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## Enforcement-Proofing Work Law

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# FELLER LECTURE

## Enforcement-Proofing Work Law

April 21, 2022

Charlotte Garden<sup>†</sup>

Hello, I wanted to start by thanking the *Berkeley Journal of Employment and Labor Law* students and Amelia Smith for all her work on the arrangements for today.

I also want to emphasize that I am just so incredibly honored to have been invited to deliver a lecture in honor of David Feller. I can claim a connection to him, albeit a tenuous one. From 2005-2008, I was an associate at Bredhoff & Kaiser, which, in a previous incarnation, had been known as Goldberg, Feller and Bredhoff. Much of what I know about law practice and legal writing, I learned from the extraordinarily talented lawyers there, as well as some of what I know about labor law.

I say “some” because almost none of the cases I worked on there had much to do with the NLRA, at least not directly. That was for a few reasons, but one was that many unions were actively avoiding the NLRB at the time. They had good reason for that approach. As a bit of scene setting, let me remind you that in September 2007, the so-called “Bush II Board” issued a group of decisions that earned the name “September massacre” in labor circles because they cemented a pattern of legal interpretations that favored employers.<sup>1</sup> Then, in 2008, the Board fell to two members who held opposing

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1. See generally, Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010) (describing the “September massacre” decisions); William B. Gould IV, A PRIMER ON AMERICAN LABOR LAW, ch. 7 (5th ed. 2013) (describing the “September Massacre of 2007, in which the Bush Board systematically undercut Section 7 rights for employees,” which led Senate Democrats to refuse to confirm Bush appointees to the NLRB – ultimately prompting a crisis when the Supreme Court held that the NLRB required three members for a quorum).

views on many issues of labor law. This slowed things down, and this also meant frequent deadlocks; as a coda, the Supreme Court ultimately held that a two-member Board lacks the statutorily required quorum and cannot decide cases.<sup>2</sup>

Unions dealt with a hostile or partially incapacitated NLRB, in part, by avoiding it. To be clear, that strategy wasn't only a response to the situation in 2007 and 2008. Those events amplified existing problems; they did not invent them. For many unions that were trying to organize new workers and then represent them in bargaining, the NLRA has long imposed constraints while offering too little in the form of legal protections.<sup>3</sup>

One reason that's true, of course, is the NLRA's notorious weak remedial scheme—remedies that are both meager in substance and applied infrequently, often only after a lengthy appeals process.

So, unions grappling with these enforcement problems often decided Board processes simply weren't worth it. Instead, they turned to strategies that aimed to make those Board processes unnecessary, such as substituting different enforcement schemes that worked better. For example, instead of filing for NLRB elections, unions used pressure campaigns to try to reach neutrality and card-check agreements, which could be administered by community groups.<sup>4</sup> This meant expense and effort up front, but that effort could yield an agreement that was better on substance, and also—importantly—that was enforced through a quicker and more reliable process.

This approach addressed multiple problems, both substantive and procedural—including that employers could use the delay between filing for an election and the election date to erode workers' support for the union. Employers have no shortage of lawful tactics available to them. For example, while employers can't threaten employees, they can make carefully worded "prediction[s] as to the precise effects [they] believe[] unionization will have

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2. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

3. Academics, journalists, and labor leaders have all made this case. See, e.g., Ellen Dannin, *TAKING BACK THE WORKERS LAW* at 4-5 (recounting various labor leaders' negative views of the NLRA); see generally, Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); James B. Atleson, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983) (describing how labor law is infused with concern for values such as employer property rights and managerial prerogative); Michael C. Duff, *The Cowboy Code Meets the Smash Mouth Truth: Meditations on Worker Incivility*, 117 WV L. REV. 961, 963 (stating "I do not believe that labor law was ever meant to 'succeed,' if what is meant by success is the actual effectuation of democratically based rights on the workplace floor"); Josh Eidelson *American Workers: Shackled to Labor Law*, IN THESE TIMES, May 23, 2012, <https://inthesetimes.com/article/american-workers-shackled-to-labor-law> [<https://perma.cc/B8BT-NC68>].

4. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-31 (2005) (discussing the increasing importance of neutrality agreements to union organizing successes beginning in the late 1970s).

on [their] company.”<sup>5</sup> Despite this leeway, researchers including Kate Bronfenbrenner have shown that a disturbingly large share of employers resort to illegal tactics, presumably because they know the costs will be little more than the proverbial slap on the wrist.

This is a roundabout way of getting to my larger theme today, which is work-law enforcement problems, and how we could think about solving them. In other words, how might we make work law more enforcement-proof?

I want to start by describing the scope of the problem—that is, multiple, overlapping barriers to enforcing work law, such that dismantling even a very big barrier to enforcement—for example, amending the Federal Arbitration Act to exclude employment-related claims—might still be unlikely to lead to a renaissance in work-law enforcement. Then, I want to start to think about how to make work law more impervious to enforcement problems, using rules and structures that either make work law more difficult to violate in the first place, or make enforcement more likely and the outcome of enforcement proceedings more certain.

Let me start by illustrating how work-law enforcement problems pile up, by way of another example from labor law. Consider a group of Uber drivers. They often wait together in an airport parking lot to be assigned rides. While they wait, they get talking about their working conditions, and how, despite all the company’s talk about flexibility and being your own boss, they feel like they have little actual say in their working conditions – when they get assigned rides, how much they make, and so on. Skip ahead, and the drivers are going on strike, signing petitions, and demanding that the company make changes. Assume that all this activity catches Uber’s attention, and then one of the drivers who has been supporting the collective effort gets deactivated or, in more common parlance, fired. They believe this is no coincidence, and so, they go to the NLRB to file an unfair labor practice charge.

Because the NLRA has no private right of action, the driver must wait to see what the office of the Board’s General Counsel will do. If they refuse to issue a complaint, that’s the end of the story, at least as far as the Board is concerned. Making it past that initial hurdle means an administrative law judge and then likely the full NLRB will decide whether the driver is covered by labor law – that is, whether they are an employee rather than an independent contractor. This means considering a list of different factors, each of which is likely to be contested.<sup>6</sup> In other words, the process is awash

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5. NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 618 (1969); see also Charlotte Garden, *Tactical Mismatch in Union Organizing Drives*, in *THE CAMBRIDGE HANDBOOK OF US LABOR FOR THE TWENTY-FIRST CENTURY* (2019).

6. Although the NLRB’s independent contractor analysis has long been grounded in the factors articulated by the Restatement (2d) of Agency, different Boards have varied as to which factors or other considerations are most important, leading to more or less employee-protective analyses. See Supershuttle DFW, 367 NLRB No. 75 at \*2 & 15 (2019) (describing the common-law agency test, which has long

in uncertainty, including about how to weigh the various factors. To be clear, I think the argument that Uber and Lyft drivers are properly classified as employees under the NLRA is strong, but I also think some board members and federal judges will see things differently.

Still, let's say that at the end of this process, the Board concludes the driver is indeed an employee who was fired in violation of the NLRA. This will likely trigger an appellate process that can drag out for years. At the end, assuming the Board's decision stands, the employer will owe back-pay subject to the driver's duty to mitigate their damages, and the employer will probably also have to post a notice stating that they won't do it again and offer to reinstate the driver.<sup>7</sup> If the violation was egregious, the employer will be given a choice between reading the notice out loud to their workers and having a representative of the NLRB show up to do it.<sup>8</sup>

Still, if the driver wins, then at least everyone will know, once and for all, that Uber drivers are employees, right? Wrong, for three reasons. First, there will be more circuit courts to weigh in; in the meantime, the upsides to the company are so great that there's nearly no reason not to continue testing their theory. Second, there's the possibility that the company will tweak its operations to give drivers marginally more control, prompting the process to begin again. Third, there's the possibility that the Board's composition will change following the next presidential election.

So, we've already come up against a list of potential enforcement problems: the lack of a private right of action, an agency that has seen its funding flatline in recent years and that is sometimes controlled by members who routinely adopt pro-employer views of what the statute requires, the ambiguous and manipulable substantive legal standard, and the weak remedy that offers little deterrent.

Other scenarios present different problems. This time, consider a worker who is owed overtime pay. Some of the problems in the last scenario are no longer present. For example, the federal FLSA contains a private right of action in addition to allowing for enforcement by the agency.<sup>9</sup> The remedies available for wage and hour violations are also more substantial than those under the NLRA—workers are often awarded attorneys' fees and liquidated

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grounded the NLRB's analysis in discerning employees from independent contractors, and then adopting an approach emphasizing "entrepreneurial opportunity," and overruling an earlier decision *FedEx Home Delivery*, 361 NLRB 610 (2014)).

7. 29 U.S.C. § 160(c); *Phelps Dodge Corp. v. NLRB* 313 U.S. 177, 187-87 (1941) (describing scope of the NLRA's remedial scheme).

8. See, e.g., *HTH Corp. v. NLRB*, 823 F.3d 668, 673-74 (D.C. Cir. 2016) (discussing notice-reading by the employer or the Board as an "extraordinary" remedy, and recounting other cases in which the Board had ordered notice reading by the company).

9. 29 U.S.C. § 216(b).

damages worth double their unpaid wages.<sup>10</sup> This still may not be much money—but it’s better than what’s available under the NLRA.

On the other hand, this worker is increasingly likely to run into an individual arbitration clause, which they might not even know they’d accepted. The obligation to pursue their claim individually, rather than as a collective action, might make their claim financially non-viable. In other words, they might never bring it any forum. Professor Cindy Estlund estimates this fate can befall hundreds of thousands of claims in a year.<sup>11</sup>

Change the scenario a third time. This time, our worker has a sexual harassment claim rather than a wage-and-hour claim. They would no longer be bound by their employer’s pre-dispute arbitration agreement, thanks to the newly enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.<sup>12</sup> That Act does what it says—it makes pre-dispute arbitration agreements unenforceable as to cases involving allegations of sexual harassment or assault. Instead, litigants in these cases have the options to proceed in court, and to proceed on a collective basis if the situation warrants. To be clear, I think this is an important development.

But what happens once these cases get to federal court? There’s a good chance they will be dismissed at summary judgment; Sandra Sperino and Suja Thomas have described how judges have concluded that behavior that we would probably all agree is way out-of-bounds is actually not severe or pervasive enough to rise to the level of harassment that violates Title VII.<sup>13</sup> Other scholars who have documented a similar through-line in judicial interpretation of other work-law statutes, especially the NLRA: that is, a judicial unwillingness to second-guess employers or to disrupt the at-will default, and suspicion of employees’ claims.<sup>14</sup>

Enforcement problems can also be related to proof. Consider, for example, the difficulty of proving that an employer discriminated in making a hiring decision. It can be hard even to collect basic facts about the employer’s decision from the outside. In any event, federal judges tend to grant summary judgment in discrimination cases more than other types of cases.<sup>15</sup> And, the difficulty of winning these cases can make lawyers reluctant

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10. *Id.*

11. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

12. Pub. L. 117-90 (March 3, 2022).

13. Sandra F. Sperino & Suja A. Thomas, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

14. Karl Klare, *Judicial Deradicalization*; James Atleson, *Values & Assumptions in American Labor Law*, *supra* note 3.

15. Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672, 676 (2012-2013) (canvassing literature showing high rate of summary judgment grants in employment discrimination cases, and offering some possible reasons).

to take them. It is little wonder, then, that employees self-report considerably more discrimination than is reflected in court filings.<sup>16</sup>

Other enforcement barriers include the possibility of retaliation—by one’s own employer or prospective employers. Take the case of an attorney who had contracted to provide document review services to a major law firm. He was paid \$25/hour, no matter how many hours he worked in a week, and so he sued, alleging that because he often worked more than 40 hours in a week and he was due overtime pay under the Fair Labor Standards Act.

The attorney lost his case, and when a reporter reached out to him for comment on the district court decision in his case, she found that he was “jobless and sleeping in his car,” because nobody else would hire him—a result of the lawsuit, he thought.<sup>17</sup> Fear of meeting a similar fate might also deter employees who have stronger cases on the merits.

The problem is that retaliation by potential future employers isn’t even illegal under the Fair Labor Standards Act, as the statute protects only *employees* from retaliation, and courts have concluded that job applicants are not employees.<sup>18</sup> The same is true of some significant whistleblower statutes; in fact, Leora Eisenstadt and Jennifer Pacella recently summed up this state of affairs by writing that “*most* whistleblowers ... never work in their field again.”<sup>19</sup>

We still aren’t quite done cataloging enforcement problems. There’s also siloing, in which different statutes are enforced by different agencies or in different forums. An employee whose employer is a multiple-offender might face the prospect of travelling from one agency to the next, filling out different complaint forms, meeting with different investigators, and so on. This problem has been apparent for some time,<sup>20</sup> but the Trump NLRB is the source of a particularly vivid example. In its 2019 decision in *Electrolux Home Products*,<sup>21</sup> the Board rejected a claim of anti-union retaliation. The employer in the case asserted that it had fired the complaining employee because she had been insubordinate, but the administrative law judge had decided that wasn’t the real reason, based on evidence that other insubordinate employees had not been treated so harshly. The fact that the

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16. See, e.g., Fekedulegn et al., *Prevalence of Workplace Discrimination and Mistreatment in a National Sample of Older US Workers: The REGARDs Cohort Study*, 8 SSM Population Health (2019), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6612926/> [<https://perma.cc/8T7V-WEAA>].

17. Debra Cassens Weiss, *Lawyer is Jobless and Sleeping in his Car After Losing Suit Seeking OT for Document Review*, ABA JOURN. (Sept. 22, 2014, 5:45 AM), [https://www.abajournal.com/news/article/lawyer\\_is\\_jobless\\_and\\_sleeping\\_in\\_his\\_car\\_after\\_losing\\_suit\\_seeking\\_ot\\_for](https://www.abajournal.com/news/article/lawyer_is_jobless_and_sleeping_in_his_car_after_losing_suit_seeking_ot_for) [<https://perma.cc/TB5X-7XLL>].

18. See *Dellinger v. Science Applications Intern. Corp.*, 649 F.3d 226, 229-30 (4th Cir. 2011).

19. *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 666 (2018).

20. Ann Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601 (2005).

21. 368 NLRB No. 34

employer had offered a pretext to explain its decision, the trial judge concluded, was reason to believe the employer's real reason was anti-union animus.

But the Board disagreed. It wrote that "When an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, *but then again it might not*. It is possible that *the true reason* might be a characteristic protected under another statute (such as the employee's race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine." In other words, it isn't enough to show an employer lied because an employer might lie to protect itself for lots of reasons, but the Board has jurisdiction over only one of those reasons.

Like many Trump Board decisions, this decision likely is not long for this world. But, I still wanted to mention it because it just so perfectly encapsulates the siloing problem. Note also how the form that this siloing problem takes is one that is likely to be worse for marginalized workers. For example, decisionmakers might think it more plausible that an employer is covering up for a Title VII violation rather than an NLRA violation in a situation where the worker is a person of color, or a woman, than when the worker is a white man.

There's one last kind of enforcement barrier that I haven't talked about yet, and that enforcement often turns on employees' knowledge of and willingness to even try to enforce their workplace rights. Employees' understanding of their rights can have a bit of a Goldilocks quality to it. On one hand, employees might think they have rights that they lack; Pauline Kim showed that this was the case in 1997,<sup>22</sup> and in 2020, Alex Hertel-Fernandez confirmed that this was still true.<sup>23</sup> Where this is true, employees might not take steps to protect themselves. Conversely, workers who think they lack rights that they have obviously will not try to remedy violations of those rights, unless some third party like a co-worker, a union, or a plaintiffs' lawyer first enlightens them. But Hertel-Fernandez also found that employees often don't talk to each other about their working conditions much, and this is especially true of low-wage workers and workers with less formal education. No doubt there are a lot of reasons for this but one may be employer rules directing employees not to talk to each other about wages and

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22. Pauline Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

23. Alexander Hertel-Fernandez, *American Workers' Experiences with Power, Information, and Rights on the Job: A Roadmap for Reform* (2020), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_WorkplaceVoice\\_Report\\_202004.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_WorkplaceVoice_Report_202004.pdf) [<https://perma.cc/353T-HA6T>].



the like. Of course, these rules often violate the NLRA,<sup>24</sup> bringing us back to the enforcement challenges associated with that statute.

This is now a substantial list of barriers to effective enforcement of work law: lack of knowledge of a claim, or unwillingness to pursue it because of fear of retaliation; the difficulty of getting to any forum where the claim can be adjudicated, either because of individual arbitration clauses or because the relevant statute lacks a private right of action, and the agency charged with enforcement is strapped for resources or unwilling to take a given case for another reason; employee knowledge problems; proof problems, and no real way to overcome them; ambiguous standards that are susceptible to manipulation, requiring similar cases to be litigated over and over again; hostile decisionmakers construing workers' rights narrowly; siloing; and weak remedies.

Finally, while a cascade of enforcement problems can arise for any worker, low-wage and marginalized workers are often at particular risk. Low-wage workers are especially unlikely to be able to pursue their claims in court or in arbitration, sometimes because of difficulty attracting counsel because the worker's damages are likely to be low; or maybe because the worker is particularly vulnerable to retaliation; or simply doesn't believe the legal system is there to help people like them; or because their employer disappears before paying damages.

There is a racial justice component here too. Work-law enforcement problems can be more serious for workers of color than for white workers along at least two axes. First, workers of color are more likely than white workers to have their rights violated; second, they are also more likely to be paid poverty-level wages, which, again, compounds the enforcement problems that workers face.<sup>25</sup> Workers of color and immigrant workers are also overrepresented in what the Department of Labor has called "low wage, high violation" industries, which include agriculture, child care, food service, janitorial work, and construction, among others.<sup>26</sup>

One might ask whether the totality of work law's various enforcement problems, numerous though they are, are really such a big deal – maybe employees ultimately find their way over or around the enforcement barriers; or maybe employers generally follow the law, either because they believe that they should; or because they overestimate the likelihood of enforcement.

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24. The Boeing Co., 365 NLRB No. 154 \*4 (2017) (unlawful work rules would include "a rule that prohibits employees from discussing wages or benefits with one another").

25. David Cooper, *Workers of Color are Far More Likely to be Paid Poverty-level Wages Than White Workers*, ECONOMIC POLICY INSTITUTE: WORKING ECONOMICS BLOG (Jun. 21, 2018, 4:53 PM), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>, [<https://perma.cc/8H9B-JBGG>].

26. *Low Wage, High Violation Industries*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries> [<https://perma.cc/T9S2-6E8K>].

But, research suggests otherwise. For example, in 2008, a group of researchers surveyed about 4,000 low-wage workers in Chicago, Los Angeles, and New York. They found widespread violations, including significant wage-and-hour violations, frequent retaliation against workers who complained, and workers who simply remained silent because they, quite reasonably, feared retaliation.<sup>27</sup>

Anna Stansbury, a labor economist, links employer lawbreaking to the enforcement problems I've been describing.<sup>28</sup> Comparing the costs to employers of violating the NLRA or the FLSA to the benefits that might be gained from breaking those laws, she has estimated that "a firm which expects to face the typical penalty levied on first-time violators ... would have to expect at least an 88 percent probability of detection to have an incentive to comply." Needless to say, no employer that is even vaguely aware of the enforcement reality would expect an 88 percent probability of detection. The situation is even worse with respect to the NLRA, where Stansbury estimates that a firm would have a "compelling financial incentive to dismiss a worker for union activities ... if this dismissal would reduce the likelihood of unionization at the firm by less than two percent, and perhaps by as little as .15 percent."<sup>29</sup>

So, how might policy makers go about addressing these barriers? Some possibilities are obvious—more money for public enforcement, higher penalties, and other steps that go barrier-by-barrier, working to dismantle each one.

The Protecting the Right to Organize Act is an excellent example of this approach. The PRO Act is a major overhaul of the NLRA that is pending before Congress; it has been passed by the House twice but seems to have run aground in the Senate.

The PRO Act would amend the NLRA to correct a long list of problems, many of which are enforcement related.<sup>30</sup> Among them, it would create a private right of action with recoverable attorney' fees, substantially raise the amount that can be recovered by employees, create substantial civil penalties, and increase the likelihood that a worker can get quick reinstatement while their claim is processed. It would also make workplace pre-dispute arbitration agreements unenforceable for workplace claims. It would adopt a much more clear and predictable substantive standard governing who is an employee –

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27. Annette Bernhardt et al., *Broken Laws, Unprotect Workers Violations of Employment and Labor Laws in America's Cities*, NATIONAL EMPLOYMENT LABOR, (Sept. 21, 2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>, [<https://perma.cc/A5LY-YM4D>].

28. Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (last modified August 2021), <https://www.piiie.com/sites/default/files/documents/wp21-9.pdf> [<https://perma.cc/3W8Y-FUBW>].

29. *Id.*

30. H.R. 842 (2021-22), <https://www.congress.gov/bill/117th-congress/house-bill/842> [<https://perma.cc/2855-4FEJ>].

the “ABC” test, which, for those who are not familiar, creates a presumption that someone working in the same industry as their putative employer is an employee, and allows that presumption to be rebutted only when an employer can establish three criteria—first, that the worker is free from control, second, that they are performing a service outside the employer’s normal course of business, and third, that the worker is customarily engaged in their own line of work as a business. Finally, the statute also substantially increases legal protections for employee self-help by rebalancing the economic weapons available to employers and employees. Whereas the NLRA currently channels workers to the most perilous forms of collective action and then allows employers to wage potent counter-offensives, the PRO Act protects less risky actions by workers and limits employers’ responses by, for example, taking permanent replacements off the table.

Another way that some state and local governments already address enforcement problems is to empower and fund unions, workers’ centers, and other advocacy groups so that they can play a formal role in enforcing working conditions, while also helping workers organize and push for change through collective action.<sup>31</sup> This is the approach taken by jurisdictions that have experimented with co-enforcement models, which often focus on wage-and-hour compliance among low-wage employers.

This basic idea also undergirds arguments that jurisdictions should do more to create a role for unions or other workplace representatives in non-union workplaces. For example, the Clean Slate for Worker Power recommends a graduated system of representation that begins by empowering employees to elect workplace monitors who would be trained to recognize and address problems.<sup>32</sup>

These are important solutions that we should implement widely. In addition, we should think systematically about how to construct workplace regulations that either will be harder to violate in the first place, or that will help expand workers’ access to recourse, which could look either like meaningful adjudication opportunities in a judicial, agency, or arbitral forum, or like collective pressure and self-help. So, what features might we value if we designed work law through an enforcement lens? In doing that, we should also ask where enforcement is currently most difficult, and start there – both in terms of what stages of the employment relationship are most prone to

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31. See generally, Janice Fine, *Enforcing Labor Standards in Partnership With Civil Society: Can Co-Enforcement Succeed Where the State Alone has Failed?* 45 *POLITICS & SOCIETY* 359 (2017); Seema Patel & Catherine Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, *HARV. L. & POL’Y REV.*, available at <https://harvardlpr.com/wp-content/uploads/sites/20/2017/11/Patel-Fisk-CoEnforcement.pdf> [<https://perma.cc/56KQ-X5JQ>].

32. CLEAN SLATE FOR WORKER POWER, *The Clean Slate Agenda* (last visited Nov. 1, 2020), <https://www.cleanslateworkerpower.org/clean-slate-agenda> [<https://perma.cc/S7KE-5YMB>].

enforcement problems, and which groups of workers are most vulnerable to enforcement problems. With that framing, I want to suggest a few ideas:

First, we could consider improving the flow of information that facilitates worker self-help, either individually or collectively, or conversely, restricting information that enables bad practices by employers.

Second, we could consider constraining employer discretion. For example, we might think of the push for just-cause employment protections as belonging to this category. Cindy Estlund, Michael Fischl, and others have argued convincingly that just cause backstops difficult-to-enforce discrimination and retaliation statutes by limiting employer discretion over decisions to fire workers.<sup>33</sup> More specifically, they argue that removing the burden on an employee to show they were fired for an illegal reason, and instead imposing a burden on the employer to show they affirmatively had a good reason, will protect employees who actually were fired for an illegal reason, even if they have difficulty marshalling evidence that will convince a fact-finder, or they can't find an attorney to represent them, or they face some other enforcement difficulty.

And third, we should consider removing financial incentives to engage in bad practices. Here, I'm thinking mainly of measures that reduce the incentive to misclassify workers, though maybe this strategy could be useful elsewhere too.

Let me say a little more about each of these. As I do, I'm going to try to emphasize the idea of constraints on employer actions, rather than employer mind sets, with the idea that it's much easier to know whether an employer has done something than whether an employer has thought something. Here, you might think about the difficulty of proving that an employer is bargaining in bad faith, given the focus on whether the employer was genuinely trying to reach an agreement or not. So "actions, not mindsets" might be a fourth way to think about enforcement-proofing work law.

First, information flows. We might value providing information to workers about what the employer is doing and why. Pay transparency laws are an example; Washington, Colorado, and New York City have all recently passed laws requiring employers to disclose wage scales or salary ranges in their job postings.<sup>34</sup> In Washington, this rule is replacing an earlier one that enabled successful job applicants to access that information upon request, so

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33. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1682 (1995) (arguing that a "requirement of just cause for discharge and a fair process for enforcing it would help to realize the policies underlying each of the existing exceptions to employment at will," including non-discrimination and whistleblower protections); Richard Michael Fischl, 'A DOMAIN INTO WHICH THE KING'S WRIT DOES NOT SEEK TO RUN': WORKPLACE JUSTICE IN THE SHADOW OF EMPLOYMENT-AT-WILL, IN *LABOUR LAW IN AN ERA OF GLOBALIZATION* 253, 261 (Joanne Conaghan et al. eds., 2002).

34. NYC Local Law 32 (2022); RCW 49.58.110 (2022); C.R.S. § 8-5-201(2) (2021).

a key innovation of the new iteration is that the information is public.<sup>35</sup> This means it isn't contingent on whether applicants know they have a right to ask or whether they feel empowered to do so, and it's immediately obvious whether the employer has complied with the posting requirement. While this information will of course be helpful to individual prospective applicants, it is also important information for current employees who might want to ask for a raise. And it can spur low-cost forms of collective action, such as taking employers to task on social media for job postings that offer abnormally low salary ranges or for posting lower salary ranges for jobs traditionally done by women than those traditionally done by men.

States or localities could take this strategy further. For example, disclosure could go beyond pay ranges, requiring employers to disclose publicly all of the criteria on which they will make hiring decisions. Consider a job listing for a position as a journalist that was posted by the outlet *Newsday*. In addition to reporting skills you'd expect, the listing went on to state that applicants should be able to reach, bend, lift, push, pull and carry a minimum of 25 pounds" and "sit for an extended period of time."<sup>36</sup> The public noticed and journalists with disabilities and allies took the company to task on Twitter, prompting a quick retraction and mea culpa from the company that the listing was a mistake and the job didn't involve those functions. One can imagine that the publicity sent other news outlets to take a look at their criteria as well.

In other words, just knowing that they will have to make job criteria plus salary information public could improve an employer's compliance with anti-discrimination law at the hiring stage. Specifically, knowing there could be public scrutiny that leads to backlash could lead an image-conscious employer to look for and eliminate job criteria that could predictably have the effect of disadvantaging candidates with one or more marginalized identities. I said compliance with anti-discrimination law a few sentences ago, but I actually meant that this dynamic could extend beyond statutory boundaries. Influencing employer behavior even when there isn't a very great likelihood that, for example, a court would agree that some job requirement has a disparate impact that violates Title VII.

Conversely, we might think about restricting employers' access to information that can unfairly disadvantage workers. Here, think about "ban the box" laws that restrict when employers can ask about prior criminal convictions or "no say on pay" laws that prohibit employers from asking salary history questions. The latter are intended to prevent future employers from continuing the effects of past pay discrimination, and there are better

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35. RCW 49.48.110 (2019).

36. Wendy Lu, *This Is How Employers Weed Out Disabled People From Their Hiring Pools*, HUFF POST (Jun. 17, 2019, 04:08 PM), [https://www.huffpost.com/entry/employers-disability-discrimination-job-listings\\_1\\_5d003523e4b011df123c640a](https://www.huffpost.com/entry/employers-disability-discrimination-job-listings_1_5d003523e4b011df123c640a) [<https://perma.cc/7GPM-KMQU>].

and worse versions of them. There are some that allow employers to ask about salary history but prohibit them from retaliating against applicants who refuse to answer, and others that prohibit employers from asking. In other words, there are versions that rely on employees to know about and be willing to enforce their rights, and others that don't. But, even the latter category would be difficult to enforce, making this an enforcement mechanism that is potentially in need of reinforcement.

Of course, disclosure regimes go only so far. For example, what if an employer maintains two sets of criteria: one for public consumption, and then the "real" one? Or, perhaps more likely, the employer creates a job announcement but then uses relatively amorphous hiring practices that allow decisionmakers to substitute their own criteria for the stated ones. Under such a system, unfair biases could come into play, and for the reasons I described a few minutes ago, it would be very difficult for anyone to know, much less usefully respond.

On the other hand, it might be possible to design rules that constrain employers' discretion.

To give a thought experiment, imagine a system where the employer begins by setting hiring criteria, and listing them in the job announcement. Then, as applications come in, the employer evaluates each application only to determine whether or not they meet the stated criteria. At that point, they are required to inform each unsuccessful candidate of exactly what criterion they failed, and—maybe even—to report that same information to the EEOC. Finally, the employer is required to choose from the remaining candidates at random, rather than deciding which candidate they like best and offering the job to that person. If we're doubtful about employer compliance with these procedures, we could have a third party do the randomization and then verify that the selected person gets the job offer.

This plan, incidentally, is maybe not as far-fetched as it might seem—it is partially inspired by Seattle's new "first in line" law governing how landlords must select tenants.<sup>37</sup> Under that rule, the landlord sets rental criteria but then must offer the lease to the first applicant who meets those criteria.

Such a system would force employers to think carefully about what criteria are really important to them in advance, before they have seen any applications. It would also make it more difficult for employers to discriminate based on protected characteristics and weed out whistleblowers, union activists, or people whose previous wage-theft complaints are discoverable through a google search or disclosed by a prior employer. It would also, for better or worse, make it harder for employers to make soft considerations like "fit" part of their criteria. That would be "for better" to

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37. SMC 14.08 (2017).

the extent fit is often used as a proxy for whether the decisionmaker feels comfortable with the candidate or thinks the candidate is like them, which, in turn, can be a proxy for race, class, gender, age, and so on. It might be “for worse” to the extent it makes more room for workplace personality clashes, though that assumes that employers are good at assessing personality in an interview setting. It would also mean employers couldn’t assess which candidate has the optimal mix of various qualifications, though, again, that assumes that employers are actually good at doing that. My suspicion is that in a lot of situations, employers are relying on imperfect heuristics and guesswork. All this to say, various methods of limiting employer discretion in hiring, including injecting some randomness into the process, might have downsides, but those downsides also might not be as great as people might initially think.

Another initial objection to this or other ways of limiting employer hiring discretion might be that this system would make it more difficult for employers to implement affirmative action plans or achieve other worthwhile hiring goals, and that’s a serious concern. It suggests a role for limited, closely monitored exceptions for employers who can prove they are actively and successfully pursuing goals like diversifying their workforces. Further, the existence of limited exceptions might helpfully incentivize employers who object to the interference with their hiring process to decide to achieve those goals.

I suspect the larger objection, though, will be a political one – that hiring is just the employer’s prerogative, and that employers hire the “best” people by some kind of objective standard and that, therefore, government shouldn’t interfere beyond what’s minimally necessary to require non-discrimination and so on. Putting aside questions about what it means to be the “best” candidate and whether employers can meaningfully predict who will be best, I’d just note that there are already some relatively broad incursions on employers’ hiring discretion in existence. For one example, there’s the hiring hall system, under which unions refer candidates for jobs at employers’ requests, usually by a seniority system. For another, more recent example, a number of cities have adopted recall rights for at least some workers, often focused on the hospitality industry, which was, of course, hit very hard by layoffs during the beginning of the pandemic.<sup>38</sup> Recall rights perform a number of important functions, including that they prevent employers from using the layoff and rehiring process to squeeze out disfavored workers, including those who are more senior and higher-paid, or “troublemaker” workers who are union activists. In a nutshell, recall rights don’t solve inequality that existed before the pandemic, but they help prevent a new layer of inequality from being layered on top by limiting another opportunity for

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38. See, e.g., CAL. LABOR CODE § 2810.8.

employers to exercise discretion in undesirable ways. They respond to employers' incentives to, in a sense, not let a crisis go to waste, in an industry where workers can face significant barriers enforcing their rights. True, recall rights apply in the context of the decision to rehire, rather than the decision to hire, but the point is that limiting employer discretion in the context of hiring is not completely absent from the landscape now.

Relatedly, we might think about reducing the incentives for employers to make unlawful or borderline calls that almost inevitably end up in enforcement limbo. The poster child for this kind of problem is misclassification. A major way to address it is the one I mentioned earlier – adopting a clear test, like the ABC test. At the same time, the benefits of classifying a worker as an independent contractor are so great that employers will also try to game the ABC system. But should the benefits be that great? In some cases, we might decide the answer is no – that some bargains struck between ostensible independent contractors and companies reflect an unacceptably skewed bargaining power. Perhaps this question could be part of the substantive analysis of who is an independent contractor and who is an employee, but policymakers might also backstop the classification system by, for example, deciding that even independent contractors should not be able to agree to work for less than the minimum wage.

We are in a moment of worker empowerment. There's the "great resignation," which is mostly a reflection of workers leaving their jobs for better jobs,<sup>39</sup> and, of course, there is also the recent upsurge in union organizing and collective action at places like Amazon's JFK8 warehouse and at a long and growing list of Starbucks locations. That makes this the perfect time to ensure that all workers, especially those that are most often closed out from economic prosperity, get to take part in rising wages and standards. It's also a time to think big – or at least there's no reason to think small, as resistance to rising employment standards will be loud no matter the scope of the proposal. My suggestion for policymakers is that this is the perfect time to think creatively about new approaches to enforcement problems.

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39. Richard McGahey, *A 'Great Upgrade,' Not A 'Great Resignation'—Workers Quit for New And Often Better Jobs*, FORBES (Jan. 20, 2022, 06:30 AM), <https://www.forbes.com/sites/richardmcgahey/2022/01/20/a-great-upgrade-not-a-great-resignation—workers-quit-for-new-and-often-better-jobs/?sh=2b2cf3936eac> [<https://perma.cc/5H44-3JH2>].