopt a living wage law. Besides the four laws that are the focus of this OLO Report, two laws provide protections for domestic workers and displaced service workers and another regulates employers' use of criminal records during the hiring process. Table 5-10 (on the next page) provides a summary list of these laws.

¹⁵⁹ The document is available online at

https://www.montgomerycountymd.gov/humanrights/Resources/Files/Sick_Safe_Leave_Guidance_Aug2018.pdf

Table 5-10. List of County Workplace Protection Laws Enacted Since 2002

Code Chap.	Law	What it does...	Took Effect	Years in effect as of 7/ 2018	Implementing Entity/ Enforcing Entity
CH11B-33A	Wage Requirements Law (Bill 5-02) “Living Wage Law”	Requires certain County service contractors and subcontractors to pay certain level of wages. Excludes goods and construction contracts.	July 1 2003	15 years	Director of Procurement
CH11B-33A	Wage Requirements - Amendments (Bill 43-15)	Requires submission of payroll records. Specifies remedies for violations. Amends causes for debarment. Prohibits certain paycheck deductions.	May 2016	2+ years	Director of Procurement
CH11-4B	Domestic Workers – Employment Contracts (Bill 2-08)	Requires employers to negotiate and offer written contracts disclosing information about job conditions and benefits to workers employed in their homes.	Jan. 2009	10.5 years	Office of Consumer Protection
CH27	Displaced Service Workers (Bill 19-12)	Requires building services contractors to retain staff following change in contract.	Dec 2012	6 years	County Office of Human Rights and County’s Human Rights Commission
CH 27	Minimum Wage (Bill 27-13)	Establishes schedule to phase in minimum wage increases to reach \$11.50 by 2017: Oct 2015 to \$9.55 in Oct. 2015; \$10.75 in July 2016; \$11.50 in July 2017.	July 2014	4 years	Maryland Department of Labor and Licensing Regulation (DLLR) – Employment Standards Service (ESS)
CH 27	Minimum Wage – Annual Adjustment (Bill 28-17)	Establishes schedule of minimum wage increases by firm size to reach \$15 for all by 2024.	July 2018	0 years	DLLR (ESS)
CH 27	County Minimum Wage – Definitions – Employer (Bill 34-18)	Modifies the definition of an employer required to pay the minimum wage to include sole employees.	July 2019	Pending	DLLR (ESS)
CH 27	Ban the Box (Bill 36-14)	Regulates use of criminal records in the hiring process by certain employers.	Jan 2015	3.5 years	County Office of Human Rights
CH 27	Discriminatory Employment Practices – Retaliation for Wage Disclosure Prohibited (Bill 51-14)	Prohibits employer retaliation against an employee who discloses wage information to another employee.	May 2015	3+ years	County Office of Human Rights
CH 27	Minimum Wage Law for Tipped Employees (Bill 24-15)	Sets base pay for tipped employee at \$4 to reconcile wage amount with increases in State minimum wage increases.	July 2015	3 years	County Office of Human Rights and DLLR (ESS)
CH 27	Earned Sick and Safe Leave (Bill 60-14)	Mandates sick and safe leave benefits for employees of County businesses and allows leave use for adoption.	Oct 2016+	2 years	County Office of Human Rights
CH27	Use of Earned Sick and Safe Leave – Parental Leave (32-16E)	Provides sick and safe leave may be used for parental leave.	Nov. 2016	2 years	County Office of Human Rights
CH 11B- & CH27	Contracts – Labor Peace Agreements – Displaced Service Workers – Amendments (Bill 6-18)	Requires certain County contractors to enter into a labor peace agreement with a labor organization. Adds County residential solid waste collection contract workers to County’s Displaced Service Workers Act.	Jan. 2019	Pending	Director of Procurement

Source: OLO.

VI. LABOR STANDARDS' COMPLIANCE RESEARCH SURVEYS AND ESTIMATES

OLO's review of agencies' documents and practices did not find any regularly published reports of measures that routinely track businesses' compliance levels with the County's minimum wage or living wage standards or with the County's sick leave standards. OLO's review did find agency reports that track and publish activity measures. For example, the Maryland Department of Labor, Licensing and Regulation publishes annual reports with numbers of claims and investigations, numbers of case resolutions, amounts of back wage payments and other penalties assessed, collected and disbursed.

This chapter responds to the Council's request for a better understanding of businesses' compliance with the County's statutory wage and benefit standards and what these data can tell us about how these standards are enforced. Given the lack of actual compliance data, it presents research about two areas: (1) businesses' noncompliance with federal or state labor standards based on surveys, and (2) state level estimates of minimum wage violations by industry based on U.S. census data.

The research base for labor standards compliance is sparse but growing. It consists of establishment surveys, worker surveys and violation estimates based on census data.¹⁶⁰ Details from these studies can provide insights into some of the challenges that must be addressed if policymakers want a set of reliable indicators for monitoring and tracking agencies' regulatory performance outcomes. This chapter has four sections, organized as follows:

Part A defines three common measures of noncompliance;

Part B presents details of a few historic U.S. Department of Labor representative employer surveys;

Part C presents summaries of select worker surveys, including a 2008 rigorous landmark survey; and

Part D presents noncompliance estimates developed from census survey data.

A. Measures of Noncompliance

Recent initiatives to establish state labor standards raise questions about the data systems agencies rely on to track and report whether these new standards are affecting businesses' behavior. Officials, administrators and the public would benefit from a set of measures that could be used for legislative oversight purposes, whether it be tracking agencies' inspections or tracking businesses' compliance levels.

Types of Compliance Level Measures. Three measures frequently used to report noncompliance are the percent of noncompliant businesses, the percent of workers who receive a back-wage payment and the average back-wage payment per worker.

- The **percent of noncompliant businesses** is calculated as the number of businesses with a FLSA violation divided by the total number of businesses or establishments in a sample. This indicator provides a broad measure of compliance because it counts violations but does not distinguish between minor and major violations. It can also combine different types of violations.

¹⁶⁰ OLO chose the studies to highlight key themes and illustrate differences in the data sources that support the research.

- The **average number of workers paid in violation of standards in a particular geographic area or industry** is calculated as the number of employees who receive a back-wage payment divided by the total number of workers at a workplace. This indicator measures the risk or likelihood a worker at a particular site will experience a violation.
- The **average back wage payment per worker** is calculated as the total back wage payment amount divided by the number of employees who received a payment. It provides an indication of how the severity of a violation can vary from site to site.

B. U.S. Department of Labor Representative Employer Surveys

In the late 1990s, the U.S. Department of Labor (DOL) conducted a series of surveys to assess employer noncompliance with the FLSA's minimum wage, overtime and child labor provisions.¹⁶¹ The initial list of industries DOL surveyed, which included agriculture and garment manufacturing, was later expanded to include health care and residential living facilities. DOL's compliance surveys also targeted restaurants' compliance with child labor laws. According to one summary:

[T]he department found that in 1999, only 35% of apparel plants in New York City were in compliance with wage and hour laws; in Chicago, only 42% of restaurants were in compliance; in Los Angeles, only 43% of grocery stores were in compliance; and nationally, only 43% of residential establishments were in compliance.¹⁶²

The following section describes details of DOL's compliance surveys of nursing home/long term care facilities in the health care industry and the fast food, full-service and supermarket segments of the restaurant industries.

1. Compliance Surveys of Nursing and Other Personal Care Facilities (1997 and 2000)

In 1997, DOL conducted an initial compliance survey of workplace standards that focused on six low-wage occupations at 288 private skilled nursing, intermediate care and assisted living facilities.¹⁶³ In 2000, DOL conducted a follow-up survey that added public establishments and high wage jobs to the sample.¹⁶⁴

To conduct the surveys, DOL investigators conducted site visits, met with employer representatives, reviewed payroll records and interviewed employees. DOL engaged in extensive outreach to industry advocates and employers prior to fielding of the survey. Both samples included a mix of first-time cases (firms not previously investigated) and recidivist cases (firms that had been issued citations in the past).¹⁶⁵

¹⁶¹ These surveys were part of DOL's Low Wage Industries Initiative, a strategic plan developed as part of its response to the Government Performance and Results Act. The Government Performance and Results Act of 1993 (GPRA) (Pub.L. 103-62)

¹⁶² Annette Bernhardt, Heather Boushey, Laura Dresser and Chris Tilly, *The Gloves-off Economy: Workplace Standards at the Bottom of America's Labor Market*, (Champaign: Labor and Employment Relations Association, 2008), 5.

¹⁶³ The low wage occupations in the 1997 sample included nursing assistants, laundry personnel, food prep workers and clerks. DOL's focus on the health care industry was driven, in part, by data that showed a 40% FLSA compliance rate. (See *Nursing and Other Personal Care Facilities 1997 Compliance Survey Fact Sheet*, U.S. Department of Labor, Wage Hour Division; retrieved from <https://www.dol.gov/whd/healthcare/surveys/nursing.htm>).

¹⁶⁴ *Nursing Home 2000 Compliance Survey Fact Sheet*, U.S. Department of Labor, Wage Hour Division; retrieved from <https://www.dol.gov/whd/healthcare/surveys/nursing2000.htm>

¹⁶⁵ The 1997 national sample had 288 private establishments, including skilled nursing facilities, intermediate care facilities and assisted living facilities. The sample had 161 first time cases (firms not previously investigated) and 127 firms that had

DOL defined noncompliance as any facility that had one or more types of FLSA violations. As Table 6-1 shows, noncompliance rates were 30% in 1997 and 60% in 2000. In both years, establishments were more likely to have an overtime violation than a minimum wage violation. For example, in 1997, 83% of the FLSA violations were for a failure to pay overtime versus 13% for a minimum wage violation.

Table 6-1. FLSA Noncompliance Rates: Skilled and Intermediate Care Nursing Homes and Other Personal Care (1997 & 2000)

Establishments with:	1997 Sample (n=288)		2000 Sample (n=136)	
	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>
Any FLSA violation	86	30%	81	60%
<i>Distribution of FLSA violations in sample by type</i>	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>
A minimum wage FLSA violation	11	13%	9	11%
An overtime FLSA violation	71	83%	68	84%

Source: OLO and Wage Hour Division Nursing and Other Personal Care Facilities 1997 Compliance Survey Fact Sheet and Nursing Home 2000 Compliance Survey Fact Sheet.

Minimum wage violations in 1997 were typically due to not paying for all hours worked or assessing illegal deductions that resulted in the wage rate falling below the legal standard. In 2000, most overtime violations were due to employers' misclassifying nonexempt employees as exempt based on the FLSA exemption for Executive, Administrative, Professional (EAP) workers. Other types of overtime violations included: being paid the regular rate instead of the premium rate for overtime hours, not including shift differential payments in the regular rate of pay and not being paid for pre-shift and post-shift work.

2. Youth Employment in Fast Food, Full Service Restaurants and Supermarkets (2000)

In 2000, DOL investigated restaurants and supermarkets to measure compliance with FLSA youth employment provisions. The sample included a total of 108 firms, including 68 first time firms and 40 recidivist firms. Table 6-2 summarizes rates of noncompliance by industry segment and sample type. In the baseline sample, establishment noncompliance rates for youth workers ranged from 18% (for supermarkets) to 30% (for fast food outlets). Youth worker noncompliance rates varied from 2% to 11%. In the recidivist sample, about half of full-service restaurants were noncompliant compared to 28% of fast food outlets and supermarkets. Noncompliance rates for youth workers were 3% for fast food outlets and 7% for restaurants.

Table 6-2. FLSA Noncompliance Rates for Restaurants, Fast Food Outlets and Supermarkets (2000)

Baseline Sample (n=68)	Percent of Establishments or Workers with Violations		
	<i>Full Service Restaurants</i>	<i>Fast Food Industry</i>	<i>Supermarkets</i>
Establishments with a FLSA child labor violation	22%	30%	18%
Youth workers who experienced a violation	11%	5%	2%
Recidivist Sample (n=40)	Percent of Violations		
	<i>Full Service Restaurants</i>	<i>Fast Food Industry</i>	<i>Supermarkets</i>
Establishments	48%	28%	28%
Youth workers who experienced a violation	7%	3%	5%

Source: OLO and Wage Hour Division Fact Sheet #41: Fast Food, Full Service Restaurant, and Supermarket Industries Youth Employment Compliance Survey.

been issued citations as a result of a previous investigation ("recidivist cases"). The 2000 sample had 136 nursing homes and other personal care facilities. This sample had 136 first time cases and 58 recidivist cases.

C. Worker Surveys

In 2005, the Brennan Center for Justice compiled 10 years of research studies about violations of federal workplace protection rules. The 56 studies all attempted to estimate actual violations. The review, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violations in the U.S.*, included six convenience sample surveys and a more limited set of representative worker surveys.¹⁶⁶

1. Convenience samples and ethnographic models

Table 6-3 displays summaries of six convenience sample surveys from the Brennan Center inventory. The interviewees worked as day laborers, building services workers, restaurant workers and grape growers. The most common violations were nonpayment or underpayment of wages, nonpayment for overtime and working without breaks. The data, which are suggestive only, show noncompliance rates for nonpayment or underpayment of wages range from 8% to 55% while rates for overtime violations range from 27% to 58%.

Table 6-3. Summaries of Convenience Sample Worker Surveys for Select Areas and Industries

Mehta et al (2002) Chicago Metro Area – Various Industries	1,653 immigrant surveys at 38 organizations	Workers reported no payment or underpayment of wages (18%); forced overtime (18%); and working without breaks (12%). There were violation rate disparities between undocumented and documented workers, e.g., nonpayment of wages (26% v. 9%); forced overtime (21% v. 16%) and working without breaks (18% v. 7%).
Day Laborer Coalition (2004) Chicago Neighborhood	143 worker surveys	Workers reported below minimum wage payments (8%); improper deductions (39%); and nonpayment for overtime (58%).
Fairfax County (2004); Fairfax County, VA Day Laborers	200 in person worker interviews at 4 sites	Workers reported multiple types of violations including no breaks (59%); underpayment (55%); nonpayment (52%); racial discrimination (36%); bad checks (26%); violence (16%); threats (15%); and robbery (12%).
Nissen (2004) Miami Dade County, FL Building services	696 in person worker surveys	Workers reported multiple types of violations including for nonpayment of wages; for working off the clock; and for nonpayment of overtime premiums.
NY Restaurant Industry Coalition (2005) NY, NY Restaurants	527 worker surveys	Workers reported multiple types of violations including being paid below minimum wage rates (13%); overtime violations (59%); and having to work without mandated breaks (57%).
Schacht et al (2005) CA Central Valley; Grape growing	1,028 worker interviews at more than a dozen sites	Workers reported multiple types of violations including pay stubs not reflecting all hours worked (50%); being paid in cash without itemized information (48%); and not always receiving overtime wages owed (50%).

Source: OLO and Brennan Center for Justice, *A Survey of Literature*, April 2005

2. Representative Worker Surveys

Unregulated Work in New York City. In 2007, the Brennan Center for Justice published an investigation of violations of workplace laws in New York City designed to identify industry segments with systemic patterns of violations. The authors interviewed over 300 workers, employers, regulatory staff and others.

¹⁶⁶ A convenience sample is one of the main types of [non-probability sampling methods](https://stattrek.com/statistics/dictionary.aspx). A convenience sample is made up of people who are easy to reach; retrieved from <https://stattrek.com/statistics/dictionary.aspx>

Based on their work, they concluded that in certain industry segments it appeared workplace violations had become so routine as to be standard business practice for a significant number of employers.¹⁶⁷ Table 6-4 displays industries that had patterns of systemic violations. Many of these segments were local establishments or “place-based industries” which highlights the local effects of labor standards violations.

Table 6-4. Industry Segments and Occupations with Systemic Patterns of Workplace Violations

Industry	Industry Segments with Violations	Occupations Most Affected
Groceries and supermarkets	Green grocers, bodegas, delis, gourmet grocers, health food stores, non-union supermarkets	Cashiers, stock clerks, deli counter workers, food preparers, delivery workers, janitors, baggers, produce washers/watchers, and flower arrangers
Retail (other than food)	Discount and convenience stores; ethnic retail; and some, non-union drug stores and retail chains	Cashiers, stock clerks, security guards, delivery workers, and workers in retailer-owned warehouses
Restaurants	All industry segments, especially high-end “white table cloth” restaurants and independent family -style and ethnic restaurants	Dishwashers, delivery persons, food prep, line cooks, porters, bussers, runners, bathroom attendants, barbacks, cashiers, counter persons, coat checkers and some waiters and hosts)
Building maintenance and security	Non-union contractors servicing small residential buildings and commercial clients; or these buildings that hire workers directly	Security guards, janitors, supers, porters, handymen, and doormen
Domestic work	Individual families and diplomats	Nannies, housekeepers, housecleaners, elder companions, with many jobs combining duties
Child care	Publicly-subsidized home-based child care	“Legally-Exempt” and “Registered Family” child care workers
Home health care	Violations are common where workers are employed directly by clients; some violations occur for home health agency employees	Home care workers
Construction	Small and medium private residential construction projects; small and medium public agency construction and renovation projects	Laborers, carpenters and other construction trades
Manufacturing	Non-union food and apparel manufacturing	Sewing operators, machine operators, floor workers, pressers, hangers, packers, cutters, porters, and helpers/assistants
Laundry and dry cleaning	Non-union industrial laundries, dry cleaning plants, retail dry cleaners, and coin-op laundries	Folders, sorters, pressers, drivers, customer service workers, cleaners/spotters, tailors, and baggers
Taxis	Yellow cabs, livery cabs, and dollar vans	Drivers
Auto services	Violations are common in car washes, but are also reported in informal parking lots, garages and auto repair shops	Car wash workers and to a lesser degree parking attendants and auto body and repair workers
Personal services	Violations are common in nail salons, in hair braiding shops, low-price spas hiring unlicensed massage therapists, and some beauty salons	Nail technicians, hair braiders and massage therapists, as well as other jobs in beauty salons such as attendants, janitors and shampooers

Source: Bernhardt, “Unregulated Work,” 21.

¹⁶⁷ Annette Bernhardt, Siobhan McGrath and James DeFilippis, “Unregulated Work in the Global City: Employment and Labor Law Violations in New York City,” *Brennan Center for Justice at New York University School of Law*, (April 2007): 1-126.

2008 Unregulated Work Survey. From January to August of 2008, a consortium project team surveyed nearly 4,400 workers in low wage industries in New York City, Los Angeles and Chicago to determine employers' compliance with various wage hour standards.¹⁶⁸ This research ("The 2008 Unregulated Work Survey") piloted the use of an innovative sampling methodology and survey instrument because a core purpose was to address the lack of representative data in academic research on workplace violations.¹⁶⁹

The researchers found evidence of severe and widespread workplace violations in the low-wage labor markets of America's three largest cities. Table 6-5 displays prevalence rates for five violation types, showing both those at risk of a violation and the percentage who experienced a violation. Of note,

- 25.9% of workers were paid less than the minimum wage and 56.8% did not receive a paystub;
- 76.3% of workers who were at-risk of an overtime violation experienced one and 70% who were at-risk of an off-the-clock violation experienced one; and
- 69.5% of workers who were at-risk of a meal break violation experienced one.

Table 6-5. Noncompliance Rates by Violation Type Among At-Risk Low-Wage Workers

Violation Type	Definition	Percent of workers with violations:	
		<i>All workers surveyed*</i>	<i>At-risk of a violation**</i>
Minimum wage violation	Worker was paid below the minimum wage in the week prior to the survey	25.9%	same
Overtime violation	Worker had unpaid or underpaid overtime in week prior to survey	19.1%	76.3%
Off the clock violation	Worker not paid for off-the-clock work in the week prior to the survey	16.9%	70.1%
Paystub violation	Worker did not receive a paystub	56.8%	same
Meal break violation	Worker was denied a meal break or it was interrupted or they worked through the meal break or it was shorter than legally required	58.3%	69.5%

*Calculated as a percent of all workers in sample. **Calculated as a percent of workers who were at risk of a violation.
Source: OLO and Broken Laws, p. 20.

In sum, all low-wage workers were more likely to experience a pay stub (56.8%) or a paystub (58.3%) violation than a minimum wage (25.9%) or an overtime (19%) or an off the clock violation (17%); however, the highest violation rates occurred among those individuals who worked overtime or before or after a shift.

¹⁶⁸ Annette Bernhardt et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," UCLA: Institute for Research on Labor and Employment, (2009): 21; retrieved from <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>

¹⁶⁹ The survey methodology allowed researchers to create a representative worker sample that included vulnerable and hard to reach workers. Detailed questions about each worker's job, hours and wages allowed researchers to make independent determinations about compliance, instead of relying on workers' perceptions or knowledge of labor and employment law.

3. Low Wage Work Compliance Levels by Violation Type and Business Characteristics

Subsequently, Bernhardt analyzed data from the 2008 Unregulated Work Study to examine variations in patterns of violations by employer characteristics, worker characteristics and industry. As Table 6-6 shows, Bernhardt found higher compliance rates among employers that provided raises, health insurance or paid leave. For example, employers that provided benefits had minimum wage noncompliance rates of 12% or 13%, compared to rates of 28% to 32% for employers that didn't provide raises or benefits.

Table 6-6. Variations in Workplace Violation Rates by Employer Benefit Characteristics

Employer Characteristics		Percent of workers with violations			
		<i>Min. Wage violation rate</i>	<i>Overtime violation rate</i>	<i>Off the clock violation rate</i>	<i>Meal break violation rate</i>
All respondents		25.9	76.3	70.1	69.5
Employer gave worker a raise in the 12-month period prior to the survey?	No	31.9	90.7	72.7	70.3
	Yes	13.7	68.8	66.6	68.3
Employer offered worker health insurance in the 12-month period prior to the survey?	No	29.9	90.3	72.4	70.3
	Yes	12.9	58.1	54.6	63.4
Employer gave worker paid sick and paid vacation time in the 12-month period prior to the survey?	No	27.9	90.6	71.6	70.7
	Yes	12.1	53.5	56.2	64.1

Source: Broken Laws, p. 38

Bernhardt examined how much of the differences in the patterns of violation by industry were attributable to differences in workforce composition, such as a reliance on undocumented workers versus differences in employer characteristics. Bernhardt found that job and employer characteristics were more predictive of noncompliance than worker characteristics. For example, Table 6-7 shows that employers who paid workers on a non-hourly basis were much more likely to pay subminimum wages than employees who paid on an hourly basis, and smaller companies were much more likely to pay subminimum wages than companies with over 100 employees.

Table 6-7. Variations in Workplace Violation Rates by Job and Employer Pay and Size Characteristics

Employer Characteristic		Percent of workers with violations			
		<i>Min. Wage violation rate</i>	<i>Overtime violation rate</i>	<i>Off the clock violation rate</i>	<i>Meal break violation rate</i>
All respondents		25.9	76.3	70.1	69.5
Pay type	Hourly	14.8	60.7	64.8	67.5
	Non-hourly	46.2	92.3	78.9	73.7
Pay method	Paid in cash	34.1	87.8	74.6	72.9
	Paid by company check	17.2	61.5	64.4	67.4
Company size	Fewer than 100 employees	28.5	82.4	73.6	73.5
	100 employees or more	15.2	52.8	64.9	63.8

Source: Broken Laws, p. 30.

Finally, in follow-up research, Bernhardt used a clustering analysis to examine patterns in the types and level of violations by industry.¹⁷⁰ Table 6-8 shows these results. The left column sorts industries into three tiers, high, moderate and medium, based on the number of their violations. The results show:

- The top tier of four high violation industries, e.g. private households and landscaping, had very high or above average violation rates for three of the five types of violations;
- The middle tier of seven medium violation industries, e.g. restaurant and food services and grocery stores, had above and below average rates for minimum wage and pay stub violations and mixed rates for overtime, off the clock and meal breaks; and
- The bottom tier of three moderate violation industries had very low rates of minimum wage and pay stub violations but mixed or above average rates for overtime, off the clock and meal break violations.

Table 6-8. Patterns of Workplace Violations by Type and Industry Tiers

Industry Tier	Violation Type:				
	<i>Minimum Wage</i>	<i>Paystub</i>	<i>Overtime</i>	<i>Off the clock</i>	<i>Meal breaks</i>
<i>High Violation Industries</i>					
Private households					
Car washes, auto repair, dry cleaning and laundries, beauty and nail salons	Very High	Very High	Above Average	Mixed	Mixed
Apparel Manufacturing					
Residential construction and landscaping					
<i>Medium Violation Industries</i>					
Warehousing and transportation					
Restaurant and food services					
Retail and drug stores	Above and below average	Above and below average	Mixed	Mixed	Mixed
Services to buildings and dwelling					
Grocery stores					
Social assistance					
Food and furniture manufacturing					
<i>Moderate Violation Industries</i>					
Home health care			Mixed (Above average)	Mixed (Above average)	Mixed (Above average)
Hotels, convention halls, stadiums, finance and real estate	Very low	Very low	Mixed	Mixed	Mixed
Education, nursing homes, hospitals				Mixed	Mixed

Source: OLO and Bernhardt, *Employers Gone Rogue*, p. 820

¹⁷⁰ Annette Bernhardt, Michael W. Spiller, and Nik Theodore, “Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws,” *ILRR* Review Vol. 66, No. 4. (July 13): 820.

D. Noncompliance Estimates Based on Census Survey Data

Another set of research studies developed measures of compliance with workplace protection standards using survey data from the U.S. Census. An early study by Ashenfelter and Smith (1979) used the Current Population Survey (CPS) to estimate minimum wage compliance as the proportion of workers earning exactly the minimum wage divided by the population earning the minimum wage or less.

This section presents the results of two more recent efforts to estimate minimum wage violations using the CPS. The first study, prepared for the U.S. DOL by the economic consulting firm Eastern Research Group (ERG), found:

- Overall, between 3.5% and 6.8% of covered wage and salary workers in California and New York experienced minimum wage violations; and
- Industries with the highest rates of violation were leisure and hospitality, education and health services, wholesale trade and retail trade.

A second study by the Economic Policy Institute (EPI), estimated minimum wage violations for the ten largest states.

1. Estimates of Minimum Wage Violations for California and New York (2014)

In 2014, the DOL released a report by the Eastern Research Group (ERG) that estimated the impact of violations of state and federal minimum wage and overtime pay laws in California and New York. The report, *The Social and Economic Effects of Wage Violations: Estimates for California and New York*, was an exploratory effort to estimate FLSA violations using census survey data.¹⁷¹ The DOL and ERG agreed that ERG should focus on data from the Current Population Survey (CPS) and the Survey of Income and Program Participation (SIPP).

ERG's Methodology. To estimate minimum wage violations for New York and California, ERG compared the wages reported by the survey respondents to the minimum wage standards for each state.¹⁷² By focusing on only two states, ERG was able to account for details in state law that could affect determinations of whether a violation occurred.¹⁷³ ERG used sampling weights to extrapolate from the sample to the population for each state.

ERG concluded that its approach of using a large national dataset to identify violations and extrapolate to a population worked well. ERG noted that limitations to this approach included measurement errors associated with the CPS and the SIPP and the analytical assumptions required to process the survey data. The analytical assumptions ERG made to process the survey data are a widely recognized limitation of this estimating approach, but they are necessary because neither survey produces the exact data elements needed for the estimates. In acknowledging that these assumptions introduce another source of error, ERG cautioned that it was important to pay attention to the error rates. ERG ran sensitivity tests to assess how

¹⁷¹ "The Social and Economic Effects of Wage Violations: Estimates for California and New York," *Eastern Research Group, Inc.* Lexington, MA, (December, 2014); retrieved from <https://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf>.

¹⁷² (In contrast to the 2008 Unregulated Worker Survey, ERG relied on respondent's self-reported wages instead of collecting the inputs to calculate the wages.)

¹⁷³ Some examples of details that affect determinations of minimum wage violations are a state minimum wage standard that is higher than the federal standard or a state provision for the treatment of tip credit. In California, for example, employers are not allowed to apply tip credits toward payment of an employee's minimum wage; instead, they must pay the minimum wage amount. In New York, employers are allowed to apply a tip credit, but the state's rules differ from the federal rules.

measurement errors related to the surveys affected the estimates and found that the measurement errors had not affected the estimates. Overall, ERG's professional judgment was that the data were adequate to support reliable estimates of minimum wage violations. Table 6-9 displays select ERG estimates based on the CPS survey data. Of note,

- In California, an estimated 370,000 minimum wage violations occurred per week. These violations represented 2.7% of all jobs; 3.8% of covered non-exempt jobs; and nearly 12% of low-wage, covered non-exempt jobs.
- In New York, an estimated 188,000 minimum wage violations occurred per week, corresponding to 2.3% of all jobs; 3.5% of covered, non-exempt jobs; and just over 11% of low-wage, covered non-exempt jobs.

Table 6-9. Estimates of Minimum Wage Violation Rates by Industry and Occupation

Indicator/Measure	California	New York
Estimate of Total Jobs (weekly)	14,262,000	8,317,000
Estimate of Minimum Wage Violations (weekly)	372,000	188,000
Estimated Percent of Workers with Violations		
For All Jobs	2.70%	2.30%
For Covered, Non-exempt Jobs	3.80%	3.50%
For Low-Wage, Covered Non-exempt Jobs	11.80%	11.10%
Distribution of Workers with Violations by Industry		
	100%	100%
Leisure and Hospitality	19%	34%
Educational and Health Services	18%	16%
Wholesale and Retail Trade	15%	21%
Other Services	12%	8%
Other	36%	21%
Distribution of Workers with Violations by Occupation		
	100%	100%
Services	43%	52%
Sales and Related	13%	15%
Office and Administrative Support	8%	7%
Transportation and Material Moving	8%	9%
Other	28%	17%

Source: ERG

2. Estimates of Minimum Wage Violations for the Ten Most Populous States (2017)

In 2017, the Economic Policy Institute (EPI) published a report estimating minimum wage violations in the ten largest states.¹⁷⁴ Like ERG, EPI based its estimates on CPS survey data and limited the study scope to account for state variations in specific wage hour provisions and exemptions. By limiting the study to the ten largest states, the sample sizes were large enough to generate additional estimates of violations by industry, occupation and other characteristics.

Table 6-10, on the next page, displays EPI's minimum wage estimates for the ten most populous states. Georgia (at 82,000) had the fewest violations and California (at 590,000) had the most. The overall violation rate, calculated as the estimate of violations divided by the population of protected workers, represents the risk that a protected worker would experience a violation. Georgia had the lowest risk of experiencing a violation (at 2.2%) and Florida workers had the highest risk (at 7.3%). For all workers in the ten states, the overall risk of a minimum wage violation was 4.1%.

Table 6-10 also displays EPI's estimates of the risk of a minimum wage violation by industry for each state. EPI disaggregated data to isolate violation estimates for the food and drink industry because many full-service restaurant businesses rely on tip credits to pay their workers a minimum wage and, as a result those businesses had a higher risk of violation. The ten-state summary data show EPI's estimated violation risk for the food and drink industry (at 14.3%) is three and a half times the overall violation risk of 4.1%.

Finally, EPI's estimates show that the risk of a violation within the same industry varies widely across states. For example, within the food and drink industry, the risk of a violation varies from 7.3% in Georgia to 25.3% in Ohio.

¹⁷⁴ David Cooper and Teresa Kroeger, "Employers steal billions from workers' paychecks each year: Survey data show millions of workers are paid less than the minimum wage, at significant cost to taxpayers and state economies," *Economic Policy Institute*, May 10, 2017 (85 pages); retrieved from <https://www.epi.org/files/pdf/125116.pdf>

Table 6-10. State Estimates of Workers at Risk of Experiencing a Minimum Wage Violation by Industry

State	# of Protected Workers	# of MW Violations	Overall Viol. Risk	Risk of Experiencing a Minimum Wage Violation by Industry												
				Constr	Mfg	Retail	Agric.	Whole-sale Trade	Trans. & Util.	Info.	Finan.	Prof. & Bus.	Ed. & Health	Food & Drink	Other Leisure & Hosp.	Other Industries
CA	14,569,000	590,000	4.1%	1.9%	2.6%	4.9%	10.7%	2.5%	3.2%	2.4%	2.4%	3.2%	3.1%	9.1%	5.6%	6.0%
FL	5,515,000	404,000	7.3%	4.5%	5.2%	7.7%		5.9%	3.4%	4.7%	4.6%	6.9%	3.4%	20.1%	9.3%	7.8%
GA	3,769,000	82,000	2.2%	1.8%	1.5%	1.4%		1.5%	2.2%	1.6%	1.2%	1.6%	1.6%	7.3%	3.4%	2.8%
IL	5,185,000	243,000	4.7%	2.6%	2.9%	6.5%		1.8%	4.8%	4.9%	1.5%	2.9%	3.5%	15.9%	6.2%	6.1%
MI	2,861,000	130,000	4.5%	1.9%	1.2%	5.0%		3.6%	1.4%	4.2%	4.0%	3.2%	2.0%	21.3%	7.6%	6.6%
NY	6,047,000,	300,000	5.0%	3.3%	2.5%	6.7%		2.9%	3.9%	2.5%	3.5%	2.8%	3.2%	17.5%	7.3%	4.9%
NC	3,111,000	84,000	2.7%	2.3%	0.9%	2.7%		0.5%	2.6%	1.8%	2.3%	1.6%	1.4%	10.9%	5.2%	3.6%
OH	3,915,000	217,000	5.5%	1.3%	1.4%	6.7%		2.4%	2.8%	5.2%	2.5%	2.9%	3.4%	25.3%	10.2%	5.7%
PA	4,299,000	107,000	2.5%	0.4%	0.9%	2.1%		2.4%	1.2%	1.6%	1.3%	1.2%	1.6%	12.8%	3.5%	2.6%
TX	9,743,000	265,000	2.7%	1.4%	1.0%	2.3%	4.5%	1.5%	1.7%	1.6%	1.5%	2.1%	1.9%	10.9%	6.9%	3.1%
Totals	59,014,000	2,422,000	4.1%	2.2%	1.9%	4.7%	9.1%	2.5%	2.8%	2.7%	2.3%	3.0%	2.7%	14.3%	6.8%	4.9%
Minimums		82,000	2.2%	0.4%	0.9%	1.4%		0.5%	1.2%	1.6%	1.2%	1.2%	1.4%	7.3%	3.4%	2.6%
Maximums		590,000	7.3%	4.5%	5.2%	7.7%	10.7%	5.9%	4.8%	5.2%	4.6%	6.9%	3.5%	25.3%	10.2%	7.8%

Source: EPI

VII. FINDINGS AND RECOMMENDED DISCUSSION ISSUES

Since 2002, Montgomery County has enacted nine laws to regulate wage standards and other aspects of employer/employee relationships. These workplace protection laws address concerns about worker precarity, but they also raise practical questions about compliance and enforcement.¹⁷⁵

This report responds to the Council's interest in what is known about how well County employers comply with these workplace protection laws; what happens when noncompliance occurs; and what this says about how these laws are being enforced. It reviews noncompliance research; it describes federal and state enforcement systems and it reviews the practices of two County departments.

OLO found that the activities of the County departments that are responsible for compliance and enforcement generally align with conventional practices recommended by the International Labor Office (ILO). OLO did not find any regularly published County or State reports that routinely track businesses' compliance rates. To fill this void, OLO reviewed research on workplace compliance and enforcement and more recent efforts to develop estimates of violations using census survey data.

OLO's review of research found that businesses' compliance with workplace protection laws is highly uneven. Most businesses comply voluntarily but, in certain low-wage industry segments, noncompliance is severe and widespread. Significantly, most workers employed in these low-wage industry segments are those most likely to benefit from workplace protection laws. Other research finds a shift in firms' business practices towards greater use of subcontracting and other nonstandard work arrangements. These practices can shield firms from the financial and legal liabilities that workplace protection laws impose and allow the parent firms to offload costs and legal risks onto smaller firms. Workers may not realize the protections that the new laws are intended to provide.

The current systems that exist to promote compliance and enforcement are unlikely to reach the most at-risk workers. On one hand, public regulatory agencies suffer from underfunding due to a mismatch of expanding legislative initiatives and declining revenues. On the other hand, greater use of private rights of action has relieved the enforcement burden for these underfunded public agencies.

But, low-wage workers may be ill-served by a greater reliance on private enforcement because it depends on workers knowing their rights, having access to legal expertise, and being willing to complain. A recent study found this "bottoms-up enforcement system" badly fails low-wage workers who are most at-risk of businesses' noncompliance. Other research suggests that regulatory agencies that rely on complaint-driven systems risk tracking indicators that do not correspond to actual workplace violations. Strategic enforcement systems are one effort to address these shortcomings.

In 1991, to address funding cuts, the Maryland Department of Licensing, Labor and Regulation (DLLR) discontinued active enforcement of the Maryland Wage Hour Law (MWHL) (the state's minimum wage law) so it could focus on enforcing the Maryland Wage Payment and Collection Law (MWPCCL). DLLR re-instated active enforcement of the MWHL in 2014. DLLR relies mainly on workers' written complaints and businesses' voluntary compliance efforts. DLLR's annual reports track worker claims and recovered wages; they do not report measures of business compliance.

¹⁷⁵ The term "precarious workforce" refers to workers in low quality, low wage jobs who can no longer access the levels of economic and social protections established during the New Deal. Because definitions vary, researchers' different estimates suggest that "precarious workers" account for 30 percent to 40 percent of today's workforce.

This chapter presents OLO’s findings and recommended discussion issues organized as follows:

- A. Research Highlights on Businesses’ Compliance with Employment Law Standards (Findings 1-5)**
- B. Characteristics of Systems to Enforce Statutory Worker Protections (Findings 6-12)**
- C. How County Departments Promote Compliance and Enforce Worker Protection Laws (Findings 13-14)**
- D. Recommended Discussion Issues**

A. Research Highlights on Businesses’ Compliance with Employment Law Standards

- 1. Workplace violations can take many forms, making compliance research challenging. Early nonrepresentative samples reported businesses’ overall compliance with multiple provisions of the Fair Labor Standards Act (FLSA) at roughly 40 or 50 percent.**

A complex set of employment and labor laws govern U.S. workplaces, including employment statutes such as the Fair Labor Standards Act that require employers to pay a minimum wage, a subminimum wage for tipped employees and an overtime wage. No federal law requires a meal break, but many state laws do. Most states regulate how or how often an employee must be paid.

Research to assess firms’ violations of worker protection laws is complicated because violations take many forms. Examples include underpaying or failing to pay for all hours worked; paying minimum wage for overtime hours; paying a flat rate that does not equate to the minimum wage for the hours worked; or deductions that effectively reduce the wage below the minimum wage. Most compliance research relies on surveys that address multiple types of violations. Overall compliance rates combine violations of separate provisions while specific rates look at individual provisions.

Older noncompliance research consisted of random surveys of employers and workers. Since few surveys were representative, it was difficult to determine the extent of noncompliance. For example:

- In the late 1990s, the U.S. Department of Labor (DOL) fielded random surveys of employers’ compliance with the Fair Labor Standards Act (FLSA) in various industries. Examples of businesses’ overall compliance rates were: 42% for restaurants in Chicago, 43% for grocery stores in Los Angeles and 43% for residential care facilities nationally.
- Six studies of vulnerable workers such as day laborers or those in low-wage occupations found the most common violations were nonpayment or underpayment of wages, non-payment for overtime, and working without breaks. Interviewers reported 8% to 55% of workers were underpaid or not paid and 27% to 58% were not paid for overtime hours.
- A New York City study, based on 300+ stakeholder interviews, identified 13 industry segments (listed below) with pervasive noncompliance. Businesses frequently violated more than one law. In some segments, systematic violations appeared to be standard practice.

Groceries and supermarkets Retail Restaurants Publicly sponsored child care Domestic work	Home health care Building maintenance and security Residential construction Food and apparel manufacturing Personal services, e.g. nail & beauty salons	Laundry and dry cleaning Taxies and dollar vans Auto repair, garages and car washes
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2. **Research to estimate compliance with minimum wage standards using U.S. census data found estimated violation rates of covered jobs in New York and California of 3.5% and 3.8% respectively. A ten-state study estimated the average overall risk of a minimum wage violation was 4.1%. The risk for a worker in the food and drink industry was 14.3%.**

The U.S. Department of Labor contracted with Eastern Research Group (ERG) to develop a methodology to estimate violations of state and federal minimum wage and overtime pay laws. Using census survey data, ERG produced statewide reliable estimates of minimum wage violations for New York and California. ERG found New York's estimated minimum wage violations represented 3.5% of covered, non-exempt jobs or just over 11% of low-wage jobs. California's estimated violations represented 3.8% of covered, non-exempt jobs or nearly 12% of low-wage jobs.

The Economic Policy Institute (EPI), a labor advocacy group, used census survey data to develop minimum wage violation estimates for the ten largest states. EPI calculated the risk that a protected worker would experience a minimum wage violation and specific risk estimates for the food and drink industry. EPI, like ERG, accounted for differences in states' laws and their mix of industries.

EPI's estimate of the risk of a minimum wage violation was 4.1% for covered workers across all ten states. Workers in Georgia faced the lowest risk of a violation at 2.2%; those in Florida had the highest risk at 7.3%. EPI's estimate of the risk of a violation for a worker in the food and drink industry was 14.3% or over three times the overall risk of violation. EPI found risks by industry varied widely by state. For example, a worker in the food and drink industry in Georgia had a 7.3% risk of a violation while the risk for a comparable worker in Ohio was 25.3%.

3. **A rigorous study of workplace violations in Chicago, Los Angeles and New York City found 26% of low-wage workers were not paid the minimum wage. Roughly 20% of low-wage workers were eligible for overtime pay and 76% experienced a violation.**

In 2008, a consortium of researchers used an innovative survey methodology to capture hard-to-reach workers and generate representative worker samples. Detailed survey questions also allowed researchers to determine compliance independently instead of relying on workers' perceptions.

Researchers reported risk rates and violation rates for five types of violations, i.e., minimum wage, overtime, pay stub, meal breaks, and working off-the-clock. Among all low-wage workers, 26% were not paid the minimum wage. Of 20% eligible for overtime, 76% were not paid overtime wages.

Table 7-1. Noncompliance Rates by Violation Type Among At-Risk Low Wage Workers

Violation Type	Definition	% of workers with violations	
		All workers surveyed*	At-risk of a violation**
Minimum wage	Worker paid below the minimum wage in week prior to survey	25.9%	same
Overtime	Worker had unpaid or underpaid overtime in week prior to survey	19.1%	76.3%
Off the clock	Worker not paid for off-the-clock work in week prior to survey	16.9%	70.1%
Paystub	Worker did not receive a paystub	56.8%	same
Meal break	Worker was denied or worked through a break or it was cut short	58.3%	69.5%

Source: Bernhardt, Broken Laws, 21. *Calculated as % of all workers in sample. **Calculated as % of those at risk of a violation.

4. Employer characteristics are more predictive of compliance than worker characteristics. Noncompliance rates are higher for businesses that pay in cash or a non-hourly basis or for small firms. Compliance rates are higher for businesses that provide raises and benefits.

The 2008 landmark study examined whether differences in violation patterns were attributable to employer characteristics or worker characteristics and the role of employer benefit characteristics, business practices and workplace violation rates. Employer and job characteristics mattered more.

Researchers found businesses' compliance rates varied by pay type (non-hourly or hourly), pay method (paid in cash or paid by check) and firm size (fewer or more than 100 employees). Minimum wage violation rates were: three times as high for firms that paid non-hourly (46.2% vs. 14.8%) and twice as high for cash businesses (34.1% vs. 17.2%) and for small firms (28.5% vs. 15.2%).

Researchers examined differences in businesses' compliance with wage standards and if a business had provided raises, health insurance or paid leave. Businesses that had provided one of these benefits had noncompliance rates of 12-13%. Rates were three times higher for those that had not.

5. Research into the growth of low-wage industries suggests increases in workplace violations are due to changing business practices undertaken in response to economic restructuring.

Economic restructuring refers to the long-term transformation of the American economy due to the emergence of globalized markets, financialization, technological change and deregulation. As a result, businesses substituted nonstandard work arrangements, e.g., temporary workers, contract workers and independent contractors, for arrangements with a standard employment contract.

Fissuring is a term used by David Weil, a former administrator in the U.S. Department of Labor, to describe how outsourcing led to the splintering of firms and the offloading of employer responsibilities that had previously defined the standard employer/employee relationship.

Weil argues that today's economy rests on a bed of fissured workplaces. His view is that fissuring creates industry patterns of lead firms and lower level entities (shown below). Firms that establish these patterns place more layers between an employer and an employee. This allows these firms to isolate their labor costs. Putting labor costs in a more competitive environment creates downward pressure on wages and that can push lower level firms to violate wage hour and safety standards.

Table 7-2. Fissured Employment in Selected Industries

Industry	Lead firm/organization	Lower level entity
Eating and drinking	Brands (franchisors)	Franchisees/outlets
Hotel and motel	Brands (franchisors)	Hotel/motel properties
Residential construction	Major homebuilders	Contractors/subcontractors
Janitorial services	Building service providers	Contractors/franchisees
Moving companies/logistics providers	Branded national companies	Subcontracted local movers; interstate trucking companies; warehouses
Agricultural products – multiple sectors	Food retailers or processors	Farms; Farm labor contractors
Retail food stores (prepared foods)	Major food retailers	Franchised prepared food providers
Home health care services	Major purchasers of home health care	Health care intermediaries; home health care providers

Source: Weil 2010.

B. Characteristics of Systems to Enforce Statutory Worker Protections

6. A 2011 minimum wage review identified three approaches and five strategies used to promote compliance and enforce statutory worker protections. In the U.S., compliance strategies are under the purview of a federal or state regulatory agency and actions to enforce rights can be pursued through a regulatory agency and/or through the courts.

An International Labor Office (ILO) implementation review of minimum wage systems identified three approaches to compliance and enforcement:

- A persuasive approach deploys techniques that emphasize shared values and norms.
- A management approach uses tools that focus on technical assistance and monitoring; and,
- An enforcement approach uses monitoring and escalating sanctions. This approach assumes noncompliance exists because the costs of compliance and likelihood of detection are low. Monitoring exists to detect non-compliance and sanctions create incentives to comply.

Research suggests the most effective regulatory systems combine all three approaches. Regulators rely primarily on a foundation of cooperative strategies and monitoring; but, when noncompliance occurs, they must be able and willing to impose escalating sanctions to create a credible deterrent.

The table below lists five ILO strategies that comprise a typical compliance and enforcement system. In the U.S., federal and state regulatory agencies implement all five strategies. The use of private rights of action in public law also provides for the enforcement of rights in federal and state courts.

Table 7-3. The U.S. System of Compliance and Enforcement for Statutory Workplace Protections

Infrastructure of Compliance and Enforcement for Workplace Mandates	Federal		State	
	Agency	Courts	Agency	Courts
COMPLIANCE STRATEGIES				
1. <u>Self-enforcement through persuasion.</u> This low-cost strategy creates a culture of compliance by appealing to common values.	√		√	
2. <u>Information and capacity building campaigns.</u> This strategy uses training seminars to ensure a general awareness of the law and specific knowledge about rules to achieve compliance.	√		√	
3. <u>Monitoring to detect non-compliance.</u> Monitoring is key to the management and enforcement approaches. Inspections are the primary method, but costs are problematic. Agencies use targeting to prioritize resources or rely heavily on worker complaints. Confidential hotlines or online complaint forms help ensure complainants' easy/safe access.	√		√	
ENFORCEMENT STRATEGIES				
4. <u>Individual and collective rights to pursue legal remedies.</u> This strategy empowers workers to take action against an employer, but it poses considerable risks. Workers can pursue a remedy either administratively through a regulatory agency or legally through a private right of action. To be effective, provisions to authorize collective actions or other protections are necessary.	√	√	√	√
5. <u>Legal sanctions.</u> This strategy relies on fines, provisions for suspending a business license, or a system of increasingly severe penalties for repeat offenders or egregious violations.	√	√	√	√

Source: ILO and OLO.

7. Public agencies charged with enforcing federal and state wage hour laws face underfunding. Agencies' efforts to use resources efficiently can create barriers for workers to file claims.

Agencies, such as the Wage Hour Division (WHD) in the U.S. Department of Labor or the Employment Standards Service ("Employment Standards") in Maryland's Division of Labor and Industry (DLI) in the Department of Labor and Licensing Regulation (DLLR) are charged with administering regulatory compliance and enforcement systems. Workers can file a wage claim with WHD or Employment Standards. Only Employment Standards enforces the Maryland Wage Payment Collection Law that addresses nonpayment of earned wages.

Regulatory agencies use all five strategies listed in Finding 6; but inadequate funding for monitoring is a longstanding problem that severely constrains an agency's ability to detect noncompliance:

- At the federal level, WHD's resources for enforcing the FLSA have declined steadily over 80 years. WHD had roughly one investigator for every 22,600 covered workers in 1948 compared to one inspector for every 135,000 workers in 2017.
- In Maryland, funding for Employment Standards was eliminated once in 1991 and again in 2006. Even after funding was re-instated in the intervening years, Employment Standards did not actively enforce the state minimum wage law. Instead, it referred complaints to WHD and used its resources to enforce the state's Wage Payment Collection Law (MWPCCL).

One statistic is that an employer's chance of being investigated is less than one tenth of one percent.

To use their scarce resources efficiently, agencies screen claims, make referrals, rely heavily on worker complaint systems to detect noncompliance, and emphasize voluntary compliance. Yet these efforts can make a process more burdensome or less safe for workers and create barriers for potential complainants. A comparison of agencies' practices yields the following highlights:

- WHD has sporadically targeted inspections of industries with high concentrations of undocumented, low-wage, immigrant workers. In contrast, Employment Standards relies primarily on worker complaints.
- WHD allows workers to file a complaint using a toll-free hotline, by email or through an office visit. Employment Standards has an online claim form but accepts only written complaints.
- WHD keeps its complaints confidential unless it must reveal a complainant's identity. Employment Standards encourages complainants to send demand letters to their employers before they file a claim.
- Both WHD and Employment Standards screen claims for jurisdiction. For example, WHD does not address violations related to rest or meal breaks, vacation or sick pay, discharge notices or pay stubs; but many state laws regulate these matters.
- Employment Standards screens for completeness. In 2017, of 1,051 complaints filed with Employment Standards, 28% were returned because they were incomplete.

- 8. In 2016 and 2017, roughly 60% of all claim types filed with Employment Standards had wages recovered. The average amount recovered was \$1,200 per claim. In FY2016, Montgomery County complainants accounted for 12 of the 162 complaints received.**

Since mid-FY2015, Employment Standards has actively enforced the Maryland Wage Hour Law and the Montgomery County Minimum Wage Law, in addition to its ongoing enforcement of the Maryland Wage Payment Collection Law. As Employment Standards' data show, there were 736 completed claim forms filed in CY2017, the lowest number over the seven-year period.

Employment Standards maintains three categories of claim data: underpayment of wages; unpaid wages; or both. Minimum wage and overtime violations fall in the first category. Employment Standards' data for all claim types show activity has declined since 2011; claims with wages recovered have held steady; and the percentage of claims with wages recovered has increased. In 2016, 60% of claims had wages recovered and the average amount of wages recovered was \$1,200.

Table 7-4. Employment Standards' Completed Claims and Wages Recovered, 2009-2017

	CY2011	CY2012	CY2013	CY2014	CY2015	CY2016	CY2017
Completed Wage Claim Forms	1,172	849	907	1,061	967	812	736
Claims with wages recovered	581	343	339	552	503	503	435
% of claims with wages recovered	50%	40%	37%	52%	52%	62%	59%
Wages recovered	\$913,820	\$424,851	\$519,879	\$880,332	\$740,541	\$603,915	NA
Ave. wage recovery per claim	\$1,573	\$1,239	\$1,534	\$1,595	\$1,472	\$1,201	NA

Source: OLO and DLLR Annual Reports.

Employment Standards' fiscal year data for the subset of claims of minimum wage violations (and some overtime claims) shows these claims account for roughly 10% of all claims. The data show fluctuations for the four-year period from FY2014 through FY2017. The number of complaints varied from a high of 162 in FY2016 to 89 in FY2017. Montgomery County's claims as a percentage of all complaints grew from 3% in FY2014 to 7% in FY2015 and FY2016.

Table 7-5. Employment Standards' Minimum Wage Complaint Data, FY2014-FY2017

	FY2014	FY2015	FY2016	FY2017
Wage and Hour Complaints Received	111	125	162	89
Montgomery County Wage and Hour Claims	3	9	12	NA
Montgomery County's Percentage of Complaints	3%	7%	7%	NA

Source: DLLR and OLO.

9. The enactment of an administrative wage order in 2010 and a wage lien in 2013 added new methods to enforce Maryland’s wage laws. Many attributes of Maryland’s compliance and enforcement system appear to be widely shared across the states.

A series of recent actions strengthened Maryland’s enforcement of wage hour matters. For example, in 2010, the State authorized the Labor Commission to issue administrative wage orders requiring an employer to pay a claim to resolve wage complaints of \$3,000 or less. More recently, with the establishment of a wage lien in 2013, Maryland joins six other states that give employees a method to place a lien on their employers’ property if they have not been paid for work performed.

Proposals to increase states’ minimum wage standards have generated interest in research that compares states’ administrative systems and their compliance and enforcement practices. States’ approaches to compliance and enforcement vary widely. Despite these variations, Maryland’s system shares several characteristics with other states, including: its emphasis on enforcing the state payment law; its staffing and resource challenges, and its emphasis on voluntary compliance. In a study of states’ regulatory and penalty regimes, Maryland ranked in the middle of the pack.

10. Complaint-driven systems are less costly than those that use routine monitoring or directed inspections, but complaints may not provide useful data about actual workplace conditions. Research shows complaint rates vary widely by industry; comparisons of actual violations to complaints found, on average, it took 130 FLSA violations to generate one complaint.

Relying on worker complaints to detect noncompliance is less expensive than comprehensive monitoring inspections; but the number and characteristics of complaints do not necessarily yield useful information about the severity or prevalence of noncompliance.

A 2006 study of FLSA complaints found average rates of 25 complaints per 100,000 workers; but rates varied widely by industry. The lowest rates were in private households (3.8 complaints per 100,000 workers). Eating and drinking establishments had moderate rates (54 complaints per 100,000 workers) and gas stations had the highest (195 complaints per 100,000 workers).

When researchers examined the relationship between complaints and actual conditions, they found violation to complaint ratios of over 100 to 1. On average, it took 130 violations of FLSA overtime rules to generate one WHD complaint. It took 120 lost work days to generate one OSHA complaint.

11. Strategic enforcement can leverage and extend public enforcement resources. The U.S. Department of Labor’s Wage Hour Division used eight practices to make sustainable changes to employer behavior. New workplace regulation structures are a work in progress.

Strategic enforcement is an enforcement approach that “seeks to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way.” Compared to the short-term, customer service orientation of a conventional system, a strategic approach aims to leverage industry structures and maximize the ripple effects of deterrence across all enforcement activities over the long term.

As administrator of the Wage Hour Division (WHD), David Weil implemented eight strategic practices to extend and leverage WHD's public resources. These included:

- Moving from reactive to proactive monitoring by shifting resources to directed investigations;
- Developing a priority list of low-wage industries and mapping industry structures;
- Increasing the use of penalties to create credible deterrents through higher costs of noncompliance;
- Establishing outreach to employers and workers; and
- Using voluntary arrangements and regulatory agreements.

WHD's regulatory agreements include provisions such as: mandates for a firm's compliance with labor standards; mandates for private monitoring practices and for public agency access to data related to these monitoring activities; and, mandates for an internal worker complaint system. A voluntary agreement with Subway held the corporate owner accountable for implementing an agreement at its 13,000 outlets.

These regulatory agreements changed WHD's oversight approach from a command and control structure to a more decentralized system. This change is part of a broader effort that is underway to develop new workplace regulation structures. These structures are a work in progress. Outstanding issues to be resolved include securing sources of funding and defining the roles and responsibilities of public agencies, businesses, worker advocacy groups and workplace organizations.

12. Recent research suggests a deliberate shift in enforcement responsibility from public agencies to private parties is underway. Most states provide for a private right of action to enforce wage hour laws but its use varies. Private enforcement has benefits and drawbacks.

Private rights of action are statutory mechanisms in public laws that give private parties the authority to file lawsuits in court to enforce their rights. A 1993 GAO review of 25 key employment statutes identified 17 laws that had a private right of action, including the Fair Labor Standards Act.

An emerging body of research sees private party regulators and private enforcement as an institutional feature of public law. This view holds that Congress' shifting of enforcement from public regulators to private parties has been deliberate. A consequence of this shift is that a regulatory system's substantive outcomes relies heavily on private enforcement activities.

Forty-seven states have a private right of action to enforce wage hour laws; however, states structure it differently. In Georgia and Texas, private lawsuits are the only enforcement mechanism; in California and Massachusetts, cases must be submitted to the lead agency which decides whether to investigate a claim or release it for private action.

Private enforcement has numerous benefits: it is self-funded, it puts the initiative for enforcement with employees, it may be more efficient, and it may lead to speedier resolution of claims. Among its drawbacks are that it offers fewer benefits to low-wage employees. A 2014 study used data from the 2008 Unregulated Work Study to analyze how often low-wage workers who had experienced a violation pursued a claim; it also evaluated workers' understanding of their rights. That study "reveal[ed] gaps in workers legal knowledge and powerful incentives to stay silent in the face of workplace problems."

C. How County Departments Promote Compliance and Enforce Workplace Protection Laws

13. The Offices of Procurement and Human Rights use different practices to detect noncompliance with worker protection laws. Human Rights relies on workers who make inquiries. Procurement screens and reviews payroll reports and responds to issues raised by contract administrators and others.

Procurement and Human Rights are responsible for compliance and enforcement of four laws that OLO reviewed. OLO found differences in their compliance and enforcement practices. Specifically:

- Procurement's implementation of the **Wage Requirements Law** uses the most comprehensive set of monitoring, compliance and enforcement practices and these have been strengthened since 2014. Specifically, Procurement has:
 - Instituted regular screening and review of vendor payroll reports to detect noncompliance while it continues to respond to issues raised by contract administrators and others; and
 - Established in-house auditors under contract who conduct in-depth investigations.

When Procurement finds noncompliance, it offers vendors an opportunity to cure their violations, followed by more formal enforcement actions.

- Human Rights' administration of the **Minimum Wage Law** and the **Minimum Wage Law for Tipped Employees** emphasizes persuasion and information to encourage voluntary compliance. Since the enforcement authority for these laws rests with the state, Human Rights refers complainants to Employment Standards in DLLR. Human Rights does not conduct any routine monitoring to detect noncompliance. Specifically, since these laws were enacted:
 - Human Rights undertook education and outreach to businesses to convey the message that it wants County businesses to pay people at the correct rate of pay.
 - In April 2018, Human Rights launched an online form for businesses with tipped employees to submit certified payrolls but it has yet to tally the submissions its received.
 - Human Rights does not regularly review the certified payrolls that businesses with tipped employees submit to detect noncompliance, but it maintains them in case they are needed for a complaint inquiry.
- Human Rights conducted workshops throughout the County for a year before **the Earned Sick and Safe Leave Law** took effect to explain the law and help businesses comply. Human Rights accepts complaints. It does not conduct routine monitoring. Since the law was enacted, the office has:
 - Posted a list of Frequently Asked Questions; and,
 - Received a few complaints, held a few mediation sessions and handled a retaliation claim.

14. Neither Procurement nor Human Rights routinely reports data about businesses' compliance rates. Procurement tracks outcomes from contractor audits. Human Rights collects (but does not review) payroll data for establishments with tipped employees.

OLO's review of Procurement and Human Rights' practices found neither office has a system for routinely collecting or reporting data about rates of businesses' compliance with worker protection laws. OLO identified the following data that each office collects for each of the four laws OLO examined:

- **The County's Wage Requirements Law.** Procurement does not routinely collect or report data about businesses' compliance with the County's Wage Requirements law.

As part of its administration of the County's Wage Requirements Law, Procurement maintains an internal spreadsheet of the County Government service contractors it has audited to track audit outcomes. This spreadsheet tracks: contractor names, total amount of back pay awarded, number of affected employees, audit cost and whether the County was reimbursed, and the close out date of the inquiry. Also, CountyStat's website has a headline performance measure for Procurement that reports the annual number of instances that employees/workers are found to be underpaid by year.

- **The County's Minimum Wage and Minimum Wage for Tipped Employee Laws.** Human Rights does not routinely collect or report data about businesses' compliance with either the County's Minimum Wage or the Minimum Wage for Tipped Employee Laws.

As of April 2018, Human Rights launched an online reporting form for employers with tipped employees to submit quarterly payrolls but it has yet to tally information from these submissions.

- **The County's Earned Sick and Safe Leave Law.** Human Rights does not routinely collect or report data about businesses' compliance with the County's Sick and Safe Leave Law.

D. Recommended Discussion Issues

Many local communities, including Montgomery County, have enacted employment laws that mandate wage and leave protections for workers. OLO's review of the workplace regulation systems that enforce these laws identified gaps that suggest that these systems are least likely to benefit low-wage workers who are most at-risk and most in need of these protections.

How well the existing workplace regulation systems work to ensure County businesses' compliance with the new minimum wage and safe and sick leave laws is unknown. Specifically, for the minimum wage laws (and the safe and sick leave law to a lesser extent), the agencies charged with enforcement report a minimal number of claims filed and wages recovered by workers in the County; but, labor standards research suggests worker claims and complaints are not a useful proxy measure for compliance.

Minimum wage compliance research based on census data show that the overall rate of businesses' compliance is estimated at over 95%. The research also shows businesses' noncompliance rates in certain low-wage industries can reach 14% to 25%. Estimated rates vary widely by area and industry segment.

More specifics are available to track County service contractors' ongoing compliance with the County's Wage Requirements Law because the Office of Procurement routinely monitors vendor payrolls and conducts follow-up audits when it suspects noncompliance.

Research suggests that most businesses will comply voluntarily with the County's higher wage standards. **OLO recommends that the Council adopt a strategic oversight approach that focuses both on those workers most at-risk of experiencing a violation and on those businesses most at-risk of noncompliance.** This dual focus will help the Council address compliance and enforcement issues within a broader context that balances the goal of creating a welcoming business environment, including support for small business startups, with the goal of strong workplace protections, including quality jobs for vulnerable workers.

The multi-year transition to higher County minimum wage standards offers time for the Council to address potential oversight implementation issues raised by this OLO study. OLO proposes three issues, listed below, to structure a Council discussion of compliance and enforcement issues with representatives from the County Government and other stakeholder groups.

Issue #1 Discuss with Executive representatives their views about complaints as a proxy for compliance, their practices for monitoring businesses' compliance and their suggestions for ways that monitoring could be strengthened.

OLO's review of labor standards compliance research shows that complaints are an unreliable proxy for monitoring businesses' compliance with FLSA minimum wage and overtime standards. This research raises questions about commonly held perceptions that a lack of complaints or a decline in complaints or phone call inquiries means that businesses are complying with the County's Wage Requirements Law or the County's minimum wage laws.

Routine monitoring is a critical piece of an effective compliance and enforcement system. Given its significance, the Council may wish to discuss with Executive representatives, including the Directors of Human Rights and Procurement, their current law and practices for monitoring businesses' compliance with the County's wage requirements, minimum wage and safe and sick leave standards.

The Council may wish to ask the Director of Human Rights to address the value of the payroll submissions the Office is receiving from businesses with tipped employees and suggest how Human Rights can use information from these submissions to strengthen its efforts to detect noncompliance. Noncompliance research by the Economic Policy Institute found higher estimated rates of minimum wage violations in low-wage industries, and it found especially high rates for workers in eating and drinking establishments. Since these workers face higher risks of violations and since Human Rights' online system is in place, a systematic review of these data to detect noncompliance would be worthwhile.

The Council may wish to ask the Director of Procurement to discuss the benefits and costs of more staff to provide a higher level of payroll screening to increase the Office's oversight of businesses' compliance.

Issue #2 Discuss with Executive, business and non-profit representatives suggestions for a system to monitor the ongoing effects of implementing the County's minimum wage laws, particularly on the County's small businesses and non-profits.

When the Council enacted the County's minimum wage increases, the Council was aware that the impact of the standard would fall more heavily on smaller firms and non-profits. This was the justification for phasing-in wage increases over a longer multi-year period for smaller and medium firms and non-profits, compared to a shorter phase-in for firms with 100 or more employees.¹⁷⁶

Given this extended phase-in schedule plus research that shows higher levels of noncompliance among small businesses, the Council may wish to ask Executive representatives to discuss what changes they envision to their current outreach and technical assistance practices for businesses. In particular, the Council may wish to ask Executive representatives to discuss their views about the need for more proactive technical assistance generally or other efforts to monitor implementation and compliance among smaller businesses and/or non-profits.

¹⁷⁶ Research on the relationship between employer characteristics and compliance levels shows other employer characteristics that are related to higher compliance levels include whether a business provides benefits, whether workers are paid by check (versus cash) and whether workers are paid on an hourly (versus a non-hourly) basis.

Issue #3 Discuss with representatives from the Executive, legal aid organizations and worker advocacy groups the role of private rights of action in the County’s system of protections for low-wage workers and their views about the current shift from public agency claims to more private rights of action.

Research on the effectiveness of private rights of action as a method of worker protection has found mixed results. On one hand, private rights of action can be a cost saving measure for resource-strapped public agencies. A survey of states’ systems found some states rely on it heavily. A private right of action was a critical resource for County employees of CAMCO, LLC, a County service contractor that failed to comply with the County’s Wage Requirement Law. In moving the U.S. Department of Labor Wage Hour Division to strategic enforcement, Weil saw private rights of action as a critical safeguard for workers to continue to pursue remedies for individual workplace claims. Nonetheless, this method can be problematic for low-wage workers because workers must have access to legal advice and be willing to file a complaint.

The Council may wish to convene a discussion with representatives from the Executive as well as representatives from legal aid and/or other worker advocacy groups to better understand: how well private rights of action currently work to protect workers who experience a violation; to solicit information about the number of claims and the current capacity of the system; and to hear stakeholder views about the merits or drawbacks locally of a shift from a public agency regulatory system to a system that relies more on private rights of action.