
**AN OVERVIEW OF STATE ATTORNEY
GENERAL LABOR JURISDICTION**



An Educational Resource on the Office of State Attorney General

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I. INTRODUCTION

The constitutions of 44 states contain provisions establishing the office of the attorney general.¹ The power of state attorneys general to enforce state laws and defend both the state and federal constitutions is typically derived from some combination of state constitution, common law and state statutes.

Using their authority, state attorneys general have, in many cases, played an affirmative role in protecting workplace rights. By using a cross-section of states, this memorandum highlights the various ways state attorneys general exercise jurisdiction to protect workers and enforce labor laws. It provides a brief background on the legal landscape in relation to labor issues, a summary of ways in which attorneys general exercise jurisdiction to enforce labor laws, and a discussion of additional approaches that have enabled attorneys general to protect workers within their jurisdictions.

The information contained in this memorandum has been compiled from various publicly available resources and does not present a comprehensive review of all current state labor enforcement jurisdiction, activity, or case law in all states. In light of often-rapid changes to statutory law, legal precedent, and other new developments, the authors invite state enforcement officials and other experts to provide recent updates to state laws that may impact this overview. Information may be sent via info@stateag.org.

II. BACKGROUND

Low-wage and other workers face ongoing problems of wage theft, retaliation, and unsafe working conditions, as well as new developments such as inconsistent scheduling, worker misclassification, and degraded standards in the gig economy. These challenges exist in the context of declining private sector union density (less than 7% in 2015) and what Professor David Weil has described as the “fissuring” of the workplace, in which companies subcontract out, franchise, or otherwise shed their employer obligations.² A seminal 2009 study of low-wage workers in New York, Chicago, and Los Angeles found that two-thirds of the sampled workers experienced at least one pay-related violation in the prior workweek, leading to an estimated loss of \$2,634 out of \$17,616 in total annual earnings,³ and similar trends have been found outside of major cities.⁴

In the midst of these trends, the federal government has already begun a hasty retreat from the prior administration’s strong protection of the nation’s workers. In addition to

¹ STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers National Association of Attorneys General ed., 2013) (hereinafter “POWERS AND RESPONSIBILITIES”).

² See DAVID WEIL, THE FISSURED WORKPLACE (Harvard University Press 2014).

³ Bernhardt, Annette, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller, *Broken Laws, Unprotected Workers: Violations of employment and Labor Laws in America’s Cities*, National Employment Law Project (2009):

<http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>

⁴ Colin Gordon, Matthew Glasson, Jennifer Sherer and Robin Clark-Bennett, *Wage Theft in Iowa*, The Iowa Policy Project (August 2012): <http://www.iowapolicyproject.org/2012docs/120827-wagetheft.pdf>

well-publicized policy rollbacks, the president has also proposed budget cuts to the United States Department of Labor's (USDOL) funding by 21%.⁵ And USDOL's enforcement of labor laws will certainly diminish sharply, in light of the administration's aversion to regulations and its general business-friendly posture.

This vacuum at the federal level will be damaging to workers, the public fisc, and law-abiding employers who struggle to compete with violators. However, with proper planning and resources, state attorneys general can fill this void and play a critical role in protecting workers in the coming years.

III. AG LABOR JURISDICTION⁶

State attorneys general exercise varying degrees of civil and criminal jurisdiction in the area of labor law enforcement. For example,

- Some state attorneys general are granted explicit civil or criminal enforcement jurisdiction;
- Others may bring labor-related cases under their broad authority to bring civil actions protecting the general public;
- Some have addressed labor violations by using their jurisdiction to enforce other civil laws such as those pertaining to civil rights, consumer fraud, unfair business competition, or false claims act statutes;

Many state attorneys general may file lawsuits or conduct criminal prosecutions upon referral from the state agency or agencies that are the primary labor law regulators, such as labor departments or workers' compensation agencies. The referral arrangement may vary by state, but generally provides that the agency, upon concluding that a particular company/employer is in violation of state labor law, refers the matter to the attorney general to initiate enforcement proceedings.

⁵ See Gregor Aisch and Alicia Parlapiano, *Trump's Budget Cuts Some Agencies to Their Lowest Levels in Decades*, N.Y. TIMES, March 16, 2017, available at:

<https://www.nytimes.com/interactive/2017/03/16/us/politics/trump-budget-cuts.html>

⁶ For a comprehensive review, see, Peter Romer-Friedman, Note, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage And Hour Laws To Protect America's Most Vulnerable Workers*, 39 COLUM. J. L. SOC. PROB. 495 (2006). See also, Jennifer Brand, *Adding Labor to the Docket: The Role of State Attorneys General in the Enforcement of Labor Laws*, National State Attorneys General Program at Columbia Law School (Feb. 2007) available at:

<http://www.law.columbia.edu/sites/default/files/microsites/career-services/THE%20ROLE%20OF%20STATE%20ATTORNEYS%20GENERAL%20IN%20THE.pdf>

A. Civil Jurisdiction

1. *Specific Statutory Authority*

Some state attorneys general have specific statutory jurisdiction to enforce labor laws through civil actions. The specific arrangements vary from state to state and from issue to issue.

The **Massachusetts** Attorney General has sole authority to enforce the Commonwealth's wage and hour laws. The office's Fair Labor Division, which contains investigators and attorneys, has both civil and criminal jurisdiction. The Division has express statutory authority to enforce laws and regulations pertaining to prevailing wage, minimum wage, payment of wages, overtime, retaliation, misclassifying workers, tip pooling and child labor.⁷ It has the power to investigate work sites, issue civil citations, and bring criminal charges where appropriate.

In the context of minimum wage enforcement, **Ohio** and **Florida** have enshrined minimum wage laws through constitutional amendments that grant enforcement authority to the state attorney general.⁸

2. *Broad Authority to Protect the Public Interest and Case Referrals from State Agencies*

State attorneys general may also exercise labor law enforcement authority under more broadly worded state statutes detailing the powers and duties of the attorney general to protect the public interest. More commonly, however, state labor agencies, through varying arrangements, refer cases to their attorney general for enforcement.

The exercise of these two types of jurisdiction is very different. To use its broad statutory authority, an office must make an affirmative decision to address a harm being inflicted on members of the public. On the other hand, taking enforcement action upon agency referral is a more traditional and often more reactive role, which typically relies upon state agencies to identify the problem and initiate the case. Despite these important distinctions, the same statute typically provides the basis for both types of authority. Moreover, if the state labor department is willing to collaborate with the attorney general's office, effective work-sharing and cooperation frameworks can be developed.

The **Delaware** Attorney General has authority to represent all state agencies in court proceedings brought on behalf of or against them and "to investigate matters involving

⁷ *Id.* Mass. Gen. Laws Ann. ch. 149, § 27C: *See*, Massachusetts Attorney General's Website "Enforcement Authority": <http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/enforcement-authority/> (last visited April 7, 2017).

⁸ FLA. CONST. art. X, § 24(e) (The state attorney general or other official designated by the state legislature may also bring a civil action to enforce this amendment."); OHIO CONST. art. II, Section 34a ("An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction.")

the public peace, safety and justice and to subpoena witnesses and evidence in connection therewith.”⁹ As part of the office’s general enforcement/investigatory authority, the Attorney General “[...]may administer oaths and affirmations to any person, including witnesses, at any time or in any place and may issue process to compel the attendance of persons, witnesses and evidence at the office of the Attorney General or at such other place as designated.”¹⁰

The Attorney General for the **District of Columbia** controls all litigation and appeals by the District, is “responsible for upholding the public interest” and has the power to intervene in legal proceedings on behalf of this public interest.¹¹ Although the primary regulator of the labor laws in the District is the Department of Employment Services, the labor law clearly contemplates meaningful involvement by the Attorney General. For example, the law prohibits retaliation against workers for complaining to the Attorney General, among others, about wage violations.¹²

Under **Indiana** law, the Commissioner of Labor may refer various matters to the Indiana Attorney General’s office for enforcement.¹³ In 2015, Indiana’s Attorney General brought a civil lawsuit, upon referral from its state labor agency, against a trucking company for wrongful termination and retaliation after a whistleblower reported workplace violence, in violation of Indiana’s Occupational Safety and Health Act.¹⁴

Under **Maryland** Law, the Commissioner of Labor, Licensing and Regulation may refer matters to the Attorney General for enforcement of the Equal Pay Act¹⁵ the Wage and Hour Law¹⁶ and the state’s Occupational Safety and Health Act,¹⁷ among others. When conducting an investigation for wage-violations, the Commissioner must seek the approval of the Attorney General before issuing a subpoena.¹⁸

Under **Michigan** statute, the Attorney General is provided broad authority to represent the public interest both in initiating and intervening in lawsuits.¹⁹ As Michigan’s Supreme Court noted, “[i]n sum, the Attorney General has the authority to bring actions involving matters of state interest, and the courts should accord substantial deference to the Attorney General’s decision that a matter constitutes a state interest.”²⁰

⁹ 29 Del. C. § 2504

¹⁰ *Id.* § 2508

¹¹ D.C. Code Ann. § 1-301.81 (West)

¹² *Id.* §§ 32-1010(a)(3)(A),(C)

¹³ *See, e.g.*, Ind. Code §§ 22-2-9-4(a)-(b)(Commissioner can refer wage claims to the Attorney General).

¹⁴ Taya Flores, *Indiana backs threatened woman with whistleblower suit*, INDY STAR, Jul. 15, 2015, available at: <http://www.indystar.com/story/news/crime/2015/07/15/indiana-backs-threatened-woman-whistle-blower-suit/30177531/>

¹⁵ Md. Code Ann., Lab. & Empl. § 3-306.1

¹⁶ *Id.* § 3-507

¹⁷ *Id.* § 5-207

¹⁸ *Id.* § 3-408

¹⁹ Mich. Comp. Laws Ann. § 14.28 (West 2017).

²⁰ *In re Certified Question from U.S. Dist. Court for E. Dist. of Michigan*, 465 Mich. 537, 547 (2002).

North Carolina's Attorney General, in addition to representing state agencies, may

[...] intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.²¹

In addition, the Attorney General must be furnished with all copies of pleadings before state agencies for which the outcome will “affect a substantial number of residents” of the state, and may intervene in such proceedings on behalf of the public when he/she deems it advisable in the public interest.²²

The **New Mexico** Attorney General may pursue litigation to enforce the New Mexico Minimum Wage Act (MWA)²³ pursuant to the Attorney General's broad authority to “prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action[.]”²⁴ Although the New Mexico Attorney General has no common law powers²⁵, the New Mexico Supreme Court has recognized that the language of § 8-5-2 allows the Attorney General the discretion to pursue cases on behalf of the public interest.²⁶

New York Law confers upon the Attorney General the power to investigate and bring actions to address “repeated fraudulent or illegal acts” or “persistent fraud or illegality,” including violations of federal, state, and local laws.²⁷ The office has used this jurisdiction extensively over the past two decades, with a fully staffed labor bureau that routinely investigates and brings actions regarding labor law violations.

Under **Pennsylvania's** scheme, the Attorney General represents the Commonwealth and all Commonwealth agencies in any action brought by or against the Commonwealth or its agencies.²⁸ The Secretary of Labor has overall authority to enforce minimum wage, wage

²¹ N.C. Gen. Stat. § 114-2(8)(a).

²² *Id.* § 114-2(8)(b).

²³ N. M. Stat. Ann. 1978, Ch. 50, Art. 4

²⁴ N.M. Stat. Ann. § 8-5-2 “Duties of the Attorney General”

²⁵ *State v. Block*, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940, 945 (“In New Mexico, the attorney general has no common law powers; instead, his/her duties are determined entirely by statute.”)

²⁶ *State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 636 P.2d 279, 281 (N.M. 1981)

(“The language of the statute grants the attorney general discretion in determining when the public interest requires him to bring a civil action on behalf of the state.”)

²⁷ Executive Law § 63(12)

²⁸ 71 P.S. § 732-204 (c).

payment, and other labor standards laws, and under Pennsylvania statute, the Attorney General has broad discretion to intervene in actions generally.²⁹

In **Virginia**, the Attorney General may authorize an employee of his office to represent a state agency in administrative proceedings (in addition to court proceedings), if the Attorney General and the state agency determine it is in the best interests of the Commonwealth to do so.³⁰

Under current **Wisconsin** law, the Department of Workforce Development administers laws relating to wage claims, receives and investigates complaints from workers, and can refer cases to the Wisconsin Department of Justice (DOJ)³¹ for enforcement.³² For example, the state's plant closing law requires employers of a certain size to provide set advance notice prior to shutdowns that impact a threshold number of employees.³³ If the Department of Workforce Development cannot recover payment of certain wages owed within a prescribed timeframe after receiving notice of the closure, the Department is required to refer the case to the Wisconsin Department of Justice. Under this arrangement, the Wisconsin DOJ has successfully pursued several cases to recover back wages for employees.³⁴

3. *State Consumer Protection and Civil Rights Statutes*

In recent years, state attorneys general have also relied on Unfair Competition Laws ("UCL") or Unfair, Deceptive Acts and Practices statutes to bring labor enforcement actions.

The **California** Attorney General's Underground Economy Unit has filed cases under the state's Unfair Competition Law ("UCL"), which grants specific enforcement authority to the Attorney General. Unlike many other state unfair competition statutes, the California statute includes a provision that makes any "unlawful" act performed in the course of business an act of "unfair competition."³⁵ This general language could empower the

²⁹ *Id.*

³⁰ Va. Code Ann. § 2.2-509.

³¹ The Wisconsin equivalent of a state attorney general's office.

³² Wis. Stat. Ann. § 109.11; *See*, Press Release, Wisconsin Department of Justice, *Van Hollen And Gassman Announce Workers To Receive Settlement Payments In First American Funding Company Claim* (Jan. 30, 2009): <https://www.doj.state.wi.us/news-releases/van-hollen-and-gassman-announce-workers-receive-settlement-payments-first-american>;

³³ *Id.* §109.07(4)(b)

³⁴ *See* Press Release, Wisconsin Department of Justice, *Employees Of Synergy Web To Receive Wage Settlement* (Mar. 5, 2009): <https://www.doj.state.wi.us/news-releases/employees-synergy-web-receive-wage-settlement>; Press Release, Wisconsin Department of Justice, *326 Sunny Industries Workers to Share \$800,000 in Back Wages* (Jan. 19, 2007): <https://www.doj.state.wi.us/news-releases/326-sunny-industries-workers-share-800000-back-wages>

³⁵ Cal. Business & Professions Code, Sections 17200, et seq; *See*, Press Release, California Department of Justice, *Brown Sues Farm Labor Contractor for Worker Safety and Wage Law Violations* (March 10, 2010), available at: <https://oag.ca.gov/news/press-releases/brown-sues-farm-labor-contractor-worker-safety-and-wage-law-violations> (Case was brought under California's Unfair Competition Law for injunctive relief, restitution and penalties for "failing to pay minimum wage and overtime, as well as

Attorney General to enforce a wide array of labor violations. Furthermore, under the California UCL, the state is entitled to recover restitution (including unpaid wages), civil penalties of up to \$2,500 per “act,” and obtain injunctive relief.³⁶

In 2015, the **Illinois** Attorney General exercised her authority under the Illinois Human Rights Act when she sued several employment agencies and Chinese restaurants for abusive and exploitative employment practices.³⁷ The Attorney General brought the action in federal court by alleging violations of 42 U.S.C. §1981, as well as the state’s Human Rights Act. In addition, the state Department of Labor joined the suit, allowing the AG to allege violations of the state’s minimum wage law.

The **Illinois** Attorney General has also used the state’s Consumer Fraud and Deceptive Business Practices Act³⁸ to pursue misclassification cases. As with the Human Rights Act, the Consumer Fraud and Deceptive Practices Act provides the Attorney General sweeping investigative authority, including pre-litigation subpoena power.³⁹ In 2009, the Attorney General, along with the Illinois Department of Labor, investigated, sued and eventually settled with five construction companies for misclassifying workers in violation of the state’s Employee Classification Act, the Illinois Whistleblower Reward and Protection Act, and the Illinois Consumer Fraud and Deceptive Business Practices Act.⁴⁰

The **New York** Attorney General used the False Claims Act to investigate an affordable housing real estate developer and contractor who were obligated, by the material terms of their contracts, to pay workers the prevailing wage, yet failed to take any steps to ensure compliance.⁴¹

4. *Common Law*

Most state courts and statutes recognize that state attorneys general have broad common law authority. For example, Chapter 114 of **North Carolina’s** statute reaffirms the

committing ‘potentially deadly’ worker safety violations by neglecting to provide rest breaks, potable drinking water or shade to field workers.”)

³⁶ *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 116 P.3d 1175 (2005). (Attorney General could seek injunction, under the unfair competition law [UCL], to protect the public and prevent third parties from committing future unlawful acts pertaining to insolvent insurer's assets, without interfering with Insurance Commissioner's exclusive authority to protect beneficiaries of insurer.)

³⁷ Press Release, Illinois Attorney General, *Madigan Lawsuit Alleges Immigrant Worker Abuse By Employment Agencies And Chinese Buffet Restaurants* (Nov. 13, 2015) available at: http://www.illinoisattorneygeneral.gov/pressroom/2015_11/20151113.html

³⁸ ILCS Ch. 815 et seq.

³⁹ 815 ILCS ch. 505 § 3.

⁴⁰ Press Release, Illinois Attorney General, *Madigan Reaches Agreement To Ensure Workers Receive Employment Benefits They Deserve*, (Aug. 10, 2009) available at: http://www.illinoisattorneygeneral.gov/pressroom/2009_08/20090810ides.html

⁴¹ Press Release, New York Attorney General, *A.G. Schneiderman Announces \$255,000 Settlement With General Contractor And Developer For Failure To Pay Workers Required Prevailing Wage* (Feb. 9, 2017): <https://ag.ny.gov/press-release/ag-schneiderman-announces-255000-settlement-general-contractor-and-developer-failure>

constitutional establishment of the office of the attorney general and delineates the office's duties and responsibilities, including all powers and duties under common law that do not conflict with state constitution and statutes.⁴² However, state courts in Arizona⁴³, Connecticut⁴⁴, New Mexico⁴⁵, Washington⁴⁶ and Wisconsin⁴⁷ have found that their attorneys general lack common law powers.

The common law powers of state attorneys general provide authority to take action on behalf of the public interest.⁴⁸ Courts have found that the attorney general has broad discretion in exercising this authority, as well as in determining the public interest at stake.⁴⁹

One powerful tool under a state attorney general's common law authority is the doctrine of *parens patriae*. This doctrine "allows a state to bring an action on behalf of its citizen in order to protect its quasi-sovereign interests in their health, comfort and welfare."⁵⁰ To achieve standing, a state must demonstrate a quasi-sovereign interest,⁵¹ an injury to a substantial segment of its population, and inability of individuals to seek redress through

⁴² N.C. Gen. Stat. Ann. § 114-1.1 ("The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina"); *See, Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987) ("We conclude therefore that the duties of the Attorney General in North Carolina as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.")

⁴³ *Woods v. Block*, 189 Ariz. 269, 272, 942 P.2d 428, 431 (1997) ("In Arizona, the Attorney General has no common law powers; 'whatever powers he possesses must be found in the Arizona Constitution or the Arizona statutes'")(internal citations omitted.)

⁴⁴ *Blumenthal v. Barnes*, 804 A.2d 152 (Conn. 2002) ("We, therefore, agree with the trial court that the office of the attorney general is 'a creature of statute' that is governed by statute and, thus, has no common-law authority")(internal citations omitted.)

⁴⁵ *State v. Block*, 2011 NMCA 101 (N.M. Ct. App. 2011) ("In New Mexico, the attorney general has no common law powers; instead, his/her duties are determined entirely by statute.")

⁴⁶ *Goldmark v. McKenna*, 172 Wn.2d 568; 259 P.3d 1095 (Wash. 2011) ("Unlike most states, we have determined our attorney general lacks common-law power that would allow him the discretion he seeks here. We have previously decided the attorney general's power is determined by the constitution and statutes.")

⁴⁷ *State v. City of Oak Creek*, 232 Wis. 2d 612, 626, 605 N.W.2d 526 (2000).

⁴⁸ *See, e.g., State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008)(affirming that under common law, the Attorney General has the duty represent the public interest); *People v. New Penn Mines, Inc.*, 212 Cal. App. 2d 667, 671, 28 Cal. Rptr. 337, 339 (Ct. App. 1963) ("As chief law officer of the state the Attorney General has broad common law powers. In the absence of legislative restriction he has the power to file any civil action, which he deems necessary for the enforcement of the laws of the state and the protection of public rights and interests.") (emphasis added); *Superintendent of Insurance v. Attorney General*, 58 A.2d 1197 (Me. 1989); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008).

⁴⁹ *See State of Florida ex rel. Shevin v. Exxon Corp* 526 F.2d 266 (5th Cir. 1976), *reh. den.* 529 F.2d 523 (5th Cir. 1976), *cert den.* *Standard Oil Co. v. Florida*, 429 U.S. 829 (1976).

⁵⁰ POWERS AND RESPONSIBILITIES *supra* note 1 at 95. *See, Alfred Snapp and Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982).

⁵¹ *Id.* ("They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace.")

a lawsuit.⁵² Courts have recognized the substantial interest a state’s chief legal officer has in pursuing matters under this doctrine.⁵³

State attorneys general have used their *parens patriae* authority and common law powers to pursue various labor-related actions. For example, the **Illinois** Attorney General exercised common law *parens patriae* authority to challenge the use of non-compete agreements directed at fast food workers.⁵⁴

B. Criminal Jurisdiction

Criminal jurisdiction varies widely among state attorneys general. The Alaska, Delaware and Rhode Island Attorneys General have complete criminal jurisdiction, whereas the Connecticut Attorney General has virtually no criminal jurisdiction.⁵⁵ In other states, the state attorney general may have concurrent jurisdiction with local district attorneys,⁵⁶ have jurisdiction over statutorily defined matters⁵⁷ or may step in for a District Attorney when a conflict arises or upon request from an agency or state official. Finally, many state attorneys general handle direct criminal appeals.⁵⁸

1. Specific Statutory Authority

States confer varying degrees of authority to state attorneys general to exercise criminal jurisdiction for labor law violations. As demonstrated in Sec. III.A.1. *supra*, the

⁵² *Id.* (“In order to maintain a *parens patriae* action, a State must articulate an interest apart from the interests of particular private parties, that is, the State must be more than a nominal party. The State must express a “quasi-sovereign” interest, such as its interest in the health and well-being—both physical and economic—of its residents in general. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. A State also has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system—that is, in ensuring that the State and its general population are not excluded from the benefits that are to flow from participation in the federal system.”)

⁵³ *Hood ex rel. Mississippi v. Microsoft Corp.*, 428 F. Supp. 2d 537, 546 (S.D. Miss. 2006) (“This type of prospective relief goes beyond addressing the claims of previously injured organizations or individuals. It is aimed at securing an honest marketplace, promoting proper business practices, protecting Mississippi consumers, and advancing Mississippi’s interest in the economic well-being of its residents [...] The fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize nor negate plaintiff’s substantial interest.”) (internal citations omitted).

⁵⁴ See Press Release, Illinois Attorney General, *Madigan Sues Jimmy John’s For Imposing Unlawful Non-Compete Agreements On Sandwich Makers And Delivery Drivers* (June 8, 2016), available at: http://www.illinoisattorneygeneral.gov/pressroom/2016_06/20160608.html; See, Press Release, Illinois Attorney General, *Madigan Announces Settlement With Jimmy John’s For Imposing Unlawful Non-Compete Agreements* (Dec. 7, 2016) available at: http://www.ag.state.il.us/pressroom/2016_12/20161207.html

⁵⁵ POWERS AND RESPONSIBILITIES at 318.

⁵⁶ For example, the Massachusetts Attorney General has concurrent criminal jurisdiction with state district attorneys – Mass. Gen. Laws ch. 12 § 27; New Hampshire Attorney General has concurrent criminal jurisdiction with county attorneys - N.H. Rev. State. Ann §7:6.

⁵⁷ POWERS AND RESPONSIBILITIES at 318.

⁵⁸ *Id.* at 323.

Massachusetts Attorney General has sweeping statutory authority to pursue civil and criminal enforcement actions.

The **District of Columbia**'s Attorney General has explicit authority to prosecute employers for violations of the District's minimum wage law.⁵⁹

The **New York** State Attorney General has authority to prosecute criminal violations of the labor law as well as any violations of state law "applicable to or arising out of any provision" of the labor law.⁶⁰ Many violations of labor law in New York have criminal penalties. For example, employers who fail to pay employees' wages in accordance with the labor law or who fail to keep payroll records are guilty of a misdemeanor for a first-time violation and a felony for second or subsequent offense.⁶¹ The labor law also provides that retaliation against an employee is a misdemeanor.⁶² Additionally, the state penal code includes many labor-related crimes, such as maintaining false business records or filing false state tax reporting forms, that are considered to be "arising under" the labor law. Based on this criminal jurisdiction, the Attorney General has obtained over three-dozen convictions of employers for violating the labor laws since 2011.⁶³

2. *General Authority and Case Referrals from State Agencies*

New Mexico law provides that "[u]pon the failure or refusal of any district attorney to act in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, the attorney general be, and he is hereby, authorized to act on behalf of said county, state or any department thereof, if after a thorough investigation, such action is ascertained to be advisable by the attorney general."⁶⁴ The New Mexico Supreme Court has acknowledged that this provision applies when a district attorney and the Attorney General have agreed that the Attorney General should handle the matter.⁶⁵ New Mexico district attorneys have the explicit authority to enforce the provisions of the state's Minimum Wage Act ("MWA"). If a local district attorney declines or fails to prosecute serious MWA violations, the Attorney General would have the authority to step in.⁶⁶

⁵⁹ *Id.* § 32-1011 (c).

⁶⁰ New York Labor Law § 214.

⁶¹ *Id.* §§ 198-1(1), 662.

⁶² *Id.* § 215.

⁶³ *See, e.g.*, Press Release, New York Attorney General, *A.G. Schneiderman And U.S. Department Of Labor Announce Criminal Charges Against, And Civil Settlement With, Papa John's Franchisee For Wage Theft* (Jul. 15, 2015): <https://ag.ny.gov/press-release/ag-schneiderman-and-us-department-labor-announce-criminal-charges-against-and-civil>; Press Release, New York Attorney General, *A.G. Schneiderman Secures Guilty Plea From Suffolk Car Wash Boss Who Failed To Pay Minimum Wage* (May 22, 2013): <https://ag.ny.gov/press-release/ag-schneiderman-secures-guilty-plea-suffolk-car-wash-boss-who-failed-pay-minimum-wage>

⁶⁴ N.M. Stat. Ann. § 8-5-3

⁶⁵ *State v. Koehler*, 629 P.2d 1222, 1224 (N.M. 1981).

⁶⁶ *See State ex rel. Atty. Gen. v. Reese*, 430 P.2d 399, 403 (N.M. 1967) (attorney general has authority to bring an action on behalf of the state "if no other provision has been made for it to be brought").

In **Pennsylvania**, the Secretary of Labor and Industry has the duty “but not the exclusive right” to enforce and administer the Wage Payment Act, which also has criminal penalties.⁶⁷ In addition, the Pennsylvania Attorney General “may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings.”⁶⁸ The Attorney General has concurrent jurisdiction with the district attorney on prosecuting matters “[...]referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision.”⁶⁹

The **Virginia** Attorney General does not have original criminal jurisdiction for most labor-related or other matters, but may prosecute criminal cases if requested by the Governor.⁷⁰

The **Washington** Attorney General’s office has brought several criminal prosecutions for wage theft through cross-agency partnerships.⁷¹

IV. MISCLASSIFICATION

The term “misclassification” is used to describe two different unlawful scenarios: (1) employers fraudulently treating workers who should lawfully be employees instead as “independent contractors,” in an effort to avoid legal requirements such as wage and hour laws, unemployment insurance and payroll taxes, and workers’ compensation obligations, among others; and (2) employers paying workers “off the books” in order to avoid reporting them for unemployment insurance, workers’ compensation, tax, or other purposes. While these two scenarios are factually different, they present many of the same problems: underpayment of workers’ wages, failure to pay all taxes and comply with other employer obligations, and unfair competition for law-abiding employers.

Many states have taken steps to address misclassification in the past decade, through establishment of multi-agency task forces⁷² as well as legislation specifically targeting misclassification either in general or in particularly problematic industries. These statutes may have civil or criminal provisions, and some specifically contemplate a role for state attorneys general.

⁶⁷ 43 Penn. St. Ann. § 260.8.

⁶⁸ 71 Pa. Stat. Ann. § 732-20 (a)(4).

⁶⁹ *Id.* § 732-20 (b).

⁷⁰ Va. Code Ann. § 2.2-511.

⁷¹ See, e.g. Press Release, Washington Attorney General, *Attorney General Ferguson files criminal wage theft and fraud charges against athletic club executives Sam Adams and Dana Sargent* (Feb. 5, 2015) available at: <http://www.atg.wa.gov/news/news-releases/attorney-general-ferguson-files-criminal-wage-theft-and-fraud-charges-against>

⁷² For a list of state task forces on misclassification, as well as memorandum of understandings between state labor agencies and the U.S. Department of Labor to combat misclassification, please see National State Attorneys General Program’s Misclassification Initiative: <http://www.law.columbia.edu/attorneys-general/policy-areas/labor-project/employee-misclassification-initiative>

Through joint investigations with California’s Employment Development Department and other state agencies, the **California** Attorney General’s Underground Development Unit has pursued criminal charges against companies for submitting false payroll reports, misclassifying workers or for failure to pay payroll taxes. In 2010, the Unit brought criminal charges against a concrete company for payroll tax fraud, workers compensation insurance fraud, and failing to pay appropriate employee taxes.⁷³

Delaware’s Workplace Fraud Act specifically grants enforcement authority to the state attorney general. The Act provides that in addition to certain statutory penalties, “an employer may be subject to a stop-work order, and may be ordered to make restitution, pay any interest due and otherwise comply with all applicable laws and regulations by multiple final determinations of the Department or orders of a court, including but not limited to, the Division of Unemployment Insurance, the Department of Insurance, the Office of Workers’ Compensation, the Division of Revenue, the Office of the Attorney General, or any other agency, department or division of the State.”⁷⁴

In **Illinois**, the Attorney General and the state’s attorneys have concurrent jurisdiction over criminal violations of the state’s Employee Classification Act. Upon concluding that a criminal violation of the Act has occurred, the state Department of Labor may refer cases to either of those agencies for prosecution.⁷⁵ Where there is conflict or absence of resources, the state’s attorneys are permitted to transfer authority to investigate or prosecute to the Illinois Attorney General.

New York’s Construction Industry Fair Play Act contains civil and criminal provisions, and explicitly mentions the Attorney General as a potential enforcer of the law.⁷⁶

Pennsylvania’s Construction Workplace Misclassification Act explicitly gives the Attorney General jurisdiction to criminally prosecute cases upon referral by the Secretary of Labor.⁷⁷

The **Virginia** Attorney General has explicit authority to represent the Commonwealth in civil actions and criminal prosecutions (at the relevant agency’s request) to enforce the law regarding unemployment insurance taxes owed by employers.⁷⁸

V. MULTISTATE INITIATIVES

Multistate coordination among state AGs, on investigations and lawsuits regarding various issues, has increased dramatically since the 1990’s on both a partisan and bi-

⁷³ Press Release, California Attorney General, *Attorney General Brown Files Charges Against Granite Bay Concrete Company for Tax Evasion and Insurance Fraud* (Nov. 30, 2010): <https://oag.ca.gov/news/press-releases/attorney-general-brown-files-charges-against-granite-bay-concrete-company-tax>

⁷⁴ 19 Del. C. § 3505 (f).

⁷⁵ 820 Ill. Comp. Stat. Ann. Ch. 185 § 30.

⁷⁶ New York Labor Law §§ 861, 861(g).

⁷⁷ 43 P.S. §§ 933.1 - 933.17.

⁷⁸ Va. Code Ann. § 60.2-118.

partisan basis.⁷⁹ This mechanism yields numerous benefits, including pooling of resources among the participating states and the coordination of strategies. Multistate participation is particularly helpful for states that lack resources, yet have been impacted by deleterious nationwide practices by industry actors. State attorneys general have taken joint action in a variety of matters, from obtaining the landmark tobacco settlement in the late 1990's,⁸⁰ to more recent efforts involving antitrust, consumer protection, and other subject areas.

While there is currently no established framework for extensive coordination among state attorneys general on labor issues, there have been some nascent multistate efforts. In 2013, **New York** and **Massachusetts** collaborated in an investigation of nonpayment of wages by National Grid after the failure of its payroll system following Hurricane Sandy.⁸¹

In 2016, a coalition of **nine state attorneys general offices**⁸² together sent joint letters to numerous retailers regarding their use of on-call shifts,⁸³ as a follow-up to letters sent by New York Attorney General's Labor Bureau in 2015.⁸⁴ Some of the participating state attorneys general had jurisdiction to enforce labor laws within their respective states, while others did not. Thus, the letters explicitly noted that "certain" of the signatory states had reporting pay laws and cited offices' involvement as being prompted by policy concerns and "by [their] shared interest in the well-being of workers nationwide."⁸⁵ This joint effort resulted in policy changes by all of the companies that were using on-call shifts when the letters were issued, and the initiative received considerable media coverage.

⁷⁹ For a detailed analysis, see PAUL NOLETTE, *FEDERALISM ON TRIAL* (University Press of Kansas 2015).

⁸⁰ To learn more about the Tobacco Master Settlement, please visit StateAG.org's Tobacco Settlement Initiative: <http://www.stateag.org/initiatives/the-tobacco-settlement/>

⁸¹ Tim Knauss, *New York attorney general wins \$5 million settlement for National Grid workers*, Syracuse.com, Sept. 26, 2013:

http://www.syracuse.com/news/index.ssf/2013/09/new_york_attorney_general_wins_5_million_settlement_for_national_grid_workers.html

⁸² Press Release, New York Attorney General, *A.G. Schneiderman Announces Agreements With Six Major Retailers To Stop On-Call Shift Scheduling* (Dec. 20, 2016): <https://ag.ny.gov/press-release/ag-schneiderman-announces-agreements-six-major-retailers-stop-call-shift-scheduling>; (Participating states: California, Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Minnesota, New York, and Rhode Island.)

⁸³ On-call shifts occur when workers are required to call in an hour or two before the start of a shift to learn if they must report to work that day. These shifts, which were increasingly used by retailers, require employees to make child care arrangements and give up other opportunities for work or education, without having any guarantee of work on a given day, thereby creating significant stresses for workers.

⁸⁴ That same year, the New York Attorney General's Labor Bureau sent inquiry letters to national retailers regarding their use of on-call scheduling practices for retail employees. These letters ultimately led to agreements by major retailers including Urban Outfitters, Abercrombie & Fitch, Bath & Body Works, Gap, J. Crew, and Victoria's Secret. See, Bouree Lam, *The End of On-Call Scheduling?* THE ATLANTIC, Oct. 23, 2015, available at:

<https://www.theatlantic.com/business/archive/2015/10/on-call-scheduling-labor/412132/>

⁸⁵ Request for Information Regarding "On-Call Shifts" to Major Retailers (April 12, 2016) available at: https://ag.ny.gov/pdfs/final_letters.pdf

VI. OTHER WAYS AGs EXERCISE AUTHORITY

In addition to involvement in litigation or prosecutions, state attorneys general have various means at their disposal to protect workers' rights generally, including filing amicus briefs, issuing opinion letters, issuing reports, proposing legislation, conducting informal inquiries, and using the bully pulpit.

A. Opinion Letters and Advisories

Attorney general opinion letters are typically issued in response to a formal request for legal guidance by a state agency or state officials. Although not generally binding on the courts or the agency client, a final opinion goes through a formalized review process within the attorney general's office, including review by the attorney general, and carries with it the full weight and authority of the office. Opinions often detail the duties and responsibilities of a state agency or official under state and federal law, or elucidate ambiguous or unclear statutory provisions in a state law.⁸⁶

AG opinions have been issued on a variety of topics, including: the effect of deductions on wage payments under state law,⁸⁷ the authority of localities to adopt right-to-work ordinances⁸⁸ or to opt out of a state's prevailing minimum wage act,⁸⁹ and the application of a state's Wage Payment Act to public employees.⁹⁰

Attorney General advisories are not formal opinions but rather guidance documents for local law enforcement and the public at large on how the state's attorney general understands and intends to enforce a particular law. In 2008, the Massachusetts Attorney General issued an advisory on the state's Independent Contractor Law.⁹¹

B. Amicus Briefs

Under the Rules of the U.S. Supreme Court, a state, through its attorney general is permitted to file an amicus brief as a matter of right and without the consent of any party. State attorneys general are active in filing amicus curiae briefs, both individually and through coordinated multistate efforts.

⁸⁶ For a detailed description of AG opinions, please see Chapter 5, POWERS AND RESPONSIBILITIES *supra* note 1.

⁸⁷ *See, e.g.*, The Uniform Wage Payment Law; Effect upon deductions from pay. N.C. Att'y Gen. Op. (1978) available at: <http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Labor;-The-Uniform-Wage-Payment-Law;-Effect-upon-d.aspx>

⁸⁸ *See, e.g.*, Authority of Counties and Municipalities to Adopt Right-to-Work Ordinances, Ill. Att'y Gen. Op. 15-001 (March 20, 2015), available at: <http://www.ag.state.il.us/opinions/2015/15-001.pdf>

⁸⁹ *See, e.g.*, Authority of Counties, Municipalities, and School Districts to Opt Out of the Prevailing Wage Act, Ill. Att'y Gen. Op. 15-002 (March 20, 2015), available at: <http://www.ag.state.il.us/opinions/2015/15-002.pdf>

⁹⁰ *See, e.g.* Application Of Wage Payment Act To Employees Of State And Local Governmental Agencies Wash. Att'y Gen. Op. No. 6 (Sep. 1, 2010) available at: <http://www.atg.wa.gov/ago-opinions/application-wage-payment-act-employees-state-and-local-governmental-agencies>

⁹¹ Mass. Att'y Gen. Adv. 2008/1 (2008): <http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf>

Between 2006 and 2011, “the Court granted certiorari to state attorneys general in virtually half of the 79 amicus briefs states filed in support of petitions for certiorari. That success rate dwarfs the typical 4% success rate of other paid (non-informa pauperis) petitions.”⁹²

State attorneys general have participated as amici in a number of consequential matters impacting labor law and policy. Most recent filings include an amicus brief in support of the Obama Administration’s revised interpretation of the Labor-Management Reporting and Disclosure Act’s (LMRDA) Persuader Rule,⁹³ a brief from 22 states urging the Supreme Court to uphold key provisions in public sector collective bargaining agreements,⁹⁴ and a brief supporting an Illinois law requiring all public-sector employees to either join the union or pay fair-share fees for collective bargaining purposes.⁹⁵

C. Proposing Legislation

Many state attorneys general have units within their office dedicated to drafting and proposing legislation. Many have used their legislative units to introduce bills that enhance worker protections and target abusive practices.

In 2014, then **Illinois** Governor Pat Quinn signed into law Illinois House Bill 5622, a bill protecting low-wage workers who receive wages through payroll cards from unreasonable fees.⁹⁶ After receiving complaints from workers about onerous payroll card fees, the Illinois Attorney General’s office, with assistance from the Illinois Department of Labor, drafted the original legislation, which was eventually sponsored by several state House Representatives.

After issuing a report on the payment of wages through payroll cards (described below), **New York** Attorney General Eric Schneiderman also introduced legislation to regulate the use of payroll cards and enhance protections surrounding workers’ access to wages.⁹⁷

⁹² POWERS AND RESPONSIBILITIES at 407-408.

⁹³ See Press Release, Massachusetts Attorney General, *AG Healey Leads Multistate Brief in Support of Federal Efforts to Provide Greater Transparency, Fairness in Union Elections* (Oct. 13, 2016) available at: <http://www.mass.gov/ago/news-and-updates/press-releases/2016/ag-healey-leads-multistate-brief-in-support-of-federal-efforts-to-provide-greater-transparency-fairness-in-union-elections.html>

⁹⁴ See Press Release, New York Attorney General, *A.G. Schneiderman and A.G. Jepsen Announce Multistate Coalition Urging U.S. Supreme Court to Protect Workers’ Organizing Rights in Key Labor Case* (Nov. 15, 2015) available at: <https://ag.ny.gov/press-release/ag-schneiderman-and-ag-jepsen-announce-multistate-coalition-urging-us-supreme-court>

⁹⁵ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

⁹⁶ Press Release, Illinois Attorney General, *Attorney General Madigan Applauds Governor’s Action To Increase Protections For Low Wage Workers* (Aug. 6, 2014): http://www.illinoisattorneygeneral.gov/pressroom/2014_08/20140806.html

⁹⁷ Press Release, N.Y. Attorney General, *A.G. Schneiderman Introduces Payroll Card Act To Create Clear Rules And Protect Workers From Unfair Fees And Coercion* (Feb. 13, 2015), available at: <https://ag.ny.gov/press-release/ag-schneiderman-introduces-payroll-card-act-create-clear-rules-and-protect-workers>

Washington Attorney General Bob Ferguson made wage theft the centerpiece of his 2015 legislative agenda. His office introduced legislation barring companies who have repeatedly violated the state’s wage theft laws from doing business in Washington.⁹⁸

D. Issuance of Reports

In 2014, the **New York** Attorney General’s Office issued “Pinched by Plastic,” a report on the payment of wages by payroll cards. The report, based on responses to inquiry letters sent by the Office to approximately forty national employers that used payroll cards, received widespread national media coverage and was the basis for the office’s legislative proposal on payroll cards that same year.⁹⁹

In 2014, the **New York** Attorney General’s Office began issuing annual Labor Day Reports, providing a detailed overview of the Labor Bureau’s actions to protect the state’s workers.¹⁰⁰ **Massachusetts** began publishing a similar report in 2016.¹⁰¹

E. Public Education

State attorneys general and their staff use myriad approaches to educate the public on a variety of issues. In the labor context, this includes public outreach events to educate participants about their rights under the law and the role of the attorney general in protecting those rights.

Through their websites, state attorneys general release office studies on pressing labor issues or provide reports on their labor enforcement activity. In addition, websites often contain brochures on a variety of labor law related topics including on applicable state and federal labor laws and workers’ rights generally.

Most importantly, websites provide the public access to formal complaint portals. The portals or electronic forms are offered in various languages and often inform complainants that staff will not ask about an individual’s immigration status or that victims of qualifying criminal activity may be eligible for U nonimmigrant status or “U visas.”

⁹⁸ Press Release, Washington Attorney General, *Attorney General targets wage theft as part of 2015 legislative agenda* (Jan. 11, 2015), available at: <http://www.atg.wa.gov/news/news-releases/attorney-general-targets-wage-theft-part-2015-legislative-agenda>

⁹⁹ New York Attorney General’s Labor Bureau Report, *Pinched by Plastic: The Impact of Payroll Cards on Low Wage Workers*, (June 12, 2014): <https://ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf>

¹⁰⁰ New York Attorney General’s Labor Bureau Report, *Standing up for Working New Yorkers*, (Sept. 2014): https://ag.ny.gov/pdfs/labor_report.pdf; (Sept. 2015):

https://ag.ny.gov/pdfs/A.G.Schneiderman_Labor_Day_Report.pdf, (Sept. 2016): https://ag.ny.gov/sites/default/files/labor_report_2016_final.pdf

¹⁰¹ Massachusetts Attorney General’s Fair Labor Division Report, *Labor Day Report: A Report of Activities by the Fair Labor Division* (Sept. 2016): <http://www.mass.gov/ago/docs/workplace/2016-labor-day-report.pdf>

F. Bully Pulpit

State attorneys general have used the bully pulpit to positively impact labor policy within a state.

In 2016, **New York** Attorney General Eric Schneiderman penned an op-ed urging New York legislators and Governor Andrew Cuomo to raise the minimum wage in New York through legislation or through executive action. Later in the year, the legislature passed and Governor Cuomo signed into law a \$15 statewide minimum wage.¹⁰²

¹⁰² Eric Schneiderman, *\$15 an hour, one way or another: Pass a law, and if not, consider new wage boards*, N.Y. DAILY NEWS, March 14, 2016, available at: <http://www.nydailynews.com/opinion/eric-schneiderman-15-hour-article-1.2563610>

About the Authors

Terri Gerstein is currently an Open Society Foundations Leadership in Government Fellow, and is working to strengthen state and local enforcement of labor laws. Previously, she worked over 17 years in New York State government, most recently as Labor Bureau Chief in the New York State Attorney General's Office. Under her leadership, the Labor Bureau increased criminal prosecutions of employers; collaborated with federal and city agencies on labor standards enforcement; aggressively enforced wage and hour laws in high-violation industries including fast food, car washes, construction companies, home health agencies, airport contractors, and taxi fleets, among others; and sparked reforms in national employers' policies in relation to on-call shifts, payment of wages by payroll cards, and use of non-compete agreements.

Previously, she was a Deputy Commissioner in the New York State Department of Labor, and an Assistant Attorney General and Deputy Section Chief in the Labor Bureau of the New York State Attorney General's Office. Prior to her government service, Terri was a Skadden Fellow and Echoing Green Fellow at the Florida Immigrant Advocacy Center (currently named Americans for Immigrant Justice) in Miami, Florida, where she represented immigrant workers and domestic violence victims, and co-hosted a Spanish-language radio show on workers' rights. She was also a law clerk to the Honorable Mary Johnson Lowe in the U.S. District Court for the Southern District of New York. Terri received her A.B. from Harvard College and her J.D. from Harvard Law School.

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Faisal graduated from Fordham University School of Law and was a recipient of the Archibald R. Murray Public Service Award. He received his B.A. in History from Trinity College in Hartford, Connecticut