Center for American Progress Action Fund

AMERICAN WORKER PROJECT

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Enforcing Change

Five Strategies for the Obama Administration to Enforce Workers' Rights at the Department of Labor

David Madland and Karla Walter December 2008

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Executive summary

From air pollution to food safety to children's toys, one of the hallmarks of President George W. Bush's administration has been its failure to enforce laws designed to protect ordinary Americans. This failure is perhaps nowhere more evident than at the Department of Labor, where the Obama administration will have an opportunity and an obligation to correct the Bush administration's inadequate enforcement of important workplace protections.

Lax enforcement by DOL harms workers, taxpayers, and law-abiding businesses. Every year, workers lose $19 billion in wages and benefits through illegal practices, nearly 6,000 American workers die on the job, and at least 50,000 workers die due to occupational disease.[1] Taxpayers are cheated out of $2.7 billion to $4.3 billion each year in Social Security, unemployment, and income taxes from just one type of workplace fraud that misclassifies employees as independent contractors.[2] Employers who play by the rules have trouble competing with irresponsible firms that keep labor costs illegally low. As one business owner frustrated with weak enforcement of labor laws wrote recently, "It is very difficult to compete when someone is not paying his/her dues and not playing by the rules."[3]

Workers in traditionally low-wage and potentially dangerous industries are harmed most by the Bush DOL's weak enforcement. At least 50 percent of garment, nursing home, and poultry employers violate basic minimum-wage and overtime protections, and 50 percent of day laborers are paid less than the wages they are owed.[4] Construction workers and truck drivers are especially likely to get killed on the job, with fatality rates over five times the national average.[5] At least one in 10 meatpackers is injured on the job every year, but the Occupational Safety and Health Administration only inspects about 75 of the more than 5,000 meatpacking plants annually.[6]

This report provides a detailed guide for how the Obama administration can protect workers and their paychecks by enforcing existing wage-theft and worker-safety laws that are already on the books. Wage-theft laws prevent employers from paying less than minimum wage, failing to pay overtime, forcing employees to work off the clock, stealing workers' tips, and violating prevailing wage laws on work contracted by the federal government. Worker-safety laws regulate occupational health and safety standards in American workplaces.

This report differs from other examinations of Bush's lax labor law enforcement to date in two key ways. First, the recommendations are geared toward initiatives that DOL officials

can adopt immediately under existing authority. We do recommend legislative changes, but this report is focused on helping the Obama administration hit the ground running and quickly improve the lives of working Americans.

Second, we take a broad view of the enforcement problem, systematically analyzing the effect of weak enforcement across DOL, rather than focusing on just one problem or agency. This perspective allows us to recommend policy changes that apply to multiple programs, encourage cross-divisional cooperation, improve the balance between enforcement programs and other activities, and highlight areas where the agency's culture as a whole must shift to better enforce worker protections.

We recommend five major strategies for a new Department of Labor:

Opportunity 1: Use penalties to create a culture of accountability. Under Bush's watch, DOL has not used penalties to its full authority to go after scofflaw employers—even though an agency-commissioned study found that when employers are penalized, they and other employers are more likely to comply with wage-theft laws. Moreover, the civil and criminal penalties are simply too low to deter or even adequately punish lawbreakers. The Obama administration must use penalties forcefully, especially in cases of willful, repeated, or high-hazard violations. It should also work with Congress to increase maximum allowable fines, and it must promote a depoliticized agenda where DOL is again seen as the top labor cop. These changes will send a message to lawbreakers that there is a new culture of accountability at DOL.

Opportunity 2: Increase enforcement staff and use partnerships to assist underfunded enforcement divisions. DOL worker-protection programs have insufficient personnel to meet enforcement needs. The Bush administration has worsened this long-standing problem through its budget cuts and by rejecting community partnerships that can multiply DOL's enforcement capacity. Increased funding from Congress is necessary for adequate enforcement, though the Obama administration can immediately increase agency capabilities by strengthening relationships with community organizations, industry associations, state worker-protection agencies, and labor unions. These groups can inform the agency's enforcement agenda and assist with industry monitoring.

Opportunity 3: Target high-violation sectors with strategic initiatives. Bush's DOL has relied on investigation methods that do not catch enough lawbreaking employers. DOL allowed department resources to be used inefficiently and many offenders to go unpunished by focusing on reactive, complaint-driven wage-theft investigations, poorly targeted worker-safety inspections, and voluntary compliance assistance. The Obama administration should reduce safety violations and wage theft by targeting high-violation industries and locations through strategic initiatives backed by sound data.

Opportunity 4: Use thorough record keeping to drive enforcement priorities, enhance public accountability, and improve performance evaluation. Good data is key to enforcement, but the Bush administration squandered opportunities to improve data collection on worker protection. Important workplace data often goes unrecorded and underutilized, and limited online availability weakens public accountability. Moreover, the administration has intentionally weakened critical reporting requirements for businesses. The Obama administration should ensure that DOL collects quality data and then uses that information to accurately target strategic enforcement initiatives, improve public accountability, evaluate past performance, and plan for future operations.[7]

Opportunity 5: Strengthen immigrant protections to improve job quality for all workers. Immigrant workers—both legal and undocumented—frequently face abuse from lawbreaking employers, which drives down job standards for all workers in industries with high concentrations of immigrant workers. The Obama administration must ensure that laws are enforced for all workers and decrease reporting barriers for immigrants by renewing the agency's commitment to treat all workers equally, increasing outreach to trusted community organizations, and improving bilingual services.

The Obama administration can take a major step forward in helping to protect workers, taxpayers, and responsible businesses by employing these five strategies to effectively enforce labor laws. The Obama administration can immediately implement these strategies, but doing so will not be easy. It will require strong leadership to change DOL's culture and make enforcement a priority.

Introduction

The Bush administration has neglected the public interest through lax enforcement across the government. The health of all Americans, our environment, and our economy have been undermined by this failure. Bush officials have cut Environmental Protection Agency enforcement personnel by 12 percent, Food and Drug Administration actions against misleading drug advertisements have plummeted 80 percent, and tests for mad cow disease were conducted in less than 15 percent of cattle slaughterhouses from 2001 to 2003.[8] And now our economy is in shambles in part because of a failure to adequately regulate our financial institutions.

Worker protections have especially suffered under the Bush administration. In our investigation, we found chronically weak enforcement throughout DOL. Bush's ideology of hands-off government has meant that too often workers face dangers at work, law-abiding business owners have difficulty competing with scofflaw employers who can lower their costs by ignoring workplace rules, and taxpayers foot the bill when lawbreakers' employees are injured on the job.

Enforcing a positive business climate

A positive business climate and effective government regulation are not mutually exclusive; business depends on effective enforcement of the law. Lax enforcement of workplace regulations puts law-abiding business owners at a competitive disadvantage. As one frustrated business owner put it, "The government plays the role of referee to have all of us play on a level playing field. It is very difficult to compete when someone is not paying his/her dues and not playing by the rules."[9]

When laws are not enforced, scofflaw employers can save on labor costs by paying workers below the minimum or prevailing wage, failing to invest in proper safety precautions, and intentionally misclassifying workers as independent contractors to avoid paying payroll taxes, unemployment insurance, and worker compensation. Moreover, when lawbreaking employers' workers get hurt, responsible employers often foot the bill because they paid into unemployment insurance and uninsured workers funds.[10]

Responsible business owners should be part of the solution in improving workplace enforcement. Industry groups, along with community organization and labor unions, are valuable enforcement partners and should be included in annual agenda-setting meetings and targeted educational outreach.

The Bush administration is not the first to neglect worker-protection laws—agency staffing has been in decline since the Reagan administration, and many penalties for scofflaw employers have not been increased since George H.W. Bush's administration. But the current administration has taken major steps in the wrong direction. This report explains what went wrong in the Bush administration and how the Obama administration can properly enforce labor laws.

This report focuses on DOL administrations and divisions with key responsibilities for enforcing worker protection: the Mine Safety and Health Administration, Occupational Safety and Health Administration, Office of the Solicitor, and Wage and Hour Division. We do not profile the Employee Benefits Security Administration. However, the available evidence indicates that EBSA exhibits failures similar to those facing DOL programs detailed in this report and would likely benefit from parallel enforcement strategies.[11]

This report examines broad problems to find cross-cutting solutions. This perspective allows us to recommend policy changes that apply to multiple programs, encourage cross-divisional cooperation, and highlight areas where the agency's culture as a whole must shift to enforce worker protections better.

Most recommendations favor initiatives that can be adopted by DOL officials right away. The incoming administration will face significant pressure to immediately effect a number of legislative changes; this report focuses, therefore, on ways the Obama administration can significantly improve worker protections by enforcing existing laws without legislative approval or rule change.

Implementing these changes will require strong leadership and skilled management. Changing DOL's culture to prioritize the enforcement strategies highlighted in this report and adopt new procedures will not be easy. Managers, whether new appointees or career

The Department of Labor programs detailed in this report

Program	Applicable enforcement duties	Key laws enforced
Mine Safety and Health Administration	Monitors and enforces mine safety standards in coal, metal, and non-metal mines	Federal Mine Safety and Health Act and Mine Improvement and New Emergency Response Act
Occupational Safety and Health and Administration	Monitors and enforces occupational health and safety standards in most American workplaces	Occupational Safety and Health Act, Contract Work and Safety Standards Act, and various whistleblower protections
Office of the Solicitor	Acts as the legal arm of the Department of Labor	Pursues civil litigation and works with the Department of Justice to enforce criminal workplace protection laws on the most egregious violations
Wage and Hour Division	Prevents employers from paying less than minimum wage, failing to pay overtime, forcing employees to work off the clock, stealing workers' tips, and violating prevailing wage laws on work contracted by the federal government	Fair Labor Standards Act, Family and Medical Leave Act, Davis-Bacon Act, McNamara-O'Hara Service Contract Act, Walsh-Healey Public Contracts Act, Copeland Anti-Kickback Act, Contract Work Hours and the Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act

agency employees, will need to be skilled at recruiting, training, motivating, disciplining, and rewarding staff. Management must already understand the current DOL regulatory environment in order to employ innovative enforcement techniques, but they also need to be skilled in the management of front-line investigative staff. Finally, new management should know how to advocate for the interests of workers while serving in an under-resourced agency.

This report does suggest two critical policy changes that will require legislation to improve executive enforcement powers. First, agency staffing must be substantially augmented to keep up with the rapid growth of the American workforce. Second, penalties at the Occupational Safety and Health Administration and the Wage and Hour Division must be significantly increased to reflect the severity of the violations and better deter employers from breaking the law. Congress can play a valuable role in promoting enforcement of labor laws by passing these legislative changes and encouraging the types of executive actions recommended in this report.

The report focuses on five of the Bush DOL's failings and recommends opportunities for the Obama administration to deal with these failures.

Addressing these five failures and seizing these opportunities can help the Obama administration immediately improve worker protections.

Five failures and opportunities

1. **Failure:** Inappropriately low and poorly used penalties have not deterred lawbreakers.
   Opportunity: Use penalties to promote a culture of accountability.
2. **Failure:** Declining staff levels and poor use of community groups have undermined enforcement capacity.
   Opportunity: Increase enforcement staff and use partnerships to assist underfunded enforcement divisions.
3. **Failure:** Targeted investigations have occurred infrequently and been poorly implemented.
   Opportunity: Target high-violation sectors with strategic initiatives.
4. **Failure:** Record keeping has been inadequate and uncoordinated.
   Opportunity: Use thorough record keeping to drive enforcement priorities, enhance public accountability, and improve performance evaluation.
5. **Failure:** Illegal treatment of immigrant workers has harmed all workers.
   Opportunity: Strengthen immigrant protections to improve job quality for all workers.

Failure 1: Inappropriately low and poorly used penalties have not deterred lawbreakers

The Obama administration has the opportunity to create a new culture of accountability at DOL by punishing lawbreaking firms and deterring others from breaking the law. The legal arm of DOL, the Office of the Solicitor, must pursue the worst offenders and empower frontline investigators to invoke tough penalties and conduct detailed "prosecution ready" investigations.

Under Bush's watch, the agency has not used penalties to its full authority. Too often penalties are easily reduced or levied for low amounts, and the solicitor's office has minimized civil and criminal liability for the worst violators. Statutory maximums for penalties are so low that, even when caught, lawbreakers know DOL penalties won't affect their firm's bottom line. The Obama administration must aggressively invoke penalties, work with Congress to increase maximum allowable fines and jail time, and promote an enforcement-driven agenda where DOL is seen as the top labor cop.

The Wage and Hour Division has made limited use of penalties during the Bush administration, even though a division-commissioned study found that when employers are penalized, they and other regional employers are more likely to comply with wage-theft laws.[12] When WHD investigators find a wage-theft violation, the lawbreaking employer is required to pay the back wages due to the worker. In addition to requiring companies to pay back wages, investigators have effective tools, granted through the Fair Labor Standards Act and McNamara-O'Hara Service Contract Act, to gain the compliance of scofflaw employers, including

- Additional penalties for repeated and willful violations and for violations of child labor laws
- A "hot goods" provision that blocks shipment of goods produced by abused workers until employers fully remediate back wages
- A "joint employer" provision that holds both direct employers and contractors accountable for wage-theft violations in industries where low-wage work is often subcontracted, such as the construction industry
- Penalties for employers who intentionally misclassify their employees as independent contractors to avoid tax and worker-protection laws, even when workers provide services completely integrated into the employer's business (see the Fighting employee misclassification through partnerships text box on page 19)[13]
- Revocation of government contracts for firms that disregard prevailing wage law.

Yet instead of using this penalty system to its full potential, WHD assessed fines on only 6 percent of lawbreakers between 2000 and 2007 and infrequently used government contract revocations, the "hot goods" provision, or the "joint employer" provision.[14] The Bush DOL also did not attempt to enforce employee misclassification. Agency leadership will penalize employers of misclassified workers when wage and safety violations are found, but it claims that misclassification in itself does not violate the Fair Labor Standards Act's record-keeping provisions—even though misclassified workers often assume that as "contractors," they are not eligible to pursue claims against their scofflaw employers and misclassification is estimated to cost the federal government $2.7 billion to $4.3 billion annually.[15]

Low penalties also inhibit enforcement at the Occupational Safety and Health Administration. Many worker-protection fines are so low—even for the worst violations—that irresponsible employers have begun factoring them in as part of their cost of doing business rather than complying with labor laws. In 2007, the median OSHA final penalty for violations that caused a fatality was only $3,675.[16]

OSHA is one of only five government entities that are exempt from the Federal Civil Penalties Inflation Adjustment Act, which directs and authorizes agencies to regularly adjust their penalties for inflation. These civil money penalties were last adjusted by Congress in 1990 and are not indexed to inflation. Adjusting for inflation, OSHA penalties have slid in value by 39 percent since 1990.[17]

There are a number of problems with OSHA penalties—most of which must be fixed legislatively. OSHA penalties for individual violations are calculated based on a formula that adjusts statutorily defined maximum penalties downward based on employer size, good

No fines for Wal-Mart

Wage and Hour Division investigators found in 2007 that Wal-Mart failed to pay almost 87,000 employees nationwide approximately $33 million in overtime wages. This was the latest in a series of labor-law violations by the nation's largest employer.

Over the last decade, Wal-Mart has been fined by DOL for violating child labor laws in 27 stores, sued by thousands of workers who were forced to work off the clock, fined by the California Fair Employment and Housing Commission and several state labor agencies for failing to reinstate employees after completion of family medical leave, and raided by immigration agents for using undocumented labor to clean 61 stores.[18] Despite these repeated violations and clear disregard for workers' rights, DOL assessed no fines or penalties on the back wages owed by the mega-retailer.[19]

faith, history, and gravity of the violation. Small employers with fewer than 25 employees who have no recent safety violations can see their fines reduced automatically by up to 70 percent, regardless of the gravity of the violation—even fines for fatalities are reduced.[20] The maximum penalties are set by law, but there is flexibility to revise reductions given under the formula in order to raise average penalties to a limited extent.

If a citation is challenged, the case goes to an administrative law judge or the Occupational Safety and Health Review Commission, which often takes years to render a decision. This often induces DOL lawyers to settle for less than they should.

The criminal language governing workplace safety is itself very weak. The maximum criminal penalty for willfully violating safety standards that lead to the death of a worker is a misdemeanor with six months in jail and a $10,000 fine for the first offense, and there are no criminal penalties associated with violations that lead to severe injuries.

Within this framework, labor officials may use "per instance" penalties to levy higher fines on lawbreakers. When OSHA violations are egregious, investigators may fine employers for every instance where they find the violation, and in some cases, for every employee who is exposed to the hazard. However, Bush appointees to the OSHRC have limited the

Mixed signals at Imperial Sugar

OSHA recently levied an $8.7 million penalty on Imperial Sugar after 14 workers died in a February 2008 sugar explosion, which demonstrates the agency's ability to use the current citation formula to levy meaningful fines. But it also shows how the Bush administration has avoided increasing penalties on known safety risks.

OSHA fined the company for 118 egregious violations at two plants. However, OSHA regulations precluded the issuance of heavy fines for inadequate combustible-dust collection practices—a major contributing factor to the explosion. These violations fell under OSHA's general duty clause, which allows it to cite unsafe practices not addressed by specific standards only once, instead of per instance. The company was fined only once at each plant for faulty ventilation and failing to maintain dust collection systems, compared to 44 violations issued at the sites for spark-producing electrical equipment.[21]

The federal Chemical Safety Board recommended OSHA institute specific standards on combustible-dust hazards after a series of fatal events in 2006—two years before the Imperial Sugar explosion.[22] The Bush administration ignored this recommendation and instead launched a voluntary education program on combustible dust in 2007.[23]

effect of the "per instance" provision by reducing the number of violations labeled egregious. The commission ruled, for example, that OSHA cannot cite firms per instance for failing to provide respirators or asbestos exposure training.[24] In response to the OSHRC decision, OSHA proposed a regulation in August 2008 to clarify that requirements for personal protective equipment and asbestos exposure training apply on an employee-by-employee basis, but the rule has not yet been finalized.

The Mine Safety Health Administration, in contrast, recently began assessing steep penalties. In the wake of several mine tragedies, Congress passed legislation requiring MSHA to increase civil penalties in 2006. MSHA predicts that the new penalty structure will increase total penalty assessments by 234 percent. Had the increased penalties been in place in 2005, MSHA estimates the total mine violations would have been 20 percent lower.[25]

Yet MSHA administrative policies still give mine operators strong incentives to fight these penalties. The agency often allows firms to easily reduce penalty assessments through the appeal process. During the Bush administration, 82 percent of MSHA's high dollar penalties (over $10,000) were appealed. Almost half (48 percent) were reduced, and all total, the penalties in cases that have been disposed were cut by 46 percent.[26]

The Bush administration's preference for corporations over workers is engrained from the top down. DOL's powerful and too often politically minded—rather than enforcement-oriented—Office of the Solicitor is one of the largest law enforcement agencies in the federal government, and it is charged with pursuing civil litigation against employers and referring criminal cases to the Department of Justice. For years, the solicitor's

Bush's DOL ignores new whistleblower law

DOL often favors corporations even when employees are fired for reporting corporate corruption. The 2002 Sarbanes-Oxley Act passed in the wake of the Enron and WorldCom, Inc. scandals offered the first federal protection for corporate whistleblowers fired by publicly traded companies. Employers who are found to have retaliated against whistleblowers are subject to penalties, including significant fines and up to 10 years in prison, as well as providing damages.

Yet the government ruled in favor of whistleblowers only 17 times out of 1,273 complaints filed since 2002.[27] DOL's Administrative Review Board dismissed another 841 cases, frequently because it interprets the law to exclude employees of subsidiaries of publicly traded companies, even though the law's authors and legal experts agree that there is no basis for this claim.[28]

office has minimized criminal and civil liability for violators—and the Bush administration did nothing to change these practices.

Since the passage of the Occupational Safety and Health Act in 1970, there have been 341,000 workplace fatalities, yet the solicitor has only referred 200 cases to DOJ, and even fewer were federally prosecuted—68 cases that resulted in defendants spending only 42 months in jail total.[29] The solicitor's office avoids referring criminal cases to DOJ in part because frontline investigators often do not collect sufficient evidence to pursue litigation and low penalties make complex cases too costly to pursue.[30] However, the solicitor's office has also shirked its responsibility to enforce civil penalties aggressively. The solicitor may bring suit under the Fair Labor Standards Act for back wages and an equal amount as liquidated damages and penalties, but a recent review of 294 court settlements brought by the Secretary of Labor that resulted in payment of back wages found that fewer than 10 percent were awarded civil money penalties and fewer than 23 percent were awarded liquidated damages.[31] Many of the poor enforcement techniques already discussed—allowing employee misclassification to go unpunished, infrequently using hot goods and joint employer provisions, significantly lowering penalties when appealed, and not taking the most egregious cases to trial due to unsophisticated frontline inspection techniques—can all be laid at the feet of the solicitor.

Opportunity 1

Use penalties to promote a culture of accountability

- Use existing penalties aggressively, especially in cases of willful, repeated, or high-hazard violations.
- Increase fines through regulatory and legislative changes.
- Use the Office of the Solicitor to pursue criminal complaints forcefully and train divisions to investigate complex cases.

The Obama administration should employ strong penalties on scofflaw employers and signal that it takes its enforcement role seriously. It will be up to the agency's new leadership to promote a new culture of accountability from the top down, with strong penalties for civil and criminal violations—especially for the most egregious violations. The administration has some limited flexibility to invoke tougher penalties within the existing statutory framework, but it must also work with Congress to significantly increase penalties for violating workers' rights.

Use existing penalties aggressively, especially in cases of willful, repeated, or high-hazard violations

Punishing employers found in violation of worker-protection laws with strong penalties will send a message to all high-risk industries that there is a new culture of accountability at DOL. The Obama administration must encourage labor officials to employ penalties to their maximum allowable limit in cases of willful, repeated, or high-hazard violations. Specific divisions can take concrete steps to enhance penalties on lawbreakers:

- Investigators should use the "hot goods" rules to block shipment of goods produced by abused workers until employers fully remediate back wages, "joint employer" provisions to hold both the direct employer and contractor accountable for wage theft violations, and closure orders to force compliance by resistant employers.[32]

- WHD leadership should clarify that misclassifying an employee as an independent contractor is a violation of the Fair Labor Standards Act and target firms suspected of employee misclassification.[33]

- Government contractors that repeatedly violate prevailing wage law should not be awarded new contracts and should also face civil penalties. Contracts should be preferentially awarded to companies with a good record of compliance with labor and other laws.

- OSHA must assert its power to levy "per instance" violations on egregious violators. Leadership should enact and finalize proposed regulations that would allow inspectors to issue per instance citations more frequently. This includes finalizing requirements for personal protective equipment and asbestos exposure training and issuing specific standards regulating combustible industrial dust.

- Corporate whistleblower protections should penalize lawbreakers. The Administrative Review Board, appointed by the secretary of labor, should strengthen the Sarbanes-Oxley Act through decisions that respect legislative intent and penalize subsidiaries of publicly traded companies the same as their parent companies.

Increase fines through regulatory and legislative changes

Penalties for violating worker-protection laws are not strong enough, and as a result, fines do not effectively deter or adequately punish lawbreakers. Even when workers are killed on the job, employers face lower penalties than if they break financial or environmental laws.[34]

The Obama administration must work with Congress to enact legislation that increases penalties for wage-theft and worker-safety laws in order to effectively punish chronic lawbreakers and deter future worker abuse, as was done for MSHA in 2006.[35] Members of Congress have introduced several bills to strengthen penalties on specific worker-protection laws.[36]

There are specific issues to consider when increasing OSHA penalties legislatively. OSHA must increase penalty maximums legislatively, and penalties should be indexed to inflation, as is the case with almost all other federal penalty programs.[37] Also, criminal penalties for violations that cause fatalities and severe injuries must be stronger. Employers whose willful violation of safety regulations leads to the death of a worker should face longer potential jail times and felony charges rather than the current misdemeanor charges. Legislation should further establish minimum penalties in fatality cases. Employers should also face criminal penalties when willful safety violations lead to severe worker injuries. Boosting these penalties to fit the severity of the crime will give DOJ attorneys greater motivation to pursue these cases.

DOL leadership also has some regulatory authority to increase average penalties for worker-safety violations. OSHA's penalty maximums are statutorily determined, but the formula for adjusting penalties downward from the maximum is enumerated in DOL regulations. Leadership can increase average fines by revising this formula.

Use the Office of the Solicitor to pursue criminal complaints forcefully and train enforcement divisions on how to investigate complex cases

A true shift in agency culture toward aggressively pursuing civil and criminal complaints will require leadership from the Office of the Solicitor. The new solicitor must understand that DOL is foremost an enforcement agency and bring this perspective to the training and management of staff. The solicitor's office must empower frontline investigators to invoke tough civil penalties—both monetary and non-monetary—and conduct detailed investigations so that the solicitor may pursue increasingly complex civil cases and refer "prosecution ready" criminal cases to DOJ. The solicitor must also avoid settlements that do not adequately penalize scofflaw employers when pursuing civil litigation and lobby DOJ to take up more criminal cases. If DOJ's criminal prosecution of labor-law violations does not increase, DOL will have to determine alternative options.

As the baby-boomer generation retires, the federal government expects to lose 530,000 employees in the next five years, and DOL will see an influx of new staff that will be responsible for investigating increasingly complex cases. By stressing investigative and litigation methods that aggressively penalize lawbreakers, the solicitor will affect an entire generation of new labor attorneys and investigators who can take these principals forward long after the Obama administration has left the White House.

Failure 2: Declining staffing and poor use of community groups have undermined enforcement capacity

The Obama administration has the opportunity to reverse the nearly 30-year decline in agency enforcement staffing and work with knowledgeable partners to supplement agency capabilities. Effective enforcement efforts rely on inspectors' capacity to investigate egregious cases thoroughly, understand regional industry conditions, and build trust with abused workers. Yet declining funding and staffing allotments mean that enforcement efforts are crippled by poor inspector-to-worker ratios. Only MSHA has experienced an uptick in staffing levels—largely in response to the mine disasters that sparked public pressure to improve miner safety.[38]

Congress and the Obama administration should not wait for a public scandal to increase staffing in other divisions. The Obama administration can also supplement staffing shortages by establishing strong ties to community organizations, state enforcement agencies, industry associations, and labor unions. Marginalized under the Bush administration, these groups were previously assets in informing the agency's enforcement agenda, assisting with strategic initiatives and serving as trusted intermediaries with victims of workplace abuse.

OSHA funding and staffing have failed to keep pace with the long-term expansion of the American workforce. Between 1980 and 2007, the number of Americans in the workforce increased by close to 50 percent from 99 million to 146 million.[39] Meanwhile, the number of OSHA staff declined by nearly 30 percent, and the total OSHA budget grew by only 4 percent in today's dollars.[40] Funding for OSHA increased in the early years of the Bush administration, but only because Congress denied executive efforts to cut the division's funding. In more recent years (between 2003 and 2006), Bush prevailed in cutting funding. Over the course of his administration, funding for OSHA decreased by 6 percent.

Inadequate staffing will impede the new administration's efforts to update enforcement strategies. Since 1980, when OSHA's staffing levels peaked, it has strayed far from this goal. OSHA had nearly 30 staff members for every 1 million Americans in 1980. By 2007, staffing ratios had been cut in half; for every 1 million Americans, there were fewer than 15 OSHA staff.[41] In order to return to 1980's per-worker staffing levels, OSHA would have to hire 2,200 new staff members. Also, the International Labour Office recommends one labor inspector for every 10,000 workers, but the current level of federal and state OSHA inspectors provides only one inspector for every 63,670 workers.[42]

Moreover, Bush's DOL has shifted OSHA's focus to voluntary compliance assistance. During the Bush administration, state and federal enforcement initially increased over the previous administration's funding levels, but then slid by 8 percent in inflation-adjusted dollars.[43] Meanwhile funding for voluntary compliance assistance climbed by 34 percent since the Clinton administration—even though a 2001 DOL report found that compliance assistance alone was not enough to change firm behavior in industries with widespread violations.[44] This has shifted the balance between voluntary compliance-assistance programs and enforcement strategies that penalize lawbreaking employers.

Many compliance-assistance programs are very valuable, such as the Susan Harwood Training Grant Program for non-profit organizations that provides education to employers and workers. But it will be important for the Obama administration to strike the right balance between education and enforcement, and within education programs, the right balance between worker and employer educational outreach.

The number of WHD investigators has fluctuated since the late 1970s but has also failed to keep pace with the growth of the American workforce. The number of investigators reached a high of 1,600 under the Carter administration. During the Reagan era, total investigators shrank to fewer than 700.[45] In its second term, the Clinton administration beefed up enforcement staff and put forward a concerted effort to modernize wage-theft enforcement. The number of investigators rebounded to almost 950 under Clinton, but the Bush administration has slashed staffing by 23 percent to 732 investigators in 2007 and reduced funding by over 10 percent in inflation-adjusted dollars.[46] Since Bush took office, the number of WHD investigators per 1 million working Americans has dropped by 27 percent from nearly seven investigators per 1 million workers to five investigators per 1 million workers.

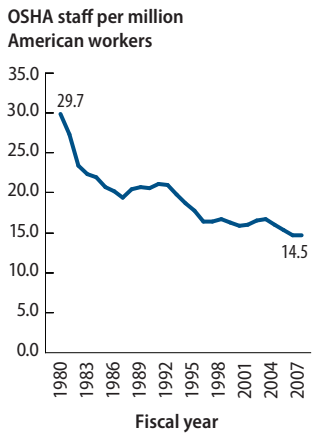
Due to decreased staffing, WHD investigators cannot adequately police the growing workforce. All Fair Labor Standards Act enforcement actions since Bush took office, including those initiated by WHD and worker complaints, have dropped by nearly 30 percent, and enforcement actions initiated by WHD alone slipped by almost 40 percent.[47] These division-initiated enforcement actions are particularly important since they are usually targeted investigations of high-violation industries with probable findings of multiple violations. Staffing capacity at the division is so low that the agency must concentrate on responding to worker complaints rather than focusing on these more proactive enforcement measures.

Moreover, decreased funding at the Office of the Solicitor has shrunk the staff's capacity to pursue the worst violators. Over the first six years of the Bush administration, funding for the solicitor's office fell by 8 percent in inflation-adjusted dollars.[48]

Yet it is important to recognize that the DOL enforcement budget is substantial, and even within current budgetary constraints, enforcement efforts could be improved with stra-

Occupational Safety and Health Administration staff per 1 million American workers

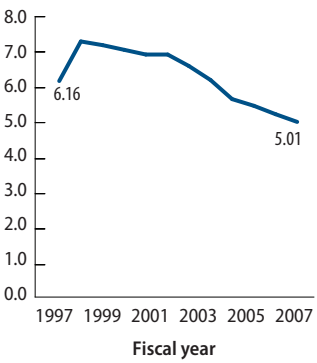
1980 to 2007



Source: OMB Watch, "Workers Threatened by Decline in OSHA Budget" (2008); U.S. Bureau of Labor Statistics, *Current Population Survey 2007.*

Wage and Hour Division investigators per 1 million American workers

1996 to 2007



Source: U.S. Government Accountability Office, "Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance" (2007); U.S. Bureau of Labor Statistics, "Employment status of the civilian non-institutional population" (2007).[49]

tegic partnerships that supplement the limited staff capacity. All total, over $1 billion was appropriated for OSHA, MSHA, WHD, and the Office of the Solicitor in 2007—a huge sum of money compared to the annual budgets of other groups fighting employer abuse such as labor unions, small community groups, and workers centers. While these groups have limited funding, they can be incredibly effective at monitoring local workplace conditions. Unfortunately, Bush's DOL has not used partnerships with these groups or industry associations and state enforcement agencies to improve enforcement capabilities.

The marginalization of enforcement partners has a significant affect on American working conditions, especially for the most disempowered workers. Fewer partnerships geared toward enforcement have resulted in weaker employer monitoring and fewer enforcement actions. Advocacy groups, labor unions, and workers centers often possess in-depth knowledge of local firm behavior and can continuously monitor repeat offenders—two capabilities beyond the reach of many regional investigation offices limited by staffing levels. Also, many workers mistrust DOL investigators because those workers fear that their identity will be exposed to employers bent on retaliation.

Innovative WHD leadership under the Clinton administration welcomed community partners and industry representatives as respected allies in setting national and regional priorities; the division held annual meetings at the national level with external organizations such as industry groups, advocates, unions, and state officials before setting the agency's priorities. The Bush administration has shifted these meetings down to the district level and marginalized partner recommendations, since these meetings do not occur until after the agency's priorities have been set.[50]

Instead, the Bush administration uses WHD partnerships almost exclusively for education rather than enforcement. Educational activities were specified in 94 percent of partnership agreements between 2000 and 2007.[51] WHD officially reports working with partner organizations to refer complaints, monitor agreements, and provide translation assistance, but partner organizations report that WHD often provides little funding and shows little interest in such activities. Educational activities are valuable, but they are just one necessary programmatic activity and must be balanced with enforcement outreach activities.

State regulatory agencies, which are also charged with enforcing worker protection laws say they feel the federal WHD investigators often approach them with at best ambivalence, and at worst animosity. A state agency reported in one instance that federal investigators settled with a lawbreaking employer without consulting the state agency, enforcing a less-stringent federal law in a state with higher workplace standards.[52] Others report instances where DOL prohibited federal investigators from participating in joint investigations with state agencies.[53] Although federal wage-theft investigations often uncover workers misclassified as independent contractors, these violations are inconsistently reported to state regulators and the federal Internal Revenue Service.[54]

Opportunity 2

Increase enforcement staff and use partnerships to assist underfunded enforcement divisions

- Increase enforcement staffing levels with well-qualified inspectors.
- Use partnerships with community organizations, labor unions, and industry representatives to assist with industry monitoring and inform DOL's enforcement agenda.
- Work with local partners to build relationships with workers distrustful of labor investigators.
- Increase cooperation between divisions and with state agencies to punish employers who violate multiple worker protections more effectively.

The Obama administration must work with Congress to increase the staffing of worker protection enforcement programs through increased funding. But the Obama administration can start improving enforcement in understaffed divisions immediately by prioritizing enforcement programs and establishing strong ties to community organizations and labor unions. DOL staff can use these partnerships to assist with industry monitoring and build trust with disempowered workers. DOL should also work with these groups, along with industry representatives, to inform the agency's nationwide enforcement agenda. Moreover, the agency should increase cooperation between divisions and with state agencies to punish more effectively employers who violate multiple worker protections.

Increase enforcement staffing levels with well-qualified inspectors

The Obama administration must work with Congress to reverse the long-term erosion of staffing within enforcement programs to better protect American workers. The Bush administration has increased funding and staffing for voluntary compliance-assistance programs while allowing enforcement programs to be insufficiently staffed. Measures to increase staffing at DOL must consider the appropriate balance between voluntary outreach and enforcement programs and prioritize programs that best detect lawbreaking employers.

One strategy for increasing WHD funding and staffing is to move the division out of the Employment Standards Administration, allowing it to report directly to the DOL secretary. This will give the wage theft enforcement issues higher visibility, allow program administrators greater control and advocacy power in budgeting, and ease collaboration with other DOL administrations.[55] The Obama administration should explore this possibility, while acknowledging concerns that shifting WHD out from under the ESA could trigger an internal power struggle that would waste time and resources and dis-

tract from enforcement work. Since the ESA was created by DOL and not by Congress, the secretary of labor can initiate this change with a memo.[56]

New agency management will also have the vital—and often overlooked—role of encouraging staff to implement new enforcement strategies. For too long, staff members haven't been encouraged to pursue violators aggressively. Management will need to signal to staff that times have changed and enforcement is now a priority. In order to do so, it is essential that new managers have both deep knowledge of worker protection issues and experience in supervising staff.

DOL must seek multilingual investigators when hiring in order to improve outreach to immigrant workers who are disproportionately targeted by scofflaw employers. In the long term, increasing the number of multilingual staff can reduce costs and decrease investigation lag time associated with hiring outside translators. DOL should also make an effort to recruit new inspectors with diverse professional backgrounds, such as criminal investigators and worker advocacy organizations.

Use partnerships with community organizations, labor unions, and industry representatives to assist with industry monitoring and inform DOL's enforcement agenda

DOL can ameliorate its own outreach and monitoring limitations with assistance from community partners. Community organizations and labor unions are experts on local firm behavior and able to flag high-risk industries, gather information on employer targets, and informally monitor whether violators of workplace laws improve their behavior.[57] These groups have been consistently ignored during the Bush administration. The agency will have an obligation to keep these organizations informed of the results of its investigations. Employers who know that they are subject to this continuous monitoring by respected enforcement partners of DOL will be more likely to obey workplace rules.[58]

Together with industry representatives, these organizations should be included in annual meetings to set DOL's national and regional priorities, as they were during the Clinton administration.[59]

Work with local partners to build relationships with workers distrustful of labor investigators

Labor unions and community organizations trusted by disempowered workers can encourage those workers leery of interacting with the federal government to report workplace violations to DOL. Over time, these partnerships will also strengthen the agency's reputation with workers as an honest advocate and empower workers to take a stronger role in protecting themselves and co-workers against workplace abuse.

Partner groups can be especially valuable in outreach to immigrant communities, serving as trusted intermediaries and providing expert translators in languages for which there is no agency proficiency.[60]

DOL should also continue educational outreach programs for community partners to disseminate information on workers' rights. Educational outreach under Bush dominated all partnership activities. It is important that these programs continue, but with a greater focus on balancing outreach to worker and employer groups.

Increase cooperation between divisions and with state agencies to punish employers who violate multiple worker protections more effectively

DOL should focus on improving cooperation between federal worker-protection divisions and other federal and state worker-protection agencies. Division representatives should be trained to spot "red flags" for potential violations during investigations and share that information with their peers in other divisions and federal agencies such as the Internal Revenue Service, Equal Employment Opportunity Commission, Employee Benefits Security Administration, state and federal workers' compensation offices, and unemployment insurance offices. This will amplify DOL resources.

Fighting employee misclassification through partnerships

According to a DOL-commissioned report, an estimated 10 to 30 percent of employers commit workplace fraud by misclassifying their employees as independent contractors.[61] Employers are increasingly misclassifying workers as independent contractors to avoid tax and worker-protection laws by entering into contractual relationships with them—even when workers provide services completely integrated into the employer's business.

This fraud hurts individual workers, state and federal governments, and the cheating firms' law-abiding competitors. Lawbreaking employers save approximately 30 percent on payroll costs—including unemployment insurance, workers' compensation, social security taxes, and the cost of withholding income taxes—and avoid worker coverage under minimum-wage and overtime laws.[62] All total, this is estimated to cost the federal government $2.7 billion to $4.3 billion annually.[63]

DOL must acknowledge that misclassifying employees as independent contractors violates record-keeping laws and penalize lawbreaking employers accordingly. Some states have taken action to penalize employee misclassification, including New Jersey, which in 2007 passed a law that targets misclassification in the construction industry. The law penalizes offenders with stiff fines and allows the state commissioner of labor and workforce development to issue stop-work orders at the construction sites of repeat offenders.

Cross-division and cross-agency partnerships can be a powerful tool in combating misclassification. As pioneered in several states (see state and local innovations box on page 26), employee misclassification enforcement efforts are most effective when there is an active partnership between all agencies harmed by this fraud. Shared duties may include strategic research, targeted inspections, litigation of the worst offenses, and media outreach. A strategic initiative aimed at decreasing employee misclassification would penalize lawbreaking employers who systematically abuse the system, protect disenfranchised workers unlikely to report employer wage theft and safety violations, and improve DOL's ability to monitor employers effectively.

Given DOL's fiscal constraints, enforcement partnerships with state worker-protection agencies are particularly valuable. Federal investigators should inform state worker-protection agencies of their investigations and foster joint investigations to the fullest extent possible, especially when targeting multistate employers and when state labor standards are more stringent than federal ones.[64] DOL leaders must emphasize the Clinton-era practice of establishing enhanced partnerships with state agencies focusing on strategic initiatives.[65] Fostering these joint initiatives may be especially challenging in states with limited past experience in using strategic initiatives, but its important that DOL dedicate staff time and resources to foster these new relationships. In particular, DOL should consider partnering with state and federal agencies to prevent employee misclassification.

Failure 3: Targeted investigations have occurred infrequently and been poorly implemented

Geographic and sector-specific strategic initiatives are critical tools in changing employer behavior in industries with rampant worker abuse and areas where employers are skilled at avoiding detection. Instead of strategic enforcement, Bush's DOL has focused on reactive, complaint-driven wage-theft investigations and conducted poorly targeted worker-safety inspections. The Obama administration must continue to investigate worker complaints, but it must prioritize—and accurately target—its strategic initiatives. DOL can do so by adopting proven enforcement and publicity methods and incorporating compliance assistance into its strategy. This approach can produce widespread improvements in employer behavior across entire industry sectors and geographies.

Unfortunately, current enforcement protocols at WHD and OSHA are not adequately strategic and do not strive to create widespread changes in employer behavior.[66] Workplaces with the worst violations are often locations where workers are least empowered and the least likely to report problems—for example, youth or immigrant workers.[67] Thus, over reliance on complaint-driven investigations and inaccurate targeting methods place an unfair burden on workers.

Lack of strategic enforcement is particularly troubling at WHD. According to recent government reports, as many as 50 percent to 100 percent of garment, nursing home, and poultry employers are in violation of the basic minimum-wage and overtime protections.[68] Yet since President Bush has been in office, WHD has relied heavily on complaint-driven investigations and is plagued by weak inspection techniques. WHD investigators usually do not expand investigations of single-incident complaints to cover more onsite workers or workers at other locations of the same firm, even though there is an increased probability of finding multiple violations at these sites.

Moreover, staff frequently leave investigations into workers' complaints incomplete, and it is questionable whether current training properly prepares investigators for more targeted work. A July 2008 Government Accountability Office report found that WHD investigators are not effectively investigating complaints. It concluded that investigators regularly drop inquiries when they are unable to find addresses, reach employers after a few phone calls, or if an employer says they cannot afford to pay back wages.[69]

Complaint-driven investigations provide an important protection for individual workers, but as an internal DOL study confirmed, they are not effective in changing industry-wide behavior.[70] Reactive strategies are also ineffective at catching the most calculating violators, such as garment manufacturing sweatshops that often relocate to avoid detection.[71]

OSHA has a better track record than WHD on industry targeting but could still improve. OSHA developed the Site-Specific Targeting program in the mid-1990s to target high-risk industries based on data collected directly through employers.[72] The division also uses national and local emphasis programs to target specific hazards and high-violation industries. About half of all safety investigations currently target hazardous companies. Yet these targeting strategies simply continue Clinton-era policies, and a 2002 GAO study found that the division's efforts to target high-hazard workplaces have not significantly improved outcomes.[73] This is a long-term deficiency at the division, which is due in large part to poor collection methods.

OSHA made a small step in the right direction in 2003 by instituting the Enhanced Enforcement Program, which increases scrutiny of employers with particularly egregious, willful, or repeated violations that have demonstrated a disregard for past enforcement actions.[74] OSHA subjects these employers to increased on-site inspections and inspections at the firm's other facilities. Yet EEP has had a relatively limited effect. Few employers are subject to this program—it accounted for less than two percent of federal investiga-

Wage and Hour Division ignores important targeting data

WHD strategic enforcement is plagued with problems, including failure to implement its own recommendations and adequately use the data it has to target inspections. WHD commissioned a study on industry targeting in 2002 but still has not adopted its recommendations fully. The study identified 33 low-wage industries at high risk for violations. Yet regional offices are not required to target these industries, and many frontline investigators are not trained on the report's recommendations.[75] In the cases where regional investigators target specific industries, they often work from targeting recommendations developed in the 1990s.

WHD also collects—but doesn't use—important targeting data. For example, inspectors record enforcement actions on government contractors who violate prevailing wage laws. Although federal contracting more than doubled between 2000 and 2007 to more than $436 billion, WHD officials have not used this data to target industries and regions at risk for prevailing wage abuse.[76]

tions in 2007. And there are no provisions to increase penalties for serial violators, and only in limited situations does the investigation expand to an employer's other facilities.[77]

The Bush administration has focused on "business-friendly" compliance-assistance programs and educational outreach activities instead of emphasizing enforcement programs.[78] These voluntary programs are usually not coordinated with strategic initiatives—even though targeting high-risk industries should be a priority for both enforcement and compliance programs.

Opportunity 3

Target high-violation sectors with strategic initiatives

- Use data, investigator expertise, and community partners to determine strategic targets.
- Employ effective enforcement techniques to broaden the scope of both targeted and complaint-driven investigations.
- Work with the media to highlight strategic initiatives.
- Incorporate compliance assistance and educational outreach into strategic initiatives.

The Obama administration has the opportunity to refocus worker-protection enforcement efforts on the cases that will generate the greatest benefits for the most workers. Like Willie Horton, who robbed banks because that was where the money was, DOL needs to focus on sectors where violations are likely. Well-focused strategic initiatives can be strong tools in reducing widespread workplace abuses. Aggressive, data-driven investigations and effective investigatory techniques will send a signal to employers that DOL no longer tolerates the abuse of workers' rights.[79]

Use data, investigator expertise, and community partners to determine strategic targets

DOL can use existing data, investigator's experiences, field research, and community partners to target high-risk employers. Under the Bush administration, targeting research was underused and poorly conducted, potentially missing the worst offenders. New leadership will have to update targeting research. But before embarking on strategic initiatives, leadership must have a strong understanding of current compliance rates and industry conditions such as average firm size, employer sensitivity to public opinion, and hours of operation. In the Opportunity 4 section, we discuss how to improve worker protection data collection to better target high-risk employers who lack strong data collection methods.

Employ effective enforcement techniques to broaden the scope of both targeted and complaint-driven investigations

DOL inspectors can improve the efficacy of targeted investigations by adopting better enforcement techniques such as those proven under the Clinton administration and those employed by innovative state worker-protection agencies. These techniques should include

- Use workplace violations found at a single site of a multi-location employer to spur national investigations and follow-up efforts. Past violations at one site should be used to leverage increased responsiveness at all sites. Programs such as the Enhanced Enforcement Program to target repeat violators should be expanded and given more power to aggressively penalize flagrant lawbreakers.

- Send teams to conduct investigations unannounced, conducting geographically targeted sweeps concurrently, and avoiding identifiable patterns such as always appearing at the same time of the day or same time of the month.[80] Re-inspections of violating firms should always be unannounced.

- Use "rapid response teams" in targeted industries. Created during the Clinton era, these teams should be drawn on to quickly investigate employee complaints and focus on the most egregious violations or cases where the evidence or witnesses may disappear.[81]

It is important to note that complaint-driven investigations cannot end. In the case of WHD, basic investigation techniques for these cases must be improved: investigators must thoroughly research and record each complaint and perform "triage" to classify cases based on those most likely to uncover widespread abuse and need in-depth investigation. Investigators should conduct proactive, on-site inspections for cases at the top of the triage list rather than rely on brief telephone interviews to determine compliance.

Work with the media to highlight strategic initiatives

DOL enforcement leadership should work with the DOL Office of Public Affairs to coordinate a media outreach plan that will highlight high-profile cases within its strategic initiatives. Industry-wide compliance can be improved when employers recognize that they are the focus of a strategic enforcement initiative. Media attention will deter employers who are adverse to penalties and negative publicity from breaking the law, empower staff in their negotiations with other employers, and educate workers about their rights.[82]

Media and investigation strategies should be influenced by an industry's composition. In industries dominated by large employers, investigations and media outreach efforts should focus on key market players who have the power to impose company-wide

improvement and establish industry standards, while random investigations and high-profile investigations of the worst offenders can widely influence employer behavior in industries dominated by smaller employers.[83]

Incorporate compliance assistance and educational outreach into strategic initiatives

Compliance assistance and educational outreach should not be consigned to separate silos of each division's work plan. The Obama administration should incorporate education and compliance into each strategic initiative, along with targeted investigations and outreach to workers and community partners. Voluntary programs are often most effective after well-publicized enforcement cases catch the attention of the media and employers who would not otherwise take proactive steps to come into compliance.

The above recommendations are proven strategies employed by federal workplace investigators during the Clinton administration and innovative state enforcement agencies. New York State Commissioner of Labor Patricia Smith, for example, introduced investigation-driven enforcement in 2006 that systematically tracks, investigates, and prosecutes noncompliant employers in high-violation industries. These efforts have produced immediate results—investigator findings of minimum-wage violations increased by 37 percent in 2007.[84]

State and local innovations to protect workers' rights

While the Bush administration was missing in action on enforcing worker-protection laws, several states have been aggressively pursuing scofflaw employers. States lose billions of dollars in revenue annually to employer wage theft and often face the same challenges as the federal government in confronting hazardous workplaces. Across the country, state and municipal worker-protection agencies are using cross-agency and community partnerships, targeting high-risk industries, stepping up efforts to protect immigrant workers, and increasing employer penalties to more efficiently catch lawbreakers.

New York

Under the leadership of former Governor Eliot Spitzer, Governor David Paterson, and State Commissioner of Labor Patricia Smith, New York is taking strides to improve working conditions in low-wage industries. Commissioner Smith has used executive orders, department enforcement powers, and the bully pulpit to create a Joint Enforcement Task Force on Employee Misclassification and a new Bureau of Immigrant Workers' Rights; redirect the Fair Wages Task Force to focus on action-oriented enforcement initiatives with a newly created Task Force Director of Strategic Enforcement position; and lead a minimum-wage public awareness campaign. These efforts rely on partnerships with community organizations, other state agencies, and the media.

Within this structure, the New York State Department of Labor has targeted high-violation industries and regions and conducted well-publicized same-day sweeps of high-risk firms.[85] The agency is able to accurately target its strategic initiatives and measure programmatic success by conducting extensive compliance surveys.[86] Smith has also prioritized outreach to immigrant workers by creating a mobile "labor-on-wheels" van to target workers during community events and establishing temporary bilingual labor offices in trusted community organizations.

Smith has also focused on penalty collections—pursuing lawbreakers who do not pay fines and going after individual owners when corporate ownership entities dissolve—while prioritizing repayment of back wages. These efforts have sent a high-profile message that employee abuse will not be tolerated. As a result of this improved targeting and enforcement, the New York DOL found 37 percent more minimum-wage violations in 2007 that it did in 2006.

California

California is also using cross-agency collaboration to detect worker abuse. Five worker-protection agencies teamed up in 2005 to create the Economic & Employment Enforcement Coalition to enforce wage and safety regulations in targeted low-wage industries.[87] The coalition has prioritized immigrant outreach, and over half of its investigators are bilingual. Identified unreported wages climbed by nearly 430 percent in its first two years of operation, and collected back wages rose by over 140 percent.[88]

California illustrates the fact that the administration must prioritize aggressive enforcement in order for progressive policies to be effective. California is one of 21 states that administers its own OSH program, and has led the nation in establishing workplace safety regulations. Yet it does not consistently enforce these regulations. It was the first state to regulate ergonomic hazards and has additional standards to limit heat-related illnesses and exposure to toxic chemicals, but decreased staffing has caused total annual safety inspections to fall by 35 percent between 1992 and 2005.[89]

Maryland

Maryland is in a rebuilding stage after the previous administration gutted enforcement of worker protection laws by eliminating staffing for the state wage and hour enforcement unit in 2005. Governor Martin O'Malley and the new Department of Labor, Licensing, and Regulation Secretary Thomas Perez embarked on an effort to rebuild Maryland's wage-theft enforcement in 2007. The state legislature included funding for wage-theft investigators in the 2006 budget, but O'Malley's efforts represent a new emphasis on enforcement.

Back-wage collections more than doubled between fiscal years 2007 and 2008, and Secretary Perez is now leading efforts to target employer misclassification. DLLR has signed agreements with other agencies and between units within the department to share information on suspected violators and collaborate on enforcement efforts. Proposed legislation, introduced at the agency's request last session, would have prohibited employers from misclassifying workers and created penalties for lawbreaking employers.[90] Perez has formed a working group of government, labor, and industry representatives to build support for the issue and consensus around new legislation tackling employer misclassification.

Other States and Cities

Michigan, Massachusetts, and New Jersey created joint task forces this year on employee misclassification similar to the partnerships underway in New York and Maryland.

Several other states and cities, many with minimum wages higher than federally mandated, have enacted penalty-enhancement laws for employers violating worker protections over the last few years. Arizona, Ohio, and Massachusetts have all passed laws and ballot initiatives since 2007 that allow triple damages against employers that violate state wage laws. The Los Angeles Contractor Ordinance and San Francisco's minimum-wage law authorize city agencies to revoke contracts with employers who violate wage laws.[91] Illinois, Kansas, and New Jersey have implemented laws penalizing employer misclassification. And Colorado and Virginia enacted laws in 2006 and 2007, respectively, to penalize employers who coerce undocumented immigrant workers by threatening to report their immigrant status.

Failure 4: Record keeping is inadequate and uncoordinated

The Obama administration has the opportunity to create a system of data-driven enforcement at DOL. Accurate, high-violation industry targeting is virtually impossible without strong data collection. Comprehensive data collection will allow the agency to improve public accountability, evaluate past performance, and plan for future operations.[92]

The Bush administration squandered opportunities to improve data collection. Important workplace data has gone unrecorded or been underutilized, making strategic targeting and performance evaluations inaccurate and cross-division information sharing difficult. Limited online availability of enforcement data weakens the agencies' accountability to the public. The Obama administration must use data-driven enforcement as a critical first step in improving department-wide enforcement.

Worker-protection programs at Bush's DOL do not adequately collect or disseminate comprehensive data on workplace violations. Enforcement data are not shared across divisions even though there is an increased probability of multiple violations when one violation is found.

Record keeping at WHD is in particular disarray. Investigators do not have a consistent process for documenting initial workplace complaints, and even those with actions taken are not always logged in the division's database.[93] Moreover, the division does not track important indicators of high-risk employers such as every instance of willful or repeated violations and misclassification of employees as independent contractors.[94] Many complaints hit their statute of limitations before an investigation occurs, but the division does not track the backlog of cases.[95] WHD is therefore unable to use records to target potential violators, lacks a clear assessment of how many violations are going unaddressed, and cannot use case backlogs to plan for future staffing allocations.

Constantly changing performance indicators also make it impossible for WHD to measure long-term progress. Over the last 10 years, WHD included an unwieldy 130 performance measures in its plans, but most indicators were used only briefly. Only 10 percent of the performance indicators were kept for more than two years.[96]

OSHA has meanwhile used inaccurate data to guide strategic initiatives. A 2002 GAO report found that OSHA inspectors were unable to conduct their probes or did not find

any serious violations at about 50 percent of targeted worksites.[97] Their results were hampered by reliance on weak data collected through an employer survey conducted over a single year. For instance, OSHA relied on data with very little information on small employers in an effort to target the construction industry, even though industry experts agree that small construction firms are at greater risk for workplace hazards.[98]

OSHA bases its targeting system on employer self-reporting, which gives employers an incentive to cheat on their industry and illness reporting and reduces the chance that they will be inspected.[99] Numerous studies have shown that employer reporting is unreliable; government counts underestimate occupational injury and illness by as much as 69 percent.[100] OSHA has also failed to actively discourage safety-reward programs and employer intimidation that pressure employees to not report injuries to supervisors in the first place. Even though employer reporting of workplace injuries and illnesses is unreliable, OSHA and MSHA rely on these statistics as evidence that their policies are working.[101]

The Bush administration has shown little interest in technological advances or predictive indicators of workplace hazards that would allow inspectors to intervene before worker injury and illnesses occur and decrease reliance on employer reporting. MSHA has not yet adopted a new air quality monitoring device, for example, that is small enough to be attached to a coal miner's cap light. The device would continuously monitor coal dust levels, which causes black lung and other respiratory problems. Use of this devise would circumvent problems with employer reporting.[102]

Using data to conceal workplace dangers

Ergonomic injuries—caused by repetitive motion, lifting, and awkward positions—are some of the most critical safety issues confronting the American workplace. Nearly 1 million workers took time off work due to ergonomic injuries in 1999, costing between $45 billion and $54 billion annually in compensation expenditures, lost wages, and lost productivity.[103]

The Clinton administration issued an ergonomics standard that would have required employers to establish meaningful ergonomics standards—producing $9.1 billion in annual benefits and preventing an estimated 460,000 injuries annually—but the Bush administration repealed these rules.[104] The administration released a feeble voluntary initiative in their place. The Bush administration also removed the requirement for employers to identify which injuries were caused by ergonomic hazards on the OSHA Log of Injuries and Illnesses. The Obama administration should make it a priority to instate strong ergonomics standards and reporting requirements.

Bush's DOL has decreased important reporting requirements for employers that would identify certain workplace injuries in company injury and illness logs. And during his last days in office, DOL has proposed a rule that would handicap WHD inspectors' ability to monitor contractors on federal construction projects for employee wage theft by repealing the requirement that these contractors submit weekly payroll statements.[105]

Online access to enforcement data is also an important step toward increasing public accountability. Often the public can shine light on practices that are unacceptable and get them changed, and the public's ability to do so can sometimes limit abuses in the first place. Company-specific data on violations and comprehensive enforcement statistics are both valuable public reporting measures. Yet there is little consistency in DOL's online reporting: MSHA discloses both company-specific and comprehensive data online, OSHA discloses company-specific data online but limited comprehensive enforcement data, and WHD discloses limited comprehensive enforcement statistics and no company-specific data.

Opportunity 4

Use thorough record keeping to drive enforcement priorities, enhance public accountability, and improve performance evaluation

- Improve the breadth and accuracy of data collected.
- Manage data to drive strategic initiatives, improve cross-division coordination, and conduct performance evaluations.
- Boost public accountability by making enforcement data available online.

The Obama administration must do a better job collecting and using enforcement data. Improved collection will allow data to drive enforcement priorities, improve public accountability, conduct performance evaluations, and plan for future operations.[106]

Improve the breadth and accuracy of data collected

Data collection at DOL is in a sorry state. DOL must work to improve the breadth of data that is collected and use innovative collection methods to improve the accuracy of the data.

Simply recording important details of each enforcement case is an important first step in improving data management. DOL can improve recordkeeping by

- Recording all complaints reported to WHD
- Tracking employers at high-risk for another offense by documenting every instance of repeat and willful violations, whether penalties were assessed for these violations, and employee misclassification as independent contractors at WHD
- Reinstituting the rule that employers identify ergonomic injuries in the OSHA Log of Injuries and Illnesses
- Working with Congress to repeal or disapprove the rule, if finalized, to eliminate federal construction contractors' weekly payroll reporting requirement and thereby handicap inspectors' ability to monitor contractors for wage theft violations

DOL leadership should also look for innovative data collection methods that avoid the bias and inaccuracy associated with reliance on employer reporting. DOL should work with industry experts and the National Institute for Occupational Safety and Health and the Bureau of Labor Statistics to research predictive indicators of workplace risks in targeted industries, rather than focusing solely on employer-reported injuries. For example, adopting technology such as the air quality monitors on miners' hats would allow worker-safety divisions to continuously monitor compliance without have to rely on unreliable employer reporting.

Manage data to drive strategic initiatives, improve cross-division coordination, and conduct performance evaluations

Once data collection is improved, DOL can harness this information to more accurately target strategic initiatives, improve cross-division coordination, and conduct performance evaluations.

The Obama administration should develop up-to-date industry-compliance analyses to drive its new strategic initiatives rather than rely on inaccurate targeting information, and these compliance baselines should be established through statistically valid, investigation-based surveys.[107] Subsequent compliance surveys can expose changes in employer behavior and be used to determine the effectiveness of intervening DOL strategies. WHD implemented compliance surveys for every strategic initiative it undertook under the Clinton administration. As part of an initiative to target the poultry industry, the Clinton administration surveyed employer compliance with minimum-wage and overtime laws for chicken catchers. By calculating a compliance baseline, it was able to report a 16 percent improvement in wage and overtime compliance for chicken catchers over three years.[108]

DOL must also recognize that there is an increased probability of multiple violations when one violation is found and use data to improve cross-division coordination. This can

be accomplished by creating unique identification numbers for every employer. Such a coding system can be instituted quickly and will allow investigators to efficiently track past violations across divisions.[109] In the long term, the agency should work toward establishing a single database that tracks all worker-protection law violations. The agency must also do a better job of systematically informing other departments of their investigations, such as the Internal Revenue Service in cases of employee misclassification.

Data should be used to drive division-level performance evaluation and planning. Any division cannot accurately plan for funding and staffing needs if records of how many complaints go unanswered are woefully incomplete.[110] This has been particularly problematic at WHD. Building on improved data collection, WHD should establish and consistently maintain reporting on performance measures.[111] Consistent performance measures will allow the agency to identify and expand best practices over time while eliminating programs that do not work.

Boost public accountability by making enforcement data available online

Data can be used to improve public accountability by making both company-specific data and comprehensive enforcement data available online. Reporting on specific companies allows the public and victims to track enforcement results, exert pressure on specific scofflaw employers, and hold DOL accountable when complaints are not adequately investigated.[112] Comprehensive reporting lets the public know whether the agency is focusing efforts on specific industries, increasing enforcement actions, and improving overall compliance.

There is currently little consistency in the division-level data provided to the public. MSHA posts both company-specific data and highly detailed comprehensive reporting online, including company-specific details on inspections, accidents, and violations, and comprehensive reporting—in some cases going back to 1931—on total mine fatalities, injuries, and penalties assessed and contested. OSHA posts company-specific data online, including details on accident type, violations, Standard Industrial Classification codes, and completed inspections, but provides limited comprehensive reporting. WHD offers some comprehensive statistics on enforcement capabilities since 2002, including total back wages collected, number of workers receiving back wages, number of complaints and cases concluded, and low-wage industry breakdowns, but no company-specific data.

Company-specific data for all divisions should be freely available online. Each division will have unique records with slightly different data, but every agency should post information that includes the company name, its unique identification number (same across all divisions), the violation type, wages owed and collected (if applicable), penalties owed and collected, injury and fatality details (if applicable), type of inspection (targeted or complaint-driven), complaint and completion dates, and the results of follow-up investiga-

tions. Only truly confidential information should be kept from the public. And once DOL develops a cross-division enforcement database that combines the information from all its agencies and divisions, it should be made available online.

Comprehensive reports are equally important. Again, while each division will have specific data requirements, these reports should include the number of new complaints and targeted investigations, the number of complaints and targeted investigations resolved, the number of violations by type and industry classification, wages owed and collected (if applicable), penalties owed and collected, injuries and fatalities found (if applicable), average time between case initiation and completion, results of follow-up investigations, and the number of findings of repeated and willful violations.

Simultaneously improved data collection, management, and dissemination can, in this way, improve enforcement capacity, performance evaluation, and public accountability.

Failure 5: Illegal treatment of immigrant workers has harmed all workers

Worker-protection programs should focus specifically on decreasing illegal workplace abuse of immigrant workers. Lawbreaking employers have driven down wages and safety standards in industries with high concentrations of immigrant workers. All American workers will benefit from improving the working conditions of immigrant workers.

Federal laws and regulations are clear that all workers are protected under wage-theft and worker-safety laws, regardless of their immigration status. Yet under Bush's watch, both legal and undocumented immigrant workers' rights have been frequently ignored. Immigrant workers face a higher risk of wage theft and safety hazards on the job and are less likely to report abuse, fearing employer retribution. The Bush administration has appeared to validate these fears through policies that target undocumented immigrants in their workplaces and leave investigators ill-equipped to handle immigrant complaints. The Obama administration must decrease reporting barriers for all immigrants by renewing its commitment to treat all workers equally, increase outreach to trusted community organizations, and improve worker outreach in languages other than English.

Immigrants are often at higher risk for wage and safety violations because they are more willing to accept dangerous jobs with low wages and few benefits. And both documented and undocumented immigrant workers are less likely than native-born workers to report workplace violations.[113] Immigrants arriving in the United States legally through guest worker programs often leverage future wages—often borrowing thousands of dollars—to pay "job recruiters" for passage to their worksite.[114] These workers are frequently forced to work in sweatshop conditions, but they may not report violations for fear of falling into arrears with the job recruiter. Job recruiters are even known to making threats against workers' families if payments are missed. Undocumented immigrants often fear that workplace investigators or employers seeking retribution will reveal their undocumented status to immigration officials.

When scofflaw employers are allowed to abuse their immigrant employees in this way, American-born workers also suffer. Wages and working conditions in industries with high immigrant populations are artificially depressed. This depression occurs even in federally sanctioned guest worker programs.

While immigrants face high rates of abuse on the job and often fear reporting abuse to DOL officials, federal regulations are clear that DOL will not report undocumented immigrants who complain of worker-protection violations to immigration agents. DOL entered into

a memorandum of understanding with Immigration and Naturalization Services—now Immigration and Customs Enforcement—in 1998. The agreement established that DOL would not report the undocumented status of workers if discovered during an investigation of a labor dispute, nor inquire into a worker's immigration status while conducting a complaint-driven investigation.[115] Moreover, section 11C of the Occupational Safety and Health Act protects all workers from retaliation if they seek safe and healthful working conditions.[116]

Yet Bush's DOL has not uniformly enforced this policy and is not effectively communicating agency "blindness" on immigration status to affected communities. The administration has increasingly allowed immigration agents to target undocumented immigrants in their workplaces, while ignoring wage theft and safety violations occurring at those very workplaces. This has allowed scofflaw employers to use immigration-raid threats as a way of controlling their workers. For example, a 2007 immigration raid was conducted in Tar Heel, North Carolina, with the employer's cooperation following a union-organized walkout of hundreds of workers. This illustrates how employers facing labor disputes can use ICE to rid themselves of workers who complain.[117]

Weak agency leadership infringes on the rights of legal immigrant workers, yet DOL refuses to enforce prevailing wage requirements for guest workers arriving through the nonagricultural work H-2B visas because they are not enumerated through administrative rules.[118] The H2-B guest worker program was created over 20 years ago through an admin-

The effect of lax workplace enforcement on Latino workers

Latinos make up the largest portion—50 percent—of the foreign-born workforce and are too frequently exposed to unsafe workplace conditions. Of the foreign-born workers who were fatally injured in 2005, 62 percent were Hispanic or Latino.[119] And occupational fatalities for Latino workers are increasing. The number of fatalities among Latino workers has risen 86 percent since data were first collected by the Bureau of Labor Statistics' Census of Fatal Occupational Injuries, increasing from 533 fatalities in 1992 to an all-time high of 990 fatalities in 2006.[120]

Much of the increase in fatalities can be attributed to the rapid expansion of the Latino population in the United States. Yet Latino immigrants often take dangerous jobs, face language barriers, or fear employer retribution, which inhibits them from reporting unsafe working conditions. When the death toll of Latino workers on the job reached 990 in 2006, the fatality rate was 25 percent higher among Latino workers than white workers.[121] The Obama administration must prioritize outreach to Latino workers.

istrative directive and enumerated in an internal DOL memo, but procedures governing certification were never established by regulation.

Immigration experts believe that DOL could enforce prevailing wage requirements on H2-B visas even though there are no promulgated rules governing the program.[122] Unfortunately, Bush's DOL has also recently proposed a rule that would further weaken the existing H2-B worker protections and eliminate DOL monitoring of the H2-B employer certification process. This includes eliminating agency certification that no qualified U.S. workers are available and that guest workers would not adversely affect the wages of similarly employed resident workers.[123]

Even when immigrants attempt to report violations, Bush's DOL has not been prepared to receive their complaints. Outreach efforts geared toward immigrants often appear to be image- rather than results-driven. When OSHA announced an initiative to address the increased safety and health risks of immigrant and Hispanic workers in 2002, the Bush administration concurrently proposed terminating funding for worker training and outreach programs, many of which are targeted to high-risk workers such as immigrants.[124]

Even when immigrant workers connect with investigators, too few agency investigators are bilingual. Only 14 percent of OSHA's federal safety and health officers speak Spanish.[125] WHD has a significant number of bilingual inspectors (46 percent), but a recent GAO report found that WHD's bilingual wage-theft hotlines set up with partner organizations often went unanswered, or when answered, phone attendants were unable to refer callers to the proper agencies.[126]

Opportunity 5

Strengthen immigrant protections to improve job quality for all workers

- Strengthen ties with community organizations trusted by the immigrant community.
- Recommit to enforcing workplace protections for all workers, regardless of immigration status.
- Improve training, outreach materials, and interpreter services in key languages, especially Spanish.

The Obama administration must strive to rebuild trust within immigrant communities by strengthening its ties to organizations trusted by immigrant workers, renewing its commitment to enforce workplace protections for all workers, and improving its outreach to non-English speaking workers.

Strengthen ties with community organizations trusted by the immigrant community

Community organizations can serve as an intermediary with immigrant workers distrustful of labor investigators, as discussed in Opportunity 2. Workers centers and immigrant advocacy groups trusted by disempowered workers can encourage abused workers leery of interacting with the federal government to report workplace violations. Overtime, these partnerships will also strengthen DOL's reputation among immigrant workers as a trustworthy advocate.

Recommit to enforcing workplace protections for all workers, regardless of immigration status

DOL must take a hard stance on enforcing workplace protections for all workers, regardless of immigration status. Under the Bush administration, immigrant workers were justifiably fearful that reporting workplace abuses could lead to employer retaliation and potentially deportation. DOL must publish a renewed memorandum of understanding with ICE clarifying that DOL does not enforce immigration law or screen claimants by immigrant status. DOL should also use formal statements and educational outreach to publicize that enforcement staff are blind to immigration status.[127]

DOL must partner with ICE to ensure its immigration enforcement actions do not weaken DOL's trust within immigrant communities. Employers should not be permitted to use immigration raids to retaliate against workers who attempt to organize or fight for improved workplace protections.

DOL must also enforce prevailing wage requirements for all workers who are here on guest worker visas and bar employers who abuse guest workers from participating in these visa programs. DOL must codify the H2-B visa program into administrative rule, and if Bush's proposed rule to weaken existing H2-B worker protections is finalized, DOL should work with Congress through congressional review or rulemaking procedures to prevent its ill effects. DOL should create a process to deny certification—required for participation in the guest worker programs—to employers with a record of knowingly and repeatedly violating the rights of their employees.[128]

Improve training, outreach materials, and events and interpreter services in key languages, especially Spanish

DOL must improve outreach to immigrant workers who often do not know their rights. This will require both increasing services in key languages and tailoring education and events to specifically fit immigrant needs. Key languages for training and translation

should be determined at the district level with staff conducting analysis based on census data and area partners.[129] In areas with insufficient on-staff translators, the agency should partner with community partners and multilingual staff in other regional offices for translation services. DOL should especially focus on increasing language capabilities in Spanish given the high number of Latino workers.

DOL outreach strategies must include appearances at trusted community organizations and popular events. DOL must also work with the Office of Public Affairs to reach out to specialty media—including print, television, and radio—that serve speakers of languages other than English in order to reach the widest possible audience. The New York State Department of Labor has used a mobile "Labor-on-Wheels" program and temporary bilingual offices located at community organizations throughout the city to reach immigrants at alternative locations during evening and weekend hours when most workers are available.[130]

Conclusion

The Obama administration will have the opportunity to restructure enforcement strategies at DOL. This will require substantial work for agency leadership, but provides the opportunity to greatly improve workplace protections for all workers. Efforts must be centered on changing the culture of the workplace enforcement agencies. The agencies must embrace a culture of accountability that measures success in terms of improving work conditions nationwide rather than accepting inadequate, reactive enforcement efforts. This will require massive staff buy-in from the top down as well as adoption of many new procedures.

Many of these changes will not be simple, but the Obama administration can begin affecting new enforcement strategies immediately without protracted legislative debates. Congress must pass laws to increase staffing and penalties and support the Obama administration's enforcement agenda. New agency leaders can look to innovative state programs as well as practices adopted under the Clinton administration for guidance on how to adopt many of these changes.

It is time we had a federal administration that values a fair playing field where workers' rights are not ignored, where businesses that play by the rules don't have to compete with companies that cut costs by shortchanging workplace standards, and where taxpayers are not left with the bill when scofflaw employers don't pay into workers compensation and unemployment insurance. This report has laid out concrete, achievable steps for refocusing DOL workplace enforcement programs; now it is up to the Obama administration to set these recommendations into motion.

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65 Employment Standards Administration, "1999–2000 Report on Initiatives."

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89 Brown, "The Two Faces of Cal/OSHA." States that choose to administer their own program receive 50 percent matching funds from the federal government.

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92 Esty and Rushing, "Governing by the Numbers."

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94 DOL only records repeated and willful violations when a penalty is assessed. If no penalty is assessed, the fact that it is a repeated or willful violation will go unrecorded.

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96 Ibid.

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