Deputizing the Frontline: Enforcing Workplace Rights in a Post-Pandemic Economy

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DEPUTIZING THE FRONTLINE:
ENFORCING WORKPLACE RIGHTS IN A POST-PANDEMIC ECONOMY

Elizabeth J. Kennedy†

ABSTRACT

The COVID-19 pandemic exploded against a backdrop of federal retrenchment and repeal of workplace rights and protections for frontline workers, casting a spotlight on systemic racial inequity. While states and cities emerged as the last line of defense for wage standards in the United States, the sweeping application of mandatory arbitration agreements and restrictions on class actions makes enforcing those new rights difficult, if not impossible. A forecasted post-pandemic recession will further undermine the ability of workers to advocate for higher wages and diminish the capacity of enforcement agencies to combat wage theft. Given the enormity of this crisis, any effective response will require a significant investment of public funds, either through massive federal infrastructure and investment programs, or through a patchwork of state and local initiatives that put individuals back to work. Can the devastation of this moment lead us to a more equitable future? This paper creates a path forward for state and local governments to raise standards.

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by expanding the application of prevailing wage laws to economic stimulus projects, and empowering frontline workers to enforce those higher wages through qui tam actions that make them deputies in their own fight for equitable workplace standards.

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INTRODUCTION

Wando Evans’s job may have been classified as essential, but the lack of protection afforded to him by regulators and corporate leaders reflects a life considered to be expendable. As one of millions of disproportionately black and brown grocery and retail workers, Mr. Evans worked for low wages with scant protective gear, which allowed the rest of the nation to shelter in place during a global pandemic. Two days after

5. See Abha Bhattarai, It Feels Like a War Zone: As More of Them Die, Grocery Workers Increasingly Fear Showing Up, THE WASH. POST (Apr. 12, 2020), https://www.washingtonpost.com /business/2020/04/12/grocery-worker-fear-death-coronavirus/; Hye Jin Rho et al., CEPR, A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES (Apr. 2020), https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf (there is no uniform definition of “essential” worker, but a recent study found that workers in six different sectors were likely to be included in most federal, state and local essential worker definitions, including those in health care, trucking, warehouse, and postal services; grocery stores, convenience stores, and drugstores; public transportation; building-cleaning services; and child-care and social services); CHRISTOPHER C. KREBS, CISA, ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (Mar. 28, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure _Workers_1.pdf (the U.S. Department of Homeland Security considers essential workers as those, “who conduct a range of operations and services that are typically essential to continued critical infrastructure viability . . . The industries they support represent, but are not limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works”); Francine D. Blau et al., Essential and Frontline Workers in the COVID-19 Crisis, ECONOFACT (Apr. 30, 2020), https://econofact.org/essential-and-frontline-workers-in-the-covid-19-crisis (“Frontline workers,” are a narrower subset of essential workers who typically cannot work remotely, receive lower wages on average and are disproportionately workers of color. These include, but are not limited to, “healthcare workers, protective service workers (police and EMTs), cashiers in grocery and general merchandise stores, production and food processing workers, janitors and maintenance workers, agricultural workers, and truck drivers. These workers constitute 60% of essential workers and 42% of all workers . . . Healthcare workers represent 20% of all frontline workers”). For purposes of this article, however, “frontline workers” excludes the relatively high-paying, highly educated group of doctors, registered nurses and pharmacists (about three-quarters of all healthcare workers), but does include health-support workers (e.g., nursing assistance and home health aides), which comprise roughly one-quarter of all essential healthcare workers.

6. See Bhattarai, supra note 5 (stating the hourly wages for grocery employees like Mr. Evans averaged $11.43 in 2018 and showing that while doctors, nurses, EMTs and other medical workers have the highest risk of exposure to the coronavirus, frontline workers in grocery stores also come into contact with large numbers of people, often without protective gear, and without the ability—financially or by right—to stay at home and forego wages to care for their own health or the health of their families). See also Jamila Henderson et al., A Profile of Frontline Workers in the Bay Area, BAY AREA EQUITY ATLAS (May 13, 2020), https://bayareaequityatlas.org/essential-workers (“Black workers, who account for just 5 percent of all workers in the region, are also concentrated in specific frontline industries public transit (23 percent); trucking, warehouse, and postal services (11 percent); childcare and social services (10 percent); and health care (8 percent)”). See generally ALEXANDER HERTEL-FERNANDEZ ET AL., UNDERSTANDING THE COVID-19 WORKPLACE: EVIDENCE FROM A SURVEY OF ESSENTIAL WORKERS, ROOSEVELT INST. 1, 3 (June 2020), https://rooseveltinstitute.org
being sent home with flu-like symptoms from Walmart, where he had worked for fifteen years, Mr. Evans was found dead in his apartment.\(^7\) Dangerous working conditions, and a lack of affordable health care and paid sick leave are hazards faced by low-wage workers during normal times.\(^8\) But these are not normal times. At least eighty-two grocery workers have died from COVID-19, with thousands more sickened and in recovery.\(^9\)

Treating the lives of frontline workers like Wando Evans as disposable is not a recent trend.\(^10\) The COVID-19 pandemic exploded against a backdrop of federal retrenchment and aggressive deregulation, against which states and cities had begun to emerge as the last line of defense in preserving and raising standards, especially for lower-wage workers.\(^11\) Although the federal minimum wage has remained stagnant at $7.25 for over a decade,\(^12\) cities like Seattle, San Francisco, and New

\(^7\) See ERIC R. VULNERABLE: SERVICE-SECTOR WORKERS AND PAID SICK LEAVE, THE SHIFT PROJECT I (Apr. 2020), https://shift.berkeley.edu/files/2020/04/Essential_and_Vulnerable_Service_Sector_Workers_and_Paid_Sick_Leave.pdf (“We find that 55% of workers at large service-sector firms have no paid sick leave, and women are significantly less likely to have paid sick leave than their male co-workers. Workers who lack sick leave are very financially insecure—a quarter struggle to pay their bills and a third experienced hunger hardship even before the COVID-19 outbreak.”).

\(^8\) “I couldn’t even walk or breathe and I’m like, I think I may have to go to the hospital, because I’m not feeling well and my schedule, I think it was 3-12 that day or 2-11, something like that. So I called my boss in the morning, that was around 9 or 10 o’clock. And I told ‘em, you know I don’t feel good, I need to have the day off today, because I feel real sick... He was like, ‘No, I cannot give you the day off. If you don’t come in, I will give you 3 days of suspension’... and I went to work like that.”

\(^9\) Id. at 2.


\(^13\) Jack Arnholz, Minimum Wage to Increase in More than 20 States in 2020, ABC NEWS (Dec. 31, 2019), https://abcnews.go.com/Politics/minimum-wage-increase-20-states-2020/story?id=67935502. See also After the Longest Period in History Without an Increase, the Federal Minimum Wage Today is Worth 17% Less Than 10 Years ago – and 31% Less than in 1968, ECON.
York,\textsuperscript{13} together with nineteen states, have raised the floor to $10, $12 and even $15 an hour.\textsuperscript{14} Although twenty-one states have minimum wages equal to or less than the federal standard, roughly one-fifth of workers live in states where the minimum wage is set to rise to at least $15 an hour.\textsuperscript{15} Where legislatures have failed to raise minimum workplace standards, voters have passed ballot initiatives to do so.\textsuperscript{16} Likewise, nine states, including New York, California, Illinois, and Hawaii have extended overtime coverage to historically excluded workers in the home care and domestic work industries.\textsuperscript{17} Cities such as New York have passed more expansive laws prohibiting discrimination and harassment,\textsuperscript{18} as well as laws requiring employers to provide paid sick and family leave.\textsuperscript{19} To


\textsuperscript{14} See State Minimum Wages, NAT’L CONF. OF STATE LEGISLATORS (Jan. 28, 2021), https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#Table. ("Twenty-one states began 2020 with higher minimum wages. Seven states (Alaska, Florida, Minnesota, Montana, Ohio, South Dakota, and Vermont) automatically increased their rates based on the cost of living, while 14 states (Arizona, California, Colorado, Illinois, Maine, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, and Washington) increased their rates due to previously approved legislation or ballot initiatives.")

\textsuperscript{15} See id.

\textsuperscript{16} Id.

\textsuperscript{17} See Elizabeth J. Kennedy & Michael B. Runnels, Bringing New Governance Home: The Need for Regulation in the Domestic Workplace, 81 UMKC L. REV. 899, 918 (2013) (showing that New York passed the Domestic Workers Bill of Rights that mandated a higher rate of overtime pay for live-in domestic workers). See also Paul Shukovsky, Seattle City Council Passes Domestic Workers Bill of Rights, BLOOMBERG LAW (July 24, 2018), https://news.bloomberglaw.com/daily-labor-report/seattle-city-council-passes-domestic-workers-bill-of-rights (showing that Seattle became the first U.S. city to pass a Domestic Workers Bill of Rights in July 2019, which created a minimum wage, rest break, and meal break rights to domestic workers, along with a Domestic Workers Standards Board).


ensure effective application of these new laws, cities like Chicago, Denver, Flagstaff, Los Angeles, Seattle, and San Francisco have either created or designated municipal agencies to enforce them.

For every step forward in the creation of stronger state and local workplace protections for frontline workers, however, another barrier was erected to prevent workers from enforcing those rights. Mandatory arbitration agreements have become the new norm in the American workplace, and the Supreme Court and various district courts have been willing to uphold their use to block low-wage workers from accessing the courts to enforce legal protections. The recent federal revocation of joint employer liability in the construction, agriculture, garment, janitorial, home care and logistics industries has meant even further marginalization of those workers. Looking ahead, as the economic tsunami of COVID-19 bears down on precarious employers, we can expect many to cut costs


by illegally underpaying their employees, a crime referred to as "wage theft."  

Combating the coronavirus requires strong collaboration among doctors, scientists, public health officials, elected leaders, and citizens. So, too, does combating wage theft. A model of top-down workplace enforcement is ineffective when the "top"—in this case, the federal administration—is actively hostile to the goal of expanding workplace protections. While families of occupational COVID-19 victims like Wando Evans' are filing lawsuits to hold employers accountable, frontline workers need creative means of enforcing workplace rights while they are still on the job, not only for their own safety and economic security, but for the health and welfare of the nation.

COVID-19 has cast a spotlight on systemic racial inequity across systems of education, policing, housing, and employment. Can the devastation of this moment lead us to a more equitable future? This article creates a path forward for state and local governments to raise the floor


Practices considered to be "wage theft" include:
- Paying less than the minimum wage
- Failing to pay required overtime
- Paying less than the promised wage
- Misclassifying an employee as an independent contractor to avoid paying workers' compensation, unemployment insurance, or an hourly wage
- Deducting the cost of required uniforms or tools from paychecks
- Failing to provide paid sick leave where required by law
- Compelling uncompensated work "off the clock"

Id.

31. See Madland et al., supra note 10 (stating that essential workers, health care workers, and Congress must work together to overcome challenges posed by COVID-19).


33. See Complaint at 3-4, 6, Evans v. Walmart, Inc., No. 2020L003938 (Ill. Cir. Ct. filed Apr. 6, 2020). The estate alleges that Walmart owed all of its employees a duty of reasonable care, "in keeping the store in a safe and healthy environment" and that Walmart should have taken all of the preventive measures recommended by the Centers for Disease Control and Prevention and the Occupational Safety and Health Administration, including more frequent store cleanings and sterilizations, strict social distancing guidelines, and the provision of personal protective equipment such as masks, gloves, and hand sanitizer. Id. at 3-5. According to the plaintiff, "[a]s a direct and proximate cause of [Walmart's alleged failure to take those steps], the Decedent was infected by COVID-19 and ultimately died . . . ." Id. at 6.

on wages by expanding the application of federal, state, and local prevailing wage laws to jobs and industries in which public funds are either used or a public benefit is accrued, and strengthen the ability of frontline workers to enforce those standards through qui tam actions. While this author has previously proposed the use of qui tam lawsuits to enforce wage standards in the home healthcare industry this paper argues that an expansion of qui tam to other frontline industries may hold the key to "resisting" the current federal agenda of repeal, retrenchment, and repression. Part I of this article describes the problems of wage theft and substandard wages for frontline workers, as well as barriers to enforcing existing state and federal wage standards. Part II explains and evaluates two federal laws – the Davis-Bacon Act and the Service Contract Act – as well as their state and local law counterparts and proposes an expansion of those statutes to cover a greater number of workers. Part III considers the use of qui tam lawsuits – a very old remedy with very modern implications – as a creative solution to the lack of effective workplace standards enforcement. This proposal builds upon the growing sense that private conduct has public consequences, such as in the context of a health care mandate or the disparate impacts of climate change. The article concludes that an expansion of prevailing wages coupled with qui tam enforcement could help individual workers, worker centers, and labor unions raise the floor on wages while strengthening the enforcement of wage standards from the bottom up.

35. See e.g., Karla Walter, Getting Americans Back to Work and Good Jobs, CTR. FOR AM. PROGRESS (June 29, 2020), https://www.americanprogress.org/issues/economy/reports/2020/06/29/487075/getting-americans-back-work-good-jobs/ (stating that federally supported companies must create jobs that ensure workers an increased minimum wage, expansion of benefits, and paid family and medical leave).

36. See e.g., David Groves, Empowering Workers to Blow the Whistle, THE STAND (Feb. 13, 2020), https://www.thestand.org/2020/02/empowering-workers-to-blow-the-whistle/ (stating that states like Washington have attempted to enact legislation which would provide workers with an increased ability to report workplace violations).


38. See infra Part I.

39. See infra Part II.

40. See infra Part III.


42. See, e.g., Tina Schneider, Responsibility for Private Sector Adaptation to Climate Change, 19 ECOLOGY & SOC'Y 1, 7 (2014), http://dx.doi.org/10.5751/ES-06282-190208.
I. “LIKE A WAR ZONE”

A. Wage Suppression in Frontline Industries

Wage theft is a term used to describe a broad spectrum of employer violations of federal and state laws43 that result in workers not being paid their legally mandated wages for hours worked.44 Employers may refuse to pay their workers at all, pay for some hours but not others, or pay only straight wages for hours worked in excess of forty hours a week.45 Other workers become victims of wage theft when their employers require them to work “off-the-clock”46 or intentionally misclassify them as “independent contractors” to evade payroll taxes.47 Workers misclassified as independent contractors lose not only the protection of minimum wage and overtime laws, but also access to critical “safety-net benefits like unemployment insurance, workers’ compensation, and Social Security and Medicare.”48 For frontline workers in a pandemic, wage theft is one of the many occupational hazards in a workplace that has been described, by at least one employee, as “like a war zone.”49

43. See supra source and text accompanying note 30.
45. Brady Meixell & Ross Eisenbrey, An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year, ECON. POL’Y INST. (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ (“When a worker earns only a minimum wage ($290 for a 40-hour week), shaving a mere half hour a day from the paycheck means a loss of more than $1,400 a year, including overtime premiums. That could be nearly 10 percent of a minimum-wage employee’s annual earnings — the difference between paying the rent and utilities or risking eviction and the loss of gas, water, or electric service.”).
47. Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses, Hearing on S. 113-818 Before the Subcomm. on Emp. and Workplace Safety, 113th Cong. 1, 15 (2013) (statement of Catherine K. Rueckelshaus) (“Companies [misclassify employees] to avoid having to report and pay FICA and FUTA taxes, evade labor organizing, skirt baseline labor standards like minimum wage and overtime, discrimination protections, health and safety and workers compensation, and unemployment insurance.”).
48. Kennedy, supra note 37, at 530.
49. Bhattarai, supra note 5.
Wage theft is pervasive, cutting across industry lines and geographic boundaries, but is particularly pernicious in frontline industries.50 A study of workers in low-wage industries across three U.S. cities found that in any given week, two-thirds had been the victim of at least one incidence of wage theft.51 The researchers estimated that the average loss per worker over the course of a year was $2,634 out of total earnings of $17,616, with a collective loss for workers in those three cities alone of $3 billion.52 According to a May 2017 study by the Economic Policy Institute, a non-profit, nonpartisan think tank, 2.4 million workers in the ten largest states lose $8 billion annually to minimum wage violations alone.53 Generalizing to the rest of the U.S. low-wage workforce, wage theft costs workers $15 billion per year, not including overtime violations, a devastating loss for those workers who can least afford it.54 The epidemic of wage theft has hit low-wage and immigrant workers the hardest, groups that are disproportionately workers of color, who are also disproportionately impacted by the COVID-19 pandemic.55 According to a recent profile of Bay Area frontline workers, nearly 17 percent earn wages that place them and their families below 200 percent of the poverty level, which is approximately $48,000 for a family of four.56

When wage theft goes unchecked and unregulated, ethical employers who comply with or even exceed minimal labor standards (so-called “high-road employers”) operate at a competitive disadvantage.57 The incentives for employers to violate the law—reducing payroll costs and underbidding competitors—are obvious. Rampant wage theft in certain industries harms

51. Meixell & Eisenbrey, supra note 45.
52. Id.
53. See David Cooper & Teresa Kroeger, Employers Steal Billions from Workers’ Paychecks Each Year, ECON. POL’Y. INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/ (finding that for the ten most populous states, “2.4 million workers lose $8 billion annually (an average of $3,300 per year for year-round workers) to minimum wage violations—nearly a quarter of their earned wages”).
54. Id. (“[A]ccording to the FBI, the total value of all robberies, burglaries, larceny, and motor vehicle theft in the United States in 2015 was $12.7 billion.”). See also Meixell & Eisenbrey, supra note 45 (“[I]n the United States in 2012, there were 292,074 robberies of all kinds… The total value of the property taken in those crimes was $340,850,358.”).
55. Cooper & Kroeger, supra note 53.
not only the worker; indeed, such a pattern and practice of wage theft also “hurts law-abiding businesses and encourages unfair competition.”58 Moreover, and perhaps most significantly, wage theft, “illegally siphon[s] off state, local, and federal tax dollars, costing local governments millions of dollars in lost revenues for local governments.”59

In a double blow to state and local economies, since low-income workers are likely to circulate their earnings in the local economy by spending on basic necessities like food, clothing, and housing, any theft of those earnings by employers affects not only the [frontline] worker, but also the other businesses that workers would have patronized in the absence of wage theft.60

Wage theft also strains an already stretched public safety net, as workers whose wages are stolen by their employers are forced to rely on “food stamps, food banks, temporary assistance with utility bill payments, subsidized housing, and shelters” to meet their families’ most basic needs.51

B. Barriers to Enforcing Wage Standards

Workplace law currently provides three pathways for victims of wage theft: file a complaint with the relevant state or federal labor agency, file a private lawsuit alleging violations of the FLSA or state and local wage and

58. Kennedy, supra note 37, at 531.


61. Kennedy, supra note 37, at 532; Pamela Loprest & Demetra Nightingale, The Nature of Work and the Social Safety Net, URB. INST. (July 2018), https://www.urban.org/sites/default/files/publication/98812/the_nature_of_work_adn_the_social_safety_net.pdf (listing the largest and most commonly referred to public safety net programs, all of which except the unemployment insurance program are available based on a person’s income).
hour standards, or do both. 62 Ensuring that employers comply with wage standards requires a robust investigation and enforcement arm of government, as well as the unfettered ability of workers to bring private lawsuits. 63 Most state and local governments lack sufficient resources to investigate and enforce workplace standards, 64 which shifts the burden of enforcement to workers and the courts. 65 Yet that shift is quite literally a burden for low-wage, marginalized workers, for whom bringing a private lawsuit can be personally, economically, and emotionally costly. 66

Although wage theft is estimated to cost U.S. workers up to $50 billion per year 67 (and to have collateral economic impacts on already strained local and state economies in a post-pandemic recovery), 68 "the penalties under federal law for even willful and repeat violations are minimal." 69 The maximum civil penalty for directly stealing from employees (such as by repeatedly or willfully failing to pay minimum wages) is only $1,100. 70

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63. See Kennedy, supra note 37, at 531 ("In a recent study of the efficacy of workplace standards enforcement regimes, Professors Alexander and Prasad found that 'the least politically, economically, and socially powerful and secure workers were the least likely to make claims, the most likely to experience retaliation, and the least likely to have accurate substantive and procedural legal knowledge.'" (citing Charlotte Alexander & Arthi Prasad, Bottom-Up Workplace Law Enforcement: An Empirical Analysis, 89 IND. L.J. 1069, 1098-99 (2014)).

64. HOU STON, WE HAVE A WAGE THEFT PROBLEM, supra note 60, at 1.

65. Id. at 6-7.

66. Alexander & Prasad, supra note 63, at 1073 ("Workers are overdeterred from claiming, and employers may be underdeterred from complying, creating a self-perpetuating enforcement gap in labor and employment law."). See Andrew Elmore, Collaborative Enforcement, 10 N.E. U. L.J. 72, 92 (2018) ("Although unauthorized workers are employees under the NLRA, they cannot receive reinstatement or post-termination backpay as a remedy for a NLRA violation . . . [T]he most likely remedy for an NLRA violation is a nearly costless cease and desist order and posting.").

67. Meixell & Eisenbrey, supra note 45.


69. Meixell & Eisenbrey, supra note 45. See Coming Up Short: The State of Wage Theft Enforcement in New York, supra note 57, at 11 ("[T]he federal labor law only covers employees who work for enterprises with sales of at least $500,000 a year.").

70. Meixell & Eisenbrey, supra note 45; 29 U.S.C. § 216(e)(2) (2012). The FLSA provides for liquidated damages equal to two times the amount of wages illegally withheld. 29 U.S.C. § 216(b). Under some parallel state wage and hour laws, a liquidated damages amount equal to treble the amount of illegally withheld wages may be available. See id. (authorizing private actions and specifying the recovery available). See also Andrew Elmore, supra note 66, at 82-83 ("Private, for-
Paltry remedies coupled with the high costs of pursuing an external, formal claim, means that pursuing a legal claim just doesn’t make much economic sense for many workers.\textsuperscript{71} Moreover, when workers pursue individual claims, the risk of retaliation by employers increases.\textsuperscript{72} Retaliation can take many forms, including termination, salary reduction, harassment, and adverse changes to schedules or assignments.\textsuperscript{73} Pursuing a class action would minimize some of those risks, however the Supreme Court’s 2017 decision in \textit{Epic Systems} greatly restricted the ability of workers to hold their employers accountable through class action lawsuits.\textsuperscript{74} In the wake of that decision, there have been additional factors which have heightened the need for creative enforcement mechanisms. These factors include the widespread use of mandatory arbitration agreements that prevent workers

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profit attorneys have little incentive to represent plaintiffs where labor standards are the worst because these employers are often small and judgment proof. Public agencies tasked with enforcing labor standards lack the resources to inspect all workplaces effectively, the expertise to detect labor and safety and health violations, and the enforcement tools to remedy them. Public enforcers have adopted different strategic enforcement approaches to prioritize the worst violations and the least compliant industries. Yet, and particularly with the retreat of federal agency labor standards enforcement, state and local agencies face strong headwinds in changing employer norms and ensuring compliance with new statutory protections.\textsuperscript{72}

71. Pursuing a claim often doesn’t make financial sense for an attorney, given the relatively small amount of money at stake in an individual claim. Moreover, even when workers are successful in pursuing a claim, many never see a dime of their recovery. See, e.g., Urb. Just. CTR., Legal Aid Soc’y & Nat’l CTR for L. & Econ. Just., Empty Judgments: The Wage Collection Crisis in New York 4, 5 (2015) https://nclej.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection- Crisis-in-New-York.pdf. “In the months or years it takes to get a court judgment, employers transfer money from their bank accounts, put property in the names of family members, close down their business or change its name, create sham corporation, ignore court orders, or leave the country with their property. . . As a result, many workers never get paid the wages they earned, even when they engage in a lengthy legal process.” Id. at 4. “At least 10 states, including Maryland and Wisconsin, permit workers to put a lien on an employer’s property in connection with a wage claim.” Chris Fuchs, \textit{Wage Theft Cases can be Easy to Win. Collecting is a Different Story.}, NBC News (June 19, 2019, 1:15 PM), https://www.nbcnews.com/news/asian-america/wage-theft-cases-can-be-easy-win-collecting-different-story-n1018306.

72. Alexander & Prasad, supra note 63, at 1104, 1106. In a recent study of low-wage workers who pursued a claim against an employer for wage theft, about 43% experienced some form of retaliation. Id. at 1104. Such retaliation is itself often without a helpful legal solution, given that the only remedy offered by traditional employment and labor law is an opportunity to pursue in court a claim for the retaliation—the very action that placed the worker in jeopardy in the first place. Id. This is particularly evident when it comes to class action lawsuits, in which even the collective status of the plaintiffs does little to cover the individual risk. Id. at 1106. Having to “opt in” to a wage theft class action (as contrasted, for example, with an “opt out” consumer rights lawsuit) “requires [low-wage] workers to take the very public step of joining a lawsuit, rather than being part of an anonymous class represented by a few named plaintiffs.” Id. at 1113.


from pursuing wage theft claims in state and federal courts, the Trump Administration’s resource retrenchment, “deregulatory impulses,” and continued decline of union representation, the need for creative enforcement mechanisms has never been greater.

While the right of workers to be paid in full the wages to which they are legally owed is unwavering, whether or not that right is effectively enforced depends heavily on political support and its attendant resources. In contrast to Bush-era Department of Labor (hereinafter “DOL”) policy, the Obama administration’s Wage and Hour Division was noted for its new era of vigorous and strategic enforcement. Then, like a pendulum swinging backward, the Trump administration made decisive, unprecedented moves in the reverse direction. These included lowering the

75. Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, ECON. POL’Y INST. 1, 7 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf (showing a recent study that suggests that more than 55 percent of employees are now subject to mandatory arbitration clauses, which has stripped non-union workers in New York the right to go to court).

76. See, e.g., Daniel Schneider & Kristen Harknett, Essential and Vulnerable: Service-Sector Workers and Paid Sick Leave, THE SHIFT PROJECT 3, 4 (Apr. 2020), https://shift.berkeley.edu/files/2020/04/Essential_and_Vulnerable_Service_Sector_Workers_and_Paid_Sick_Leave.pdf (“Union membership is uncommon among our surveyed workers at 123 large retail and food-service firms, at just about 9%. But, workers who reported being in a union were significantly more likely to report access to paid sick leave—49% of union workers had paid sick leave versus 44% of non-unionized workers.”). “[S]ome companies—such as Costco and In-N-Out Burger—have offered their workers access to paid sick leave even in the absence of legislative requirements.” Id. at 6.

77. Kate Hamaji et al., Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back, CTR. FOR POPULAR DEMOCRACY & ECON. POL’Y INST. 3 (May 2019), https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf. As has been well documented, arbitrators—frequently aligned with the interests of employers—are more likely to rule in favor of corporate employers than the employees alleging violations of labor and employment laws. Id. In cases where employees do prevail, arbitrators are more likely to award lesser amounts in damages than a judge or jury may have. Id. These limitations have been “ratified by the U.S. Supreme Court,” through a series of decisions that upheld forced arbitration. See also Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407 (2019) (holding that even an ambiguous arbitration clause can be construed to prevent a worker from arbitrating their claims on a class-wide basis); see generally AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612 (2018).

78. Kennedy, supra note 37, at 532.

79. Id. at 534-35 (“[T]he WHD has hired 300 new investigators to target industries and employers most likely to violate workplace standards, resulting in a recovery of over $1.3 billion in unpaid and owed wages... Under [David] Weil’s leadership, efforts to crack down on employee misclassification have yielded significant gains for workers in industries that frequently turn to subcontracting as a way to cut costs and avoid responsibility for labor standards. The DOL has also begun to more aggressively partner with state governments and industry partners to strengthen enforcement efforts.”).

salary threshold for exempting workers from overtime pay eligibility;\(^81\) making it more difficult to hold employers liable for wage theft against contract and franchise workers;\(^82\) ending a requirement that contractors meet federal labor standards in order to do business with the federal government,\(^83\) and upholding the use of mandatory arbitration clauses and class action waivers in low-wage workplaces, which has a disproportionately adverse impact on women and frontline workers of color.\(^84\) Given these continual shifts at the federal level, worker advocates have successfully sought to raise the floor on wages and working conditions by pushing for more protective laws at the state and local levels.\(^85\)

C. State and Local Initiatives and their Limitations

Prior to the outbreak of the novel coronavirus in early 2020, state and local governments had experimented with various means of raising the floor on wages and benefits, bridging the widening gaps in federal workplace

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81. See Saharra Griffin & Malkie Wall, President Trump’s Anti-Worker Agenda, CTR. FOR AM. PROGRESS ACTION FUND (Aug. 28, 2019, 10:09 AM) https://www.americanprogressaction.org/issues/economy/reports/2019/08/28/174893/president-trumps-anti-worker-agenda/ (explaining that the change is estimated to shortchange workers an estimated $1.2 billion in annual earnings).


protections and strengthening enforcement. Such experiments, conducted by states like California, Maryland, New York and Connecticut, included the passage of legislation that required employers to notify their employees of the method of payment and amount of wages owed, and by enhancing criminal penalties for employers who committed wage theft. Similarly, the California Division of Labor Standards Enforcement began conducting more focused investigations of employers within targeted industries during nonbusiness hours. Likewise, in New York, the Attorney General has prioritized investigation and enforcement against employers who have repeatedly violated wage and hour laws, specifically targeting employers in certain industries. These state and local efforts, while critically important, are insufficient to raise standards for low-wage workers nationwide. As predicted by Professors Fine and Gordon, since many of these state and local initiatives have emerged on an ad hoc basis, rather than through institutional policy, they may be difficult to sustain in the face of COVID-19 era budget cuts or political regime change. Enforcement strategies driven by workers, rather than regulators, may help overcome these persistent barriers to achieving greater stability and sustainability within frontline industries.

New York is a particularly interesting case study for wage theft, as its state legislature has passed some of the strongest worker protections in the nation, including a $15 minimum wage bill, Domestic Worker Bill of Rights, paid


87. See Kennedy, supra note 37, at 536 n. 93.

88. JULIE A. SU, STATE OF CAL. LAB. & WORKFORCE DEV. AGENCY, A REPORT ON THE STATE OF THE DIVISION OF LABOR STANDARDS ENFORCEMENT 1, 2 (2013), http://www.dir.ca.gov/dlse/Publications/DLSE_Report2013.pdf ("In 2012, BOFE's more targeted, efficient use of inspections yielded the highest rate of civil penalty citations (80%) in the past 10 years.")

89. Janice Fine & Jennifer Gordon, Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations, 38 POL. & SOC'y 552, 568-70 (2010). In 2009, the New York State Department of Labor launched a "Wage and Hour Watch" program, in which the DOL formally partnered with six community-based organizations (Make the Road New York, the Workplace Project, Centro del Derecho, Chinese Staff and Workers Association, RWDSU, and UFCW Local #1500) using a "neighborhood watch" model of workplace enforcement. Id. at 584 n.110; see also Romer-Friedman, supra note 86, at 528 ("When the [New York Labor] Bureau receives a complaint from a worker about a specific employer, it investigates every possible violation by that employer, and prioritizes complaints in which similar employers are committing violations.").

90. Fine & Gordon, supra note 89, at 561.

91. Id.


family leave, and specific legislation to combat wage theft. Despite strong protections on the books, workers' wages are being stolen off the shop floor by employers at pervasive and significant rates. Nearly one in five low-wage workers has been the victim of wage theft, in an amount equal to $965 million in unpaid minimum wages per year. This crisis disproportionately affects women and frontline workers of color. In a study by Make the Road New York, severe underfunding of the New York State Department of Labor has decimated the annual amounts it can recover for workers, down to less than three percent of minimum wages stolen by employers. For example, in 2008, each DOL investigator had a caseload of about seventy-three workers, in 2017, that number was approximately 142 cases per investigator, with no improvements in technology or efficiency that would help investigators handle the two-fold increase in cases.

As an alternative to legislative and administrative tactics, workers have organized labor unions, cooperatives, and collectives as a means of generating stable employment and living wages, building collective political power, and enforcing workplace standards. As Fine and Gordon note, the original architects of the FLSA envisioned an enforcement system in which worker-based organizations would directly participate in enforcing wage and hour laws. They advocate for augmenting existing government enforcement by giving unions and worker organizations a formal role in enforcing compliance with minimum wage and overtime laws in low-wage industries. The strategies proposed in the next part also rest on the principle that those "closest to the action" be empowered to work with government in order to detect, report, and prevent wage theft.

94. See N.Y. WORKERS' COMP. LAW § 204 (McKinney 2020).
96. See Cooper & Kroeger, supra note 53.
97. Id.
98. Id.
99. See COMING UP SHORT: THE STATE OF WAGE THEFT ENFORCEMENT IN NEW YORK, supra note 57, at 14 ("The DOL has insufficient resources to manage growing caseloads. DOL investigators' caseloads have grown extensively over the past decade, becoming too large to effectively manage.").
100. Id.
101. Id. ("[T]he DOL has fewer than half the investigators than it had several decades ago. In 1966, the DOL had over 300 labor inspectors. As of the end of 2017, the DOL had 115 investigate officers handling 16,400 open cases.").
103. Fine & Gordon, supra note 89, at 556.
104. Id. at 556, 561 (such collaborations must be "formalized," "sustained," and "vigorous").
105. See infra Section III.
Professor Fine defines co-enforcement as "when unions, worker centers and other community-based non-profit organizations and high-road firms, in relationship with government inspectors, help educate workers on their rights and patrol their labor markets to identify businesses engaged in unethical and illegal practices." Co-enforcement represents a shift away from viewing regulation as a coercive function of the state, to a process that leverages workers’ unique knowledge of shop floor conditions and non-compliance with standards. Before workers can enforce equitable workplace rights, however, those standards must be put into place with a new approach, described in the next sections, to raise the wage floor for frontline workers.

II. RAISING THE WAGE FLOOR

A. The CARES Act Paradigm Shift

While raising the wage floor for workers is an essential anti-poverty measure, minimum wages remain insufficient to propel workers forward in an economically meaningful way. Traditionally, collective bargaining was the means through which workers could command higher, more livable wages that reflected the true value of their labor. Today, however, private sector union density has dipped below 10%, putting collective bargaining out of reach for most. One statutory means of ensuring higher wages is through the application of the Davis-Bacon Act, the Service-Contract Act, and their state and local counterparts, which establish a process for determining "prevailing" wages in the construction and service industries, which are usually higher than the relevant minimum standards. The next sections will provide an overview of these tools and suggest ways they may be applied to cover workers in more frontline industries.

107. Id. at 147, 151 ("[O]ne of the most commonly cited capabilities that worker organizations have is access to vast amounts of information on labor standards that would be difficult for state officials to gather alone.").
109. Id. at 9.
Two key rationales undergird the concept of prevailing wages. The first was frequently articulated by Samuel Gompers, who argued that workers on public projects should be paid the "current or prevailing" daily wage simply because the government should, through its own hiring and compensation policies, "set a good example for the private sector." The second rationale is that in the context of public works the "government, as a major purchaser of construction [labor], should not benefit at the expense of wage earners" (whose tax dollars ostensibly underwrite the projects themselves). A contemporary rationale for expanding the reach of prevailing wage laws to more frontline industries is that such an expansion would reduce the strain on the social safety net provided by local, state, and federal governments. In the coming post-pandemic economic recovery, that safety net will be stretched to catch an unprecedented number of individuals and families. In a study of public school cafeteria workers, the University of California Berkeley Labor Center found that public school cafeteria workers are nearly twice as likely as the workforce as a whole to participate in one or more public programs: 36.3 percent compared to 19.7 percent. The highest participation is in the Earned Income Tax Credit (31.4 percent), followed by Children's Medicaid or SCHIP (15.3 percent),

112. Id.
113. See, e.g., N.Y. LAB. LAW § 650 (Consol. 2021).

There are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families. Such employment impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that wages be supplemented by the payment of public moneys for relief or other public and private assistance. Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy.

Accordingly, it is the declared policy of the state of New York that such conditions be eliminated as rapidly as practicable without substantially curtailing opportunities for employment or earning power. To this end minimum wage standards shall be established and maintained.

Id.
114. Id. (showing the reliance of individuals and families on public assistance, as mentioned in the statute, will grow.).
Medicaid (14 percent), Food Stamps (8.5 percent) and TANF (1.7 percent).\textsuperscript{115}

By providing these workers with higher “prevailing wages,” rather than the minimum wages they were then earning, the state and local governments would recoup an even greater amount through parallel reductions in public program expenditures.\textsuperscript{116}

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.\textsuperscript{117} This law signaled a key paradigm shift for independent contractors who have been long excluded from most federal and state workplace protections.\textsuperscript{118} In a dramatic departure from established federal precedent, the CARES act created “Pandemic Unemployment Assistance,” to provide unemployment insurance (hereinafter “UI”) benefits to workers who otherwise would not normally receive such benefits, such as independent contractors, self-employed and other on-demand or “gig” workers.\textsuperscript{119} Unlike traditional employees, whose employers will verify their UI status, the CARES Act requires that non-traditional workers self-certify “that he or she is able and available to work within the meaning of applicable state law, and is

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\textsuperscript{116} Id. at 457-58.


The cornerstone of the organizational structure of most on-demand firms is the classification of its workforce as independent contractors, rather than as employees. The decision to structure the workplace in this way has immediate, as well as collateral consequences for workers, consumers, and the economy as a whole. Under U.S. law, employers have considerable incentive to classify their workers as independent contractors rather than as employees. Employers are required to pay employment taxes for employees, but not for independent contractors. In addition, employers are required to respect minimum wage and overtime standards for employees, but not for independent contractors. Federal labor and employment laws impose other financial and legal obligations on employers, including liability for discrimination under Title VII of the Civil Rights Act of 1963, the Age Discrimination in Employment Act, and the Americans with Disabilities Act; a duty to provide employees with unpaid leave pursuant to the Family and Medical Leave Act; requirements with regard to pension plans; and an obligation to negotiate wages and working conditions with eligible employees under the National Labor Relations Act (NLRA).

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'unemployed, partially unemployed or unable or unavailable to work' because of one or more [] COVID-19–related reasons." The CARES Act expanded the definition of workers eligible to receive benefits, increased the amount of benefit available, and extended the number of weeks that a worker may receive the benefit. This represented a significant paradigm shift, one arguably toward a universal basic income framework, and one that recognized the inadequacy of existing federal minimum wage standards. During economic crises, the impact of missing or subminimum wages on industries such as retail, restaurants, hospitality, are magnified. What was previously an individual struggle, becomes a larger economic catastrophe.


- He or she is diagnosed with COVID-19
- He or she has symptoms of COVID-19 and is in the process of seeking a medical diagnosis
- A household member has been diagnosed with COVID-19
- He or she is providing care to a household member with COVID-19
- A child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19
- The individual is unable to reach work due to a quarantine
- The individual is unable to attend work because a healthcare professional advised him or her to self-quarantine
- The individual is scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19
- The individual is the sole wage earner in his or her household due to death of the head of household as a direct result of COVID-19
- The individual was required to quit his or her job as a direct result of COVID-19
- The individual’s place of employment closed as a direct result of COVID-19
- The individual is self-employed, is seeking part-time employment, and does not have sufficient work history or otherwise would not qualify for unemployment benefits under another state unemployment program.

The CARES Act does not define what it means to be ‘required to quit his or her job as a direct result of COVID-19.’ The U.S. Department of Labor (DOL) is likewise ambiguous and refers simply to ‘leav[ing] employment due to a risk of exposure or infection. . ..’ We anticipate that the analysis will be guided by a reasonableness standard.”

Id.

121. Blau et al., supra note 5.

Any post-pandemic economic recovery legislation will likely require large-scale jobs components, which seek to off stave hemorrhaging unemployment rates and put people back to work. The unique opportunity of this moment presents itself through such programs, since they would trigger the application of two major pieces of federal legislation requiring the payment of prevailing wages in federal contracts, the Davis-Bacon Act and the Service Contract Act, as well as various state and local counterparts, each of which explored below.

B. Expanding the Davis-Bacon Act

Enacted in 1931, the Davis-Bacon Act (hereinafter “DBA”) was intended to protect local businesses and workers from non-local contractors underbidding for federal construction projects using wages that, while competitive in the non-local contractor’s geographic area, would be significantly less than those demanded in the region of the project site. The DBA requires that for any contract with the U.S. government or District of Columbia in excess of $2,000, contractors and their subcontractors must pay their workers “prevailing wages and fringe benefits” as established by the Department of Labor. The DBA covers projects that involve “the construction, alteration, or repair . . . of public buildings or public works.”

In addition to the DBA itself, “approximately” sixty additional federal statutes include prevailing wage provisions. These are referred to collectively as the Davis-Bacon Related Acts (hereinafter “DBRAs”), and apply to “construction projects through grants, loans, loan guarantees, and insurance.” These can include construction in such areas as transportation, housing, air and water pollution reduction, and health. If a construction project is funded or

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123. Based on household survey data, “[t]he unemployment rate declined by 1.4 percentage points to 13.3 percent in May, and the number of unemployed persons fell by 2.1 million to 21.0 million.” U.S. DEP’T OF LAB., BUREAU OF LAB. STATS., THE EMPLOYMENT SITUATION—MAY 2020 (2020), https://www.bls.gov/news.release/archives/empsit_06052020.htm#. Unemployment rates among Latinx, Black, and Asian workers were much higher—17.6 percent, 16.8 percent, and 15 percent, respectively—compared with white workers, at 12.4 percent. Id.
126. Id.
128. Id.
assisted under more than one Federal statute, the Davis-Bacon prevailing wage provisions may apply to the project if any of the applicable statutes requires payment of Davis-Bacon wage rates.\(^\text{129}\)

DBRAs have been credited with lifting generations of skilled trades workers out of poverty, as well as saving taxpayers from poor quality public works projects and reducing strain on the public social safety net through a reduction in workplace injuries.\(^\text{130}\)

The Moving Forward Act, a $1.5 trillion congressional proposal to spur economic recovery through physical infrastructure projects, is an example of the kind of federal works program the DBA was intended to cover.\(^\text{131}\) In addition to traditional construction projects related to highway, rail and transit systems, the Moving Forward Act includes investments in “health care, airports, clean energy, broadband, education, and drinking water infrastructure.”\(^\text{132}\)

Ensuring an equitable distribution of the economic benefits reaped from such large-scale public works projects will require two key elements. First, DBA prevailing wage and federal contractor affirmative action requirements must be included in all projects that receive federal grants, loans, loan guarantees and tax credits.\(^\text{133}\) An economic recovery of the size and scope contemplated will not be administered exclusively by the federal government.\(^\text{134}\) It will likely take the form of federally funded and supported state and local projects.\(^\text{135}\) Second, given the geographical and racial inequities in prevailing wages across the country, in occupations

\(^{129}\) Id.


\(^{132}\) Walter, **supra** note 35, at 1. “[T]he Moving Forward Act extends Davis-Bacon coverage to several spending programs; helps expand registered apprenticeship in surface transportation projects; and requires major purchases of transit vehicles to include incentives for manufacturers to pay decent wages as well as provide apprenticeships and recruit traditionally underrepresented labor. In addition, the package incorporates provisions of the Investing in a New Vision for the Environment and Surface Transportation (INVEST) in America Act to boost transparency and adopt guardrails to ensure that recipients meet labor and Buy America requirements.” Id. at 3.

\(^{133}\) Id.

\(^{134}\) Id. at 1-2.

\(^{135}\) Id. at 2.
with low levels of union membership, a minimum floor of fifteen dollars per hour and paid sick leave should be required for all recipients of infrastructure funds. Using the rationales articulated for the DBA, advocates have called for an even more expansive set of benefits to attach to all publicly funded and supported projects, including "fair scheduling protections, extended paid family and medical leave, and access to quality and affordable child care."\(^{137}\)

### C. Expanding the Service Contract Act

While the Davis-Bacon Act covers construction, alteration, repair, painting, and decorating, significant federal dollars are spent on public works that take different forms. The Service Contract Act (hereinafter "SCA") was enacted in 1965, largely in response to demands that government contracting in connection with President Kennedy's space program include the same kind of prevailing wage protections required for government construction contracts under Davis-Bacon.\(^{138}\) Passed in 1965, and significantly revised in 1972, the list of what constitutes "services," has evolved considerably.\(^{139}\) Initially, "services" meant food services or janitorial services, such as the workers in the cafeteria in any federal building, most of which are contracted out.\(^{140}\)

Like the Davis-Bacon Act, the SCA requires that for any contract or subcontract over $2,500, contractors and subcontractors pay no less than the prevailing wage rate in their local area for classes of workers that are established by the federal Department of Labor.\(^{141}\) The secretary of labor is instructed to set rates comparable to other federal government jobs.\(^{142}\) In setting the rates, the secretary must give due consideration to wage levels paid for comparable federal government jobs,\(^{143}\) and give deference to wages negotiated in a collective bargaining agreement. If a prior

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137. \textit{Id.}  
139. \textit{Id.} at 354.  
140. \textit{Id.}  
141. 41 U.S.C. § 351(a)(1) (2006); see also 2018 P.R. Laws 154. A service contract is a written obligation agreed upon by "an agency, public corporation, or instrumentality of the Government," pursuant to which a person (natural or juridical) has an "obligation to provide certain services to the Government for" an agreed amount of compensation. \textit{Id.}  
143. \textit{Id.} § 351(a)(5).
Contractor was covered by a collective bargaining agreement, the collectively bargained rates are applied.\textsuperscript{144}

One glaring exception to the application of the Service Contract Act is that unlike state and local projects which, if they are funded in any amount with federal dollars are subject to Davis-Bacon prevailing wage requirements, state and local service contracts that use federal dollars are \textit{not} subject to the Service Contract Act.\textsuperscript{145} Therefore, any federal recovery program would need to ensure that prevailing wages are attached as a condition with every federal grant of monies to underwrite state and local projects, a critical and necessary expansion of the SCA.\textsuperscript{146}

\textbf{D. Expanding the Definition of Public Works}

As we consider an expanded application of prevailing wage principles, it is important to note that the Davis-Bacon Act was not the first law to establish prevailing wage requirements for public projects. In fact, the first such prevailing wage law was enacted 130 years ago in Kansas.\textsuperscript{147} The principle of government leading by example was at the heart of the movement for a "living wage," which crystalized in its modern context in Baltimore in the 1990s.\textsuperscript{148} Arguing that when the government spends money to create jobs the belief that it ought to lead by example, was embedded in the living wage ordinance passed in Baltimore in 1994, which required that employers doing business with the city government

\textsuperscript{144} Paving the High Road, supra note 138, at 354-55. This provision is a notable distinction between the Service Contract Act and the Davis-Bacon Act and reflects an intention of Congress at the time the SCA was amended in 1972 to protect "high-road employers" from being outbid by "low-road" employers whose workers had not successfully organized and collectively negotiated higher wages. \textit{Id.}

\textsuperscript{145} \textit{Id.} at 355.

\textsuperscript{146} See \textit{id.} at 355.

\textsuperscript{147} \textit{Id.} at 353, 353 n.10 (citing Eight-Hour Law, Kansas Gen. Stats. §§ 3827-3829 (1891)) ("[E]ight hours shall constitute a day's work for all laborers, workmen, mechanics, or other persons now employed, or who may hereafter be employed by or on behalf of the State of Kansas, or by or on behalf of any county, city, township, or other municipality of said state . . . provided, that in all such cases, the laborer, workmen, mechanics, or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: provided further, that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by or on behalf of the State of Kansas, or any county, city, township, or other municipal of said state, and laborers, workmen, mechanics, and other persons employed by contractors or sub-contractors in the execution of any contract or contracts within the State of Kansas, or within any county, city, township, or other municipality thereof shall be deemed to be employed by or on behalf of the State of Kansas or of such county, city, township, or other municipality thereof.").

\textsuperscript{148} \textit{Id.} at 373.
would be required to pay "living wages" to their employees.\textsuperscript{149} This movement caught on, as similar ordinances were passed by city governments across the country.\textsuperscript{150} The ethos that companies seeking public subsidies should be therefore obligated to provide more generous compensation and benefits than the private market would require fueled the passage of more than 150 such laws over the following decade.\textsuperscript{151} Similar requirements for state subsidized jobs also eventually took hold, and backlash legislation banning such policies, such as in Texas, but in general they generated a robust movement for living wages across the country.\textsuperscript{152}

Rather than taking a narrow view of projects that fall under prevailing wage protections, all work that is done for a public purpose, such as projects funded in whole or in part by public grants, government-backed loans, or with tax-credits, should be required to use predominant collectively bargained wages in a region and industry as the prevailing wage.\textsuperscript{153} Expanding the use of prevailing wages would help not only the directly affected workers, but also so-called "high road employers," who would otherwise be undercut by companies that underpay their employees in order to secure government contracts.\textsuperscript{154} Though signed at a moment in which construction in New York State was effectively brought to a halt by the coronavirus, the $177 billion spending plan for fiscal year 2020-21 expanded prevailing wage laws to cover workers on certain private construction projects.\textsuperscript{155}

\begin{footnotesize}
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} See id.
\textsuperscript{153} Madland & Rowell, \textit{supra} note 85, at 5.
\textsuperscript{154} Id. at 5. An expanded use of wage boards is another idea worth exploring to help raise standards within industries. In a handful of states, including New York, New Jersey and California such boards are comprised of workers, employers, and public officials who help set minimum working standards for industries and occupations. Id. at 8. Minimum standards are established through a mix of "economic and social factors such as industry productivity and cost of living, as well as testimony from business owners, workers, and other stakeholders." Id. at 5. See Kate Andrias et al., \textit{A How-To Guide for State and Local Workers' Boards}, CTR. FOR AM. PROGRESS 4 (Dec. 11, 2019, 9:04 AM), https://www.americanprogress.org/issues/economy/reports/2019/12/11/478539/guide-state-local-workers-boards/. For workers who are not covered by the National Labor Relations Act, or NLRA, wage boards could even directly promote sectoral bargaining. Id. New York has used wage boards to raise the wages of fast food workers to $15 an hour in 2015, and more recently passed legislation establishing a farm laborer wage board. Id. The city of Seattle created a wage board in 2018 for domestic workers, such as nannies, housekeepers and elder care providers. Id. Given the current national attention focused on frontline workers, opportunities to expand and extend wage boards to help raise standards in frontline industries may be an option worth pursuing. See id.
\end{footnotesize}
As discussed above, the Davis-Bacon Act, unlike the SCA, extends prevailing wage requirements to state and local projects that use federal dollars. As those federal dollars trickle downstream to state and local agencies, the rights of workers laboring on those projects trickle down into those local economies.\footnote{prevailing-wage-to-private-projects; see also Stephen D. Rosemarino & Chad J. Caplan, New York to Require Contractors to Pay Prevailing Wages on Certain Private Projects, NYSBA (June 12, 2020), https://nysba.org/new-york-to-require-contractors-to-pay-prevailing-wages-on-certain-private-projects/ (explaining the passage of a $177 billion budget bill).} Significantly, the very definition of "dollars" was given a more expansive interpretation under the prior federal administration. In 2009, Congress passed the American Recovery and Reinvestment Act (hereinafter "ARRA") which, for the first time, extended Davis-Bacon coverage to public works funded through the purchase of tax-exempt bonds by private investors (not direct taxpayer dollars).\footnote{See generally Paving the High Road, supra note 138, at 351 (discussing disbursement of billions of dollars in grants and loans by federal agencies to the states).} Prior to the passage of the ARRA, the DBRA had covered grants, federal loans, federal loan guarantees, mortgage insurance, revolving loan banks, and other ways in which the federal government extends money to states and municipalities; but it had never applied to "a creature of the tax code."\footnote{See generally id. at 355 (discussing the structure of the ARRA and the five tax credit bonds funded under the ARRA).} The more expansive prevailing wage requirements embedded in the ARRA provided some creative inspiration for extending the application of Davis-Bacon to new instruments of financing.\footnote{Id. at 355-56.}

One broad area in which prevailing wages might most appropriately be extended is in the case of economic development programs. Cities around the country have embraced a model of development centered on Tax Increment Financing (hereinafter "TIF").\footnote{Id. at 356.} Such projects typically use a spectrum of financial incentives, including tax breaks, direct grants, and commitments for infrastructure improvements for employers seeking to relocate.\footnote{Id. at 375.} Critics of these programs argue that in the absence of prevailing wage or living wage commitments, there is no meaningful public return on the public investment in private companies.\footnote{Id.} By negotiating community benefits agreements, labor unions and community activists have, on a project-by-project basis, been able to eke out greater benefits for employees and disrupt the trend toward "poverty jobs" for...
public project.\textsuperscript{163} Examples of this approach can be seen in Los Angeles, Pittsburgh, New York and Chicago.\textsuperscript{164}

III. DEPUTIZING FRONTLINE WORKERS

A. Federal and State False Claims Acts

In addition to the "proactive" regime of DOL-WHD investigations, enforcing workplace standards in the United States also relies heavily on a system of "operational rights"—incentives for workers to bring individual and collective claims from the "bottom up."\textsuperscript{165} Most laws—federal, state, and local—that establish workplace standards provide employees with the right to bring a private lawsuit against an employer that violates those standards.\textsuperscript{166} The number of private lawsuits filed by employees seeking redress eclipses the number of enforcement actions initiated by the government.\textsuperscript{167} Advocates for new models of workplace rights enforcement, particularly in low-wage industries, have recommended that the bottom-up structure be preserved but strengthened by a system that rebalances the costs and benefits in ways that benefit both employers\textsuperscript{168} and employees.\textsuperscript{169} For ethical, law-abiding employers who also operate on low profit margins, a system that more effectively enforces wage standards could allow them to compete on a more level playing field, rather than being forced to compete with unscrupulous employers whose law breaking gives them an economic advantage.\textsuperscript{170} The following sections propose a two-step strategy for leveraging public reinvestment dollars toward raising wage standards across

\textsuperscript{163} Id.
\textsuperscript{164} Id. at 375-376 (Los Angeles and Pittsburgh have institutionalized these standards with living wage and prevailing wage standards with similar proposals in New York and Chicago to do the same).
\textsuperscript{165} Alexander & Prasad, supra note 63, at 1069-73.
\textsuperscript{166} Id. at 1070.
\textsuperscript{167} Id.
\textsuperscript{168} Elizabeth J. Kennedy & Michael B. Runnels, Bringing New Governance Home: The Need for Regulation in the Domestic Workplace, 81 UMKC L. REV. 899, 940-41 (2013) (summarizing the system of "co-regulation" as put forth by Professor Cynthia Estlund which "supports the initiatives of 'high road' domestic employers—and equips domestic workers and their employers with the tools necessary to develop enforceable workplace agreements based on core industry standards and mutual interests").
\textsuperscript{169} Alexander & Prasad, supra note 63, at 1108. One suggestion is for the U.S. Department of Labor to "establish an optional, one-way binding arbitration system, modeled on a program in place at The Coca-Cola Company, [which] would give workers a forum for speedy claim resolution." Id. at 1114. Under the Coca-Cola system, only the employer would be bound by the arbitrator’s decision. Id. at 1115. The workers would still be free to pursue their claims externally. Id.
\textsuperscript{170} Kennedy, supra note 37, at 560.
industries. First is the expansion of the DBA and SCA and their related state and local counterparts to all public projects funded by public dollars or through public-private investment vehicles. Then, as a bottom-up enforcement tool, deputize frontline workers to enforce those higher standards using qui tam actions pursuant to the federal False Claims Act or its state and local counterparts.

Congress enacted the False Claims Act in 1863 in response to concerns of rampant fraud by suppliers of goods to the Union Army during the Civil War. 171 Reports include those of mortar shells filled with sawdust instead of gunpowder, buttons that dissolved entirely in the first rain, and the same mules being sold multiple times over. 172 In an effort “[t]o stop this ‘rebellion’ and ‘put fraudulent contractors in a position where they may be punished for their frauds,’ Congress passed the False Claims Act.” 173 Given the federal government’s limited enforcement resources at the time, the key to the success of the FCA was its qui tam provision, which allowed private citizens, or “relators” to act as whistleblowers or “private attorneys general” by suing on behalf of the federal government and collecting a share of its recovery. 174

171. United States v. McNinch, 356 U.S. 595, 599 (1958) (describing the “sordid picture” painted for the Congress at the time the bill passed — a time when “the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war”). Through passage of the Act, “Congress wanted to stop this plundering of the public treasury.” Id. Some of the reports of such fraud included,

- The same mules being sold over and over again to Army quartermasters.
- Rotted ship hulls freshly painted to appear new then sold as new vessels to the Navy.
- Infantry boots made of cardboard which wore out after a mile of marching.
- Uniform cloth made from recycled rags, which disintegrated when it became wet.
- Gunpowder barrels that when opened contained sawdust.


172. Richard Hughes IV, With a Worthless Services Hammer, Everything Looks Like a Nail: Litigating Quality of Care Under the False Claims Act, 37 J. LEGAL MED. 65, 66 (2017) (citing CONG. GLOBE, 37TH CONG., 3D SESS. 955 (1863)).

173. Hughes IV, supra note 172, at 166 (citing CONG. GLOBE, 37TH CONG., 3D SESS. 956 (1863); Act of Mar. 2, 1863, ch. 67, 12 Stat. 696). “The act, signed by President Lincoln, was popularly known as the Lincoln law.” Id.

174. See 31 U.S.C. §§ 3730(a)-(b) (2012) (outlining authority of DOJ and private persons to bring suit). While the False Claims Act was born out of necessity during the Civil War, the concept of qui tam recovery dates much earlier, to as early as 1335. See Helmer, Jr., supra note 171, at 1262. Qui tam comes from English common law “brought by a person qui tam pro domino rege quam pro si ipso in hac parte sequitur,” or “[w]ho sues on behalf of the king as well as for himself” and appeared on our shores as early as the first Continental Congress of the United States, which enacted several statutes containing qui tam provisions. Id. at 1262-63; see also Vermont Agency of Nat. Res. v. United
provided that any person who knowingly submitted false claims to the government was liable for double the government’s damages, plus a penalty of $2,000 for each false claim; relators were originally entitled to fifty percent of the amount recovered. These “relators,” were not simply civilian bystanders who happened to learn of an instance of fraud. Indeed, they were often co-conspirators who opted to betray their confederate in exchange for the FCA bounty; the logic of the FCA was that it operated by “setting a rogue to catch a rogue” and bring him to justice.

In its current form, the FCA creates liability for any person who knowingly submits a false claim to the government, uses a false statement to induce the government to pay a false claim, conspires to defraud the government into paying a false claim, or uses a false statement to reduce an obligation to pay the government. Over time, the FCA has been amended to raise the penalties for false claims from double to treble damages from $2,000 to a range of $5,000 to $10,000. Relators, if successful, may collect up to thirty percent of the recovered damages. In a typical FCA case, an internal “whistleblower” – usually an employee at a private company – reports to the government that his employer has overcharged the federal government. If the claim is correct, that whistleblower is entitled to a portion of the monies recovered by the government. Using the False Claims Act, or a state corollary, in cases of wage theft would help individual workers and their allies to act as private whistleblowers to enforce public labor laws. How this could work in practice is that a worker may contact a worker center with a complaint about unpaid wages. The “false claim” by the employer may be a certification that the employer is compliant with all

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175. CHARLES DOYLE, CONG. RSCH. SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 5-6 (2009) (tracing the history of the contemporary FCA with reference to the Act of March 2, 1863, 12 Stat. 696 (1863)).

176. Hughes IV, supra note 172, 66.


181. United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir.1996).

182. Id. at 1266, 1269.

183. See supra Part III.A.
relevant laws (which, if it is engaging in wage theft, it certainly is not). The worker center, or the worker herself, would bring the claim to the state’s Department of Labor. The department would have the option of rejecting the claim as lacking merit, pursuing the claim directly, or allowing the individual or worker center to pursue the claim on its behalf. If the claim is successful, the individual aggrieved worker would be entitled to the appropriate amount of back wages and penalties, and she or the charging party (union, worker center, co-worker advocate) would also be entitled to a portion of that recovery. The rationale for sharing the additional amount (“the bounty”) with the whistleblower (the “deputy” per this article’s framework), is that he or she has essentially saved the government money it would have had to expend to investigate or prosecute the claim directly. One advantage of this system is that the court could, in addition to monetary penalties, order ongoing employer monitoring, a remedy not typically available in a private lawsuit.

In addition to encouraging individual whistleblowers to report fraud, the *qui tam* provision incentivizes lawyers and third parties to actively investigate and look for claims. Given the significant lack of procedural legal knowledge on the part of low-wage workers, incentives for lawyers and third parties to look for *qui tam* claims are particularly important. As described

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184. A claim can refer to “any communication, whether written or verbal, electronic or otherwise, any request or demand, whether under a contract or otherwise, for money or property . . . .” 2018 P.R. Laws 154. This FCA theory of liability is referred to as “false certification.” See Jason Zuckerman, What Types of False Claims are Prohibited by the False Claims Act?, ZUCKERMAN LAW, https://www.zuckermanlaw.com/sp_faq/types-false-claims-prohibited-false-claims-act/#/text=Legal%20Falsity%20(False%20Certification),in%20fact%20has%20not%20complied (Nov. 22, 2010). False certification liability can arise when a contractor submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the company’s noncompliance with a statutory, regulatory, or contractual requirement. Id. If that omission makes the original statements misleading, the individual or company may be found to have violated the FCA. Id.

185. Myriam Gilles, The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans, 86 FORDHAM L. REV. 2223, 2236 (2018). If the government intervenes and takes the case over, the whistleblower (“relator”) stands to receive a modest fee if the case is resolved successfully. Id. If the government merely allows the relator to prosecute the litigation on behalf of the state, the relator stands to receive a much larger percentage of any eventual recovery. Id. The Attorney General could, “if she wishes, intervene in order to dismiss the case—exercising, in essence, a veto power over the litigation.” Id.

186. Id. at 2236-37.

187. Id. at 2237.

188. David Freeman Engstrom, Private Enforcement’s Pathways: Lessons from *Qui Tam* Litigation, 114 COLUM. L. REV. 1913, 1944 (2014). The most common types of claims initiated under the *qui tam* provision “assert fraud in connection with federally funded healthcare services under Medicare, Medicaid, and defense-procurement contracts. Id.”

189. Other recent approaches to incentivizing third parties and lawyers to ferret out fraud in health care spending include several of the 2010 amendments passed as part of the Affordable Care Act.
by one *qui tam* lawyer, "[t]he overriding theme of the False Claims Act is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government." Ninety-two percent of revenues recovered under the FCA originated from claims brought by private parties using the power of *qui tam*.

Using the FCA to enforce minimum wage and hour standards is not a new idea. *Qui tam* claims have been used to enforce prevailing wage requirements in government construction contracts at both the federal

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190. Helmer, Jr., *supra* note 171, at 1262.


192. Recent amendments to the FCA have given it even greater potential for application in the context of wage theft. See, e.g., Andrew E. Shipley, *Trends in False Claim Act Litigation, in Government Contracts Compliance* 49, 49 (2013) (“Over the past few years, legislative changes and court decisions affecting the False Claims Act have enlarged the pool of potential plaintiffs, expanded the legal theories available to them, and weakened potential defenses.”). Prior to 2009, the FCA made liable a person who “knowingly presents, or causes to be presented, to an officer or employee of the United States ... a false or fraudulent claim for payment or approval.” 31 U.S.C.S. § 3729(a)(1) (West 2008). The Fraud Enforcement and Recovery Act of 2009, however, expanded liability and the reach of the FCA to subcontractors and indirect recipients of government funds. United States *ex rel.* Tran v. Comput. Scis. Corp., 53 F. Supp. 3d 104, 116-17 (D.C. Cir. 2014). Today, liability attaches when someone “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C. § 3729(a)(1)(B) (2012). “False claims” are those claims submitted pursuant to a contract or other agreement “by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation.” Tran, 53 F. Supp. 3d at 117.
(Davis-Bacon Act\textsuperscript{193} and Service Contract Act\textsuperscript{194}) and state (various state prevailing wage statutes) levels. When a construction contractor or subcontractor fails to pay its workers prevailing wages pursuant to the Davis-Bacon Act, a worker has the right to recover those prevailing wages, as well as file a \textit{qui tam} lawsuit, for the false claims the contractor made when it certified, pursuant to the Act, that such prevailing wages were paid.\textsuperscript{195} If the court determines that such false claims have been made, significant civil penalties may be imposed on the contractor, from which a portion may be recovered by the \textit{qui tam} whistleblower. An application of \textit{qui tam} to wage theft cases in some respects embodies more of the English tradition, which relied heavily on "common informers to secure the enforcement of laws effecting public order and safety."\textsuperscript{196}

The False Claims Act currently results in significant returns for relators. According to the Department of Justice, between 2009 and 2016, the federal government recovered $31.9 billion under the False Claims Act.\textsuperscript{197} In 2016 alone, individuals who brought \textit{qui tam} or whistleblower actions received $519 million as a portion of the $4.7 billion recovered.\textsuperscript{198} If this tool were to be wielded in the wage theft or prevailing wage context, significant gains for workers could be obtained.\textsuperscript{199} In \textit{United States ex rel. Wall v. Circle C}

\textsuperscript{193} The Davis-Bacon Act's prevailing wage provisions apply to the Related Acts, under which federal agencies assist construction projects "through loan[s], grant[s], loan guarantee[s] or insurance." See 29 C.F.R. § 5.2(c) (2017); see also 40 U.S.C. § 3141 (2012). Contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works \textit{must} pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. 40 U.S.C. § 3142(a)-(b) (2012). The Davis-Bacon Act directs the Department of Labor to determine such locally prevailing wage rates. \textit{Id.} § 3142(b); see, e.g., United States ex rel. Plumbers & Steamfitters Loc. Union No. 38 v. C.W. Roen Const. Co., 183 F.3d 1088, 1089 (9th Cir. 1999) (describing a \textit{qui tam} action brought by union alleging that construction company failed to pay prevailing wages under Davis-Bacon Act).


\textsuperscript{195} 40 U.S.C. §§ 3142(b), 3144 (2012).

\textsuperscript{196} Helmer, Jr., \textit{supra} note 171, at 1262 (quoting \textsc{Leon Radzinowicz}, \textsc{A History of English Criminal Law and its Administration} from 1750 143 (1948)).

\textsuperscript{197} 2018 P.R. Laws 154.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.}
Constructions, L.L.C., the Sixth Circuit ruled that the false certification of the payment of prevailing wages under the DBA or SCA can constitute a false claim. In that case, a contractor was found to have certified false payroll certifications in violation of the DBA. The employees of a subcontractor blew the whistle on the contractor, which had represented that it had paid prevailing wages to certain employees but had not done so. Though the contractor argued that the “primary jurisdiction” of the DBA precluded any liability under the FCA, the Sixth Circuit disagreed. Finding that the contractor “made false statements, acted in reckless disregard of the truth” that workers were paid prevailing wages, the court held that the contractor violated the FCA. Knowingly submitting false payroll certification was not the same, according to the court, as submitting payroll certifications that contained errors.

Some have advocated for a new whistleblower law, one modeled on the principles of the FCA, but which could be used in all cases of wage theft, not just those in which public monies are in the mix. Such a law would allow a worker (or her union or worker center or other advocate) to bring a wage theft case on behalf of the government. Just as in the case of Title VII, the government may decide to intercede and take the claim directly, but in any event a portion of the stolen wages recovered would go to the work (or worker center or union). According to Gerstein and Seligman, “[t]his type of new whistleblower law would allow the government to accomplish comprehensive, workplace-wide remedying of patterns and practices of violations, either through its own direct enforcement or through whistleblower lawsuits brought on the government’s behalf.”

B. Applying the FCA to Frontline Wage Theft

To determine whether or not such a qui tam claim might be successful in cases of frontline worker wage theft, the case of United States v. Science Applications International Corporation (hereinafter “SAIC”) provides guidance. That case considered whether a government contractor, SAIC,
was liable under the FCA for certifying, falsely, that it complied with the conflict-of-interest provisions embedded in its contract with the Nuclear Regulatory Commission.\textsuperscript{210} This was not a case in which SAIC had not performed the contracted for services, nor was it a case in which the quality of the services performed was anything less than expected.\textsuperscript{211} Rather, this was a case in which the plaintiff argued that compliance with the conflict-of-interest provision was material to the government contract, and therefore any payments to the company under the contract constituted a "false claim."\textsuperscript{212} Using a "certification theory" of liability, the government was required to establish that its FCA claim "rests on a false representation of compliance with an applicable federal statute, federal regulation, or contractual term," in this case the conflict-of-interest provision.\textsuperscript{213}

SAIC argued that the plaintiff would have to prove that its compliance with the conflict-of-interest provision was expressly designated by the government as a condition of payment.\textsuperscript{214} However, "false certification," may also be implied, held the district court, effectively lowering the threshold for liability by requiring only that a plaintiff "prove by a preponderance of the evidence that compliance with the legal requirement in question is material to the government’s decision to pay."\textsuperscript{215} Under this lower threshold for liability, SAIC was held liable under the FCA because the plaintiffs were able to demonstrate that the company’s failure to comply with the conflict-of-interest provisions was "information critical to the [government’s] decision to pay."\textsuperscript{216}

Accordingly, a contractor’s compliance with wage and other workplace standards, may indeed be critical to the government’s decision to pay that contractor. This may be the case for multiple reasons already discussed, such as the potential loss of tax revenues owed to the government as the result of wage theft; the obligation of government entities to protect the employees themselves; as well as increasingly universal concerns related to pay equity for

\textsuperscript{210} Id. at 1263.

\textsuperscript{211} United States v. Sci. Applications Int'l Corp., 958 F. Supp. 2d 53, 77 (D.C. Cir. 2013) ("There is evidence in the record that SAIC provided 'extremely high' quality work to the NRC and that the NRC continued to use SAIC's work even after it discovered the alleged OCIs.").

\textsuperscript{212} Sci. Applications Int'l Corp., 626 F.3d at 1266.

\textsuperscript{213} Id.

\textsuperscript{214} Id. at 1261, 1268; Kennedy, supra note 37, at 546 ("This was the standard the Second Circuit previously established in Mikes v. Straus. Under the Mikes standard, the Centers for Medicare and Medicaid Services (CMS) would have to expressly designate compliance with the FLSA or other applicable wage and hour laws as a condition of reimbursement for a plaintiff to successfully argue that wage theft is a violation of the FCA.").

\textsuperscript{215} Sci. Applications Int'l Corp., 626 F.3d at 1271 (emphasis added).

BIPOC and female employees. Failure to comply with such standards, using an implied certification theory, triggers liability with each submitted invoice for services performed.

Provided an express or implied certification theory is applied in a case of wage theft, a second issue is the calculation of damages. When a worker is not paid prevailing wages, but provides the contracted for services, what is the loss to the federal government? Traditional contract remedies seek to put the plaintiff in the position it would have been, had it not been for the defendant’s false claim, and likewise courts in FCA cases apply either a “benefit of the bargain” or an “out of pocket cost” framework. In the SAIC case, where the quality of the services provided to the government were irrefutably high, the government argued nonetheless that had it known SAIC was not in compliance with the conflict-of-interest provisions, it would not have paid SAIC any amount for those services rendered. Indeed, the jury would ultimately be instructed to disregard the value of the services provided, and instead calculate as damages the amount paid to SAIC above what it would have paid had it known about the conflicts of interest.

There is an argument that such a remedy—where the government has received the services for which it bargained, at the level at which it expected—is unfair, because the government suffered no real damages. That argument fails to include in its calculation the moral hazard created when an underpaying employer (or, in the case of the Anti-Kickback Statute, an overcharging physician) is allowed to escape penalty simply because its workers provided high quality services. For that reason, courts have

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218. Id. at 548.
219. E.g., Sci. Applications Int'l Corp., 626 F.3d at 1257, 1277-78 (illustrating that after applying an expressed or implied certification theory, the court then shifts to calculate damages).
220. See id. at 1278.
221. See Kennedy, supra note 37, at 549 ("In a case where the court applies the benefit-of-the-bargain standard, damages will equal the difference between the market value of the contracted-for goods or services and the market value of those goods or services as actually received. There are cases, however, in which it is difficult to ascertain the market value of the goods or services, in which case the court will assess damages as the difference between the price the government paid (its 'out of pocket costs') and the actual value to the government of what it received.").
222. Sci. Applications Int'l Corp., 626 F.3d at 1265.
223. Id. at 1278 ("[T]he damages that the United States is entitled to recover under the False Claims Act are the amount of money that the government paid out by reason of the false claims over and above what it would have paid out had SAIC not made the false claims. . . Your calculations of damages should be limited to determining what the Nuclear Regulatory Commission paid to [SAIC] over and above what the NRC would have paid had it known of SAIC's organizational conflicts of interest. Your calculation of damages should not attempt to account for the value of services, if any, that SAIC conferred upon the Nuclear Regulatory Commission."). (internal citations omitted).
224. Kennedy, supra note 37, at 549-50.
awarded all amounts paid by the government in those cases to be recoverable as damages.\textsuperscript{225} This was not the case in SAIC, where the court declined to award the government the total amount it had paid to the contractor as damages, unless the government could show "that the services it received were truly worthless."\textsuperscript{226} This case appears to have shifted the court’s inquiry in FCA cases away from a theory of unjust enrichment, and bring them more into line with a traditional analysis of financial injury.\textsuperscript{227}

In the context of frontline work, "there are several stakeholders who might serve as relators."\textsuperscript{228} Workers themselves would be best positioned to report any underpayment of wages or misclassification of employment status.\textsuperscript{229} "Incentivizing private persons (i.e., workers, consumers, and family members) to blow the whistle on wage theft using \textit{qui tam} litigation could help mitigate the limitations on public enforcement" placed on local and state government in a post-pandemic recovery.\textsuperscript{230} Given the low wages endemic to many workers engaged in the kind of work governed by the Davis-Bacon and Service Contract Acts, however, any recovery that is based solely on a percentage of a worker’s owed wages may not be an adequate financial reward. A focus on equity must guide this process, not only with respect to the individual worker – whose wages, if substandard, constitute a form of unjust enrichment by an employer in receipt of public funds – but also to local economies, the health of which depends on a robust and creative system of wage theft enforcement.\textsuperscript{231}

Incentivizing or encouraging underpaid or misclassified workers to bring a \textit{qui tam} action under the FCA (or, as Professor Pandya suggests, reporting such cases of wage theft to the taxing authority as a tax informant) could serve as a new approach to combatting the problem of wage theft.

\textsuperscript{225} Id. at 550.
\textsuperscript{226} Kennedy, supra note 37, at 550; see also United States v. Sci. Applications Int’l Corp., 626 F.3d at 1257, 1279-80 (D.C. Cir. 2010).
\textsuperscript{227} Id. at 550; see also Helmer, Jr., supra note 171, at 1262.
\textsuperscript{228} Id. at 550; see also Helmer, supra note 171, at 1262.
\textsuperscript{229} See Helmer, Jr., supra note 171, at 1262. The most widely followed misclassification case involves drivers for app-based ride services such as Uber and Lyft, and food delivery services such as Uber Eats, Postmates, and DoorDash. See Josh Eidelson, \textit{Uber, Lyft Called Out in Hometown for Flouting Workplace Law}, BLOOMBERG NEWS WIRE (Mar. 24, 2020), https://www.bnnbloomberg.ca/uber-lyft-called-out-in-hometown-for-flouting-workplace-law-1.1411830. While drivers have been largely sidelined during the COVID-19 pandemic, food delivery workers have seen an explosion in hours, as well as their continued classification as independent contractors, in some cases in blatant violation of state law. Id.
\textsuperscript{230} Id. at 551.
\textsuperscript{231} Id. at 551-52.
If, however, *qui tam* litigation in the context of wage theft is foreclosed by federal courts’ interpretations of implied certification requirements or by the calculation of damages, equitable arguments remain. That the receipt of [public] dollars should impose additional responsibilities, including fiduciary duties, on [employers] is an argument rooted in principles of unjust enrichment and the collateral impacts of wage theft on local economies.\(^{232}\)

Another possible avenue would be use of debarment for government contractors who commit wage theft.\(^{233}\) Such a barring of eligibility for federal contracts could help incentivize employers to ensure they are complying with standards, and as a matter of policy, taxpayer dollars should not support companies that break the law.\(^{234}\)

In contemplating the rollout of federal, state and local projects that could help spur economic recovery in a post-pandemic nation, we would be well-served to learn from the past. Under such New Deal programs created in the 1930s and 1940s, including the Works Progress Administration and Civilian Conservation Corps, such public spending created “numerous opportunities for unscrupulous government contractors to defraud the government.”\(^{235}\) “A corresponding influx in the number of *qui tam* suits occurred under the FCA, which until then had been mostly untapped by relators.”\(^{236}\) In economically desperate times, however, not only was combating fraud more necessary, many of the relators themselves were regarded as “opportunistic private litigants,” chasing after “generous cash bounties” by bringing “parasitic lawsuits copied from preexisting indictments or based upon congressional investigations.”\(^{237}\) Any system to combat wage theft using the tool of *qui tam* should structure the procedural requirements to tamp down on inefficiencies and opportunism, while still maintaining the strong financial incentives for relators to blow the whistle on wage theft.\(^{238}\)

\[\begin{align*}
232. & \quad \text{Id.} \\
233. & \quad \text{See Helmer, Jr., supra note 171, at 1262.} \\
234. & \quad \text{Id.} \\
235. & \quad \text{Hughes IV, supra note 172, at 66 (quoting United States ex rel. Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 679 (D.C. Cir. 1997)).} \\
236. & \quad \text{Id. (citing United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994)).} \\
237. & \quad \text{Id. at 67 (citing Findley, 105 F.3d at 679-80).} \\
238. & \quad \text{See Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 Colum. J. Tax L. 113, 131-32 (2012).}
\end{align*}\]
C. State Qui Tam Innovation

1. New York False Claims Act

In New York, concerns about rampant and unchecked Medicaid fraud prompted the state legislature to pass the New York False Claims Act in 2007. At the time, New York spent nearly $45 billion annually through the Medicaid program, more than any other state in the nation, and the program was found to be “riddled with waste and corruption,” with critics estimating that “fraud accounts for as much as 10 percent of the state’s Medicaid expenditures each year.” The New York FCA largely mirrored the federal False Claims Act, in that it subjects any “person” who “knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval” by the state or a “false record or statement material to a false or fraudulent claim” paid or approved by the state to civil liability, including treble damages. As with the federal act, individual whistleblowers are empowered to bring qui tam actions on behalf of the state to recover any amounts paid due to fraud. As rationale for the bill, it’s sponsors explained that the “state is involved in the direct and indirect payment of tens of billions of dollars every year, and the payment of fraudulent claims has a significant adverse effect on the fiscal well-being of the state.”

Thirty-one states have a version of the federal False Claims Act, which are typically used in cases where state and local contractors overcharge the government or commit some other type of fraud. For decades the False Claims Act and its “qui tam” whistleblower provision has been used to fight contractors who overcharge the government and engage in other types of fraud. But a recent settlement under the New York False Claims Act shows that the law can be used to protect workers’ rights. In 2017, the Laborers International Union used the New York

240. Id.
242. See id. § 190(2).
245. See Helmer, Jr., supra note 171, at 1267.
False Claims Act to settle allegations that a construction contractor and
developer falsely certified that they were paying their workers the
prevailing wage rate.\textsuperscript{247} In that case, a New York City-based
general contractor, A. Aleem Construction Inc., (hereinafter “Aleem”), and a
developer, West 131\textsuperscript{st} Street Development Corp. (hereinafter “West
131”), participated in the Neighborhood Entrepreneurs Program of the
New York City Department of Housing Preservation and Development
(hereinafter “DPD”).\textsuperscript{248} Through that program, which was partially
funded with federal money, private developers renovated and resold
deteriorated city-owned buildings. Completed buildings would then be
sold to the Neighborhood Partnership Housing Development Fund
Corporation and leased to program participants.\textsuperscript{249}

Since the project was funded in part with federal monies, including
a low-interest thirteen million dollar loan and certain property tax breaks,
federal prevailing wage laws applied.\textsuperscript{250} The building where the wage
theft took place, 241 W. 135\textsuperscript{th} Street, in Manhattan, included ten
affordable housing units, half of which were designated “for families of
four making less than $54,000.”\textsuperscript{251} Aleem and West 131 certified that all
workers on the project were paid prevailing wages.\textsuperscript{252} Workers on the
project made claims that contradicted that certification, and the Laborers
Eastern Region Organizing Fund of the Laborers International Union of
North America (hereinafter “LIUNA”) helped organize the workers to
bring forth their claim and served as the relator.\textsuperscript{253} According to New
York Attorney General Eric Schneiderman, carpenters working on the
project should have been paid forty dollars per hour, plus another thirty
dollars in benefits.\textsuperscript{254} One of Aleem’s subcontractors—SJ Insulation—
paid only twelve to fourteen dollars per hour, according to
Schneiderman.\textsuperscript{255}

\begin{thebibliography}{9}
\bibitem{247} Id.
\bibitem{248} Jonathan Sizemore, \textit{Prevailing Wage Violation Leads to $255,000 Settlement with Attorney

General}, CITYLAND (Feb. 13, 2017), https://www.citylandnyc.org/prevailing-wage-settlement; see

also Greg. B. Smith, \textit{Exclusive: Construction Firm Reaches $189G Settlement After Charged with

Ripping Off Workers in Harlem Housing Project}, N.Y. DAILY NEWS (Feb. 9, 2017, 12:00AM), https://

www.nydailynews.com/new-york/construction-firm-reaches-189g-settlement-wage-cheat-case-

article-1.2967879.
\bibitem{249} Sizemore, \textsuperscript{supra} note 248.
\bibitem{250} \textit{id.}; Smith, \textsuperscript{supra} note 248.
\bibitem{251} Smith, \textsuperscript{supra} note 248.
\bibitem{252} \textit{id.}
\bibitem{253} \textit{See} Press Release, N.Y. State Off. of the Att’y Gen., \textsuperscript{supra} note 246.
\bibitem{254} Smith, \textsuperscript{supra} note 248.
\bibitem{255} \textit{id.}
\end{thebibliography}
The New York law also adopts the federal requirement that to be a *qui tam* whistleblower, the relator must be "an ‘original source’ of the allegations in the complaint."²⁵⁶ "That is, the whistleblower must have direct and independent knowledge of the information on which the allegations are based and must have voluntarily provided it to the government."²⁵⁷

In essence, the *qui tam* provision provides monetary incentives for whistleblowers who have special knowledge of the fraud and the documentation to back up the charges to come forward and assist the government in recovering monies it has paid out as a result of fraud. . . . [Qui tam] provides powerful financial incentives to private persons who may know about fraud on the state.²⁵⁸

This unique knowledge is what powers the co-regulatory framework described above; frontline workers themselves are, in some respects, best positioned to blow the whistle on systemic underpayment of wages and benefits.²⁵⁹ Creative and expansive application of *qui tam* laws can help workers and their advocates navigate around the structural barriers of underfunded enforcement agencies, mandatory arbitration agreements, and class action restrictions.²⁶⁰

2. The Empire Worker Protection Act

Another example of bottom-up co-enforcement is embodied in legislation introduced to the New York Assembly, the “Empowering People in Rights Enforcement Worker Protection Act” (hereinafter “EmPIRE Worker Act”), which would extend the power of the state attorney general to private citizens in order to enforce New York workplace rights.²⁶¹ The bill would allow a victim of wage theft, a

²⁵⁶ Loewenson & Smithline, supra note 239.
²⁵⁷ Id.; see Rockwell Int’l Corp. v. United States, 549 U.S. 457, 463 (2007) (“An ‘original source’ is ‘an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.’”) (quoting False Claims Act, 31 U.S.C. § 3730(e)(4)(B)).
²⁵⁸ Loewenson & Smithline, supra note 239.
²⁵⁹ See Alexander & Prasad, supra note 63, at 1073, 1077, 1084-85, 1094.
²⁶⁰ See Gerstein & Seligman, supra note 11.
²⁶¹ Assemb. 7958, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); 2017 Bill Tracking NY A.B. 7958 (LEXIS); see also S. 6553, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); 2017 Bill Tracking NY S.B. 6553 (LEXIS) (allowing us to compare the differences between the EMPIRE Worker Protection Act and EMPIRE Consumer Act, which is namely that the EMPIRE Worker Protection Act authorizes an aggrieved employee or representative organization to initiate a public enforcement action on behalf
whistleblower, or an organization (e.g., union, worker center) to bring a qui tam enforcement action on behalf of the state for violations of any provision of New York labor law.\textsuperscript{262} If an EmPIRE action were successful, the New York State Department of Labor would receive most of the civil penalties recovered in the action, with the rest distributed to the aggrieved worker.\textsuperscript{263} Moreover, if an organization designated by an employee (such as a labor union or worker center), brings the complaint, and any civil penalties are recovered, such monies will be distributed as follows: thirty percent to the aggrieved employee or employees; fifteen percent to the representative organization, fifty-five percent to the commissioner for enforcement of the law and education of employers and employees about their rights under the law.\textsuperscript{264}

The framework for the EmPIRE Worker Act, which was reintroduced in 2019 but failed to pass, is a complaint-driven model, designed to empower workers and their advocates, without regard for the operational capacity required for an agency-driven model.\textsuperscript{265} Given the sharp decline in numbers of senior labor investigators employed by the state and federal departments of labor, the law sought to “deputize the frontline,” providing financial incentives for workers themselves to file claims.\textsuperscript{266} EmPIRE was modeled on California’s 2004 Private Attorney’s General Act (hereinafter “PAGA”), which significantly expanded that state’s enforcement capacity by empowering individual citizens and worker organizations to investigate and initiate enforcement actions.\textsuperscript{267}

\begin{footnotesize}
\begin{enumerate}
\item of the Labor Commissioner for violations of any provision of the New York labor law, while the EMPIRE Consumer Act allows aggrieved consumers to initiate similar public actions on behalf of the Attorney General to enforce specified consumer-protection statutes).
\item See Assemb. 7958; see also S.B. 6553.
\item See Assemb. 7958; see also S.B. 6553 (discussing when a lawsuit is brought under EmPIRE, sixty to seventy percent of the penalties recovered depending on whether the state intervenes in the action are returned to the state, generating desperately needed revenue to expand capacity of the DOL).
\item See S.B. 6553.
\item See Assemb. 7958; see also S.B. 6553.
\item See S.B. 6553.
\item The Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE § 2699.3. An administrative process established under PAGA first requires that workers file a claim with the Labor and Workforce Development Agency (LWDA) and pay a filing fee. \textit{Id.} § 2699.3(a)(1)(A)-(B). The LWDA then has 65 days to either agree to investigate and prosecute the alleged violation, or to give notice of their intent not to investigate or cite the employer, which authorizes the worker to file a civil action on behalf of themselves and other similarly situated workers. \textit{Id.} § 2699.3(a)(2)(A)-(B). If the LWDA decides to investigate or cite the employer, that have up to 180 days to conduct that process and come to a decision. \textit{Id.} § 2699.3(a)(2)(B). For certain violations, the employer has a 33-day window in which to cure the violation and avoid a penalty. \textit{Id.} § 2699.3(c)(2)(A). No employer may avail themselves to the notice and cure provisions of PAGA more than three instances in any 12-month period, or once per year for certain paystub reporting violations. \textit{Id.} § 2699.3(c)(2)(B)(i)-(ii).
\end{enumerate}
\end{footnotesize}
3. California’s Private Attorney General Act

The idea of state and local governments taking up the slack in response to federal retrenchment on labor law investigation and enforcement is not new.\(^{268}\) California led this movement with the passage, in 2004, of the Private Attorney General Act, which empowers workers and their advocates to report labor law abuses and recoup a portion of penalties awarded.\(^{269}\) PAGA was passed in response to critical deficits in the state’s ability to effectively investigate and prosecute such violations on behalf of a growing workforce.\(^{270}\) Though a longtime leader in expanding workers’ rights through increased minimum wage standards, anti-retaliation laws, and paid sick leave, prior to PAGA, California lacked sufficient resources to enforce these rights and standards on their own.\(^{271}\) For example, although its workforce nearly doubled between 1980 and 2000, the ratio of enforcement staff to workers declined by thirty-six percent.\(^{272}\) PAGA addressed this issue (as well as lack of will among district attorneys to divert resources away from violent crime investigation and prosecution) by allowing “aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.”\(^{273}\)

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269. Id. § 2699.

270. Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 379, 327 P.3d 129, 146 (2014) (“[T]he Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR), ‘was failing to effectively enforce labor law violations. Estimates of the size of California’s ‘underground economy’—businesses operating outside the state’s tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city’s garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. [¶] Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California.’”) (internal citations omitted).


272. Id. at 4.

273. Iskanian, 59 Cal. 4th at 379.
Financial penalties recovered as a result of actions pursued by such frontline deputies not only benefited the individual worker, but also helped to more fully fund the state’s traditional enforcement arms. Penalties recovered by employees suing an employer as a proxy or agent of California’s state labor law enforcement agencies are distributed as follows: seventy-five percent to the California Labor and Workforce Development Agency (hereinafter “LWDA”), and twenty-five percent among the employees affected by the violations. The three-quarters recovery for the LWDA provides a critical source of funding for the agency to conduct independent investigations, as well as to support the creation of public education campaigns that encourage workers to bring claims forward. For example, a PAGA lawsuit against Bank of America for requiring that its employees stand for the duration of their shift, resulted in a settlement that allocated $10 million to the LWDA. The agency used those proceeds to hire nine additional staff persons, greatly augmenting its enforcement capacity. Although most wage and hour class actions are subject to a four-year statute of limitations, plaintiffs bringing a PAGA action have only one year to file their claim.

A PAGA representative action is therefore a type of *qui tam* action. “Traditionally, the requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.” The PAGA

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274. See Coming Up Short: The State of Wage Theft Enforcement in New York, supra note 57, at 22 (“Prior to PAGA, much of California’s labor code went unenforced, affecting workers in all industries, but especially those in the underground economy, including undocumented workers in industries such as hospitality, landscaping, construction, and agriculture.”). “In 2017-2018, PAGA brought in $34.6 million in revenue.” Id. It is estimated that if New York were to pass the EmPIRE Act, it would raise $17.7 million in annual revenue for the DOL. Id.

275. CAL. LAB. CODE § 2699(i) (West 2016).

276. Id. § 2699(j).

277. Deutsch et al., supra note 271, at 7-8; see Garrett v. Bank of Am., N.A., No. 13-CV-05263-JST, 2014 WL 1648759 at *1 (N.D. Cal. Apr. 24, 2014) (“Plaintiff Nicole Garrett (‘Garrett’), a former bank teller employed by BANA, filed suit against Defendant Bank of America (‘BANA’) in Alameda Superior Court alleging that BANA has violated California’s labor law provisions that require employers to provide seats for their workers.”).

278. Deutsch et al., supra note 271, at 8 (internal citation omitted).

279. CAL. CIV. PROC. CODE § 340(a) (West 2003).

280. Sanders v. Pac. Gas & Elec. Co., 53 Cal. App. 3d 661, 670 (Ct. App. 1975) (“Black defines *qui tam* actions as: ‘An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution is called a ‘*qui tam* action’; because the plaintiff states that he sues as well for the state as for himself.’”) (citing *qui tam* actions, BLACK’S LAW DICTIONARY (4th ed. 1951)).

281. Id. at 671.
conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.282 “The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.”283

Notably, while courts have been willing to uphold arbitration agreements that contain class action waivers, the California Supreme Court has held that PAGA actions cannot be waived by employees and cannot be compelled to arbitration.284 In Iskanian v. CLS Transportation Los Angeles, LLC, the Court held that, “an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy.”285 The California model has taken root elsewhere.286 In 2011, New York passed the Wage Theft Prevention Act to increase the civil damages for wage and hour law violations and related retaliation that plaintiffs could receive under state law.287 At the local level, several Florida counties and one municipality have also expanded the capacity for private enforcement of wage theft through pro se claims.288

One example of how PAGA has resulted in successful labor law compliance in notoriously abusive workplaces, the California Rural Legal Assistance Foundation assisted four landscape workers in Stockton, California in pursuing their claim.289 The lawsuit, filed on behalf of their fifty-eight co-workers, alleged serious violations of wage theft, being forced to work in extreme heat, and a lack of required rest breaks.290 Up to $8,200 for each worker was recovered, which “[i]n an industry notorious for abusing vulnerable workers, [is a] type of relief [that] would be unimaginable without the ability to bring actions collectively to recover significant statutory and civil penalties.”291 In 2019, California collected

282. See CAL. LAB. CODE § 2699(a), (g) (West 2016).
284. See Iskanian, 59 Cal. 4th at 383-84.
285. Id. at 360.
286. See Betancourt v. Prudential Overall Supply, 9 Cal. App. 5th 439, 445, 215 Cal. Rptr. 3d 344, 348 (2017) (“The PAGA was designed to address two problems. The first problem was that alleged Labor Code violations often went unenforced because they were punishable as criminal misdemeanors, and prosecutors rarely investigated or prosecuted the alleged violations. The second problem was that when civil penalties could be assessed, there were few government resources to pursue enforcement of the penalties.”).
287. N.Y. LAB. LAW § 198 (McKinney 2016); N.Y. LAB. LAW § 215 (McKinney 2019).
288. Elmore, supra note 66 at 95.
289. Deutsch et al., supra note 271, at 5.
290. Id.
291. Id.
more than $88 million in penalties from employers pursuant to claims brought by workers under the Private Attorneys General Act.\textsuperscript{292} According to a recent study, those penalties reflected "serious wrongdoing by massive employers," including systemic violations by large, low-wage employers.\textsuperscript{293} The most significant PAGA judgments and settlements address systemic violations by large low-wage employers, including Bank of America, Walmart, Rite Aid, Target, Virgin America, and CVS.\textsuperscript{294}

4. Washington State HB1965

The state of Washington, like California, is a state that has historically created workplace standards and rights that exceed federal minimums, and—in industries such as the on-demand economy, agriculture, and domestic workers—has provided national leadership on protecting workers in the absence of traditional legal protections.\textsuperscript{295} Substantive rights are meaningless, however, in the absence of effective enforcement, which for some enforcement agencies can mean "years-long backlogs."\textsuperscript{296} In response to this critical lack of enforcement resources, and in light of the success of California’s PAGA, state Representative Drew Hansen introduced HB1965 into the Washington State House of Representatives.\textsuperscript{297} HB1965 would allow whistleblowers to bring actions on behalf of the state for violations of a variety of state workplace protections.\textsuperscript{298} Through a \textit{qui tam} action, similar to those permitted under the states’ Medicaid False Claims Act, an individual worker or workers’ association could enforce laws related to minimum wage, prevailing wages, overtime, health and safety standards, paid sick and family leave, equal pay, discrimination, rest breaks and laws related to agricultural and

\begin{itemize}
  \item \textsuperscript{293} Id.
  \item \textsuperscript{295} See, e.g., Kennedy, \textit{supra} note 118, at 1019, 1036.
  \item \textsuperscript{297} Id.
  \item \textsuperscript{298} Id.
\end{itemize}
seasonal labor. If an alleged violation does not provide a civil penalty, a civil penalty of $500 is established and "must be awarded for each aggrieved employee for each two-week time period." Any penalty amounts awarded in a successful qui tam action under HB1965 would be distributed as follows: (1) if the agency intervenes in the action, "20 percent to the relator and 80 percent to the agency; and (2) if the agency does not intervene, 40 percent to the relator and 60 percent to the agency." Damages, however, must be awarded to the agency for distribution to aggrieved employees, and the relator is entitled to reasonable attorneys' fees and costs. Though the bill failed to reach a vote prior to sine die, advocates for the bill hope to continue gaining momentum; in contemplating future state budgets operating with even less money for workplace enforcement as a result of COVID-19, measures like HB1965 may find greater bipartisan political support.

5. Preemption Concerns

Any attempt by state and local governments to either raise workplace standards or extend labor and employment rights to workers traditionally excluded from federal protections triggers the threat of a legal challenge on preemption grounds. In Epic Systems Corp. v. Lewis, the U.S. Supreme Court held that arbitration agreements governed by the Federal Arbitration Act (hereinafter "FAA") may lawfully prohibit collective and class actions in employment disputes. In that case, the Court upheld as valid arbitration agreements pursuant to which employees had agreed (or in some cases, assented to simply by remaining in their jobs) to waive their rights to "group arbitration," arguably in contravention of their rights under the National Labor Relations Act to "engage in concerted activities

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299. WASH. STATE H.R., LAB. & WORKPLACE STANDARDS COMM., BILL ANALYSIS OF H.B. 1965, at 2-3 (2019) ("No qui tam action may be brought if the agency issued an order or otherwise resolved the complaint.").
300. Id at 3.
301. Id at 4.
302. Id.
303. See generally States Grappling with Hit to Tax Collections, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 6, 2020), https://www.cbpp.org/sites/default/files/atoms/files/4-2-20sp.pdf (reporting the effect that COVID-19 has had on state budgets due to sharp drops in revenue, which may lead to changes in views on previously proposed legislation).
for... mutual aid or protection.\textsuperscript{306} As we know, the amount in controversy when dealing with low-wage, frontline worker wage theft, is often too low to make pursuing an individual claim worthwhile, especially when weighed against the costs and collateral consequences.\textsuperscript{307} In the wake of Epic Systems, however, might employers simply eliminate the possibility of workers bringing a \textit{qui tam} action by including a waiver of such right in their arbitration agreement?\textsuperscript{308}

Even though employers enforce class waivers in arbitration clauses, using \textit{qui tam} to blow the whistle on wage theft would not involve private litigants suing on their own behalf, but rather, the state's action to enforce its worker protection laws.\textsuperscript{309} California's PAGA has been upheld in federal and state courts on that very basis.\textsuperscript{310} As the Ninth Circuit held in \textit{Sakkab v. Luxottica Retail North America, Inc.}, \textit{qui tam} actions fall under the "historic police powers" delegated to the states by the U.S. Constitution and therefore cannot be preempted by federal law.\textsuperscript{311} Simply put, private individuals cannot contract away the rights of the state to, in these cases, seek penalties for employers who violate minimum and prevailing wage standards.\textsuperscript{312} Critical to this analysis is the fact that the individual worker (or worker center or labor union) is not seeking compensatory damages; rather, the \textit{qui tam} action is seeking statutory per-incident penalties on behalf of in-state consumers or employees.\textsuperscript{313} This is regarded as a model of damages that are complementary—rather than duplicative of individual damages actions or arbitration.\textsuperscript{314}

One critique of this model, however, is that which is levied against \textit{qui tam} actions more generally, which is whether this system primarily benefits the plaintiffs \textit{qui tam} bar, rather than individual frontline workers.\textsuperscript{315} For example, what happens when state government intervenes

\textsuperscript{306} Id. at 1614, 1635-36.
\textsuperscript{307} See supra Part I.B.
\textsuperscript{308} See generally Alison Miller, Epic Systems: Employers can Collectively Celebrate the Supreme Court's Decision Validating Class Action Waivers, WILLIS TOWERS WATSON (Oct. 9, 2018), https://www.willistowerswatson.com/en-US/Insights/2018/10/finex-observer-epic-systems-and-class-action-waivers (discussing the implications of the Epic Systems decision for employers and various considerations before drafting mandatory arbitration agreement waivers for employees to sign, as employers now have the power to block such actions).
\textsuperscript{309} Gerstein & Seligman, supra note 11.
\textsuperscript{310} Id.
\textsuperscript{311} Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 439 (9th Cir. 2015).
\textsuperscript{312} Id.
\textsuperscript{313} See id. at 430-31 (observing that "the penalties contemplated under the PAGA... punish and deter employer practices that violate the rights of numerous employees").
\textsuperscript{314} Id. at 436-37.
\textsuperscript{315} See Janet Cooper Alexander, To Skin a Cat: \textit{Qui Tam} Actions as a State Legislative Response to Concepcion, 46 U. MICH. J.L. REFORM 1203, 1203 (2013).
and overrules the action.\textsuperscript{316} Are workers in those cases in a weaker position to ultimately recover lost wages than they would have been filing an individual claim?\textsuperscript{317} As one such critic explained, "the \textit{qui tam} model does not put funds into the pockets of injured victims. The penalties flow to the state and, to a lesser extent, the relator. Accordingly, the \textit{qui tam} model may do a good job of promoting deterrence but an awful job of compensating injured parties."\textsuperscript{318} With this criticism in mind, state and local approaches need to build in additional safeguards for frontline workers that ensure a more just and equitable recovery.\textsuperscript{319} Cognizant of the ways in which certain groups of workers are routinely made more vulnerable within the civil justice system, PAGA includes certain protections, such as the requirement that the LDWA approve any settlement only after having an opportunity to review and comment upon any proposed settlements.\textsuperscript{320}

\textbf{CONCLUSION}

The coronavirus may be novel, but we have been here before. American workplace history has been marked by persistent and unchecked wage theft that is exacerbated by employers’ incentives to violate workplace standards and employees’ disincentives to pursue claims.\textsuperscript{321} Though some of the most groundbreaking advances in workers’ rights have occurred through federal action, from collective bargaining, to affirmative action, to civil rights, often the federal government erects additional barriers to enforcing or expanding those rights. Raising standards through an expanded application of prevailing wage laws, and deputizing workers to enforce those higher standards through a more robust and expansive \textit{qui tam} model, would be an "elegant and effective way[] to expand the government’s resources and serve important public goals, creating additional resources for enforcement at minimal cost to taxpayers."\textsuperscript{322} The victims of wage theft are not limited to

\begin{itemize}
\item \textsuperscript{316} See id.
\item \textsuperscript{317} See supra Section III.C.
\item \textsuperscript{318} Gilles, supra note 185, at 2237.
\item \textsuperscript{319} See supra Section I.C.
\item \textsuperscript{320} CAL. LAB. CODE § 2699(a), (e)(1) (West 2016). \textit{Epic Systems} has no apparent effect on the California Supreme Court’s 2014 ruling in \textit{Iskanian v. CLS Transp. Los Angeles, LLC}, 59 Cal. 4th 348, 327 P.3d 129 (2014) that the FAA has no preemptive effect on PAGA because the FAA’s purpose is specific to the resolution of \textit{private} disputes, and a PAGA claim is by nature a dispute between an employer and the state. See \textit{Epic Sys. Corp. v. Lewis}, 138 S. Ct. 1612 (2018); see also \textit{Iskanian v. CLS Transp. Los Angeles, LLC}, 59 Cal. 4th 348, 327 P.3d 129 (2014). SCOTUS declined to review \textit{Iskanian}.
\item \textsuperscript{321} See supra Section I.A
\item \textsuperscript{322} Gerstein & Seligman, supra note 11.
\end{itemize}
individual frontline workers; unchecked wage theft siphons off taxpayer dollars and public trust, further straining a community’s social safety net. This article’s proposals for collaborative enforcement through prevailing wage and *qui tam* claims would augment existing “bottom up” strategies in order to create an economy “more resilient to challenges such as COVID-19 and . . . its aftermath.”

323. *See supra* Section III.B.
324. Madland et al., *supra* note 10.