

**ADDING LABOR TO THE DOCKET:
THE ROLE OF STATE ATTORNEYS GENERAL IN THE
ENFORCEMENT OF LABOR LAWS**

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INTRODUCTION

Take a look at the websites of attorneys general's offices throughout the country. Nearly all show examples of how attorneys general act to protect the rights of their citizens in consumer transactions and to protect the environment in which their citizens live. Most discuss the regulation of non-profit organizations and the protection of the civil rights of their citizens. Many discuss antitrust and investor protection initiatives and many describe enforcement actions in new problem areas such as identity theft and internet fraud. Yet, nearly always missing from this list is a very basic right of an individual in most states: the right to be paid the wages earned for a day's work.

This document examines the affirmative role that attorneys general can play in the enforcement of wage and hour laws and other basic state workplace rights. Most attorneys general's offices have been involved in workplace issues in their role as counsel to their state labor agency, representing the agency when it is sued or when court action is necessary to carry out a particular enforcement effort. While this is a vital role to play, there is a large untapped potential for attorneys general to play a far greater role in protecting their citizens in the workplace. Working both side-by-side with their state labor agencies and independently taking actions, attorneys general can be an active force in protecting workers and in leveling the playing field for employers who follow the law.

While we now take for granted the role that attorneys general play in many areas of practice, the emergence of attorneys general in areas such as consumer fraud, antitrust, and environmental protection did not appear overnight. This work reflected a consensus that attorneys general have an affirmative responsibility in the enforcement of all of their

state's laws. There is no reason for state labor laws to be excluded from this responsibility.

This document is intended as a “jump start” for states that want to get started doing affirmative labor law work. The term “affirmative labor law work” is meant to include any type of labor law enforcement that goes beyond responding to lawsuits brought by employers or handling the individual underpayment claims of workers. It includes any type of targeted, proactive enforcement done either independently or together with the state labor agency. It can include wage and hour or other labor standards enforcement and the enforcement of workers compensation and unemployment insurance requirements.

Section III of this document highlights the work of the New York State Attorney General's Labor Bureau, one of the few bureaus in the country specifically dedicated to affirmative labor work. This example is used only because it demonstrates an example of an attorney general's office doing a large amount of affirmative labor law work. This document is intended to be useful and adaptable to all states regardless of the type of jurisdiction and regardless of the level of resources available to do this type of work.

The information in this document is also geared towards states that are getting started in this area since that is currently where most states find themselves. Our hope is that as more states begin to do affirmative workplace cases, that states will continue to share the strategies, ideas and problems that these cases generate. Thus, this document is a Part I that will hopefully be followed by many years of collaboration between states and by increased enforcement of basic workplace rights throughout the country.

I. WHY WORKPLACE RIGHTS

Since the early twentieth century, states have played a central role in the regulation of workplace rights. Early state regulation of workplaces grew out of the Progressive movement and many states had basic labor laws in place by the start of the twentieth century. In 1912, Massachusetts enacted the nation's first minimum wage law and in the following eight years, thirteen states passed minimum wage laws. By the time the federal Fair Labor Standards Act was passed in 1938, as part of the New Deal, twenty-five states already had minimum wage laws.²

Today, nearly all states have minimum wage laws.³ Many also have basic wage payment laws, which require that employers pay the wages promised to an employee. Most have a variety of laws covering basic labor standards such as meal breaks, child labor, deductions from wages, tip appropriation, and overtime. These laws ensure that working people receive either a basic level of income for working or that they receive the level of compensation that they have been promised. In twenty-nine states, the minimum wage is higher than the current federal minimum wage of \$5.15 an hour.⁴

Minimum wage laws have huge public support across all social and political lines. A recent survey showed that 83% of the American public favored raising the federal minimum wage from \$5.15 per hour to \$7.15 per hour.⁵ In November 2006, six states had ballot initiatives which proposed either raising their existing minimum wage or creating a minimum wage. All of the initiatives passed, some by huge margins: Missouri

² JEROLD WALTMAN, *POLITICS OF THE MINIMUM WAGE* 28–30 (2000).

³ U.S. DEP'T OF LABOR, *MINIMUM WAGE LAWS IN THE STATES - JANUARY 1, 2007* (2006), <http://www.dol.gov/esa/minwage/america.htm>.

⁴ *Id.*

⁵ Michael Dimock, Pew Center for the People & the Press, *Maximum Support for Raising the Minimum* (Apr. 19, 2006), <http://pewresearch.org/obdeck/?ObDeckID=18>.

passed by 76%; Montana by 73%; Nevada by 69%; Arizona by 66%; Ohio by 56%; and Colorado by 53%.⁶

If the above numbers represent overwhelming support for raising or establishing a minimum wage, the support for ensuring that employees actually receive the current legal minimum wage or a wage already promised to them would have to be even higher.

While there are not likely to be surveys of this type, one would imagine that the positive response to the question “Do you think that the government should act to insure that employees receive the legal minimum wage or the wage that an employer promised to pay?” would be nearly unanimous.

Labor law enforcement also finds allies among legitimate business owners. Enforcing labor laws levels the playing field between business owners who comply with the law and those that break the law. For example, in seeking reactions to the increased labor law enforcement by New York State Attorney General Eliot Spitzer, the New York Times found: “One industry group that might have been expected to criticize Mr. Spitzer, the New York State Restaurant Association, welcomed his work. Rick Sampson, the group’s chief executive, said: ‘He’s going into some places that aren’t paying overtime or the minimum wage. Those places give the whole industry a black eye.’”⁷

⁶ CNN.com, America Votes 2006 — Key Ballot Measures, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/>.

⁷ Steven Greenhouse, *Waging War, From Wall Street To Corner Grocery; Beyond the High-Profile Cases, Spitzer Helps Low-Wage Workers*, N.Y. TIMES, Jan. 21, 2004, at B1.

II. WHY ATTORNEYS GENERAL'S OFFICES

Attorneys general's offices can play an important role in the enforcement of workplace rights. That role may vary depending on the jurisdiction available in a particular state, on the resources committed to the work, and on the particular workplace issues present in the state. The historical factors that have led to the exclusion of workplace rights from the list of issues taken on by attorneys general should not be an impediment to taking on these issues today.

It is likely that affirmative labor cases have not been considered part of the work or structure of attorneys general's offices because workplace protection and wage and hour cases have long been handled by state labor agencies with attorneys general's offices stepping in to either represent the agency when sued, to take action to ensure that the department can carry out its enforcement, or to use criminal enforcement powers. This structure has not changed in most states despite the changes that have occurred in the structure of workplaces, in the ratio of investigators to employers, and in the role that attorneys general play in affirmative litigation in other areas.

But all of those things *have* changed dramatically. A recent study of the United States Department of Labor's wage and hour enforcement shows that between 1975 and 2004, the number of workplaces covered by federal wage and hour laws increased by 112% and workers covered increased by 55%, yet the number of federal investigators declined by 14% and the number of compliance actions declined by 36%.⁸

⁸ Annette Bernhardt & Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975–2004*, ECON. POL'Y BRIEF (Brennan Center for Justice, New York, N.Y.), Sept. 2005, available at http://www.brennancenter.org/dynamic/subpages/download_file_8423.pdf.

Moreover, the types of issues presented by today's workforce do not lend themselves to what is often a complaint-handling approach led only by a usually understaffed labor agency. As attorneys general have learned from their experience enforcing consumer laws, a case by case system of handling complaints would never truly protect consumers from fraud. Today, every attorney general understands that effective consumer protection involves a combination of complaint handling, broad consumer education, and a coordinated litigation strategy targeted at major law breakers. This model applies equally well to workplace law enforcement.

Many of today's workplace issues would benefit from a focused legal strategy. This strategy should involve bringing high profile cases that highlight persistent problems and have an effect beyond the individual case. It should also target key legal issues, such as establishing the coverage of labor laws to certain classes of workers. Many studies have shown persistent violations of labor laws in many industries that employ low-wage workers.⁹ The decline in the number of unionized workers, the globalization of the economy, and the creation of a large pool of low-wage workers due to immigration and welfare policies are among the factors that have contributed to these violations.¹⁰ Employers have often used strategies such as subcontracting, outsourcing, and

⁹ See, e.g., U.S. Dep't of Labor, Employment Standards Administration, Nursing Home 2000 Compliance Survey Fact Sheet, http://www.dol.gov/esa/healthcare/surveys/printpage_nursing2000.htm (reporting that sixty percent of nursing homes were not in compliance with minimum wage, overtime and child labor provisions in 2000); RESTAURANT OPPORTUNITIES CENTER OF NEW YORK, BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY (2005), available at <http://www.rocny.org/RestaurantIndustrySummit.htm> (finding a majority of New York City restaurants not in compliance with minimum wage and overtime laws); U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, FY 2001 ANNUAL PERFORMANCE REPORT SUMMARY (2002), available at <http://www.dol.gov/esa/aboutesa/str-plan/esa01report/esa01rpt.pdf> (providing detailed compliance statistics for many industries, including the finding that the compliance level for poultry processing plants was "essentially zero" in 2001); see also SIOBHAN MCGRATH, BRENNAN CENTER FOR JUSTICE, A SURVEY OF LITERATURE ESTIMATING THE PREVALENCE OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN THE U.S. (2005), available at http://www.brennancenter.org/dynamic/subpages/download_file_8418.pdf.

¹⁰ Siobhan McGrath & Nina Martin, *Unregulated Work*, DOLLARS & SENSE, Sept.– Oct. 2005.

classification of workers as independent contractors in order to attempt to insulate themselves from coverage under the labor laws.¹¹

These problems can be addressed through legal challenges. The fact that labor agencies protect the workplace rights of citizens using different powers and tools than the attorney general would use should not lead to the exclusion of these cases from the work of the attorney general's office. Cases protecting the rights of citizens in the workplace should take their place on the dockets of attorneys general's offices next to consumer, environmental, and other affirmative cases.

¹¹ NATIONAL EMPLOYMENT LAW PROJECT, SUBCONTRACTED WORKERS: THE OUTSOURCING OF RIGHTS AND RESPONSIBILITIES (2004); NATIONAL EMPLOYMENT LAW PROJECT, 1099'D: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (2005).

III. THE LABOR BUREAU OF THE NEW YORK STATE ATTORNEY GENERAL'S OFFICE

Twenty-five years ago, the labor work done by the New York State Attorney General's Office was no different than that of most attorneys general's offices. Within the Division of State Counsel (the part of the Attorney General's Office that represented the state), there was a "Labor Bureau" that served two primary functions: (1) to prosecute misdemeanor Labor Standards cases on referral from the New York State Department of Labor; and (2) to represent the Workers Compensation Board in appeals from administrative determinations. An "Employment Security Bureau," also located within State Counsel, represented the Department of Labor in appeals from administrative determinations in unemployment cases. The "Litigation Bureau," which represented most state agencies, represented the Department of Labor in most other appeals or other litigation.

Today, without any changes in jurisdiction, the Labor Bureau has a full docket of affirmative labor cases which it brings both on its own¹² and in conjunction with the New York State Labor Department. It collects millions of dollars in backpay for workers and is hailed as an innovative and responsive government player in this area.¹³ The story of

¹² The New York State Attorney General has the jurisdiction, pursuant to New York Executive Law § 63(12), to bring cases where there is evidence of persistent fraud or illegality. It also has the power to take cases on referral from the New York State Department of Labor pursuant to multiple provisions of the New York Labor Law, and has criminal jurisdiction to enforce certain provisions of the New York Labor Law.

¹³ The National Employment Law Project has recognized the Labor Bureau as an important exception to an otherwise ineffective enforcement system. National Employment Law Project, Policy Update, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* (Oct. 2006), available at <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor%202Epdf>. As Denis Hughes, president of the New York State A.F.L.-C.I.O., stated: "[Eliot Spitzer] has redefined what attorney generals do — not only in our state but throughout the country — in enforcing worker rights." Greenhouse, *Waging War*, *supra* note 7.

how this change took place should assist other attorneys general's offices beginning to do work in this area.

The first important change in the make-up of the Labor Bureau occurred at the start of the second administration of Attorney General Robert Abrams in the mid-1980's. Abrams combined all of the defensive functions described above into one Bureau, the Labor Bureau, and also gave the Bureau a mandate to commence affirmative labor cases and to study policy issues affecting the workplace. To carry this out, he replaced the existing Bureau Chief with an Assistant Attorney General from the office's Civil Rights Bureau who had experience with affirmative cases and using the affirmative powers of the Attorney General. The new hires in the Bureau tended to be attorneys with either a labor or employment background or a general public interest background. These attorneys represented the Labor Department in administrative appeals and other litigation and began doing some affirmative labor work. Much of the early affirmative work done by the Bureau tended to be in policy areas (for example, polygraph regulation) or tended to be aggressive affirmative work done in conjunction with the Department of Labor (for example, door-to-door sales, garment industry, and Public Employee Safety and Health Act enforcement).

In 1999, at the start of the administration of Attorney General Eliot Spitzer, affirmative work represented approximately 10% of the work of the General Labor Section of the Labor Bureau.¹⁴ Today it represents over 70% of the work of the section. When this shift began, the Bureau did not receive any additional resources to do its work.

¹⁴ The Bureau is currently made up of three sections: the General Labor Section, which represents the Department of Labor and brings affirmative cases; the Workers Compensation Section, which represents the Workers Compensation Board in appeals; and the Employment Security Section, which represents the Department of Labor in unemployment insurance appeals.

Instead, fewer challenges to a less aggressive Department of Labor meant fewer defensive cases and thus more time and resources to do affirmative work. Eventually, as the Bureau achieved success in its affirmative cases, additional attorney and support lines were given to the Bureau.¹⁵

Two major catalysts brought about the change into an affirmative labor bureau. One was the personal support and encouragement of a new attorney general, Eliot Spitzer, who encouraged the Bureau to be aggressive and proactive. The other was the Bureau's strategy of "partnering" with community groups, unions, and non-profits to bring affirmative cases. This strategy enabled the Bureau to identify problem industries and workplaces, and to locate individual workers who were willing to come forward to complain about workplace violations. Most importantly, this strategy enabled the Bureau to gain the trust of these workers, many of whom would ordinarily be reluctant to come forward to a government agency.

The nature of labor law cases makes the ability to gain the trust of workers essential. Most labor cases cannot be proven and litigated solely based on documentary evidence such as payroll records or other proof such as the observations of an investigator. These cases need to be developed based on the statements of workers who can testify to hours actually worked and wages actually paid. Yet, for the most part, obtaining worker testimony requires the workers to come forward against their current employer and risk retaliation or firing. Even though most state laws protect against such

¹⁵ At the start of the Spitzer administration, the General Labor Section had ten attorneys. This number remained constant during the first Spitzer term when the increase in affirmative work began. By the end of the second Spitzer term, four attorneys, a paralegal, and an accountant had been added. These attorneys and support staff do all of the affirmative labor law work and do all of the defensive litigation involving the New York State Department of Labor, with the exception of unemployment insurance cases. The Section also does criminal enforcement of both criminal offenses under the New York Labor Law and the New York Penal Law.

actions by the employer, the risks and the fear can be great. Thus, a certain amount of organizing, coaxing, and reassurance must take place before a worker enters a government agency to complain. Moreover, since the goal of an affirmative investigation is to change the practices in an entire workplace rather than to resolve an individual's claim, it is critical to get additional workers to come forward once one or more workers have identified a problem. While some work of this kind can be done by a government investigator, much of this work can be accomplished more effectively by community groups and labor unions, which have a stronger presence in the workers' community.

The New York State Attorney General's Office first began using the "partnering" model for affirmative litigation during the years just prior to the Spitzer administration. During the Abrams administration, the Bureau, along with the Department of Labor, began working with one of the first workers centers¹⁶ in the country, the Chinese Staff and Workers Association (CSWA), on some wage and hour criminal prosecutions in the garment industry. When CSWA was looking to raise compliance with the labor laws in restaurants in New York City's Chinatown, it approached the Bureau about doing some affirmative wage and hour cases directly, without the involvement of the Department of Labor. Because the problems identified by the Association were so serious and because the Association was able to bring in groups of workers to testify as to the conditions, the Bureau agreed to do the cases directly.

¹⁶ The term "workers center" describes a variety of "community-based and community-led organizations that engage in a combination of service, advocacy, and organizing to provide support to low-wage workers." Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 419 (2006). In contrast to unions, workers centers do not focus on collective bargaining or negotiating employment contracts. See Chinese Staff and Workers Association, *Workers' Centers and the New Labor Movement* (Jun. 13, 1994), <http://www.cswa.org/www/faq.asp#q6>.

This collaboration resulted in a number of successful civil prosecutions including a \$1.1 million settlement with the largest restaurant in Chinatown, the Jing Fong restaurant, for minimum wage violations and tip appropriation by managers. This prosecution occurred during the administration of Attorney General Dennis Vacco.

Because of the success of this collaboration with CSWA, the Bureau actively began to seek out other groups, both to identify problems and to locate workers willing to come forward and complain. At the start of the Spitzer administration, having received encouragement to bring affirmative cases, members of the Bureau started reaching out and finding groups that might be able to assist in bringing cases. To locate possible groups, the Bureau spoke to its existing contacts at worker centers, non-profits, and universities. Members of the Bureau paid visits to these groups or invited them to the Attorney General's Office to discuss problems and issues. The Bureau's credibility and track record during this outreach process was enhanced by its positive relationship with CSWA and the successful work it had done with this group that was very respected in the workers rights community.

The collaborations that developed from this outreach were different and much more interdependent than most relationships that have developed between government and community groups and unions. Many government/community models focus on making government responsive to the needs of the community and on keeping the lines of communication open between the parties and keeping government accountable for claims brought to an agency.¹⁷ The "partnering" model went beyond these basic communication

¹⁷ Meredith DeSpain, *Cross-Sector Collaborations in Immigrant Worker Protection: Exploring Their Emergence and Considering Their Strategic Value for Worker Centers* (Aug. 2004) (unpublished M.P.Aff. thesis, Lyndon B. Johnson School of Public Affairs, University of Texas) (on file with Wasserman Public Affairs Library, University of Texas).

issues and into more of a working relationship. Partnering acknowledges the reality, on the part of the Attorney General's Office, that community groups and unions have access to citizens who were being affected by legal violations in a way that government could not accomplish on its own. Conversely, it acknowledges the reality on the part of community groups, non-profits, and unions, that a responsive government agency can greatly assist its members.

As the Labor Bureau brought successful cases in the labor field, it became less necessary to engage in outreach as the Bureau became an acknowledged part of the landscape of labor law enforcement. The cases done by the Bureau were reported on in both the mainstream and ethnic presses. Community groups and even just private citizens began to approach the Bureau with issues and cases.

As issues and problems were identified, the Bureau used a variety of approaches to address them. These included investigations, litigation, public outreach, and amicus briefs on state law or national issues. The Bureau worked with a wide variety of community groups, unions, and non-profits. When the New York State Department of Labor started a Fair Wages Task Force in 2004 to investigate individual workplaces and problem industries, the Bureau started taking an increased number of affirmative cases on referral from the agency. Between 1999 and 2005, the Bureau collected over \$27 million in wages and restitution on behalf of workers.

The Bureau has brought cases involving the entire spectrum of workers including supermarket delivery persons, greengrocer stockpersons, restaurant workers, bathroom attendants, pretzel vendors, retail shop clerks, day laborers, garment workers, and others.

Appendix A describes some of the cases brought by the New York State Attorney General's Labor Bureau over the past eight years.

IV. GETTING STARTED: HOW TO BEGIN TO DO OR INCREASE AFFIRMATIVE LABOR WORK

If an attorney general's office is considering starting or increasing its affirmative labor work, below are some steps to take and issues to consider.

Jurisdiction

The first step in planning to do labor work is to evaluate jurisdiction. Jurisdiction to bring these cases may be derived either from the general jurisdiction of the attorney general's office or from specific grants of jurisdiction within your state's labor laws. An attorney general's office will obviously be familiar with the general grants of attorney general jurisdiction from other areas of affirmative work. Some states have broad general powers that allow them to bring cases under most state statutes.¹⁸ Many attorneys general's offices use *parens patriae* powers to directly protect citizens even in the absence of a specific statutory grant of jurisdiction in a particular area.¹⁹ Some states have business regulation laws that can be used by attorneys general's offices to protect consumers and workers.

Some state laws will allow the attorney general to directly enforce all or parts of the labor law.²⁰ This is especially true of some recent minimum wage initiatives.²¹ Other

¹⁸ *See, e.g.*, NEV. REV. STAT. § 228.120 (2003) (the Attorney General may “appear in, take exclusive charge of and conduct any prosecution in any court of this state for a violation of any law of this state, when in his opinion it is necessary or when requested to do so by the governor”); N.M. STAT. § 8-5-2 (1978) (the Attorney General shall “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 or when requested to do so by the governor”).

¹⁹ The Supreme Court has held that state attorneys general have authority to act in *parens patriae* if: (a) the case implicates a sovereign or quasi-sovereign public interest; (b) that interest affects a substantial segment of the state's population; and (c) the state has an articulated interest apart from the interests of particular private parties. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

²⁰ In Massachusetts, the state attorney general has exclusive authority to enforce wage and hour laws. Under a 1993 statute, the Massachusetts Attorney General was given the authority previously held by the state labor agency to inspect and investigate all workplaces, receive all complaints of wage and hour violations, issue civil citations, and bring criminal charges. In addition, the Massachusetts Attorney

state laws permit the attorney general to enforce the labor law on referral from the state labor agency.²² Some states have both criminal and civil jurisdiction to enforce the labor laws.

Each state's strategy in bringing these cases will depend on whether it has jurisdiction to bring cases independent of the state labor agency. If the attorney general's office has the jurisdiction to either bring cases on its own or on referral from the agency, it can choose the best strategy given the particular case or given how the case has arisen. If a state only has jurisdiction to bring cases together with its labor agency, its strategy must then shift to how to work together with that agency. It does not mean that the attorney general's office must then resume a passive approach to these cases and await referrals. An attorney general's office can still be an active player in identifying industries and cases where intervention is needed. The labor agency can be brought into the case either through active collaboration or, failing that, through outside pressure from constituent groups.

Labor Laws

Another preliminary step is to gain familiarity with the state's labor laws. It may sound simple, but having someone read the labor law and regulations front to back is a very useful exercise. If there are attorneys who have been working on defensive cases referred by the state labor agency, they have likely focused on whatever provisions have

General also has broad powers under the common law. See Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J. L. & SOC. PROBS. 495, 512–14 (2006).

²¹ Ohio, for example, passed a constitutional amendment in 2006 adopting a state minimum wage that is adjusted each year for inflation. The amendment gives the state attorney general authority to bring civil actions to enforce the minimum wage. OHIO CONST. art. II, Section 34a. Florida passed a similar amendment in 2004. FLA. CONST. art. X, § 24.

²² The Illinois Department of Labor, for example, refers cases to the Illinois State Attorney General's Office pursuant to the state Prevailing Wage Act, 820 ILL. COMP. STAT. ANN. 130/6 (West 2006), the Health and Safety Act, 820 ILL. COMP. STAT. ANN. 225/17, and other state labor laws.

been challenged in specific cases rather than taking a broader approach. Taking a step back and looking at the overall substantive and procedural provisions of the statute can be very useful.

It is also helpful to figure out if there are areas of state law that provide different or greater protection than is provided by the federal Fair Labor Standards Act. These areas are particularly ripe for state intervention. As stated earlier, many states have a higher minimum wage than is provided by federal law, thus providing more relief to workers. The federal Fair Labor Standards Act does not provide a remedy for collecting a wage promised by an employer but not paid, while many state laws do provide such relief. Many state laws have longer statutes of limitations, more favorable tip collection provisions, and more favorable overtime provisions than federal law.

Some state laws also provide both civil and criminal remedies for the failure to pay wages. Other specific violations of the labor law may also be punishable with criminal penalties. It would also be helpful to become familiar with certain provisions of the general penal laws to determine whether any would be helpful in prosecuting labor cases and what the attorney general's powers would be to enforce them. For example, there may be general criminal statutes that could be used to prosecute employers who falsify payroll records.

It is also essential to become familiar with whatever possibilities exist for individual liability on the part of business owners for unpaid wages. The ability to collect a judgment for wages may often rest on securing such individual liability since a corporation facing a judgment could simply go out of business.²³ The possibility for

²³ Under the federal FLSA, an employer is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee” 29 U.S.C. § 203 (2000).

individual liability could be found in the language of the labor law itself, in the statutes used by the attorney general to bring the case, or in general business law.

Doing workplace cases will also inevitably bring up issues related to immigration. Undocumented immigrants are among the most exploited workers and some cases will involve these workers. There is no dispute that wage and hour laws apply equally to undocumented workers.²⁴ Failure to prosecute workplace violations involving undocumented workers leads to a worsening of labor standards for all workers. Attorneys general doing labor law work will need to become familiar with the intersection between labor laws and immigration laws.²⁵

Structure — Who Should Do the Labor Work

Another important early question is where to place the attorneys doing affirmative labor law work. The best and most ambitious model would be to place them in a free-standing labor bureau combined with the attorneys doing work representing the state labor agency. It may well be the case that the attorneys who have been representing the agency are well-suited to begin doing affirmative labor work. They may have a familiarity with the issues, the law, and the agency that gives them a huge headstart in doing this work.

²⁴ “Hoffman does not preclude enforcement of State wage payment laws on behalf of undocumented immigrants.” N.Y. Op. Att’y Gen. 2003-F3 (Oct. 21, 2003); U.S. DEP’T OF LABOR, FACT SHEET #48, APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>.

²⁵ For more information on immigrant workers, go to <http://www.nelp.org> or <http://laborcenter.berkeley.edu/immigrantworkers/index.shtml>. See also Addison Thompson, *The Office of the State Attorney General and the Protection of Immigrant Communities: Exploring an Expanded Role*, 38 COLUM. HUM. RTS. L. REV. (forthcoming 2007), available at http://www.law.columbia.edu/center_program/ag/Library/AG_Publications.

However, someone who was hired to do defensive cases may or may not have a suitable approach and the same skill set that is required to do affirmative work. Some people may resist changing from how cases have been done traditionally and may resist taking an affirmative approach. Someone hired to write administrative appeals may not be able to switch gears and do investigations. The ideal candidate for doing this type of work is someone who is able to pursue investigations but who can also analyze complex legal issues. It is someone who can do outreach and interact well with workers, community groups and unions. Ideally, it is someone who has language skills that will assist in this process. It is someone willing to meet with workers or groups at whatever time or whatever location is required to get evidence. These factors, and knowledge of the existing staff, will inform decisions on who should do this type of work.

If starting a free-standing labor bureau is not possible because of either limited overall resources or the need to start gradually, it may be advisable to place an attorney or attorneys doing labor work within either a general “public advocacy” division or within an established civil rights or consumer division or other area where attorneys are doing affirmative work. Attorneys who are doing affirmative work will be familiar with the mindset of doing affirmative work and will be familiar with the attorney general’s jurisdiction to bring affirmative cases. Designating a “labor counsel” or “special advisor” for labor work may also be a way of beginning to develop labor cases.

Two states that have recently begun to increase their affirmative labor law work provide examples of these strategies. In Illinois, Attorney General Lisa Madigan has sought to expand the affirmative labor law work done by the Attorney General’s Office. The attorneys doing labor law cases work in a Special Litigation Bureau within the

office's Public Interest Division. The Special Litigation Bureau does a variety of different public advocacy cases including the labor cases. Representation of the state labor agency is still done within the General Law Bureau. Attorneys handling affirmative labor cases in the Special Litigation Bureau consult with the attorneys in the Labor Law Unit of the General Law Bureau.²⁶

In California, the state labor agency is authorized to do its own representation and thus the Attorney General's Office does not do defensive labor law cases. In 2001, then Attorney General Bill Lockyer appointed a Special Counsel for Labor, with the purpose of increasing involvement in labor issues. In 2006, the Office received funding for two attorneys and one investigator to start a section called the Underground Economy Statewide Investigation and Prosecution Unit. The attorney who had formerly been the Special Counsel for Labor will head up the unit which will be located within the Office's Civil Right's enforcement section.²⁷

Each state that is interested in increasing its role in affirmative labor law work will need to make a determination of the resources available to do this work. While designating some attorneys to do labor law work is certainly optimal, any increased work would be beneficial to the workers in your state. If resources only allow an amicus brief on an issue of state labor law, or a public information campaign, or taking one piece of impact litigation at a time, or taking a public stand on an issue of importance to workers, then doing so is better than rejecting a new initiative because resources are scarce.

²⁶ Telephone interview with Paul Gaynor, Chief of Special Litigation, Illinois Attorney General's Office, November 2006.

²⁷ Telephone interview with Ralph Lightstone, Deputy Attorney General, California Attorney General's Office, November 2006.

Starting with one initiative may also be a way to begin a path to a larger commitment to this area in the future.

Working with the Labor Agency

Whatever jurisdiction an attorney general has to do labor law enforcement, the state labor agency can be a partner in increasing compliance. Increasing the attorney general's role in labor law enforcement beyond referrals from the state labor agency does not mean leaving the agency behind. Working proactively with the state labor agency is an excellent way to do affirmative labor law work.

If the state jurisdiction permits an attorney general to do labor cases only in conjunction with the labor agency, the attorney general will need to establish a relationship with the agency that allows for more than waiting for the agency to refer cases. These relationships will vary depending on the culture and political affiliation of each agency and it is impossible to predict all of the variations. Ideally, outreach can be done together and cases can be developed together. If that is not possible, outreach and the identification of cases can be done by the attorney general and then brought to the labor agency.

Even where an attorney general has independent jurisdiction, it can be very valuable to work together with a labor agency. Strategizing and combining the resources and powers of the two agencies can be an extremely effective way to approach labor investigations. In fact, the ideal enforcement scheme includes a labor agency and an attorney general's office committed to active enforcement of labor laws with collaboration between the agencies. An attorney general can try to assure this type of cooperation by meeting with the governor to discuss labor law enforcement.

An attorney general's office that is active in labor law enforcement should meet regularly with agency personnel to share information on violations and strategize about the selection of cases. Decisions can be made together as to what types of cases are best done by each agency separately and what cases can be developed together. If the state has criminal jurisdiction over workplace violations, the attorney general can have input into which cases should be referred criminally and which civilly.

Establishing Partnerships

As described in Section III, establishing partnerships with community groups, labor unions, and advocacy organizations is a critical part of both identifying the types of labor problems in a jurisdiction and uncovering workplaces that may be violating the law. As stated earlier, establishing partnerships requires much more than communicating with these groups and letting them know of available services. It involves a true collaboration with outside groups to gain the trust of workers. These groups are also able to assist the attorney general's office in identifying the particular industries or types of labor problems that exist in a jurisdiction.

Beginning this process means first identifying likely groups with which to work. The attorney general's office may have contacts in the labor, non-profit, and social services communities that may help to find groups with which to cooperate. Local law school clinical programs or professors who specialize in labor or public interest law may be another source of information.

The National State Attorneys General Program at Columbia Law School and some of the national groups with whom it works — for example, the National

Employment Law Center²⁸ and the Brennan Center for Justice²⁹ — can help identify and make contact with groups in your area. These existing collaborations may help pave the way to meaningful partnerships in a way that cold-contacting these groups would not. These early contacts and meetings are critical to both establishing a working relationship and to actually making these cases happen.

While groups with a specific labor focus, such as worker centers, unions, or non-profits dedicated to worker rights, may be the most fruitful places to identify issues and cases, other groups may also lead to meaningful collaborations. Groups focused on specific ethnic or immigrant groups that may contain a large number of low-wage workers may hear about workplace problems in the course of advocacy or social service provision. Similarly, churches and social service agencies may be places where low-wage workers are willing to express workplace problems. All of these groups can be used to identify workers with valid wage and hour complaints.

In each of these relationships and collaborations, the attorney general will need to find the right balance between a meaningful collaboration that assists the office in carrying out its law enforcement responsibilities and maintaining the appropriate confidentiality required of a government agency. All parties to the collaboration must be clear on the roles that each group will play. To maintain its impartiality and standards, the attorney general's office must fully investigate each piece of evidence brought by a partner and must not be tempted to cut corners based on the trust it may have in a particular group. The attorney general must also evaluate what information is proper to

²⁸ The National Employment Law Project, <http://www.nelp.org>, is a national non-profit research and litigation organization that advocates on behalf of low-wage and non-standard workers.

²⁹ Brennan Center for Justice at New York University School of Law, <http://brennancenter.org>, is a policy and law institute that combines scholarship with legal advocacy on many issues including workplace enforcement.

share with an outside group to facilitate an investigation and what must be kept confidential.

Partners must understand that once a case is brought to the attorney general, the attorney general's office will pursue its own law enforcement goals which may not dovetail exactly with the interests of the outside partner. For example, a union may identify serious minimum wage violations in the course of a union organizing drive and may provide witnesses to the attorney general who can testify to the violations. If the organizing drive is successful in a particular workplace, a union may see it as in its best interests to have the attorney general withdraw its investigation. It must therefore be made clear from the outset that once the attorney general is notified of a violation of state law, it will not withdraw an investigation because of the interests of a partner. Similarly, the attorney general and an outside partner may view certain settlement offers differently. The attorney general will weigh a settlement offer against the extent of the violation of the law while an outside partner may want to use litigation leverage to build a larger campaign around a particular workplace. These issues must be discussed prior to collaborations to ensure that all parties understand the parameters of working together.

Working with the Private Bar

Many state laws and the federal Fair Labor Standards Act provide for a private right of action for the collection of unpaid wages. Thus, in most states, there will be private lawyers who practice in this area. Identifying and consulting with these attorneys will be a beneficial practice for an attorney general seeking to expand his or her presence in enforcing labor law.

Because there will always be more violations of wage and hour laws than could ever be prosecuted by even the most active attorney general, private actions to enforce labor laws hold great potential to assist workers. Many members of the private bar will have years of experience in this area that could be a helpful resource for the attorney general's office. An attorney general must also be aware that private cases could result in insufficient settlements or in "bad law" that could hamper both the attorney general and other members of the private bar.

An attorney general working on labor law issues should seek out those members of the private bar who are already engaged in these efforts.³⁰ The attorney general could host or co-host meetings of lawyers engaged in labor cases in order to enhance areas of mutual assistance. These efforts could keep the attorney general informed about state law issues that arise in privately litigated cases and could provide the opportunity for intervention or amicus briefs on issues of particular importance.³¹

How to Select Cases or Initiatives

With the knowledge gained from research and outreach, an attorney general who begins to do affirmative labor work will need to carefully select initial matters to investigate. Since the attorney general is not the primary agency responsible for enforcing the labor laws, it does have the ability to choose cases based on the impact that a case will have rather than being responsible for providing assistance for all workplace complaints.

³⁰ The National Employment Lawyers Association (NELA), for instance, is a network of advocates for labor and employment rights. For further information, see NELA, <http://www.nela.org>.

³¹ State attorneys general have long become accustomed to working successfully with the private bar on affirmative litigation in areas such as consumer, antitrust and environmental litigation.

With that in mind, the attorney general should look for cases that could have an impact on an industry that is particularly rife with violations. Bringing a high profile investigation in a particular industry could lead to compliance beyond that particular workplace. The attorney general can also look for cases that present issues of legal importance that will set precedent and thus have an impact well beyond a particular case. Depending on its jurisdiction, the attorney general will have to decide when it is appropriate to use criminal or civil powers.

The attorney general can use a variety of different methods to bring cases. Investigation and litigation will undoubtedly be the primary method of enforcing the law. There is also a large role for the attorney general to help define the course of labor law by filing amicus briefs in private litigation that involves issues of state labor law. Similarly, the attorney general can become involved in policy issues impacting on workers. Finally, the high profile of the attorney general means that public outreach on labor issues has the potential to reach large numbers of individuals who may not ordinarily be aware of new laws or initiatives.

The attached appendix contains examples of cases and initiatives done by the New York State Attorney General's Labor Bureau. These examples provide a concrete picture of the type of affirmative work that can be done by attorneys general's offices. The National State Attorneys General Program can provide further support and networking to states that wish to expand their work in this area. As more states increase their work in this area, the Program will facilitate ways to allow states to share information and ideas about affirmative labor work. If you are interested in further information, discussion, or assistance or if you would like to be notified of further

discussions on this issue, please contact please contact Jim Tierney, Director of the National State Attorneys General Program, at jtiern@law.columbia.edu or Tam Ormiston, Deputy Director, at tormis@law.columbia.edu.

APPENDIX

What follows are some examples of cases or initiatives brought by the New York State Attorney General's Labor Bureau between 2000 and 2007.³²

Greengrocers

A union, a community group, and the Mexican consulate together brought this issue to the attention of the Attorney General's Office. New York City has an estimated 1,000 greengrocers, which sell fruits and vegetables and basic groceries.³³ The stores are nearly always open twenty-four hours a day. Many of the groceries hire mostly Mexican workers to stock fruits and do other basic work. Most workers we encountered were working twelve hour shifts six or seven days per week and being paid between \$200 and \$300 per week, far below the minimum wage.

The Labor Bureau began its initiative by bringing individual enforcement actions against a total of 18 stores over the course of two years. The worker complainants for these cases were brought to us by two retail unions. We also began doing education and outreach to the owners of the greengroceries, who were predominantly Korean. We gave several training sessions on minimum wage law at the various trade associations with greengrocer members.

Because it would be impossible to reach every greengrocer in the city and because the owners largely belonged to the same trade associations, we decided to initiate a Code of Conduct that would bring a larger number of stores into compliance. After three-way negotiations between the Korean trade associations, the community and union groups, and the Attorney General's Office, we developed a Code of Conduct. The Code requires employers to comply with New York's Labor Laws, provide some minimal additional benefits (vacation/sick days), and submit to unannounced monitoring. The employers who signed on and complied with the Code would not be investigated by the Labor Bureau for past violations.

Approximately 200 greengrocers signed on to the Code for a period of two years and were monitored by an outside monitor paid for by the state. The monitoring showed a very high level of compliance with both the Labor law and with the additional provisions of the Code.³⁴

Delivery Workers

Many supermarkets and drug stores in New York City provide home delivery to their customers. Several store chains provided the service through subcontractors who

³² The website of the New York State Attorney General's Office contains a full listing of press releases from this time period at <http://www.oag.state.ny.us/labor/index.html>.

³³ Steven Greenhouse & Seth Kugel, *Labor Truce Wearing Thin For Koreans And Mexicans*, N.Y. TIMES, Sept. 27, 2004, at B3.

³⁴ See Steven Greenhouse, *Korean Grocers Agree to Double Pay And Improve Workplace Conditions*, N.Y. TIMES, Sept. 18, 2002, at B1; Sujata Shah, *Grocer Code to Aid Workers: Spitzer Pushes for Minimum Wage, OT pay & Rest*, N.Y. DAILY NEWS, Sept. 18, 2002; Greenhouse, *Waging War*, *supra* note 7.

hired delivery workers who were predominantly from West Africa. The delivery workers received far below the required minimum wage and overtime from the subcontractors.

This situation came to the Labor Bureau's attention both through a non-profit legal organization, the National Employment Law Project (NELP), and through one of the delivery workers, Mamadou Camera, who led an informal strike by the delivery workers that received press attention and that led to a union organizing drive by a retail workers union.

The Attorney General's Office and NELP, together with a private law firm, brought suit for minimum wage and overtime violations against both the subcontractors and the supermarket and drug store chains under a theory of joint employment. The case led to settlements of close to \$7 million for the delivery workers and a favorable decision on the issue of joint employment under state and federal law.³⁵ Following the lawsuit several of the supermarket chains agreed to hire the delivery workers directly and the largest subcontractor agreed to a union contract providing benefits to the workers.

Pretzel Vendors

In 2003, the Labor Bureau recovered \$450,000 in wages on behalf of vendors who staff pretzel and hot dog stands in New York City's Central Park. The vendors were employees of M&T Pretzel, which had won the right to operate the stands through a bidding process with New York City. The vendors worked between 50 and 70 hours per week during the summer months but were not paid time and half their regular wage for hours worked over forty hours per week as required by state and federal law. The Urban Justice Center, a non-profit legal group, brought the case to the Attorney General's attention and assisted with identifying complainants.

Bathroom Attendants

In 2004, the Labor Bureau announced the results of an investigation into the conditions of bathroom attendants in New York City restaurants. Many upscale restaurants provide attendants to keep the bathrooms clean, hand out towels, offer personal hygiene products for sale, and provide additional security. Following complaints by some bathroom attendants, the Attorney General's Office investigated the industry and determined that most restaurants hired attendants through outside contractors. The attendants hired in this manner did not receive any wages but instead just received tips from patrons. In addition, they were required to give a portion of their tips to the contractor in violation of state law. As a result of the investigation, many restaurants agreed to hire the attendants in house and pay the correct minimum wage. Tavern on the Green, a prominent New York City Restaurant, agreed to hire fourteen bathroom attendants in house and pay up to \$175,000 to compensate the attendants for

³⁵ See *Ansoumana v. Gristede's Operating Corp.*, 255 F.Supp.2d 184 (S.D.N.Y. 2003), *reconsideration denied*, 255 F.Supp.2d 197.

back wages. A large contractor, Royal Flush Bathroom Attendants, was also sued for back wages.³⁶

Employment Agencies

Many of the workers who complained to the Labor Bureau about wage violations were referred to their jobs through employment agencies. New York State law regulates the fees that employment agencies can charge applicants and also makes it illegal to refer an applicant to a job that pays below the minimum wage. The Bureau investigated over forty employment agencies in a two year period and found that it was not uncommon for an agency to refer half of its applicants to jobs that paid less than the minimum wage. The Bureau fined the agencies close to \$300,000 in total, and entered into agreements whereby the agencies' records would be monitored going forward.³⁷

Day Laborer Task Force

Because of widespread minimum wage violations among contractors who hire day laborers, mostly in construction or landscaping businesses, the Bureau launched a day laborer task force in 2000. Representatives of the Bureau conduct outreach and training to day laborers through various community and church groups. Through this outreach, the Bureau learns of minimum wage violations and either handles the cases itself or refers the cases to the New York State Department of Labor.³⁸

Minimum Wage Outreach

In 2004, the New York State legislature passed a bill that increased the minimum wage in New York State in three increments starting on January 1, 2005. A study by the Brennan Center shortly thereafter showed that few businesses and workers were aware of the change.³⁹ The Bureau launched a public awareness campaign. The Bureau wrote a fact sheet on the minimum wage increase that was translated into ten languages. Representatives of over fifty different community groups were invited to a meeting and press conference with the Labor Bureau and Attorney General Spitzer. The fact sheets, which were distributed widely by the community groups, included the Labor Bureau

³⁶ Steven Greenhouse, *Restroom Attendants Gain Ally in Bid for Back Pay and Tips*, N.Y. TIMES, Oct. 8, 2004, at B1; Press Release, N.Y. Att'y Gen., Investigation Reveals Deplorable Plight of Restaurant Bathroom Attendants (Oct. 7, 2004).

³⁷ Steven Greenhouse, *Agencies Sued Over Low-Paying Jobs*, N.Y. Times, Jun. 16, 2004, at B4; Press Release, N.Y. Att'y Gen., Spitzer Takes Action Against Employment Agencies Making Referrals to Jobs Paying Below Minimum Wage (Jun. 15, 2004).

³⁸ *Advocating for Day Laborers; Abuse by Employers All Too Common*, HISP. OUTLOOK IN HIGHER EDUC., Sept. 22, 2003, at 34; Press Release, N.Y. Att'y Gen., Spitzer to Investigate Labor Law Violations Against Day Laborers (Apr. 11, 2001).

³⁹ Annette Bernhardt, Op. Ed., *Pssst. The Minimum Wage is Up. Pass It Along*, N.Y. DAILY NEWS, Jan. 10, 2005.

phone number for complaints.⁴⁰ The Bureau followed up on all complaints in subsequent months, including one where a restaurant delivery worker was fired for complaining to a restaurant owner that he was not receiving the new minimum wage. The delivery worker received backpay totaling \$17,000.⁴¹

Home Health Care Attendants

In 2005, the Labor Bureau entered into a settlement with a home health care agency called Special Touch for overtime wages for home health care attendants. The agency had failed to pay the required minimum wage for hours worked over forty hours per week and agreed to pay approximately \$3 million to over 2,000 workers.⁴²

Criminal Prosecutions of Prevailing Wage Violations

Working with various unions and local governments, the Bureau greatly increased its docket of criminal prevailing wage prosecutions. Using felony penal laws such as “Falsifying Business Records,” “Offering a False Instrument for Filing,” and “Grand Larceny,” the Bureau collected over \$11 million in restitution, penalties and interest and cracked down on this type of misuse of public funds.⁴³

Amicus Briefs

The Bureau intervened or filed amicus briefs in numerous cases of interest, including: *Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd.*, 535 U.S. 137 (2002) (undocumented worker who provided false employment documentation not entitled to back pay award for work not performed due to employer’s unfair labor practice); *Gorgonio Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338 (2006) (interpreting *Hoffman Plastics* under state law); *Zheng v. Liberty Apparel*, 335 F.3d 61 (2d Cir. 2003) (joint employment standard); and *Chu Chung v. New Silver Palace Restaurant*, 272 F.Supp 2d 314 (S.D.N.Y. 2003) (individual employer liability for wages).

⁴⁰ Press Release, N.Y. Att’y Gen., Spitzer Launches Campaign About Higher Minimum Wage (Mar. 3, 2005).

⁴¹ *Worker Fired for Seeking Minimum Wage Receives Back Pay, Damages*, U.S. STATE NEWS, Jul. 5, 2005; Press Release, N.Y. Att’y Gen., Worker Fired for Seeking Minimum Wage Receives Back Pay, Damages (Jul. 6, 2005).

⁴² Press Release, N.Y. Att’y Gen., Attorney General Obtains Overtime Pay For Thousands Of Home Health Care Attendants (Jun. 7, 2005).

⁴³ See, e.g., Press Release, N.Y. Att’y Gen., Contractors Admit Stealing More Than \$6.5 Million in Wages From Over 400 Workers on NYC Housing Authority Contracts (Jan. 26, 2007); Press Release, N.Y. Att’y Gen., Contractor Pleads Guilty to Wage Underpayments and Theft (Feb. 1, 2005).