Wage Theft in a Recession: Unemployment, Labor Violations, and Enforcement Strategies for Difficult Times

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Abstract

During the COVID-19 pandemic and accompanying recession, millions of low-wage workers have become increasingly vulnerable to exploitation. Limited scholarly attention, however, has been paid to the relationship between rising unemployment, labor standards violations, and government enforcement capacities during periods of economic recession. In this article, the authors begin to draw out these connections. First, they turn to the case of the Great Recession of 2008-2010 in the United States to examine the relationship between rising unemployment and minimum wage violations, using Current Population Survey data to estimate minimum wage violation rates by industry and demographic group. They find that minimum wage violations rose in tandem with rising unemployment, were shouldered by some groups of low-wage workers more than others, and unexpectedly affected certain industries more than others. The researchers then use an analysis of internal complaint data filed with the San Francisco Office of Labor Standards Enforcement to illustrate that even during non-recession periods, the number of complaints received by industry are in some cases wildly disproportionate to the estimated violation rates by industry. This underscores the shortcomings of the complaint-based enforcement model, which is by far the most common mode of workplace regulation in the United States. Finally, they discuss how this empirical evidence points to the importance of developing alternatives to complaint-based models of enforcement—in particular, *strategic enforcement* and *co-enforcement*—especially during periods of high unemployment.

Introduction

The COVID-19 pandemic and accompanying recession have exacerbated the power imbalance in the workplace, leaving millions of low-wage workers increasingly vulnerable to exploitation. As the unemployment rate has spiked and federal, state, and local governments have experienced massive revenue shortfalls, many low-wage workers have found themselves in a position of extreme precarity: their labor market power has diminished at precisely the same time that government capacities to enforce labor standards have weakened. What impact has this crisis had on low-wage workers, and what can labor standards enforcement agencies do while resources are scarce?

To date, limited scholarly attention has been paid to the relationship between unemployment, labor standards violations, and government enforcement capacities. In this article, we begin to draw out these connections. First, we turn to the Great Recession of 2008-2010 to examine the relationship between rising unemployment and minimum wage violations (one of the most pernicious forms of "wage theft"). We find that minimum wage violations rose in tandem with rising unemployment, and that these violations were shouldered by some groups of low-wage workers more than others. Specifically, the data reveal that Latinx, Black, female, and noncitizen workers were disproportionately harmed, and when the interaction of gender, race, and citizenship are taken into account, the effects of discrimination were compounded. We also look within industries to probe for possible explanations for why some industries experienced larger than average increases in violations during the recession and find that the largest increases were driven by growth in gender disparities in violations where women experienced more violations than men.

In the second part, we draw upon a novel dataset of internal agency complaint data to examine the efficacy and efficiency of complaint-based enforcement models, which are by far the most common mode of workplace regulation in the United States. We find that due to its reliance upon the complaint-based enforcement model, even one of the most professional and experienced municipal regulatory agencies in the country almost completely fails to detect high rates of violations across some major low-wage industries. The complaint-based mode of enforcement becomes especially problematic, we argue, when workers are less likely to complain for fear of losing their job and when violations spread beyond the industries in which they are traditionally concentrated—which is precisely what happened during the last recession.

In the third section, we describe how two programmatic innovations—*strategic enforcement* and *co-enforcement*—can help labor standards enforcement agencies maximize their impact in the face of limited government resources and increased worker exploitation.

Rising Unemployment and Budget Shortfalls

The need for examining the relationship between unemployment rates, labor standards violations, and government enforcement is made abundantly clear by the coronavirus pandemic, which has produced a disruption to the global economy unprecedented in modern times. In February 2020, unemployment in the United States was at 3.5 percent, a 50-year low.[1] By April 2020, unemployment rose to a staggering 14.7 percent, the largest increase in the history of the series.[2] In just 2 months, job losses due to the pandemic—which disproportionately affected Latinx, Black, and female workers[3]—surpassed the total number of jobs lost during the period known as the Great Recession, from December 2007 to June 2009.[4] By the end of 2020's third quarter, the unemployment rate remained at 7.9 percent, with 12.6 million people without a job.[5]

In addition to the extraordinary job losses in the private sector, the shuttering of the U.S. economy sharply reduced public revenues, which, combined with unanticipated expenditures related to the coronavirus pandemic and resulting recession, leaves governments at all levels with substantial deficits and weakened operational capacities. The nonpartisan Congressional Budget Office estimated a federal deficit of $3.7 trillion for fiscal year 2020 ending September 30, 2020, and $2.1 trillion for FY 2021 (without accounting for any additional coronavirus relief funding).[6]

These revenue losses are being felt at the state level. For example, California is anticipating a $54.3 billion budget deficit.[7] New York state's budget for FY 2021 now includes reduced estimates for FY 2021 general fund receipts by $13.3 billion.[8] In response, New York plans to cut state spending by $7.3 billion in FY 2021, the largest annual percent decline since the Great Depression.[9] Without further federal intervention, the state plans to cut aid to localities by $8.2 billion, reductions the state says "have no precedent in modern times."[10]

Amid the COVID-19 pandemic, in other words, low-wage workers' already minimal labor market power has diminished while shortfalls in government revenues have reduced labor standards enforcement capacities, leaving workers less protected from workplace exploitation. While the sources of the Great Recession are markedly different, we know that the effect of the Great Recession on unemployment was profound. By October 2009, the unemployment rate was 10.1 percent, compared to 4.4 percent two and a half years earlier. By 2010, over 40 percent of people who were unemployed had been searching for work for more than six months.[11] These effects were also not evenly experienced. For example, those without a college degree experienced a greater absolute increase in unemployment as a result of the Great Recession.[12] Among those who remained employed during the Great Recession, both job and employment insecurity increased.[13] These labor market effects were also disproportionately shouldered by Black workers, in part due to the contraction of government employment.[14]

We know next to nothing, however, about the relationship between unemployment during the Great Recession and another important labor market outcome: minimum wage violations. There is evidence that minimum wage violation rates vary by industry, job, and employer characteristics—but there is reason to suspect that violation rates are also linked to labor supply

as well.[15] In labor markets with an abundance of available workers, employers may feel at greater liberty to violate employee wage standards because the larger pool of willing workers reduces the "market wage" and increases the pressure on existing workers to keep their job even at a lower wage.[16] Another important contributor to the prevalence of violations is enforcement strength and practices.[17] This paper examines both of these factors—unemployment rate and enforcement practices—which are both impacted by recessions, to advance our understanding of employers' violations of labor standards. Ultimately, we argue that, in contrast to conventional economics-driven policy making—which advocates for the relaxation of labor standards during periods of high unemployment—eras of high unemployment are precisely the times during which upholding labor standards is most essential. The next section examines data from that period to glean insights into the dynamic relationship between rising unemployment and minimum wage violations.

I. Unemployment and labor standards violations: Lessons learned from the Great Recession

We examine the relationship between the steep rise in unemployment during the Great Recession and the changing rate of minimum wage violations by industry. Between 2007 and 2010, the unemployment rate doubled from 5 percent to 10 percent before gradually declining in the slow recovery thereafter.

Using Current Population Survey (CPS) Outgoing Rotation Group earnings data, we estimate minimum wage violations by industry by comparing individuals' reported hourly wages to their applicable state minimum wage (or, in the case of states without a minimum wage, the federal minimum wage). Minimum wage violations are thus dichotomous measures of whether an individual was illegally paid less than their applicable minimum wage.[18] Violation rates by industry can then be compared to changes in the unemployment rate.

We use a two-step estimation strategy to examine the relationship.[19] This procedure is especially useful when using CPS data since the survey is not a random sample of households, but a multistage stratified sample that does not use industries or states as its primary sampling unit; the two-step estimation strategy allows us to account for the CPS's peculiar survey design and use the proper weights in the first step while producing more accurate estimates of standard errors in both stages.

First, we fit a probit regression to the individual-level data to generate minimum wage violation estimates by industry-year, with predictors including age, sex, race, citizenship, union membership, state residence, and dummy variables for recent statutory minimum wage increases.[20] In the second step, those estimates become the dependent variable in a fixed-effects model in which unemployment serves as the main predictor. As illustrated in **Figure 1**, minimum

wage violation rates rose by 0.8% for every 1 percentage point increase in the unemployment rate between 2005 and 2013. The average amount these workers lost due to wage theft was 20 percent of what they were owed, or $1.45 per hour.

Figure 1: Minimum Wage Violation Rates Rise with Unemployment (2005-2013)
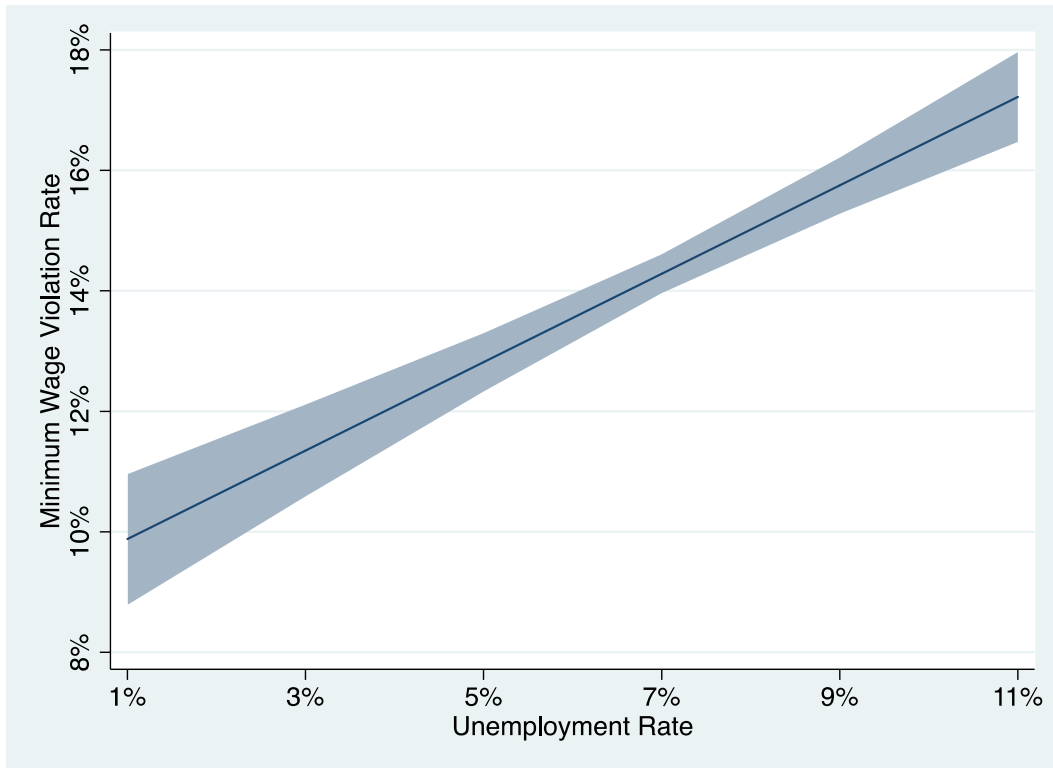
Note: Predicted probabilities. Includes only low-wage workers (those in the bottom quintile of their state's income distribution). Excludes industries with N<1000, 2005-2007.
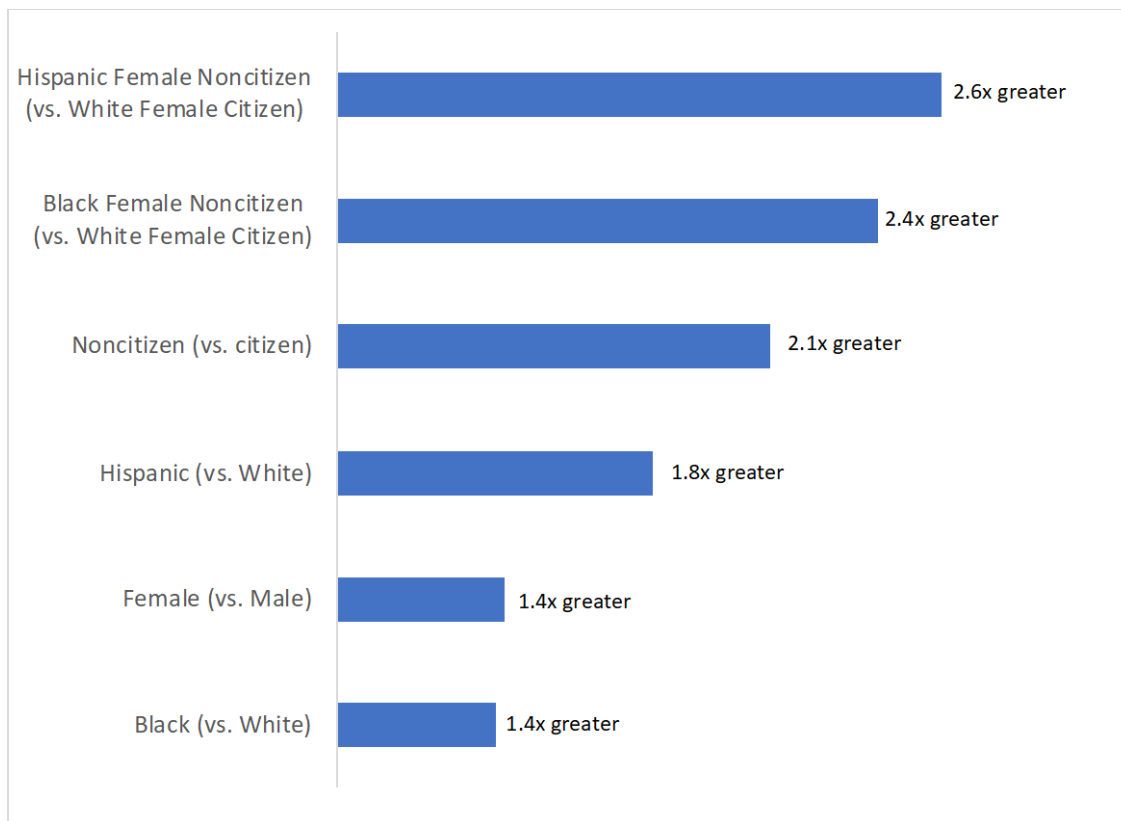*Source*: CPS-ORG data compiled by Center for Economic and Policy Research. 2017. CPS ORG Uniform Extracts, Version 2.3. Washington, DC.

Some groups of workers were affected more than others. To assess the relative likelihood that workers in key demographic groups would experience minimum wage violations (relative to the reference group), we examine all workers during the height of the recession in 2008–2010. We find that the probability of experiencing a minimum wage violation was about two times greater for non-citizens and Hispanic workers relative to citizens and White workers, respectively; women and Black workers were 1.4 times more likely than men and White workers (**Figure 2**). In addition, workers who belonged to a union were more than three times less likely to experience a minimum wage violation than workers who did not belong to a union.

When the *interaction* of gender, race, and citizenship are taken into account, the effects of discrimination were compounded. During the Great Recession, Hispanic women who were not U.S. citizens, for example, were 2.6 times more likely to experience a minimum wage violation

than White female citizens; non-citizen Black women were 2.4 times more likely (**Figure 2**). This is consistent with Petrescu-Prahova and Spiller's findings that women had significantly higher rates of minimum wage and overtime violations and that nativity and immigration status played a greater role for women than men.[21]

Figure 2: Probabilities of minimum wage violations by demographic group (relative to reference group), 2008-2010
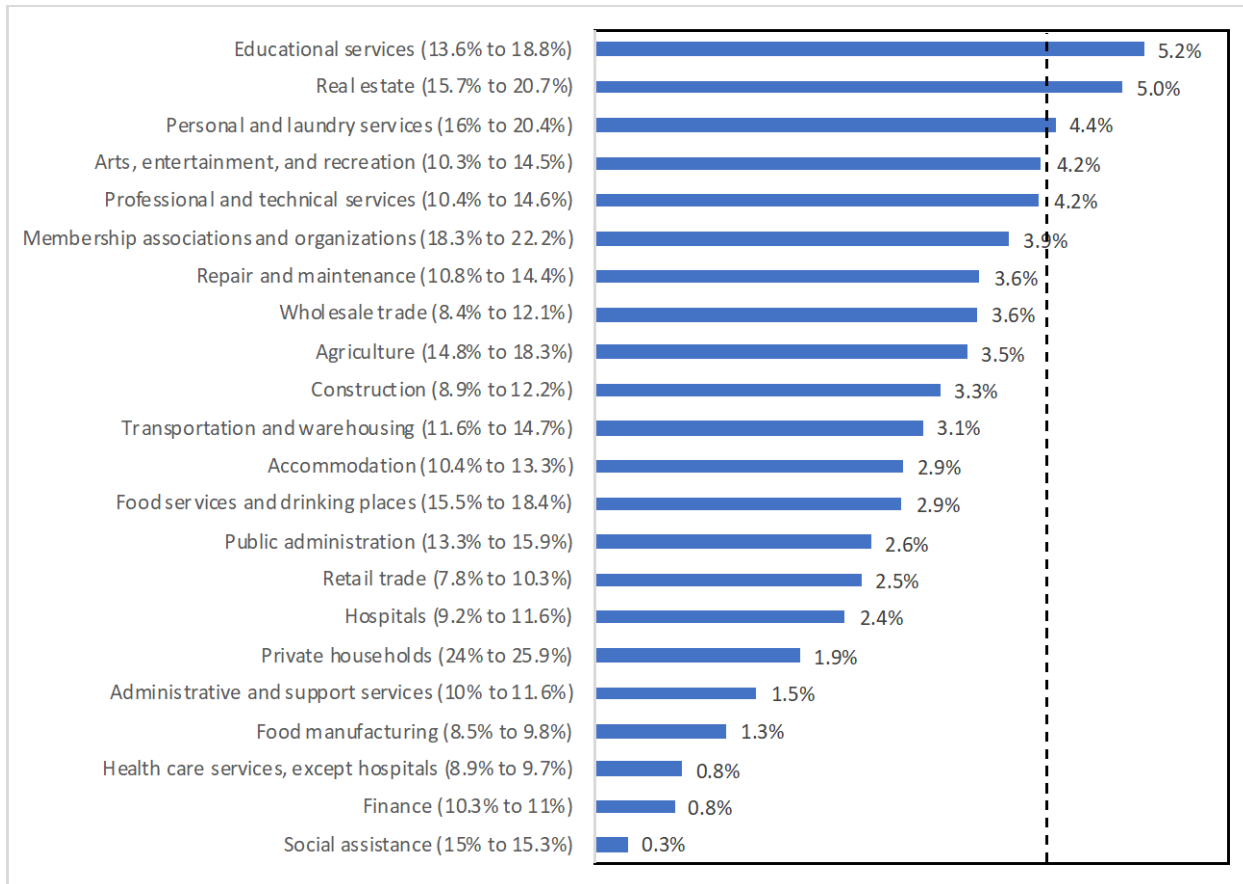

Source: CPS-ORG data compiled by Center for Economic and Policy Research. 2017. CPS ORG Uniform Extracts, Version 2.3. Washington, DC.

We know that rates of minimum wage violations vary significantly by industry.[22] In certain low-wage sectors, violations are always high—in part, because workers are afraid to report them because they have few exit options. We now turn to an examination of variation in the rates of *increase* in minimum wage violations by industry in order to better understand how the Great Recession impacted the incidence of minimum wage violations.

Across the country, during the Great Recession, we find that violations increased significantly in sectors where they were previously not as high. In the years just prior to the Great Recession, low-wage workers in educational services had a 13.6 percent probability of suffering a minimum wage violation. During the ensuing recession, their probability of experiencing this form of wage

theft rose to 18.8 percent. The educational services industry was not the highest-violation industry prior to the Great Recession—private households was, at 24 percent—but its rate of change was steeper than any other industry amid that recession. Violations rose 5.2 percentage points, which was more than a standard deviation above the average increase (of 2.9 percentage points). Two other industries also saw outsized increases in violations: real estate and personal and laundry services (**Figure 3**).

Figure 3: Industries in which low-wage workers saw the largest percentage point increase in minimum wage violations during the Great Recession, 2005-2013

Industry	Increase
Educational services (13.6% to 18.8%)	5.2%
Real estate (15.7% to 20.7%)	5.0%
Personal and laundry services (16% to 20.4%)	4.4%
Arts, entertainment, and recreation (10.3% to 14.5%)	4.2%
Professional and technical services (10.4% to 14.6%)	4.2%
Membership associations and organizations (18.3% to 22.2%)	3.9%
Repair and maintenance (10.8% to 14.4%)	3.6%
Wholesale trade (8.4% to 12.1%)	3.6%
Agriculture (14.8% to 18.3%)	3.5%
Construction (8.9% to 12.2%)	3.3%
Transportation and warehousing (11.6% to 14.7%)	3.1%
Accommodation (10.4% to 13.3%)	2.9%
Food services and drinking places (15.5% to 18.4%)	2.9%
Public administration (13.3% to 15.9%)	2.6%
Retail trade (7.8% to 10.3%)	2.5%
Hospitals (9.2% to 11.6%)	2.4%
Private households (24% to 25.9%)	1.9%
Administrative and support services (10% to 11.6%)	1.5%
Food manufacturing (8.5% to 9.8%)	1.3%
Health care services, except hospitals (8.9% to 9.7%)	0.8%
Finance (10.3% to 11%)	0.8%
Social assistance (15% to 15.3%)	0.3%

Note: Violation rates before the recession (2005-2007) compared to violation rates during the height of the recession (2008-2010). Dashed vertical line indicates one standard deviation above the mean.

The primary explanation for why violations in these three industries grew the most during the recession involves *gender disparities in violations*. Whereas the average gap in the violation rate between women and men narrowed slightly during the recession (-0.5%), it increased significantly in the real estate, educational services, and personal and laundry services industries. These three industries ranked first, second, and third in terms of the growth of their gender gaps during the recession (see **Table 1** below). Only in these three industries did the gender gap in violations grow by more than a standard deviation above the mean -- and growth in the gender gap in the real estate industry was more than two standard deviations above the mean. In other

words, it was the disproportionate increase in violations among women in these industries which pushed them to the top of the list in **Figure 3** above.

This is consistent with research on wage theft among women, which finds that occupation and measures of non-standard work and informality, including subcontracting, temporary work and misclassification as independent contractors—the so-called "deinstitutionalization of the labor market"—account for much of the significant gender difference in minimum wage violations.[23] In fact, Kalleberg, Reskin and Hudson (2000) find that in five out of the seven non-standard employment arrangements they analyze, women average more "bad" job characteristics than men.

In this case, we do not know whether the growth in the gender gap in disparities during the Great Recession was due to more women being hired or being fired less often than men in those industries, or due to the use of more non-standard work arrangements for women in these industries during the recession. Future research might examine whether employers are indeed more likely to turn to non-standard employment arrangements for women during recessions, which are correlated with higher violation rates.[24]

Table 1

	2005-2007 % minimum wage violations			2008-2013 % minimum wage violations			
	Men	Women	Gender Gap in Violations	Men	Women	Gender Gap in Violations	Growth in Gender Gap
Real estate	16.2%	19.2%	3.0%	16.6%	24.2%	7.6%	4.7%
Educational services	13.5%	12.2%	-1.3%	16.8%	17.9%	1.1%	2.3%
Personal and laundry services	15.6%	16.0%	0.3%	18.4%	20.7%	2.3%	2.0%
Arts, entertainment, and recreation	10.5%	10.0%	-0.5%	13.5%	14.9%	1.3%	1.8%
Social assistance	22.3%	12.7%	-9.6%	21.9%	13.7%	-8.2%	1.4%
Professional and technical services	14.2%	8.6%	-5.6%	17.1%	12.8%	-4.2%	1.4%
Membership associations and organization	23.8%	15.6%	-8.2%	26.2%	19.2%	-7.0%	1.2%
Hospitals	10.1%	8.6%	-1.5%	11.4%	10.9%	-0.5%	1.0%
Food services and drinking places	12.5%	15.9%	3.4%	15.2%	19.6%	4.4%	1.0%
Administrative and support services	9.7%	9.8%	0.1%	10.6%	11.5%	0.9%	0.8%
Retail trade	8.2%	7.1%	-1.1%	10.2%	9.4%	-0.8%	0.3%
Construction	7.4%	10.9%	3.5%	11.2%	14.6%	3.4%	-0.1%
Accommodation	10.0%	9.0%	-1.0%	12.7%	11.3%	-1.4%	-0.4%
Health care services, except hospitals	9.7%	8.1%	-1.6%	12.4%	9.4%	-2.9%	-1.3%
Public administration	11.8%	13.7%	1.9%	16.2%	15.9%	-0.3%	-2.1%
Repair and maintenance	9.5%	10.2%	0.7%	14.6%	13.0%	-1.6%	-2.2%
Transportation and warehousing	12.5%	11.4%	-1.0%	15.4%	12.0%	-3.4%	-2.4%
Food manufacturing	6.7%	8.1%	1.4%	9.7%	8.6%	-1.1%	-2.5%
Finance	13.6%	8.4%	-5.2%	17.2%	8.8%	-8.3%	-3.1%
Agriculture	16.8%	18.0%	1.2%	20.9%	18.7%	-2.2%	-3.4%
Wholesale trade	7.6%	9.2%	1.6%	12.4%	10.5%	-1.9%	-3.5%
Private households	21.8%	25.2%	3.4%	25.6%	25.3%	-0.2%	-3.6%
Insurance	15.3%	11.1%	-4.2%	23.0%	14.2%	-8.8%	-4.6%

II. The Limitations of Complaint-based Enforcement

Labor enforcement agencies across the United States predominately use a reactive, complaint-based approach to labor standards enforcement, in which workers who experience a violation are expected to report it to the appropriate public agency in order for the violation to be investigated. Complaint-based enforcement became the default mode of enforcement in the early years of the

Fair Labor Standards Act of 1938 and largely remained so until the Obama administration.[25] In a groundbreaking study in 2005, David Weil and Amanda Pyles found little overlap between industries with the highest FLSA complaint rates and those with the highest wage and overtime non-compliance rates, suggesting that workers in industries with the worst conditions were much less likely to complain.[26]

Nevertheless, state and local enforcement agencies remain largely complaint-based. In a survey by Janice Fine, Greg Lyon, and Jenn Round, conducted in 45 states and cities that have enacted labor standards laws between 2012–2016, 70 percent of cities surveyed indicated their enforcement is complaint-driven while 54 percent of states interviewed said the same.[27] In the survey, most states were overwhelmingly complaint-based, except for child-labor investigations, some of which were initiated without a formal complaint.

As part of the Strengthening Labor Standards Enforcement initiative at the Center for Innovation in Worker Organization (CIWO) at Rutgers, The State University of New Jersey, we were approached by the first municipal office of labor standards enforcement in the country—the San Francisco Office of Labor Standards Enforcement (OLSE) which was established in 2001—to support their interest in strategic enforcement by building on Weil and Pyles' methodology, comparing the actual number of complaints submitted to their office with our estimates of minimum wage violations by industry between 2005-2018 (again, using CPS-ORG data).[28] Initially responsible for prevailing wage enforcement, OLSE has since expanded to include enforcement authority for over 25 laws. San Francisco has been at the forefront of passing innovative legislation to better protect workers, including four ordinances that were a first for any American municipality: the minimum wage, paid sick leave, predictive scheduling laws in retail, and paid parental leave ordinances. Other cities look to San Francisco as a model for labor standards enforcement.

Regulators typically want to know that the workers who are not being paid what they are legally owed are complaining and that the workers who are complaining are voicing genuine grievances. That is, they wish to minimize both false negatives (violations that go unreported) and false positives (complaints without violations). False negatives are, of course, the most worrisome in complaint-driven regulatory systems, as they likely include the most vulnerable and exploited workers who are fearful of complaining or are unable to complain, and are therefore falling through the cracks. *Quiet* industries should be *compliant* industries, not industries where workers are suffering silently.

Following Weil and Pyles, we conceptualize the relationship between compliance and complaints as a 2 x 2 matrix:[29]

High Violation Rate   **Low Violation Rate**

High Complaint Rate	*Quadrant 1* High complaints High violations	*Quadrant 3* High complaints Low violations
Low Complaint Rate	*Quadrant 2* Low complaints High violations	*Quadrant 4* Low complaints Low violations

Ideally, all industries will be located in Quadrants 1 and 4. Those working in industries with high violation rates should have unimpeded access to the complaint process, and complaint rates should be commensurate with violation rates. Likewise, in industries with low violation rates, complaint rates should be equally low. In those two ideal-type quadrants, the DOL's enforcement resources will be well-applied.

Ideally, no workers will be found in Quadrant 2—low-complaint industries that are rife with violations—and few workers will be found in Quadrant 3—high complaints despite low violations. The existence of workers in Quadrants 2 and 3 would indicate "significant problems in terms of enforcement resources reaching the right workplaces."[30]

Comparing data on complaints submitted to the San Francisco OLSE to our estimates of minimum wage violations by industry in 2005–2018, we can begin to fill out the 2 x 2 matrix and answer the following questions: "Are industries with the most frequent and severe violations also those that show the highest frequency of worker complaints? Are there industries that we know to be serious violators that [the agency is] not hearing from? Do investigators spend a disproportionate amount of time on industries that are less egregious violators?"[31]

We found that in many industries, the number of minimum wage complaints reported to the agency were far fewer than the estimated violation rates in those industries – and conversely, estimated minimum wage violations in several industries were far higher than the number of complaints filed by workers in those industries. Specifically, violations in the private households, social assistance, and food manufacturing industry sectors were among the highest of any industry, but workers in these three industries made few complaints to the city's labor standards enforcement agency (see Figure 4).[32]

Figure 4: Matrix of Minimum Wage Complaints and Estimated Levels of Compliance by Industry in San Francisco, 2005-2018

	High violation rate	**Low violation rate**
High complaint rate	*Quadrant 1* • Food services and drinking places • Personal and laundry services • Rental and leasing services • Retail trade	*Quadrant 3* • Repair and maintenance • Construction
Low complaint rate	*Quadrant 2* • Private households • Social assistance • Food manufacturing	*Quadrant 4* • Publishing industries • Professional and technical services • Finance • Educational services • Wholesale trade • Public administration

Another way to think about the extent of the discrepancy between individually driven complaints and minimum wage violations is to calculate a ratio for each industry.[33] In San Francisco, more than 1,300 violations were estimated to have occured for every one worker complaint in the private households industry. In social assistance, more than 800 violations occured for every one complaint.

In contrast, industries that are more compliant in their wage standards yet nevertheless receive many complaints (as detailed in Figure 3, quadrant 3 above) have much lower ratios, among them: 19:1 in the repair and maintenance industry and 49:1 in the construction sector. (See Figure 5.) These inequalities are only likely to be exacerbated in the context of a recession and particularly amid the current pandemic-induced recession.[34]

Figure 5: Estimated Number of Minimum Wage Violations Associated with One Complaint Case in San Francisco
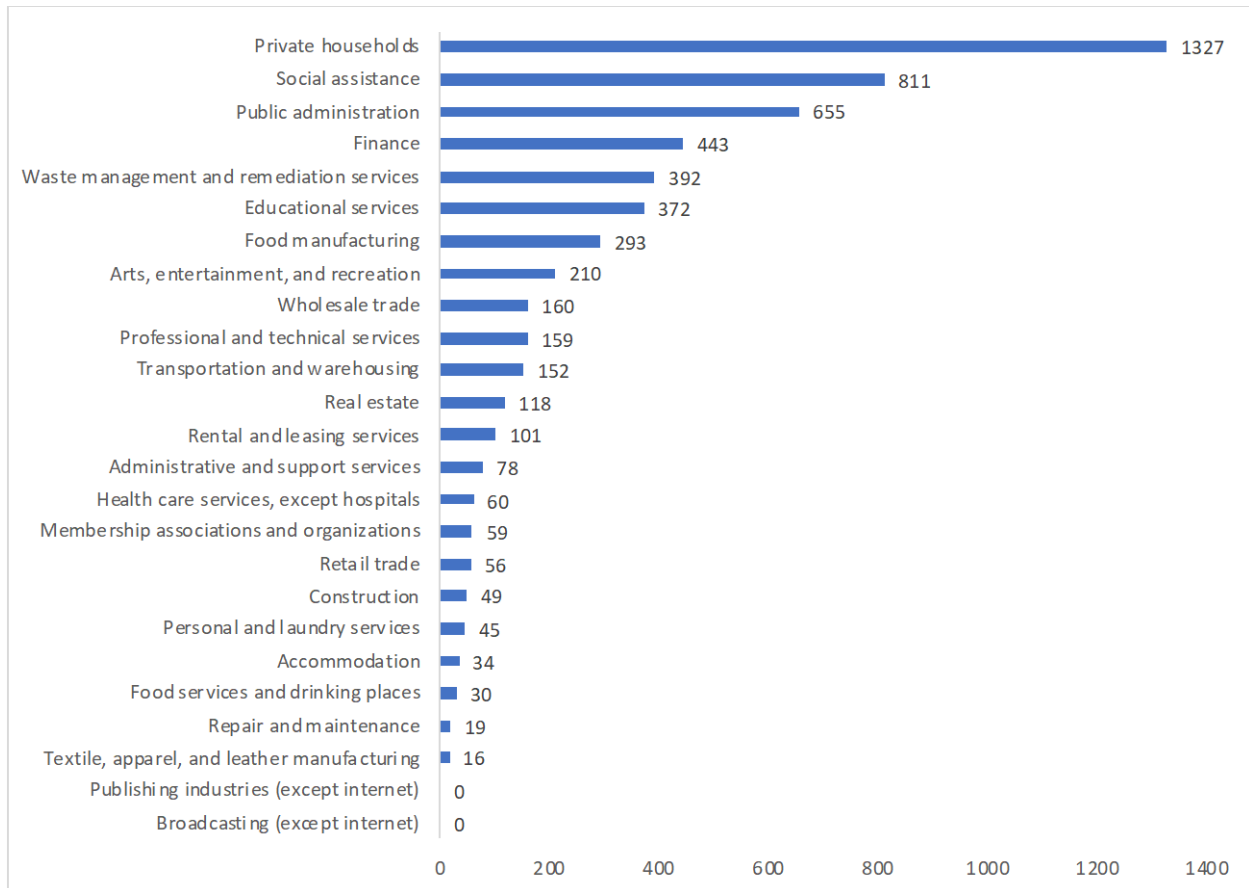
The discrepancy between individual complaints and business violations is caused by asymmetries of power between low-wage workers and the firms for which they work. Workers with the least power and few alternative employment options face barriers that keep them from stepping forward to complain much of the time.[35] In a recession, high unemployment increases

workers' desperation to maintain any job, thus tipping the power imbalance even further toward firms.

Indeed, the coronavirus recession may push more industries into quadrant 2 in Figure 3 – high violations but few complaints. Notably, as of November 2020, sectors that fell into quadrant 1 in Figure 3 above—those with high violations and many complaints—continued to have significantly elevated unemployment rates. Nationwide employment in the food services and drinking places sector was down 1,978,900 from November 2019 to November 2020, followed by retail trade (-592,600), personal and laundry services (-243,200), and rental and leasing services (-115,800).[36] The concern, then, is that high unemployment will render these high violation sectors more vulnerable to exploitation but less likely to complain. In other words, those workers most impacted by the coronavirus recession may find themselves in the most problematic category of high violations but relatively few complaints (quadrant 2 in Figure 3), largely overlooked by regulators adhering to complaint-based enforcement.

III. Protecting workers in difficult times: Strategic enforcement and co-enforcement

Given the evidence presented above regarding a) the strong relationship between unemployment rates on minimum wage violations, b) the disproportionate impact of wage violations on some demographic groups compared to others during the Great Recession, and c) how even well-resourced enforcement agencies do not fully capture the highest violation industries, we now turn to a conceptual discussion of the value of other enforcement strategies. Under conditions of increasing violations and diminishing government resources, it is more important than ever for agencies to engage in strategic enforcement: marshalling their resources and targeting them on the industries with the worst problems. Under conditions of heightened worker vulnerability and fear of job loss, it is more important than ever for agencies to engage in co-enforcement: partnering with civil society organizations that have important information about what is happening in these industries and relationships of trust with the workforce.
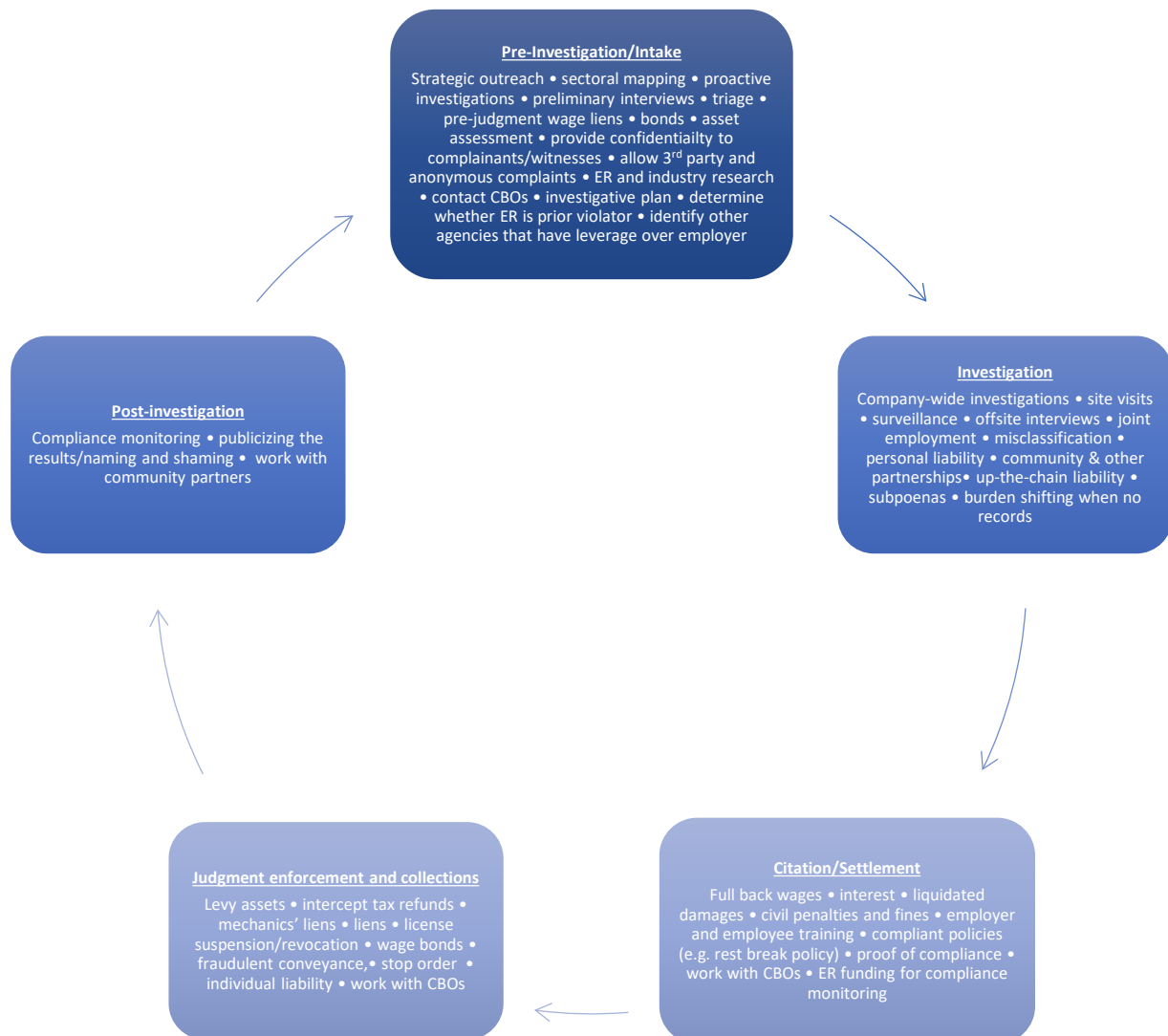
Strategic enforcement

Unlike complaint-based enforcement, in which each case is typically processed as an isolated or idiosyncratic incident, a strategic enforcement model analyzes complaints for underlying causes and targets enforcement resources to high-violation industries. As articulated by Weil, the overarching goal of strategic enforcement is "to use the limited enforcement resources available to a regulatory agency to protect workers as prescribed by laws by changing employer behavior in a sustainable way."[37] At the federal level, the main components of strategic enforcement include a proactive, rather than reactive, approach to investigations, triaging complaints into different categories of responses, targeting industries high in violations but low in complaints, maximizing the extent of legal penalties imposed on violators, informational campaigns to businesses and workers, strategic communications and signaling to employers, robust compliance agreements with violators, and using data to measure effectiveness.[38] Of course,

federal, state, and local enforcement agencies operate in vastly different political climates and with a wide variety of statutory powers and bureaucratic limitations. Accordingly, strategic enforcement cannot be cast in "one size fits all" or "all or nothing" terms.

Through our research on state and local policies, powers and practices, and our work with state and local agencies, we have come to understand strategic enforcement as a set of interconnected tools and techniques that agencies can use at each stage of the process to achieve broad, long-term compliance. Agencies can adopt and incorporate some of these strategic practices and work toward adopting others by taking on administrative and statutory power limitations over time.[39]

Figure 6: Incorporating Strategic Enforcement at Every Stage of the Case

Pre-Investigation/Intake
Strategic outreach • sectoral mapping • proactive investigations • preliminary interviews • triage • pre-judgment wage liens • bonds • asset assessment • provide confidentiailty to complainants/witnesses • allow 3rd party and anonymous complaints • ER and industry research • contact CBOs • investigative plan • determine whether ER is prior violator • identify other agencies that have leverage over employer

Investigation
Company-wide investigations • site visits • surveillance • offsite interviews • joint employment • misclassification • personal liability • community & other partnerships• up-the-chain liability • subpoenas • burden shifting when no records

Citation/Settlement
Full back wages • interest • liquidated damages • civil penalties and fines • employer and employee training • compliant policies (e.g. rest break policy) • proof of compliance • work with CBOs • ER funding for compliance monitoring

Judgment enforcement and collections
Levy assets • intercept tax refunds • mechanics' liens • liens • license suspension/revocation • wage bonds • fraudulent conveyance,• stop order • individual liability • work with CBOs

Post-investigation
Compliance monitoring • publicizing the results/naming and shaming • work with community partners

Strategic enforcement addresses gaps created by traditional complaint-based enforcement in several ways. First, the use of proactive investigations in targeted industries means enforcement resources are more likely to identify and reach vulnerable workers who are unlikely to complain. Likewise, industry research to identify industry structure, influential employers, and widespread, noncompliant industry practices helps agencies target employers that are likely to get the attention of others in the industry.

Under a strategic enforcement framework, proactive investigations are used in tandem with triage, a system for sorting complaints into different treatment categories to help agencies efficiently manage their resources so that high-violation industries with high and low complaint rates are prioritized.[40] To be effective, this approach must be informed by data so that enforcement agencies have a firm basis for making decisions about where to dedicate resources.

Additionally, strategic enforcement includes maximizing the use of statutory tools that are designed to address common enforcement impediments. Fear of retaliation, for example, keeps workers from making complaints and cooperating during investigations.[41] Savvy bad-faith employers who know that worker cooperation is critical to robust enforcement may use retaliation as a means to hinder an agency's wage and hour investigations.

Similarly, low-road employers may flout recordkeeping requirements to avoid documenting noncompliance or otherwise falsify or destroy records when they learn of an investigation. Where the facts in an individual case indicate such wrongdoing, creative lawmakers have included "rebuttable presumptions" in labor standards laws to shift the burden onto employers to prove they were in compliance with the law. Strategic enforcement legal tools such as rebuttable presumptions help to disincentivize bad-faith actions while allowing enforcement agencies to more effectively enforce substantive labor standards rights against employers who engage in them anyway.

Moreover, strategic enforcement involves assessing high damages and penalties in addition to back wages owed. These measures deter future violations by changing the cost/benefit calculation some employers make when they decide that violating the law is worth the risk of being caught.[42] A study conducted by Galvin finds that higher penalties and stronger enforcement capacities lead to lower rates of noncompliance with minimum wage laws, all else being equal. In particular, difference-in-difference models reveal that states that implemented "treble damages" for wage violations between 2005 and 2014 experienced statistically significant drops in the incidence of minimum wage noncompliance.[43]

Sustained compliance also requires holding those with the most power in the contracting relationship liable for downstream violations. This approach helps to address the fissuring of employment relationships and holds liable the entity with the most reputational risk—a tactic

that is more likely to get the attention of the other powerful upstream companies in an industry. For that to happen, agencies need a media strategy that alerts other employers to the consequences of noncompliance. Indeed, publicity is crucial for maximizing the ripple effects of agencies' limited resources.[44]

Similarly, robust collections efforts and tools are necessary to ensure judgments are meaningful and workers, in fact, receive money they are owed.[45] Innovative settlement terms that address the root of the violation and promote ongoing compliance are also key components of strategic enforcement.

Co-enforcement

Strategic enforcement is a logical response to the coronavirus recession, but to succeed, it must be accompanied by a significant enhancement of worker voice.[46] Initiating an investigation is merely the first step in the enforcement process. While proactive enforcement helps to bridge the gap between complaints and violations, worker cooperation after the investigataion is initiated is crucial for establishing violations and defending the agency's findings on appeal. Simply put, problems will remain hidden from investigators unless workers speak up, but vulnerable workers will not speak up in isolation. Co-enforcement—formal and sustained partnerships between government agencies and civil society organizations embedded in low-wage workers' geographic communities and often focused on specific high-violation sectors is essential to addressing the enforcement challenges created by the 21st century labor market.[47]

To illustrate this, we must consider why the vast majority of agencies continue to utilize the complaint-based enforcement model. One reason is that complaints often provide a foundation from which to build a strong case. In reacting to a complaint, before an investigation even begins, the agency has a cooperating witness and an array of information that may include the nature of the violations, how the employer may attempt to hide violations, names of management and ownership personnel, and other facts relevant to the case.

Worker participation and evidence is particularly important in establishing violations and back wages owed in more difficult investigations in which employers have no records or have falsified timesheets and payroll records to appear compliant. Without a connection to the workforce on which the agency can build an investigation, proactive investigations can be daunting and the agency may be unable to establish that violations are occurring.

Worker organizations have access to information on labor standards compliance that would be difficult, if not impossible, for state officials to gather on their own.[48] It is often only when the organization that has relationships with vulnerable workers vouches for a government agency that they are willing to come forward. By building on the existing trust between workers and
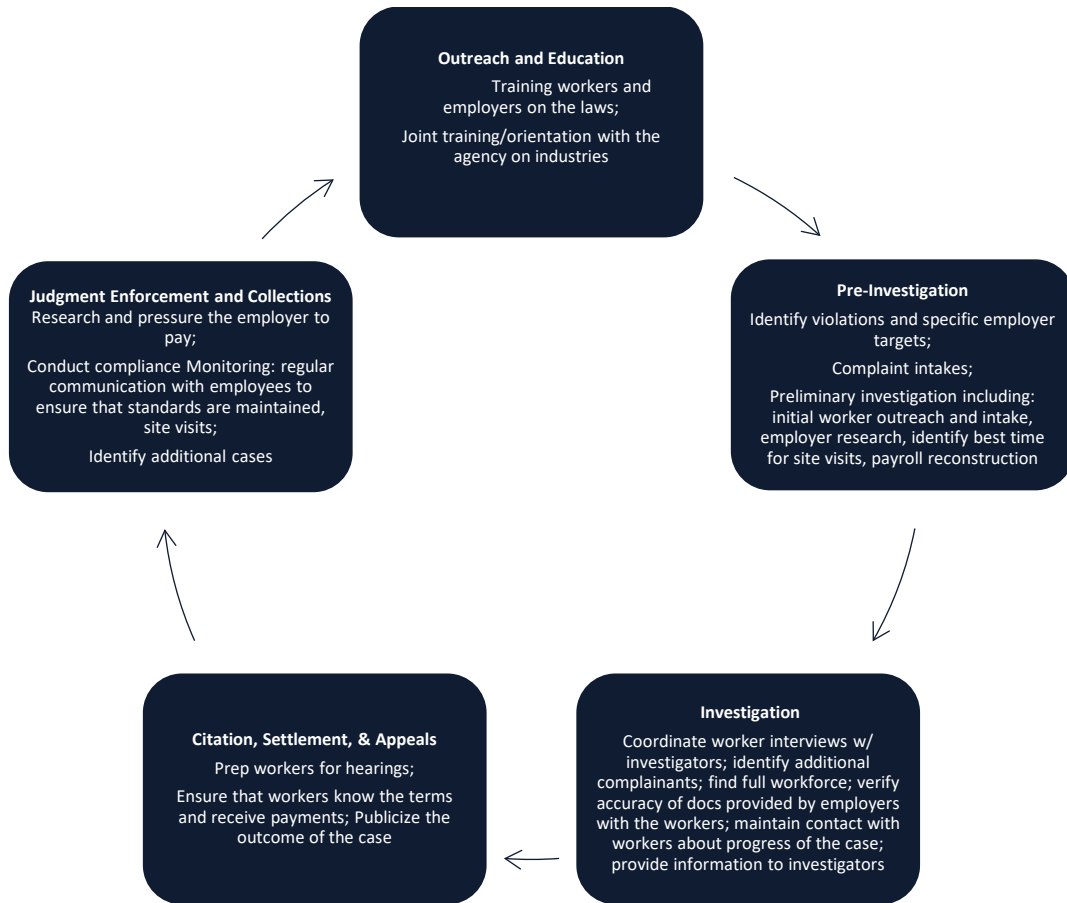
organizations, investigators can gain access to the knowledge and information workers possess about violations.[49]

Additionally, through their relationships and local credibility, community organizations can educate workers, encourage them to file complaints, and help to gather testimony and documentation. Drawing on workers' networks, community organizations can also recruit workers from problematic industries and workplaces by providing a safe space and interpretation and facilitation services, as well as helping state inspectors meet with workers who may be too intimidated to go to a government office. They also exercise a kind of moral power and broaden public support for robust enforcement when they document and publicize egregious examples and patterns of abuse.[50]

Some might ask, given the current austerity governments are facing, if additional resources could be made available, why not just hire more investigators rather than putting financial resources into civil society partners? Although we strongly support expanded inspectorates at the federal, state and local levels, we believe that directing resources to civil society partners, along with the government staffing necessary to support them, would bring benefits to the inspection program that could not be realized through government inspectors alone, because of the parties' complementary strengths. Some of the key attributes of state and society are nonsubstitutable because of relationships of trust and power and, as we have detailed in previous work[51], workers, worker organizations, and regulators have capabilities that cannot be perfectly substituted for one another without great cost.

State enforcement agencies face a wide range of political pressures not to engage in vigorous enforcement. Worker organizations can act as countervailing points of pressure and, when an investigation is undertaken by an agency, through their relationships with workers, they can continue to monitor the employer over time, after inspectors have moved on to new cases.[52] (See Figure 7.)

Figure 7: Incorporating Co-Enforcement at Every Stage of the Case

Outreach and Education
Training workers and employers on the laws;

Joint training/orientation with the agency on industries

Pre-Investigation
Identify violations and specific employer targets;

Complaint intakes;

Preliminary investigation including: initial worker outreach and intake, employer research, identify best time for site visits, payroll reconstruction

Investigation
Coordinate worker interviews w/ investigators; identify additional complainants; find full workforce; verify accuracy of docs provided by employers with the workers; maintain contact with workers about progress of the case; provide information to investigators

Citation, Settlement, & Appeals
Prep workers for hearings;

Ensure that workers know the terms and receive payments; Publicize the outcome of the case

Judgment Enforcement and Collections
Research and pressure the employer to pay;

Conduct compliance Monitoring: regular communication with employees to ensure that standards are maintained, site visits;

Identify additional cases

V. Conclusion

We are facing a precarious time in US history. Over the past several decades, growing inequality, pay stagnation, decline in union participation, and deregulation have resulted in a labor market in which the balance of power has shifted substantially away from workers and toward employers. The coronavirus pandemic and accompanying recession has exacerbated this power imbalance and threatens to undo the progress made in cities, counties, and states that have raised the minimum wage and passed other innovative worker protection laws.

This paper has shown that during the Great Recession of 20078–2010, minimum wage violations rose in tandem with the unemployment rate and weakened the labor market power of low-wage workers who remained employed. Violations increased dramatically during the Great Recession and had a disproportionate impact on Latinx, Black, female, and immigrant workers. Further, we observe an increase in the gender gap in violations beyond those low-wage industries where they had traditionally been concentrated. Through our San Francisco analysis, we have also strongly reinforced the findings of Weil and Pyles that complaint-based enforcement systems neglect some significant high violation sectors.

We have argued that, given severe resource constraints that are certain to be exacerbated by recession-related shortfalls in government revenues, and complicated by low-wage workers' reluctance to come forward with complaints lest they lose their jobs, enforcement agencies at all levels of government must embrace strategic enforcement and co-enforcement strategies. However, out of concern for businesses suffering amid the coronavirus recession, some elected officials and agency personnel at the Department of Labor have argued for a reduction in regulations or suspension of labor standards enforcement.[53] It is vitally important to support business revival, but it must not be done at the cost of labor standards. Government could and should play a much more active role in providing small businesses with coaching, loans, and support for back office, accounting (payroll and taxation), and HR functions, but suspending enforcement would be harmful to the most vulnerable workers. This is especially the case for those who have been on the front lines in terms of risk during the pandemic and would be enormously destructive to wage floors and labor market standards.

More fundamentally, the argument that there should not be labor standards enforcement during a recession (or at any other time) amounts to saying that it is reasonable for an employer to take money from their workforce because they are unable to make their business produce a profit. Those companies that remain in business by not paying their workers are essentially forcing those workers to subsidize the businesses. Even if workers are eventually made whole, it is after an involuntary, interest-free loan from their employees who have no financial capacity to provide one.[54]

Moreover, if minimum wage laws are not enforced during a recession, the whole structure of wages in an industry or city is weakened. Allowing unfair competition by allowing wage theft amounts to the provision of informal concessions to weaker firms in an industry, which weakens the stronger firms that are in compliance. In this scenario, wage standards across labor markets are likely to decline, particularly in the low-wage sectors where so many essential workers are employed.

Consider the restaurant industry, which is well-known to have high rates of wage theft violations.[55] If demand for restaurants' food and drinks falls off, as is the case today, the problem must be addressed either by expanding demand or reducing supply, but not by reviving the industry by reducing minimum wage enforcement. If labor standards enforcement agencies ignore the violations of very marginal restaurants, then they undermine the compliant ones. In particular, they undermine those firms that may be just barely managing to stay in business yet not resorting to wage violations in order to do so.[56]

Lastly, research by labor economists demonstrates that some firms weigh the costs and benefits of minimum wage compliance and are more likely to violate the law if there is a low probability of being investigated or face minimal fines even if they are caught.[57] Relaxing minimum wage enforcement is certain to exacerbate this problem.

Labor standards enforcement agencies need to be able to engage in enforcement strategies as sophisticated as the industries and companies they are meant to monitor. These agencies must be able to proactively target those sectors where vulnerable workers are experiencing high rates of violations and they need to partner with organizations that workers trust.

Acknowledgements

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[21] Miruna Petrescu-Prahova and Michael W. Spiller, "Women's Wage Theft: Explaining Gender Differences in Violations of Wage and Hour Laws," *Work and Occupations* 43 (4) (2016): 381-387, available at https://journals.sagepub.com/doi/abs/10.1177/0730888416661019.

[22] Weil and Pyles 2005; Bernhardt, Spiller and Theodore 2013.

[23] Petrescu-Prahova and Spiller, "Women's Wage Theft."

[24] Annette Bernhardt, Heather Boushey, Laura Dresser and Chris Tilly, *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market*," (Illinois: Labor and Employment Relations Association Series, 2008); Marc Doussard, *Degraded Work: The Struggle at the Bottom of the Labor Market* (Minneapolis: University of Minnesota Press. 2013); Chris Warhurst, Francoise Carre, Patricia Findlay and Chris Tilly, *Are Bad Jobs Inevitable?: Trends, Determinants and Responses to Job Quality in the Twenty-First Century* (UK*:* Macmillan International Higher Education, 2012); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge: Harvard University Press, 2014).

[25] Janice Fine, "New Approaches to Enforcing Labor Standards: How Co-Enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward," *The University of Chicago Legal Forum* 2017 (7) (2017): 145, available at https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/7; David Weil, "Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change," *Journal of Industrial Relations* 60 (3): 441, available at https://www.doi.org/10.1177/0022185618765551.

[26] David Weil and Amanda Pyles, "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace," *Comparative Labor Law and Policy Journal* 27 (1) (2005): 59, available at https://hctar.seas.harvard.edu/files/hctar/files/hr08.pdf.

[27] Janice Fine, Greg Lyon, and Jenn Round, "The Individual or the System: Regulation and the State of Subnational Labor Standards Enforcement in the U.S.," unpublished manuscript, last modified April 2020.

[28] Daniel J. Galvin, Jenn Round, and Janice Fine, "A Roadmap for Strategic Enforcement: Complaints and Compliance with San Francisco's Minimum Wage" (New Brunswick: Rutgers School of Management and Labor Relations, 2019): 4, available at https://smlr.rutgers.edu/complaints-compliance-in-sanfrancisco-study. This research replicates and builds upon Weil and Pyles's groundbreaking study, Weil and Pyles, "Why Complain?"

[29] Here, we follow David Weil and Amanda Pyles in their classic 2005 article "Why Complain?: Complaints, Compliance, and the Problem of Enforcement in the Us Workplace." *Comp. Lab. L. & Pol'y. J.* 27:59.

[30] Ibid.

[31] Ibid.

[32] Complaint data covering the period 2005-2018 provided by the San Francisco Office of Labor Standards Enforcement (OLSE), May 2019. Employment by industry (the denominator for complaints) is from the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (average annual employment, 2005-2018). Minimum wage violations are estimated using Current Population Survey's Merged Outgoing Rotation Groups (CPS-MORG) data, 2005-2018. It includes only those employees working in San Francisco proper. Studies show that measurement error in the CPS-MORG data likely biases our estimates of minimum wage violations downward, meaning the estimates reported here are conservative, and actual violation rates are likely much higher. An unknown number of complaints are filed with the state agency and the U.S. Department of Labor rather than the San Francisco OLSE. Thus, the total number of complaints likely does not reflect the total number of complaints made. The comparison of CPS estimates to OLSE complaints must therefore be interpreted cautiously and in that light. For further methodological details, see Daniel J. Galvin, Jenn Round, and Janice Fine, "A Roadmap for Strategic Enforcement: Complaints and Compliance with San Francisco's Minimum Wage" (New Brunswick: Rutgers School of Management and Labor Relations, 2019) and online appendix, available at https://smlr.rutgers.edu/complaints-compliance-in-sanfrancisco-study.

[33] Weil and Pyles, "Why Complain?"

[34] Janice Fine, "Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States," *Osgoode Hall Law Journal* 50 (4) (2013): 820–21, available at https://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss4/3; Janice Fine and Jenn Round, "Federal, State, and Local Models of Strategic Enforcement and Co-Enforcement across the U.S." (forthcoming).

[35] Shannon Gleeson, "From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers," *Law and Society Review* 43 (3) (2009), available at https://www.doi.org/10.1111/j.1540-5893.2009.00385.x; Fine, "Problem from Hell," p. 815.

[36] U.S. Bureau of Labor Statistics, "The Employment Situation – November 2020," Press release, December 4, 2020, Table B-1, available at https://www.bls.gov/news.release/pdf/empsit.pdf.

[37] Weil, "Creating a Strategic Enforcement Approach," p. 437.

[38] Ibid.; David Weil, "Enforcing Labour Standards in Fissured Workplaces: The US Experience," *The Economic and Labour Relations* Review 22 (2) (2011); Weil, *Why Work Became So Bad for So Many*.

[39] Fine and Round, "Federal, State, and Local Models," pp. 4–5.

[40] For more information on triage, see Jenn Round, "Tool 1: Complaints, Intake, and Triage," Janice Fine and Tanya L. Goldman, eds. (Washington and New Brunswick: CLASP and the Rutgers School of Management and Labor Relations, 2018), available at https://www.clasp.org/sites/default/files/publications/2018/09/2018_complaintsintakeandtriage.pdf.

[41] Tanya Goldman, "Tool 5: Addressing and Preventing Retaliation and Immigration-Based Threats to Workers," Janice Fine, Pronita Gupta, and Jenn Round, eds. (Washington and New Brunswick: CLASP and the Rutgers School of Management and Labor Relations, 2019), p. 2, available at https://smlr.rutgers.edu/sites/default/files/2019_addressingandpreventingretaliation.pdf.

[42] David Weil, "Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage," *Industrial and Labor Relations Review* 58 (2) (2005), available at https://www.jstor.org/stable/30038575.

[43] Galvin, "Deterring Wage Theft."

[44] For example, one study found that OSHA press releases resulted in an 88 percent decrease in violations at other facilities in the same sector within a 5-kilometer radius and led to an especially large decrease in willful or repeat violations and those most likely to lead to a severe incident. See Matthew S. Johnson, "Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws," *American Economic Review* (conditionally accepted, 2019), available at https://drive.google.com/file/d/1HcKpGXZuFWNNLa1YTl0A4Hte1BiJabT-/view?usp=sharing.

[45] For comprehensive information regarding strategic enforcement tools, including collections, the Center for Innovation in Worker Organization and the Center for Law and Social Policy created the Labor Standards Enforcement Toolbox, available at https://smlr.rutgers.edu/content/labor-standards-enforcement-toolbox (last accessed August 27, 2020), which is a series of briefs highlighting effective enforcement policies and how agencies have employed them to more effectively enforce laws in their jurisdictions.

[46] Fine, "Problem from Hell," p. 815.

[47] Janice Fine and Tim Bartley, "Raising the Floor: New Directions in Public and Private Enforcement of Labor Standards in the United States," *Journal of Industrial Relations* 61 (2) (2018): 257, available at https://www.doi.org/10.1177/0022185618784100; Matthew Amengual and Janice Fine, "Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States," *Regulation and Governance* 11 (2) (2017), available at https://doi.org/10.1111/rego.12122; Janice Fine and Gregory Lyon, "Segmentation and the Role of Labor Standards Enforcement in Immigration Reform," *Journal on Migration and Human Security* 5 (2) (2017), available at https://doi.org/10.1177/233150241700500211; Fine and Gordon, "Strengthening Labor Standards Enforcement"; Fine, "New Approaches."

[48] Tess Hardy, "Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards," *The Economic and Labour Relations Review* 22 (3) (2011), available at https://www.doi.org/10.1177/103530461102200308; Fine and Gordon, "Strengthening Labor Standards Enforcement"; Fine, "Problem from Hell"; Amengual and Fine, "Co-Enforcing Labor Standards."

[49] Janice Fine, "Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?" *Politics and Society* 45 (3) (2017): 364, available at https://www.doi.org/10.1177/0032329217702603.

[50] JJ Chun, *Organizing at the Margins: The Symbolic Politics of Labor in South Korea and the United States* (Ithaca: Cornell University Press, 2009); Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca: Cornell University Press, 2006); James M. Jasper, *The Art of Moral Protest: Culture, Biography, and Creativity in Social Movements* (Chicago: University of Chicago Press, 2008); Cesar F. Rosado Marzan, "Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing," *The University of Chicago Legal Forum* 2017 (7) (2017), available at https://chicagounbound.uchicago.edu/uclf/vol2017/iss1/16.

[51] Amengual and Fine, "Co-Enforcing Labor Standards;" Fine, "Enforcing Labor Standards in Partnership with Civil Society."

[52] Fine and Bartley, "Raising the Floor," p. 257. The success of combining strategic enforcement with co-enforcement is not merely theoretical. In California, Julie Su's appointment as labor commissioner in 2011 placed a longtime advocate from a community organization who had seen firsthand the inadequacies of the existing system into a top leadership position. Su revolutionized the enforcement model and internal culture of the agency such that the California Labor Commissioner's Office, or LCO, marshalled its full powers, sought additional powers from the legislature over time (with the support of labor and community allies), systematically changed management and personnel practices, and brought community partners into the very center of its strategic enforcement efforts. These changes achieved powerful results. Through its partnerships, LCO has been able to focus its resources on cases of a greater magnitude, resulting in the agency finding more violations per investigation and more wages owed to workers in LCO's history. Under Su, LCO increased the ratio of violations to investigations from 49 percent in 2010 to 150 percent in fiscal year 2017–2018, and wages assessed per inspection rose from $1,402 in 2010 to $28,296 in 2017–2018. As LCO noted, "better targeting leads [to] fewer law-abiding employers to be inspected, more unpaid wages to be found, and more citations to be issued per employer." See Bureau of Field Enforcement, *2017-2018 Report on the Effectiveness of the Bureau Field Enforcement* (CA Labor Commissioner's Office, n.d.), p. 3 and pp. 8–9, available at https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf.

[53] Executive Order no. 13924, *Code of Federal Regulations*, title 3, section 1 (2020), available at https://www.federalregister.gov/documents/2020/05/22/2020-11301/regulatory-relief-to-support-economic-recovery, stating, "Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery…"

[54] Personal communication from David Weil, June 4, 2020.

[55] For example, the U.S. Department of Labor found that 84 percent of the more than 9,000 restaurants investigated were in violation of wage and hour laws. See Elise Gould and David Cooper, "Seven Facts about Tipped Workers and the Tipped Minimum Wage" (Washington: Economic Policy Institute, 2018), available at https://www.epi.org/blog/seven-facts-about-tipped-workers-and-the-tipped-minimum-wage/; Annette Bernhardt, Michael W. Spiller, and Nik Theodore. "Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws," *Industrial and Labor Relations Review* 66 (4) (2013): 808–32, available at https://doi.org/10.1177/001979391306600404.

[56] Personal communication with Michael Piore, May 15, 2020.

[57] Orley Ashenfelter and Robert S. Smith, "Compliance with the Minimum Wage Law," *The Journal of Political Economy* 87 (2) (1979), available at https://doi.org/10.1086/260759; Weil, "Public Enforcement/Private Monitoring."