

Local and State Business Registration Schemes

An Enforcement Lever to Strengthen Employer
Compliance With Labor Standards and to
Facilitate Worker Organizing

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Executive Summary

We have a wage theft epidemic in our country, especially in the low-wage labor market, where too many workers are cheated out of fair pay. The many factors that contribute to the wage theft epidemic include woefully under-resourced public enforcement agencies, inadequate anti-retaliation protections for workers who come forward to enforce their rights, and a lack of strong consequences to change employer behavior from noncompliance to compliance with labor standards. Moreover, for too many workers, the effort to hold their employers accountable for wage violations turns out to be a disempowering experience; not only is it common for workers to wait years with little or no information as their wage claim languishes at a public enforcement agency, but many workers never collect unpaid wages even after an employer is found liable. To turn the tide against the wage theft crisis, I explore the use of registrations and licenses—which businesses are often required to obtain as a prerequisite of doing business—as a labor standards enforcement tool, with the goal of creating strong consequences for violating wage laws to motivate employers to change their behavior. I also explore ways in which the business registration scheme, as an enforcement tool, could facilitate worker organizing and worker power-building by creating opportunities for meaningful participation in the implementation and enforcement of the registration program. This would be achieved through the creation of an infrastructure called the “Business Registration Board” that would be governed by worker, employer, and government representatives.

Introduction

Every day workers across the country are cheated out of their fair pay when their employers pay sub-minimum wages, fail to pay time and a half for working more than 40 hours a week, or shave off hours worked. Wage theft has become an epidemic in our economy. Various factors contribute to the wage theft epidemic including woefully under-resourced public enforcement agencies with no political will to engage in more aggressive enforcement, inadequate anti-retaliation protections for workers who come forward to enforce their rights, and a lack of strong consequences—which are necessary to motivate change of behavior—for employers who violate wage and hour laws. A lack of a robust public enforcement system means that when workers do come forward to assert their wage rights, too often they experience disempowerment. Disempowered workers are discouraged from pursuing future claims because wage claims often languish for years at public enforcement agencies, and even if employers are found liable, often workers are unable to collect unpaid wages for a number of different reasons, including corporate and individual employers declaring bankruptcy or simply disappearing.

What is an effective public policy response to the wage theft epidemic? In this paper, I propose establishing a robust business registration scheme as an enforcement tool to tackle wage theft. Under my proposal, all businesses within a jurisdiction, as a condition of doing business, would be required to annually register and disclose information regarding outstanding wage judgments or pending claims against them with a designated enforcement agency. By tying the annual issuance and renewal of business registration to compliance with wage and hour laws, an enforcement

agency can leverage—and activate—the power to shut down business operations by denying or suspending employers’ registration until violations are remedied. Any business with pending wage claims would be issued a temporary registration to operate, and any wage claims against a business that requires registration renewal would be fast-tracked to ensure that no business would be allowed to operate permanently until all wage claims are resolved and proof of payment of unpaid wages is submitted.

To address the disempowerment workers experience when they come forward to enforce their wage rights, my proposal creates an infrastructure called the “Business Registration Board” that would be governed by worker, employer, and government representatives. It would create opportunities for meaningful participation of workers and worker organizations in the implementation of the business registration scheme as well as facilitate worker organizing and power-building. I conclude by discussing some challenges to implementing my proposal and some implications for worker organizing.

Wage Theft Epidemic: The Problem

Wage theft—which includes any number of ways in which employers steal workers’ wages and violate wage and hour laws—is an epidemic in the U.S. labor market, and it occurs in industries that span the economy. A seminal 2009 study of nearly 4,500 low-wage workers in New York City, Chicago, and Los Angeles found that more than two-thirds of low-wage workers experienced at least one wage violation in their previous work week, including 76 percent who were not paid overtime when they worked more than 40 hours, and 26 percent who were not even paid the minimum wage.¹

The wage theft epidemic has many roots. First, repercussions for violating wage and hour laws are simply not strong enough to dissuade employers inclined to break the law. In many states, monetary damages awarded to workers are not high enough to provide a real incentive for compliance. Fines and penalties are not mandatorily assessed against employers who have been found to have violated the law, making it difficult to “teach” them a lesson and to change their behavior. Employers know that if they fail to pay wages, the worst that may happen is that they will eventually have to pay the bare amount of wages owed. There are also virtually no consequences for employers who, once found liable, file for bankruptcy, hide their assets, shut down operations and

¹ Bernhardt, Annette, Ruth Milkman, Nik Theodore, Douglas Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz González, Victor Narro, Jason Perelshteyn, Diana Polson, and Michael Spiller. 2009. Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities. p. 3. New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment. Not surprisingly, wage violations were disproportionately high among undocumented workers—for example, 37 percent of undocumented workers were paid less than the minimum wage versus 21 percent of documented workers and 16 percent of U.S.-born workers. Women, in particular undocumented immigrant women, experienced higher rates of wage violations than their male counterparts—47 percent of undocumented women experienced minimum wage violations versus 30 percent of undocumented men. There are many other surveys and studies that have found staggering rates of violations of wage and hour laws. For a summary of survey and research from across the country, see National Employment Law Project. July 2013. Summary of Research on Wage and Hour Violations in the United States. Retrieved April 14, 2015 (http://nelp.3cdn.net/acf9c2ba5baa5fc6b6_6wm6bnook.pdf).

reorganize as a “new” entity, or simply disappear, all in an effort to avoid paying judgments and leaving workers with empty pockets.²

Second, many employers deliberately adopt outsourcing practices—including multi-layered subcontracting, use of staffing or temp firms, franchising, and misclassifying employees as independent contractors—as a business strategy to evade their responsibilities of paying fair wages and to place them beyond the reach of the law.³ These outsourcing practices hinder workers’ ability to assert their workplace rights because workers often do not know who their real boss is, and neither federal nor state departments of labor go after more than the most immediate employer in wage claims.

Moreover, inadequate anti-retaliation protections for workers who do assert their workplace rights give employers free rein to engage in illegal tactics. These force workers to accept wage theft in silence for fear of losing their jobs or being deported. The 2009 study, *Broken Laws, Unprotected Workers*, found that 43 percent of the low-wage workers who complained about violations of workplace standards were retaliated against. Retaliation included firing, suspension, threats to cut hours or pay, cutting hours or pay, and threats to call immigration authorities.⁴ This culture of fear is the norm in many workplaces, where many workers rarely have an opportunity to exercise power vis-à-vis their employers.

Our current public enforcement regime further aggravates the wage theft epidemic.⁵ This is largely due to perpetually under-resourced public enforcement agencies with woefully inadequate numbers of investigators and field staff, and a long backlog of cases. Public enforcement agencies also lack the political will to engage in more aggressive and proactive enforcement to send a public message to employers that violations don’t pay. Our public enforcement system also contributes to workers’ experience of disempowerment, discouraging them from pursuing wage claims in the future. Many workers simply do not know what is happening with their complaint once they file it with a public enforcement agency; even assuming they are able to contact the enforcement agency to inquire about the status of their claim, these workers rarely receive concrete information. It is common for workers to wait for years with little or no information as their claim languishes at the agency and the statute of limitations for filing a private lawsuit ticks away. Even after a claim has

² Cho, Eunice Hyunhye, Tia Koonse, and Anthony Mischel. 2013. *Hollow Victories: The Crisis for Collecting Unpaid Wages for California’s Workers*. New York: National Employment Law Project and UCLA Labor Center. Retrieved April 14, 2015 (http://nelpl3cdn.net/b5cea6550994c2358d_15m6id1ha.pdf).

³ Most state minimum wage and overtime laws and the federal Fair Labor Standards Act (FLSA) have very broad definitions of employer, employee, and employ, and are meant to capture most work relationships, except for those legitimately between independent businesses. However, we also know that the enforcement of the law has not been nearly enough to deter violations, even when the appropriate employer with real ability to control workplace conditions is theoretically liable under the law. This is especially true in those jurisdictions that have thwarted these standards through narrowing case law or agency interpretation. For a description of some of the organizational shifts in the way businesses operate, see Ruckelshaus, Catherine, Rebecca Smith, Sarah Leberstein, and Eunice Cho. 2014. *Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work*. New York: National Employment Law Project.

⁴ Bernhardt, Milkman, Theodore, Heckathorn, Auer, DeFilippis, González, Narro, Perelshteyn, Polson and Spiller, p. 3.

⁵ Our current private enforcement regime is also a significant barrier to workers’ ability to assert their workplace rights. While a growing number of private lawyers are representing low-wage workers in wage and hour litigation, the high cost of legal representation remains a significant barrier to workers achieving redress for wage theft by means of a private lawsuit. Additionally, the current legal trend of mandatory individual arbitration dissuades workers from asserting their rights by joining a collective/class action.

finally been resolved and an employer is found liable, many workers never collect the unpaid wages and damages owed to them because fly-by-night, undercapitalized firms and individuals simply disappear.⁶

Local and State Business Registration and Suspension Schemes as Labor Standards Enforcement Levers

In this paper, I explore the use of registrations and licenses—which businesses are often required to obtain as a prerequisite of doing business—as a labor standards enforcement tool, with the goal of creating strong consequences for violating wage laws. Meaningful consequences will motivate employers to change their behavior from noncompliance to compliance with labor standards. To that end, I propose a business registration and suspension regime requiring all businesses within a city or a state to register annually with a designated enforcement agency (e.g., state department of labor) as a condition of doing business. As part of the registration and renewal process, employers would be required to disclose critical information about their business and employment practices, such as outstanding judgments or orders of unpaid wages, pending wage and hour claims, and lawsuits, among others.

As I discuss below, when employers have outstanding unpaid wages owed to workers, the administering agency would have the power to shut down business operation by denying or suspending registration until the violations are remedied. Any business with pending wage claims against it would be issued a temporary registration to operate, and any wage claims against a business that is up for registration renewal would be fast-tracked. This would ensure that no business would be allowed to operate permanently until all wage claims are resolved and proof of payment of the unpaid wages is submitted. The threat of business shutdown would always be present, ready to be activated whenever employers fail to comply with registration requirements. The proposed business registration program requires a rigorous enforcement system that brings under one coherent regime both enforcement of wage and hour laws and registration law.

To turn the tide against the overwhelming sense of disempowerment workers experience when they attempt to enforce their wage and hour rights, I also explore ways in which the business registration scheme, as an enforcement tool, could facilitate worker organizing and power-building. This would be achieved by creating opportunities for meaningful participation by workers and worker organizations in the implementation and enforcement of the registration program. I propose the creation of an infrastructure called the “Business Registration Board” that would be governed by worker, employer, and government representatives. This body would not be an advisory entity, but one that would be vested with authority to set the overall direction for and oversee the implementation, enforcement, and monitoring of the business registration program. As a vehicle to engage workers and worker organizations, the Board could advance an approach of more formalized and sustained partnership between governmental and non-governmental entities,

⁶ Cho, Koonse and Mischel, p. 4.

where worker organizations are positioned as a fully integrated partner to the administering agency's work, instead of merely a group to be consulted.⁷ Under this more integrated partnership model, worker organizations could assume a greater role in the implementation and enforcement of the registration program. I conclude by discussing some challenges of implementing my proposal and some implications for worker organizing.

Business Licenses and Registrations: An Overview

To protect the public welfare, health, and safety, most cities and states regulate businesses by requiring a demonstration of character, competency, and responsibility as a prerequisite for doing business, and issue a license or registration as proof of such demonstration. For example, a store owner cannot obtain a certificate of occupancy for a premise in which to operate business without first demonstrating that the store owner has complied with applicable regulations to ensure public safety. To address rampant wage and hour violations in the state's garment and car wash industries, California requires annual registration of garment manufacturers and contractors and car wash businesses as a prerequisite for their operation.⁸ The government provides oversight by requiring businesses to renew their licenses or registrations on a regular basis and holds the power to suspend or revoke them when businesses violate applicable standards, requirements, or laws. A business license or registration thus can be a strategic site for policy intervention by making compliance with labor standards a condition for a license or registration, and penalizing businesses by suspending a license or registration when wage violations are committed.

Current State of the Law: Suspension or Revocation of Business Licenses

Several cities and states have enacted laws that suspend a range of business licenses or permits for violations of employment (wage and hour, workers' compensation, unemployment insurance, anti-retaliation), tax, or civil rights laws. For example, the New Jersey labor commissioner may direct an appropriate agency to suspend one or more business licenses⁹ for a period of time when there is a determination—after the employer is afforded a hearing—that the employer has continued to fail to

⁷ Janice Fine and Jennifer Gordon discuss how community-based organizations need to be fully integrated into an enforcement agency's work and how these partnerships between public enforcement agencies and community-based organizations can give workers' organizations equal standing with government and employers. See Fine, Janice and Jennifer Gordon. 2010. "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organization." *Politics & Society* 38(4):552-585.

⁸ The registration program in the garment industry was enacted in 1999 as part of a broader legislative effort (Assembly Bill 633) to deal with horrendous labor abuses in the garment industry and to hold those who profit most from sweatshop working conditions responsible for eliminating them. See Seville, Marci. 2005. "Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law – An Evaluation of Assembly Bill 633 Six Years Later." *Women's Employment Rights Clinic*. Paper 4, Retrieved April 14, 2015 (<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1003&context=werc>). Modeled after the garment industry, the car wash registration law was first enacted in 2004. See California Labor Federation. "Keeping Car Wash Workers Out of the Underground Economy." Retrieved April 14, 2015. (http://www.calaborfed.org/index.php/site/page/car_wash_registry).

⁹ The business licenses that could be suspended under the New Jersey law include a certificate of incorporation, a certificate of limited partnership, a license connected to engaging in public works, and a liquor license. New Jersey Revised Statutes, Section 34:1A-1.11 (West 2014).

pay wages, benefits, taxes, or other contributions required under the law.¹⁰ The labor commissioner is empowered to permanently revoke any of the licenses if the employer remains in violation.¹¹

Under Connecticut liquor laws, any employer that fails to pay its unemployment insurance contribution will have its liquor license suspended until the payment is made.¹² Massachusetts also has a mechanism to suspend an employer's liquor license for a failure to pay unemployment insurance contributions after a hearing and court judgment.¹³

As of 2013, California's employers can have their business licenses suspended or revoked if the state department of labor or a court finds that an employer retaliated against a worker by reporting—or just threatening to report—the citizenship or immigration status of a worker or a worker's family member.¹⁴

On the local level, there is a growing list of cities that have enacted ordinances permitting the suspension of a range of business licenses when employers admit to—or there is a judicial or administrative finding of—wage and hour violations or until such violations are remedied. Those cities include San Francisco, Houston, Seattle, New Brunswick (New Jersey), Chicago, Somerville (Massachusetts), and Washington, D.C.

Limits of Business License Suspension as a Labor Standards Enforcement Tool

Licensing laws that suspend or revoke business licenses based on an administrative or judicial finding of guilt or liability for wage violations, although powerful in theory, are narrow in reach. These laws are largely designed in this manner because there are genuine legal limitations to suspending or revoking a business license without adjudication or affording the license holder due process. Compounding these legal limits is the reality that the vast majority of civil wage claims—either judicially or administratively adjudicated—do not reach a determination of liability. Many cases settle without any admission of liability. In fact, when private lawsuits settle out of court, employers routinely expect no admission of liability, and it is often a condition of settlement. As such, employers in these settlements—who sometimes pay millions in unpaid wages—are beyond the reach of these licensing laws. This is because even though these employers admitted to the violations by paying the wages owed to workers, they did not “admit” in the manner required by the law. Moreover, because many jurisdictions face long complaint backlogs, even when there is a finding of liability, the potential suspension—if the enforcement agency decides to exercise its power—may come years after wage claims were filed, delivering little value to aggrieved workers.

¹⁰ New Jersey Revised Statutes, Section 34:1A-1.12 (West 2014).

¹¹ *Ibid.*

¹² General Statutes of Connecticut, Section 30-55a (West 2011).

¹³ Executive Office of Labor and Workforce Development, “Unemployment Insurance FAQs for Employers and Businesses.” Retrieved April 14, 2015 (<http://www.mass.gov/lwd/unemployment-insur/resources/questions-and-answers/employers-and-businesses/unemployment-insurance.html>).

¹⁴ California Business and Professions Code, Section 494.6 (West 2014).

The discretionary, as opposed to mandatory, power to suspend, even temporarily, further limits the impact of these licensing laws. Discretionary power means that the enforcement agency may not enforce the law if it lacks political will, or unless it is pressured to do so. Advocates in many of the cities that have passed licensing ordinances can attest to this reality, because they are either waiting for the city administration to implement the ordinance or have not seen the city actually exercise its bestowed power.

Lastly, many of these laws do not delineate a clear enforcement process. Almost all of the local ordinances rely on a finding of liability for violating state or federal laws, but the city is empowered to suspend the license. These ordinances fail to delineate the necessary mechanisms for the city to exercise its power. For instance, the ordinances are silent on how the city may ascertain wage-theft-related information about individuals and businesses that operate within its jurisdiction. They also do not provide a mechanism for aggrieved workers or third parties with knowledge of violations to file a complaint with the city, which could provide one way for the city to identify employers who have committed wage theft. Without an enforcement mechanism, it is unclear how and when the cities that have enacted local ordinances will exercise their discretionary powers to suspend or revoke the business licenses of employers who violate the law.

Current State of the Law: Industry-Specific Registration as a Condition of Doing Business

There are industry-specific registration schemes where annual registration is a condition for doing business. As part of registration, businesses are required to attest to knowledge of and/or compliance with specified workplace-related laws. There are also specified grounds for denial or suspension of registration under these schemes. For instance, a recently enacted registration program in the landscaping industry in Princeton, New Jersey, requires applicants to “acknowledge” at the time of registration that they have received a copy of the federal and New Jersey State wage and hour laws as well as the New Jersey State workers’ compensation insurance laws.¹⁵ When a landscaping business is found guilty or liable for violating the federal or state wage and hour laws, the mayor and the town council may temporarily suspend its registration for a period not to exceed a week.¹⁶

California has a more extensive registration program for garment manufacturers and contractors (including temp and staffing agencies that are used by these manufacturers and contractors), car wash employers, and farm labor contractors. Registration requirements vary somewhat from industry to industry. Generally, however, covered individuals and businesses are required to register annually with the state’s Division of Labor Standards Enforcement (DLSE), pay a registration fee, post a surety bond to cover unpaid wages and pending or potential wage claims. They must also disclose whether any covered employer (1) has any outstanding unpaid judgment,

¹⁵ Code of Township of Princeton, Section 10C-3 (2014).

¹⁶ *Ibid.*

(2) owes any employee unpaid wages, and (3) is involved in any pending litigation.¹⁷ Employers are required to affirm their compliance with the unemployment insurance, workers' compensation, and tax laws.¹⁸ The garment manufacturers and contractors as well as the farm labor contractors are required to take an exam to demonstrate their knowledge of California's basic labor and health and safety laws.¹⁹ Farm labor contractors are further required to participate in continuing education and provide worker safety training to their employees who have supervisory roles.²⁰ The garment registration program also permits DLSE to confiscate garments and even manufacturing equipment under certain circumstances as "tainted goods" if applicants have not complied with the registration program.²¹

DLSE is empowered to deny or suspend these industry-specific registrations on different grounds, in addition to the obvious ones such as making false statements on registration applications. In the garment industry, for instance, a third or subsequent wage violation within a specified time period is a basis for registration denial or suspension.²² In both the garment and car wash registration programs, DLSE has the power to suspend registrations for employers' failure to maintain records.²³ However, many California advocates have noted that DLSE doesn't often exercises its power to suspend registrations and there has been very limited enforcement of the registration law generally.²⁴

Business Registration and Suspension Regime: Scaling Up and Tapping the Power to Shut Down Business

Building upon California's industry-specific registration laws and leveraging the power of license suspension to disrupt the flow of business, I propose a model that scales up these registration programs by requiring all businesses operating within a city or a state to register annually as a condition of doing business. At the time of registration and renewal, businesses would be required to (1) pay a registration fee and (2) self-report about their businesses, including all entities in their subcontracted chain (if applicable) and their employment practices. Businesses would also be required to conduct periodic educational training for their staff on the registration law and other basic workplace laws (e.g., minimum wage and overtime laws, health and safety laws) as a condition

¹⁷ For information required from farm labor contractors, see California Code of Regulations, Title 8, Sections 13660 and 13661 (West 2015). For information required from garment manufacturers and contractors, see California Code of Regulations, Title 8, Section 13634 (West 2015). For information required from car wash and polishing businesses, see California Code of Regulations, Title 8, Section 13682 (West 2015). The registration applications and instructions for these applications are available on the DLSE's website.

¹⁸ *Ibid.*

¹⁹ See California Code of Regulations, Title 8, Section 13662 (West 2015) for the written examination requirement for farm labor contractors and California Labor Code, Section 2675 (West 2000) for the requirement in the garment industry.

²⁰ California Code of Regulations, Title 8, Section 13666.2 (West 2015).

²¹ California Labor Code, Section 2680 (West 2000).

²² California Labor Code, Section 2679(b) (West 2000). California also addresses outstanding unpaid wages in the garment industry by requiring employers to post a bond or cash deposit to guarantee payment of the wages instead of denying registration. See California Labor Code, Section 273 (West 2000). The garment and car wash registration programs further established a special fund that allows workers to collect their unpaid wages from the special fund as a payment of last resort when they cannot collect from their employers.

²³ California Code of Regulations, Sections 13631 and 13681 (West 2015).

²⁴ Seville, p. 10.

of obtaining their registration. A new infrastructure, called the Business Registration Board, governed by worker, employer, and government representatives, would be established to oversee the implementation and enforcement of the registration program. This proposal necessarily requires our public enforcement agencies to be significantly transformed in order to have the capacity to engage in vigorous enforcement.

The proposal could be tested at a local or state level. Which is most appropriate depends on various factors, but for the experiment to reach its full potential, it should be pursued only in localities that have wage-setting and enforcement authority. This is because the enforcement of the registration law—at the state or local level—must be located within the jurisdiction’s wage and hour enforcement system. If the program is pursued at a state level, the state department of labor should administer and enforce the registration program. If the program is pursued at a local level, it must include the establishment of a local centralized enforcement office empowered to enforce a local wage law.

Mandatory Disclosures and Public Display of Business Registration

As a condition of registration and renewal, this proposal would require businesses to self-report about their business and employment practices. In particular, the proposal would require disclosure of (1) the business, i.e., ownership, principal officers, investors, shareholders, “doing business as” (DBAs); (2) the number of employees and independent contractors employed (here, one could require a breakdown of the percentage of employees by full-time, part-time, and temporary status); (3) wage rates and benefits provided; (4) any entities in a subcontracting chain; (5) any corporations or entities the business and its principal officers have operated previously; (6) any outstanding judgments, court orders, settlement agreements, or other contracts/agreements of unpaid wages against businesses and corporate officers; (7) any judicial or administrative determinations of wage and hour violations or resolutions of claims, including those that resulted in settlements within the last three years; and (8) any claims pending against the employer. As part of the registration process, employers would be required to submit documents to substantiate the disclosures they have made, as well as documents to show that they are in compliance with workers’ compensation, unemployment insurance, and tax laws.

The registration program would hold lead companies responsible for violations committed in multi-tiered subcontracting systems. It would require any lead company—which contracts with other companies to obtain workers to perform the labor-intensive parts of its business—to enter into a written contract with all subcontracted entities and submit it as part of its registration application.²⁵ The same submission of contract would be required from subcontracted entities, and no business would be relieved of its own registration responsibility.

²⁵ This requirement is already in place in California’s garment manufacturing industry registration program. This also builds upon a law recently enacted in California (Assembly Bill 1897) that holds corporations that use labor subcontractors and staffing agencies jointly liable for the wage, hour, and workers compensation protections of workers.

Businesses would be required to display their registration in a conspicuous place on their premises, visible to their employees and any person who may be on the premises. The administering agency would create a database of business registrations, and make it publicly available on its website. Making the list of businesses that have received registrations accessible to workers and the broader public means that workers and worker organizations can play an important role in the implementation and enforcement of the registration program. Workers and worker organizations might identify businesses that are operating without a registration or businesses that are up for renewal—all critical information that workers and worker organizations can use in enforcing wage and hour rights.

The registration program could be a vehicle to collect data on local or regional labor markets. The collected data could aid the administering agency in identifying industries with high rates of violations or in determining where to direct affirmative audits and investigations. The program could require the government to consolidate and analyze the collected data and publish reports about the local or state economy. These reports could explore relevant information on local or regional labor markets, the jurisdiction's workforce, or leading industries in the local or state economy. Importantly, advocates could access the data through public records laws, and such data could help advocates better understand certain industries and inform campaign development.

Registration Fees

The registration fee amount should be determined by the size and annual gross revenue of the employer, in addition to any history of registration denials, suspensions or findings of violations. Similar to California's garment industry registration program, those with past violations would be required to pay a higher fee. The revenue generated from the registration fees should be dedicated to the implementation and enforcement of the registration program.

A Robust Enforcement Regime

A robust enforcement system with sufficient resources and dedicated investigators and staff is central to the success of business registration as a labor standards enforcement tool. To build a robust regime to enforce the registration law, the administering agency must develop (1) an aggressive, proactive investigation strategy, and (2) a strategic complaint-based process. In developing these strategies and systems, the administering agency should work closely with worker organizations as integral partners because these organizations are likely to possess the type of information (e.g., types of violations in workplaces, sectors with high of violations) that is critical for effective enforcement. These organizations will also have access to workers who routinely experience wage theft or who may be afraid to come forward to file complaints.

First, the administering agency—whether it is a state department of labor or a centralized local labor standards enforcement office—must develop an aggressive, proactive investigation strategy. The proactive strategy should include (1) conducting regular audits of businesses to monitor businesses' compliance with the registration law; (2) verifying the accuracy of information

contained in registration applications through its own internal databases or in collaboration with other state and/or local agencies; (3) aligning the enforcement of the registration program with its wage and hour enforcement priorities to target repeat violators of wage and hour laws and high-violation industries; and (4) pursuing immediate and aggressive registration denial or suspension when it is warranted to send a strong message to the business community that there are consequences for violating the law.

The second pillar of a robust enforcement regime is establishing a strategic complaint-based process that includes a triage system for complaints in line with the goals of the registration program. There must be an independent mechanism for any person—workers, worker advocates, or worker organizations—to file an administrative complaint against any business for outstanding unpaid wages, pending wage claims, operating without proper registration, and making false statements in registration applications. Under the complaint triage system, claims for outstanding unpaid wages should be pursued as high priority. Pending wage claims should also be fast-tracked and treated as high priority, because these pending claims provide an opportunity to tap the power of registration denial or suspension for swift recovery of unpaid wages. However, the timing of fast-tracking is key because it is not realistic to fast-track all claims, and doing so would be contrary to the purpose of a triage system. As noted above, the proposal would require businesses to post their registration—indicating when they are up for renewal—in a conspicuous place on their premises, and the same information would be available through the administering agency’s website. This should arm workers and worker advocates with the information they need to bring pending wage claims to the agency’s attention or file a wage claim in a timely manner, alerting the agency that an employer that cheated a worker out of fair wages is up for registration renewal.

Mandatory Denial or Suspension of Registration for Outstanding Unpaid Wages

In New York City, when the local health department shuts down food establishments for health code violations, these establishments generally move quickly to correct the violations in order to minimize the risk of losing their business and customers. Many New Yorkers accept this as part of the government’s job and even applaud the city for acting to protect their health and safety as well as the general welfare of the city. City and state governments should have a similar orientation and adopt the same approach with wage violations and wages owed to workers.

When the administering agency identifies a business that has outstanding unpaid wages owed to workers, their registration should be (1) denied, if the violation is detected at the time of registration or renewal, or (2) suspended, if the violation is detected subsequent to the issuance of registration. Denial or suspension of registration should last until the violations are remedied.²⁶ Here, the category of outstanding unpaid wages should not be limited to judgments or final orders with a finding of liability. It should include unpaid wages resulting from judicial and administrative settlements with no admission of liability. The power to shut down should be mandatory and not

²⁶ Employers are entitled to some level of due process to determine whether a worker’s claim for outstanding judgment is legitimate before their registration is suspended. However, this determination can be a summary process.

left to the discretion of the agency. The message to the business community should be loud and clear: shut down until you pay up. Employers should be given a specified period of time to pay up,²⁷ and additional fines should be imposed if they cannot remedy the violation within that period of time or if they shut down operations permanently to escape their obligations. Shutting down the business should create enough disruption—a squeeze on profits—to motivate law-breaking employers to act swiftly to remedy the violation.

The power to shut down should reach workplaces where there are multiple contractors, such as hotels and hospitals, holding lead businesses that outsource any part of their business operation accountable for violations that occur at any point in the subcontracted chain. For example, if one contractor in a worksite has an outstanding unpaid wage claim, the agency should issue a stop-work order as part of registration suspension, freezing any and all work taking place in that workplace until the violation is remedied. This can include, for instance, an order to shut down a hospital catering company that would essentially shut down food services in an entire hospital if workers are owed unpaid wages. The hospital could lift the stop-work order by paying the unpaid wages, and then seek reimbursement from the catering contractor.

Some would argue that workers themselves do not want their employer's business shut down because they would be out of work. Or worse, some employers may close the business permanently and reorganize under a new corporate entity, getting rid of all the employees in the process. As for workers being out of work temporarily until their employer remedies the violation, it may be unavoidable—a collateral consequence of using this enforcement tool until advocates can devise appropriate solutions that can provide some kind of safety net for those who will be out of work. As to the second concern, it is true that some employers may pursue this option as their business strategy. In anticipating such tactics, the registration program should require employers to disclose information about any corporations or entities they have held previously, as well as impose additional fines for closing businesses and dissolving corporations to avoid these obligations. The mandatory registration for all businesses coupled with strong enforcement of the program could, in the long run, weed out such low-road practices.

Fast-Track Pending Wage Claims and Use the Power of Suspension as an Incentive for Employer Compliance

While the administering agency can aggressively enforce the registration law to force employers to immediately pay outstanding unpaid wages, a different process is needed to deal with pending wage claims. As an initial matter, the registration program cannot cover pending wage claims brought through private lawsuits.²⁸ However, the program can fast-track administrative wage claims, either self-reported by businesses or brought to the agency's attention by workers. As noted above, before

²⁷ Depending on the amount of unpaid wages, we may need to develop a mechanism (a bond, a lien) to secure payment of wages for those employers that genuinely cannot pay the outstanding unpaid wages within a relatively short period of time. For a discussion on different policy models to guarantee that workers can collect from their employers, see National Employment Law Project, 2011. *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft*. New York: National Employment Law Project.

²⁸ This proposal cannot cover private lawsuits because we are focused on enforcement by public agencies.

the government can deny or suspend a registration, the registration applicant/holder is entitled to some level of due process and opportunity to be heard, even if it is a summary process. Rather than holding a hearing to determine whether an employer's registration should be denied or suspended on the grounds of pending wage claims, it is much more efficient to adjudicate the underlying wage claims. To be sure, this process will benefit aggrieved workers more than adjudicating registration denials or suspensions.

As discussed above, not all wage claims can be fast-tracked. But those claims against any business up registration renewal should be fast-tracked. Any business with pending wage claims will be issued a temporary registration, allowing time for claims to be investigated and resolved, including an appeal process. When a wage claim is finally resolved, the business would be required to re-apply to obtain a permanent registration, paying another registration fee, and show proof of payment of the wages owed. If the business does not comply with the re-registration requirement, it would be subjected to registration revocation and the business would be shut down until complied with the registration requirement. For example, if the business chose to operate with an expired temporary registration, the business would be shut down until it successfully obtained a valid registration. If the business attempted to apply for a permanent registration without a proof of payment for the unpaid wages, the business would be shut down until the proof of payment was submitted.

Worker Training on the Registration and Workplace Laws

As a condition of obtaining their licenses, California's farm labor contractors are required to provide periodic worker safety training to each crew leader, foreperson, or other employee whose duties include the supervision, direction, or control of any agricultural worker on behalf of a licensee.²⁹ In a similar way, my proposal would require each business to provide periodic educational training on the registration process and other basic workplace laws to all of their staff, on its premises. Workers would be compensated for their time participating in the training. To facilitate worker organizing, the training could be conducted through labor and management collaboration.³⁰ Employers, especially smaller businesses, would be encouraged to collaborate with each other through trade associations or unions to conduct trainings together, creating an opportunity to bring workers across different workplaces and industries together. There could also be a public-private partnership, where the administering agency works with employers and workers to convene larger training sessions at the city or regional levels.

The Business Registration Board: A Vehicle for Meaningful Worker Participation

A key component of the business registration regime is the establishment of a Business Registration Board responsible for setting the overall direction for, and overseeing the implementation and

²⁹ California Code of Regulations, Title 8, Section 13666.2 (West 2015).

³⁰ One example of joint labor-management efforts is found in Minnesota's Occupational Safety and Health Law, which requires that every private and public employer with more than 25 employees to establish a joint labor-management safety committee. Minnesota Statutes, Section 182.676 (West 2007). Its legislative purpose states that it encourages "joint labor-management efforts to reduce injuries and diseases arising out of employment." Minnesota Statutes, Section 182.65(10) (West 2007).

enforcement of, the program. However, it would not carry out the day-to-day work. The Board would be governed by tripartite representation of workers, employers, and the government to provide meaningful worker participation in the implementation and enforcement of the registration program, so it would offer opportunities to organize workers and to build worker power and worker organizations.

There are many examples of infrastructures—task forces, commissions, and boards—that bring together various stakeholders to study a problem, conduct fact-finding hearings, and develop recommendations on various issues, including the adequacy of minimum wage, independent contractor misclassification, and wage theft. Although these bodies are generally good vehicles to shine a light on a problem, to issue policy recommendations, or to facilitate worker organizing, they often have limited power beyond these functions due to their advisory nature.

What I am proposing is more akin to the New York City’s Rent Guidelines Board. The Rent Guidelines Board is a local quasi-legislative body that is mandated to investigate conditions within the residential real estate industry and to establish annual rent adjustments for rent stabilized apartments in New York City.³¹ The board members are appointed by the mayor and serve two- or three-year terms.³² Two members represent the interest of tenants, two members represent landlords’ interests, and five members (including the chairperson) represent the general public.³³ The board members are compensated on a per diem basis, with the chairperson being compensated at a higher level, and have full-time staff who carry out the day-to-day work leading up to annual public meetings and the establishment of rent adjustments at the end of the process.³⁴

In a similar vein, the Business Registration Board would not be merely an advisory body, instead it would have greater authority and decision-making power. To promote meaningful worker engagement on various levels in the implementation and enforcement of the registration regime, the Board would first mandate that the administering agency cooperate with both governmental and non-governmental entities and stakeholders in carrying out the administering agency’s implementation and enforcement functions and duties.³⁵ This mandate, a very critical starting point, is the basis of establishing a more formalized and sustained partnership with worker organizations in the implementation and enforcement of the registration program. Under this more integrated partnership model, the Business Registration Board could oversee and engage in critical implementation and enforcement-related activities such as (1) developing a comprehensive outreach plan to educate workers and businesses on the registration regime that includes dedicated

³¹ Collins, Timothy. 2014. “An Introduction to the NYC Rent Guidelines Board and the Rent Stabilization System.” New York: New York City Rent Guidelines Board. Retrieved April 14, 2015 (<http://www.nycrgb.org/html/about/intro/toc.html>).

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ A similar mandate is enshrined in the New York City Human Rights Law. Under the New York City Human Rights Law, the functions of the Commission of Human Rights include “to cooperate with governmental and non-governmental agencies and organizations having like or kindred functions.” New York City Administrative Code, Section 8-104 (West 2006). The powers of duties of the Commission also include “to enlist the cooperation of various groups, and organizations in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes, bigotry, and discrimination.” New York City Administrative Code, Section 8-105 (West 2006).

city or state grants to worker organizations for community outreach and education programs;³⁶ (2) developing a strategic plan to vigorously enforce the program, as discussed above; and (3) monitoring and evaluating the implementation and enforcement of the program by conducting public hearings, holding town-hall meetings in different regions of the jurisdiction, or targeting certain industries. All of these activities offer opportunities for worker participation and worker organizing.

Although employers would be represented on the Business Registration Board, they may oppose its statutory establishment. They may argue that the Board and its tripartite governance in the implementation and enforcement of the registration program is preempted by the National Labor Relations Act (NLRA) because it impermissibly interferes with the collective-bargaining process.³⁷ Businesses may argue that one of the goals of the NLRA is to ensure an equitable bargaining process and that Congress left the choices of terms of bargaining to be unregulated “to be controlled by the free play of economic forces.”³⁸ The Business Registration Board and its structure, employers may claim, upsets and alters the balance of power between labor and management in favor of labor and therefore frustrates the goals of the NLRA.³⁹

The Supreme Court has articulated a NLRA preemption doctrine called *Machinists* preemption. This doctrine “protects against state interference with policies implicated by the structure of the Act itself.”⁴⁰ The *Machinists* doctrine prohibits state and local regulation that attempts to regulate certain activity neither arguably protected nor prohibited by the NLRA and that have been intentionally left “to be controlled by the free play of economic forces.”⁴¹ Under *Machinists* preemption, courts have struck down laws that attempted to regulate weapons of bargaining (e.g., a state enjoining union members from engaging in a concerted refusal to work overtime during negotiations for renewal of a collective-bargaining agreement)⁴² or that forced a party to forgo its use of an economic weapon of self-help (e.g., a city council conditioning taxicab franchise renewal on settlement of strike and thereby denying the company its ability to wait out a strike).⁴³

On the other hand, courts have found that laws of general application that impose minimum labor standards on contract agreements negotiated between parties are not inconsistent with the goals of the NLRA and are thus not preempted by the statute.⁴⁴ A law of minimum labor standard is one that affects all employees—union and nonunion—equally, and “neither encourages nor discourages the

³⁶ These government contracts could support base-building strategies by allowing worker organizations to engage in various enforcement-related activities (i.e., educate workers about the registration law and basic workplace laws, help workers detect violations, assist workers file complaints and conduct any advocacy related to the complaint). These activities could also help worker organizations identify industries or workplaces to target for workplace justice campaigns.

³⁷ The business community is less likely to challenge annual registration because it is well within the traditional exercise of police powers of cities and states.

³⁸ *Lodge 76, Intern'l Ass'n of Machinists v. Wis. Employment Relations Comm'n*, 457 U.S. 132, 140, 96 S.Ct. 2548, 2553 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377 (1971)).

³⁹ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751, 105 S.Ct. 2380, 2395 (1985).

⁴⁰ *Ibid.* at 749, 105 S.Ct. at 2394.

⁴¹ *Machinists*, 457 U.S. at 140, 96 S.Ct. at 2553.

⁴² *Ibid.*

⁴³ See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395 (1986).

⁴⁴ *Metropolitan Life* 471 U.S. at 756-758, 105 S.Ct. at 2397-2398; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22, 107 S.Ct. 2211, 2222-2223 (1987).

collective-bargaining process.”⁴⁵ It also has only “the most indirect effect on the right of self-organization established under the Act.”⁴⁶

The proposal would likely prevail in this type of NLRA preemption challenge. Needless to say, the Business Registration Board does not involve any attempt by the state (or the city) to regulate or prohibit private conduct in the labor-management field. It is not attempting to regulate any economic weapon of self-help, such as a strike, much less one that Congress intended to leave to the “free play of economic forces.” States have broad authority under their police power to regulate the employment relationship to protect workers within the state, and state minimum wage laws are clear examples of such broad authority.⁴⁷ The Business Registration Board is a component of a minimum labor standard that has general applicability, for it provides protections to individual union and nonunion workers alike and thus neither encourages nor discourages the collective-bargaining process that is the subject of the NLRA. At best, it may have some indirect effect on the collective-bargaining process, just as any law addressing workplace conditions would. Business registration and the creation of the Business Registration Board to implement and enforce the law is the usual exercise of police power, which seeks to ensure that a minimum wage is paid to all employees within a state or a city.

Challenges in Implementing the Business Registration Regime

The business registration scheme as discussed above could be a powerful enforcement tool, bringing enough disruption to employers’ business operation and affecting their profit margin to change their behavior and thereby improve the material conditions of workers. The proposal also opens up possibilities for workers to have meaningful participation in the enforcement of their rights and to bring democracy to workplaces.

Such possibilities also bring significant challenges. In the immediate term, this proposal would likely face opposition from some government officials and the business community on the registration scheme itself, given the myriad other registration regimes that are already required, such as registering as a corporation with the secretary of state and industry-specific licenses. To be sure, requiring all businesses in a state or a city to register annually will pose significant bureaucratic challenges—and no doubt, government agencies and businesses will characterize it as a big, bureaucratic nightmare. The business community might also claim that these registration requirements are too burdensome and that conditioning the issuance and renewal of business registrations on compliance with labor standards and shutting down businesses for wage violations will hurt the local or state economy, kill jobs, and turn businesses away from the jurisdiction. Finally, businesses might cry foul on the establishment of the Business Registration Board, alleging that legislators and government officials are giving special treatment to labor.

⁴⁵ *Metropolitan Life*, 471 U.S. at 755, 105 S.Ct. at 2397.

⁴⁶ *Ibid.*

⁴⁷ *DaCanas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 937 (1976).

In the longer term, assuming that some type of registration program at the state or local level is enacted, there are some challenges in the implementation of this program. The biggest challenge is the state of the public enforcement regime across the country. Public agencies are typically under-resourced and overburdened with complaint backlogs, a myriad of laws to enforce, and pressure to show results. Similarly, at the local level, while cities with the authority to enact a local wage law can develop an independent enforcement system, the feasibility of building a robust regime hinges partly on the size of the city but largely on the level of enforcement budget that is politically realistic. This proposal requires an agency that can build and deliver a robust enforcement system that has both reactive and proactive investigation strategies, a triage system to prioritize certain complaints to maximize the effects of claims-based enforcement efforts, and dedicated investigators and resources for enforcement. As a starting point, the registration fees and any fines or penalties collected from employers should be dedicated to fund the implementation and enforcement operations. Additionally, advocates need to develop additional revenue sources, beyond seeking more money from either the city or state budget, to fund the operation of the registration regime to its fullest potential.

Implications for Worker Organizing

As a labor standards enforcement tool, the business registration program provides some levers for industry-based or workplace organizing. First, similar to California’s car wash and garment industries, a city- or state-wide registration program could have an initial effect of formalizing industries that have been largely operating beyond the reach of the law and organizing workers who work in disaggregated work structures. The domestic-work industry is one of the industries that could benefit from the registration regime. Notably, almost all industries and occupations in our economy are regulated by a combination of licenses, permits, or certificates as a condition of doing business and/or entering and remaining in an occupation. But domestic work is primarily seen as “women’s work,” and no such regulatory scheme reaches private homes, where domestic workers, who are predominately immigrants and women of color, work behind closed doors under substandard working conditions.⁴⁸ Requiring employers of domestic workers to register with a city or state as a condition of hiring a domestic worker to work in their homes, could be an important starting point to formalize the industry and to shift the perception of private homes to include them as workplaces. This initial formalizing of the industry could be a gateway to opportunities to aggregate and organize workers into organizations and identify policy solutions to raise industry standards and improve working conditions and workers’ lives.

I have discussed above some of the ways in which the business registration regime could open up organizing and power-building opportunities. These opportunities include the structure of the Board itself, positioning worker organizations as a fully integrated partner to the administering agency’s work, joint labor and management efforts to educate workers on the registration law in

⁴⁸ See Linda Burnham and Nik Theodore. 2012. *Home Economics: The Invisible and Unregulated World of Domestic Work*. New York: National Domestic Workers Alliance, Center for Urban Development, University of Illinois at Chicago, and DataCenter.

workplaces, and government contracts to community organizations to educate workers on the registration program. Each of these policy levers offers possibilities for industry-wide or workplace organizing.

Conclusion

The business registration and suspension regime could be an effective labor standards enforcement tool to change employers' behavior from that of routinely cheating workers of fair pay to that of compliance with labor standards. Aggressive and consistent denials or suspensions of registrations that result in business shutdowns and a squeeze on profits could teach employers the much-needed lesson that wage theft has real negative market consequences. The business registration and suspension regime could also be a policy lever to facilitate worker organizing and the building of worker power and worker organizations. We will absolutely face vigorous opposition if we try to push for such a regime. While we will not win the business registration and suspension regime as I describe here right away, we need to persist and experiment with it across the country if we are going to turn the tide against the wage theft crisis. Finally, if we want to see real progress addressing wage theft, the business registration and suspension program as a policy solution has to be part of a broader power-building strategy.

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