



# EXPOSING WAGE THEFT WITHOUT FEAR:

States Must Protect Workers  
from Retaliation

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NATIONAL  
EMPLOYMENT  
LAW  
PROJECT



### **National Employment Law Project**

For 50 years, the National Employment Law Project has sought to ensure that America upholds, for all workers, the promise of opportunity and economic security through work. NELP fights for policies to create good jobs, expand access to work, and strengthen protections and support for workers in low-wage jobs and those seeking employment. To learn more, visit [www.nelp.org](http://www.nelp.org).

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# Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation

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## Why Do Workers Experience Retaliation?

- Workers in the U.S. generally bear the burden of enforcing their own labor protections—it is up to them to come forward to report violations.
- When a worker comes forward to report a workplace violation, we know that employers often retaliate or threaten to retaliate against the worker.

## What Does Retaliation Look Like?

- Retaliation takes many shapes and can be difficult to pinpoint or prove. Employers, for example, may fire a worker, demote a worker, reduce a worker's hours, change a worker's schedule to a less favorable one, subject a worker to new forms of harassment, unfairly discipline a worker, threaten to report a worker or a worker's family member to immigration authorities, and much more.

## How Common Is Retaliation Against Workers?

- Retaliation and the fear of retaliation are pervasive for workers across industries and demographics, although low-wage workers, immigrant workers, and women workers are particularly vulnerable. For example:
  - One survey of over 4,000 workers found that of the workers who had made a complaint to their employer or attempted to form a union, 43 percent experienced one or more forms of illegal retaliation.
  - A survey by the Raise the Floor Alliance and the National Economic and Social Rights Initiative (NESRI) of 275 workers in the Chicago metro area found that 48 percent “reported experiences involving retaliation.”
  - An Alabama Appleseed and Southern Poverty Law Center report capturing surveys of 302 workers found that almost 1 in 10 workers who reported an injury (9 percent) were, in fact, “fired or otherwise disciplined for being injured, missing work or seeing a doctor.”

## What Does Retaliation Cost Workers?

- When a worker experiences retaliation for trying to protect their rights, the costs can quickly escalate financially and emotionally, especially for the countless workers nationwide who live paycheck to paycheck. A worker may experience lost pay, for example, which can quickly lead to missed payments, lower credit scores, eviction, repossession of a car or other property, suspension of a license, inability to pay child support or taxes, attorney's fees and costs, stress, trauma, and more.
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# EXECUTIVE SUMMARY

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## What Are the Essential Elements of a Retaliation Protection Law?

- Any retaliation protection law must provide adequate compensation to workers who suffer retaliation while effectively deterring employers from retaliating in the first place. To achieve, this, at a minimum, a retaliation protection law must contain four basic elements:
  1. A right to monetary damages for the worker who suffers retaliation in addition to lost pay.
  2. A right for workers who prevail in their retaliation case to recover attorney's fees and costs so that workers, especially low-wage workers, will have a better chance of finding attorneys who will represent them when they experience retaliation.
  3. A right to bring a retaliation complaint to a government agency and go directly to court.
  4. A government-imposed fine.

## How Many States Have Adopted Retaliation Protection Laws That Contain the Basic Elements for Meaningful Protection?

- Just six states, including the District of Columbia, have retaliation protection laws for workers exercising their minimum wage or overtime rights that contain the most basic elements for a good law.
- The vast majority of workers around the country live in states that fail to provide the most essential mechanisms for legal protection when it comes to retaliation in the wage and hour context.

## What Must Worker Advocates and Policymakers Do to Better Protect Workers From Retaliation?

- Policymakers and worker advocates must take stock of the current retaliation protection landscape and identify opportunities to build a better support system for workers.
  - Everyone benefits from effective enforcement of our labor standards and effective protection from retaliation.
  - As long as our labor standards almost exclusively place the burden of enforcement and employer accountability on workers themselves, our laws must ensure that workers who come forward to report violations can access swift, meaningful remedies and penalties when an employer retaliates while also effectively deterring retaliation.
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# EXPOSING WAGE THEFT WITHOUT FEAR

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- When a worker comes forward to report a workplace violation, we know that employers often retaliate or threaten to retaliate against the worker.
- Under our current system, workers bear the entire risk of retaliation from their employer when they report violations.

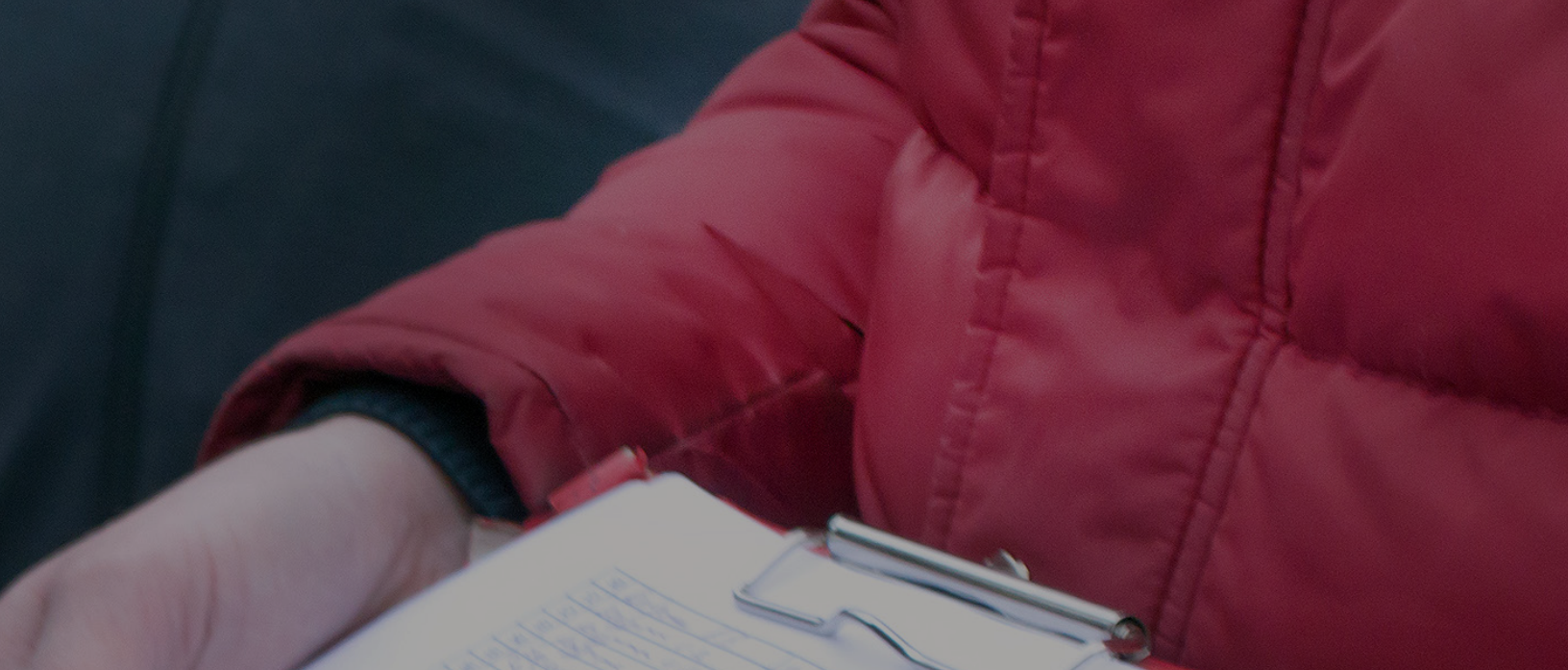
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## What Does Retaliation Cost Workers?

- When workers experience retaliation for trying to protect their rights, the costs can quickly escalate from both a financial and emotional standpoint, especially for the countless workers nationwide who live paycheck to paycheck. A worker may experience lost pay, for example, which can quickly lead to missed payments, lower credit scores, eviction, repossession of a car or other property, suspension of a license, inability to pay child support or taxes, attorney's fees and costs, stress, trauma, and more.





## »» Introduction

**Around the country, workers who speak up about workplace violations often face a significant risk of retaliation by their employer.** Yet our laws generally place the burden on workers to come forward and report violations, either through complaints filed with enforcement agencies or through lawsuits filed in state or federal court. Government investigations or audits of employers are relatively rare. Retaliation is therefore one of the most pressing and persistent challenges to effective enforcement of our workplace laws—workers should not fear that their employer will punish them for asserting their rights. **Ultimately, any law intending to protect workers’ rights must protect workers from retaliation in order to make that law a reality.**

**Low-wage workers face an especially high risk of retaliation along with potentially more devastating consequences.** On a daily basis, workers who want to assert their basic rights risk not only their job and income, but also their long-term economic security, trauma, their ability to remain with their families and communities when immigration status is an issue, and more.

Any retaliation protection law must provide adequate compensation to workers who suffer retaliation while effectively deterring employers from retaliating in the first place. **This report explains that a retaliation protection law must, at a minimum, contain four basic elements:**

1. A right to monetary damages for workers who suffer retaliation in addition to lost pay.
2. A right for workers who prevail in their retaliation case to recover attorney’s fees and costs so that workers, especially low-wage workers, will have a better chance of finding attorneys who will represent them when they experience retaliation.
3. A right to bring a retaliation complaint to a government agency and go directly to court.
4. A government-imposed fine.

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NELP’s analysis of retaliation or “whistleblower” protection laws for workers who seek to exercise their wage and hour rights (i.e., minimum wage and overtime) reveals that only six states, including the District of Columbia, can claim to incorporate all four of these basic elements. Thus, **the vast majority of workers around the country live in states that fail to provide the most essential mechanisms for legal protection when it comes to retaliation in the wage and hour context.** Even in the six states that arguably include the most essential mechanisms, NELP’s interviews with practitioners reveal that retaliation remains a persistent challenge requiring bolder protections and collaboration among advocates, agencies, and workers.

**Policymakers and worker advocates must take stock of the current retaliation protection landscape and identify opportunities to build a better support system for workers.** While the analysis of state laws presented here focuses on laws in the minimum wage context, the stark absence of strong protections nationwide in that space very likely reflects similar gaps when it comes to other workplace protections, such as employment discrimination and harassment, health and safety, and paid sick leave.

**Everyone benefits from effective enforcement of our labor standards and effective protection from retaliation.** Workers first and foremost stand to benefit from increased compliance and a greater sense of security on the job. Law-abiding businesses benefit by not having to compete with employers who cut corners by violating labor laws and retaliating against workers who try to hold them accountable. **As long as our labor standards almost exclusively place the burden of enforcement**

**and employer accountability on workers themselves, our laws must ensure that workers who come forward to report violations can access swift and meaningful remedies and penalties when an employer retaliates, while also effectively deterring retaliation.**

**Part I** of this report provides an overview of the research confirming the prevalence of retaliation and fear of retaliation in the American workplace, especially in low-wage jobs. **Part II** places the problem of retaliation in the context of a changing economy and an intensifying anti-immigrant climate that urgently call for better retaliation protection laws around the country.

**Part III** outlines the patchwork of federal, state, and local laws that govern retaliation against workers. **Part IV** discusses the four elements that NELP considers critical for any anti-retaliation or “whistleblower” law aiming to both compensate workers and effectively deter retaliation. Finally, **Part V** breaks down NELP’s analysis of state-level retaliation protection laws in the minimum wage context to illustrate how the vast majority of states fail to provide even the most basic mechanisms for protection and deterrence. This part also aims to help policymakers and advocates evaluate how their state compares to others.



# I **Retaliation:** **An Insidious Force Undermining Basic Labor Rights**

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**Combating retaliation against workers has proven particularly difficult because of the varied and subtle forms that retaliation can take.** Certainly, an employer may retaliate by firing a worker who files a complaint or voices opposition to an employer’s practice. However, employers often retaliate by reassigning workers to other positions or shifts, reducing a worker’s hours, subjecting a worker to another type or level of scrutiny or criticism, harassing a worker, significantly increasing a worker’s tasks, blacklisting or threatening to blacklist a worker in a particular industry or area, threatening physical violence, and depriving workers of opportunities for advancement, among many other forms of retaliation. Workers and their advocates also know that employers sometimes report or threaten to report workers, coworkers, or family members to the police for fabricated reasons, threaten workers with reporting them, their family members, or coworkers to the authorities, and subject immigrant workers to potential deportation by involving the police or immigration authorities.

Retaliation sometimes occurs even before workers have asserted their rights, through what some call “anticipatory retaliation.”<sup>1</sup> For example, anticipatory retaliation can take the form of a threat to fire any worker who challenges an employer’s actions before a worker has even considered such an action or knows of an employer’s unlawful practices. A 2013 law journal article focusing on anticipatory retaliation highlighted an especially subtle example where hundreds of Mexican farmworkers arrived in North Carolina and were given a booklet on their rights by a legal services organization. Their employer then instructed them to throw those booklets away and replaced them with a booklet warning that workers who have spoken with the legal services organization “‘harmed themselves.’”<sup>2</sup>

**Retaliation remains difficult to track and measure because it operates almost by definition to silence workers. Nevertheless, study after study that has attempted to identify and measure rates of retaliation against workers seeking to assert their rights in a wide range of contexts all recognize that the risk of retaliation is high and pervasive, especially for low-wage and immigrant workers who often stand to lose the most.**<sup>3</sup>

When it comes to workers asserting their basic wage and hour rights, which generally include a right to the minimum wage and overtime, a 2009 seminal study of more than 4,000 workers by NELP, the Center for Urban Economic Development of the University of Illinois at Chicago, and the UCLA Institute for Research on Labor and Employment found that 26 percent were paid less than the required minimum wage in the previous work week,<sup>4</sup> and more than two-thirds experienced at least one pay-related violation in the previous week,<sup>5</sup> such as failure to pay overtime, not being paid for all hours worked, and stolen tips. The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations.<sup>6</sup> Moreover, the report highlighted that those who experience wage theft are disproportionately women, people of color, and immigrants.<sup>7</sup> With regards to retaliation, the survey found that one in five workers “reported that they had made a complaint to their employer or attempted to form a union in the last year.”<sup>8</sup> Of those, **“43 percent experienced one or more forms of illegal retaliation from their employer or supervisor.”**<sup>9</sup> Twenty percent of workers surveyed did not make a complaint to their employer during that period “even though they had experienced serious problems such as dangerous working conditions or not being paid the minimum wage” because they

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feared retaliation in the form of wage or hours cuts or thought it would not make a difference.<sup>10</sup>

**According to a survey by the Raise the Floor Alliance and the National Economic and Social Rights Initiative (NESRI) of 275 workers in the Chicago metro area, 48 percent “reported experiences involving retaliation.”**<sup>11</sup> A more detailed breakdown showed that of the 73 percent of workers who voiced a complaint to their employer, 61 percent experienced retaliation.<sup>12</sup> Of the 24 percent who made a complaint to a government agency, 80 percent experienced retaliation.<sup>13</sup> Of the 17 percent who took some sort of group action, 89 percent experienced retaliation.<sup>14</sup> And when employers did not retaliate, the surveys made clear that the employers “mostly ignored workers’ concerns.”<sup>15</sup>

**Advocates and academics have similarly found that fear of retaliation keeps countless workers from coming forward in the first place.** An Alabama Appleseed and Southern Poverty Law Center report capturing survey responses from interviews with 302 workers “currently or previously employed in Alabama’s

poultry industry”<sup>16</sup> found that “40 percent of injuries went unreported to the company.”<sup>17</sup> The “fear of being fired or disciplined for reporting the injury, missing work to heal, or seeking medical treatment” accounted for about one-fourth, 24 percent, of all unreported injuries.<sup>18</sup> Almost 1 in 10 workers who did report an injury (9 percent) were, in fact, “fired or otherwise disciplined for being injured, missing work or seeing a doctor.”<sup>19</sup> In addition, “[t]he majority of workers uncomfortable asking for hazards to be addressed (58 percent) also said they were afraid they might be fired for reporting a safety violation or requesting an improvement in work conditions,” particularly among workers who had previously “witnessed retaliation or some adverse response to such requests.”<sup>20</sup>

Retaliation is not limited to the wage and hour context, of course. In their article on “bottom-up,” or complaint-based enforcement of workplace laws, Charlotte Alexander and Arthi Prasad discuss and cite to numerous studies assessing retaliation and its prevalence in the workplace, including a 2005 article by Deborah Brake exploring the relationship between retaliation and discrimination.<sup>21</sup> Brake’s article



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explains that “[r]etaliatio[n] occurs with sufficient frequency to justify perceptions of the high costs of reporting discrimination and support the rationality of decisions not to do so.”<sup>22</sup> At least two studies have found retaliation rates above 40 and 60 percent for persons reporting sexual harassment or discrimination.<sup>23</sup> A 2012 report by the Ethics Resource Center noted that a 2011 National Business Ethics Survey “revealed that nearly half (45 percent) of employees observe misconduct each year.”<sup>24</sup> While 65 percent of those workers report such misconduct, “more than one in five (22 percent)” of those workers “perceives retaliation for doing so.”<sup>25</sup> The report also revealed that “not only is retaliation on the rise nationally, it is rapidly becoming an issue even at companies with a demonstrated commitment to ethics and integrity.”<sup>26</sup> A report based on surveys conducted of 253 employers and 500 individuals across demographics and the economic spectrum about their experience with California’s Paid Family Leave program found that of those workers eligible for the program who chose not to participate in it, almost one-quarter (23.9 percent) reported being “[a]fraid of [b]eing [f]-ired” and 28.9 percent worried that it would “[h]-urt [o]pportunities for [a]dvancement.”<sup>27</sup>

The research highlighted in this section represents a small sampling of the extensive confirmation (available anecdotally and through worker surveys) that retaliation and the fear of retaliation silence workers across a wide spectrum of industries and demographics. This research also repeatedly emphasizes how low-wage workers, women, immigrants, and people of color are particularly vulnerable to retaliation.

**Ultimately, in myriad ways, workers who want to assert their basic workplace rights risk losing their income, livelihood, liberty, and, for some immigrant workers, their ability to remain with their families. Any effort to protect workers, especially more vulnerable workers, at the federal, state, or local level must aggressively tackle the problem of retaliation.**



## WORKER STORY

Claudia G. is an electrician and mother of two children who has worked in the construction industry for 15 years. Five years ago, Claudia worked for an electrical company that came to owe her (and five of her coworkers) around \$20,000 in unpaid wages for electrical work performed at a Roanoke, Texas, supermarket. Her employer had told the crew to meet him at the supermarket to pick up their wages, but, instead, he called the police and accused Claudia and her husband of stealing tools from the worksite. She and her husband worked together on the supermarket project and so not receiving their wages meant that they could barely make ends meet and couldn't provide for their children. They went to Worker Defense Project (WDP), a Texas worker center, for assistance.

WDP helped Claudia and her husband recover their wages through a claim with the Texas Workforce Commission (TWC) and through a mechanic's lien. Even after they filed a complaint with the TWC, however, their employer continued to accuse Claudia and her husband of fraud and theft, demanding that she and her husband be prosecuted along with WDP. Eventually, the TWC ruled in favor of Claudia and her husband, but the agency did not award penalties and the employer appealed the decision. Although the TWC ruling was ultimately upheld, the employer still refuses to pay all wages owed. Claudia has only been able to recover wages that WDP recovered through a lien and that the TWC garnished from the employer's bank accounts, and she and her coworkers are still owed thousands of dollars in unpaid wages.



# II

## A Changing Landscape For Workers Requires New Urgency In Tackling Retaliation

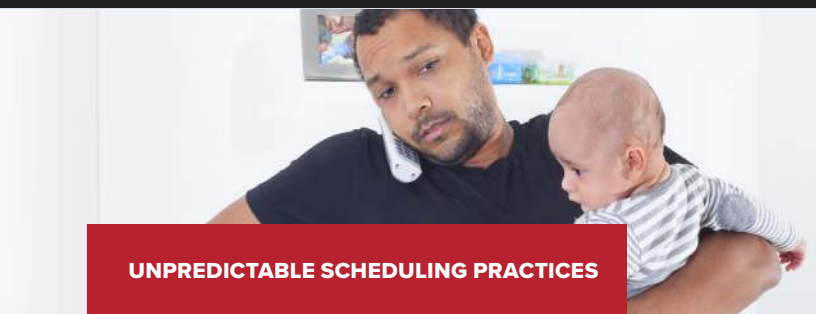
Advocates and policymakers committed to improving labor protections for workers must recognize the increasing urgency with which workers require strong protection from retaliation. **Workers have experienced an erosion of basic workplace rights and conditions in numerous ways in recent years, and these changes have made low-wage workers increasingly vulnerable to wage theft and other labor standards violations.** Policymakers must ensure that workers can, at a minimum, come forward to protect the basic rights they retain.

First, any policymaking affecting workers in the 21<sup>st</sup> century must recognize that the basic structure of work in the United States in many high-growth sectors has shifted dramatically away from a traditional relationship between one employer and an employee to a complex web of companies that, among other things, value shedding labor costs to other actors in order to maximize profits.<sup>28</sup>

While this “fissuring” of the workplace, as David Weil, former administrator of the Wage and Hour Division of the U.S. Department of Labor, has termed it, is not a new phenomenon, it has become increasingly prevalent, and it drives pay and benefits down for workers.<sup>29</sup> A NELP report highlighted that: “Once outsourced, workers’ wages suffer as compared to their non-contracted peers, ranging from a 7 percent dip in janitorial wages, to 30 percent in port trucking, to 40 percent in agriculture; food service workers’ wages fell by \$6 an hour.”<sup>30</sup>

**Some industries and employers deliberately use outsourcing models, such as franchising, to shed responsibility for complying with basic labor standards, contributing to high rates of wage theft in industries like fast food<sup>31</sup> and home care.<sup>32</sup>**

### ELEMENTS OF THE CHANGING LANDSCAPE FOR WORKERS





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Without strong protections from retaliation, we cannot expect workers in heavily outsourced industries that incentivize wage theft to hold employers accountable. In a case illustrating just one way in which retaliation affects workers in this context, workers filed a lawsuit against Schneider Logistics Transloading and Distribution, an operator of warehouses for Walmart. The warehouse operator went beyond the alleged wage and hour violations when it retaliated against workers who asserted their rights by intimidating the workers and coercing them into signing statements that would undermine their case.<sup>33</sup>

**Second, employers today increasingly depend on last-minute and unpredictable scheduling systems that can make retaliation easier to obscure.** A number of industries, for example, use “just -in -time” scheduling or “on -call” scheduling to try and match their employees’ hours as closely as possible to demand. This type of scheduling can lead to last-minute or immediate changes to workers’ schedules.<sup>34</sup>

Millions of workers, particularly in low-wage retail and service industries, have little to no control over their schedules and receive entirely inadequate notice about changes.<sup>35</sup> The Economic Policy Institute has noted that “[n]early half of low-wage and/or hourly workers have no input into their work hours, including the inability to make even minor adjustments,” and 9 out of 10 “workers in retail and fast food service jobs report variable hours” while “part-time workers are even more likely to have variable and unpredictable schedules.”<sup>36</sup> When schedules can change substantially with little notice, it becomes harder for workers (and advocates) to detect whether a reduction or unfavorable change to their hours truly resulted from “efficiency” efforts as opposed to retaliation for raising a complaint.

**Third, the current anti-immigrant climate puts immigrant workers at greater risk of retaliation from employers who may feel emboldened by the Trump administration’s anti-immigrant agenda.** The Trump administration has conducted several highly visible workplace raids that have resulted in worker detentions, including the raid of a meatpacking plant in Tennessee in 2018 that resulted in the arrest of 97 immigrants.<sup>37</sup> As of July 2018, the number of immigration arrests at workplaces for the fiscal year starting in October 2017 had increased five times over the previous year.<sup>38</sup>

In California, where a number of laws expressly address immigration-related retaliation, the Labor Commissioner’s Office saw a surge in complaints alleging immigration-related retaliation in 2017.<sup>39</sup> As of December 22, 2017, workers in California had filed 94 immigration-related retaliation complaints, compared with 20 in 2016.<sup>40</sup>

**Fourth, employers increasingly limit workers’ options once they leave the job by forcing them to sign non-compete agreements.** These agreements prevent workers from working for an employer’s competitors until they have left their employer and waited for what can amount to a long period of time.<sup>41</sup> The Treasury Department has estimated that about 30 million workers are subject to non-compete agreements,<sup>42</sup> many of them in low-wage jobs like janitorial services, home care, and fast food.<sup>43</sup> **No-poaching agreements between companies, including low-wage employers like fast food chains, similarly limit workers’ options should they quit or lose their job as a result of retaliation.**<sup>44</sup>



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The issues summarized in this section paint only a partial picture of the challenges facing workers in the current economy, but they demonstrate how workers across a wide range of industries face increasingly difficult conditions and pervasive violations of their workplace rights.



## WORKER STORY

J.A. worked as a busser at a popular family-owned restaurant chain in Westchester, New York, for over a decade. The family/owners committed serious workplace violations, including failing to pay overtime for workweeks that ran as long as 70 hours; requiring 20 hours a week or more of “off- the- clock” work (i.e., unpaid); impermissibly claiming a tipped worker credit; not allowing employees to eat or take breaks during their shifts; and requiring J.A. to work at the family’s private homes on his days off for little or no pay.

After one of J.A.’s coworkers filed a complaint with the New York Department of Labor several years ago, the family threatened to fire other workers if they spoke to anyone else about their working conditions. J.A. was upset about the abuse but was scared and reluctant to take legal action at first. Several months after J.A. first visited an office of Make the Road New York, a workers’ organization, the group, along with other attorneys, filed a class action lawsuit on behalf of J.A. and his former coworkers. Soon after, J.A. heard from one of his former coworkers that the family had been walking around the restaurants telling staff that they would send ICE after J.A. if he didn’t drop the lawsuit. J.A. was especially shaken by the threat because the family had told staff they have relatives working in a couple of police departments in the area. J.A. has since also heard that the owners are telling workers that they will never settle the lawsuit. His case is still ongoing.

# III Retaliation Protection For Workers: A Patchwork Of Federal, State, And Local Laws

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**Our federal, state, and local laws offer a patchwork of retaliation protections for workers, but, for a variety of reasons, they are not enough to protect workers who speak up about violations and abuse.**

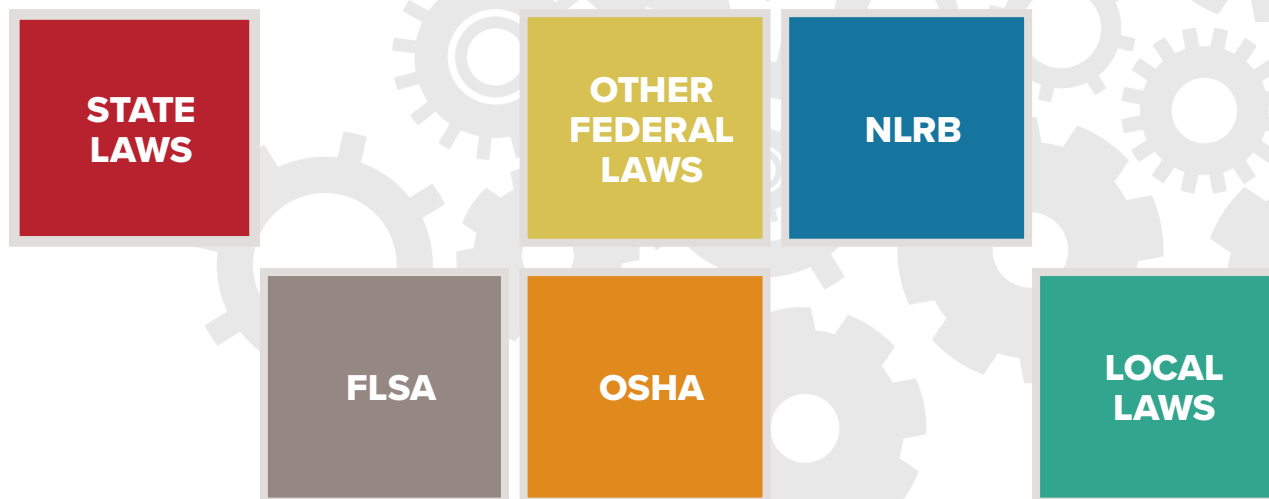
Federal law has developed its own patchwork of retaliation protections for workers, such as protections in the Occupational Safety and Health Act (OSHA) and the Sarbanes-Oxley Act’s whistleblower protections for employees of publicly traded companies.<sup>45</sup> When it comes to workers who aim to assert their basic wage rights, the federal Fair Labor Standards Act (FLSA) expressly prohibits retaliation.<sup>46</sup> Workers whose employers unlawfully retaliate against them under the FLSA may be entitled to damages or other relief, such as reinstatement and payment of wages lost.<sup>47</sup> The FLSA does not guarantee workers a minimum amount in compensation, however. Moreover, while some courts around the country allow both punitive and compensatory damages, some permit only compensatory damages, a difference that can significantly impact how much a worker may recover.<sup>48</sup> This type of uncertainty keeps many workers and their attorneys from going forward with retaliation cases that generally prove difficult and time-consuming to litigate. Workers simply cannot know if they will recover \$200 or \$20,000 if a judge finds that retaliation occurred. Also, under the FLSA, workers who cannot hire an attorney—a particularly common challenge for low-wage workers<sup>49</sup>—must rely on the U.S. Department of Labor (USDOL) to address their retaliation claims, but USDOL operates with extremely limited resources. Experts have estimated that given the limited number of investigators to monitor employers in every state, the average employer faces just a .001 percent

chance of being investigated by the USDOL’s Wage and Hour Division or Occupational Safety and Health Administration.<sup>50</sup>

The National Labor Relations Act offers workers protection from retaliation even if workers do not form part of a union. The National Labor Relations Board (NLRB) protects workers who engage in “concerted activity,” which encompasses situations “when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.”<sup>51</sup> In addition, a “single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.”<sup>52</sup> Workers who join a union may rely on the NLRB to protect them from discrimination and retaliation.<sup>53</sup> As Charlotte Alexander has argued, however, both the FLSA’s retaliation protections and the NLRB process generally operate in a “reactive” manner, making it more difficult for workers to bring claims of “anticipatory” retaliation where an employer retaliates against a worker even before the worker actually engages in some protected activity.<sup>54</sup> The NLRB process can also prove extremely slow for workers and fail to quickly secure much-needed relief or protection.<sup>55</sup>

States offer workers a variety of laws, sometimes referred to as whistleblower laws, intended to protect workers from retaliation. These laws address retaliation in a range of areas affecting workers, including employment discrimination, health and safety, government corruption or misconduct, paid sick leave, and more. Part V, below, details this report’s findings regarding state-level laws that protect workers who assert their basic minimum wage rights.

## A PATCHWORK OF LEGAL PROTECTIONS



While most states have enacted some type of law that addresses retaliation against workers exercising these rights, most states do not offer strong or truly meaningful protection or deterrence.

At the local level, cities and counties around the country have responded to the needs of workers in their communities by passing a rapidly expanding set of local worker protection laws.<sup>56</sup> These local policies address issues such as paid sick leave,<sup>57</sup> the minimum wage,<sup>58</sup> freelance or independent contractor rights,<sup>59</sup> fair scheduling,<sup>60</sup> employment discrimination,<sup>61</sup> and much more. A number of these local laws include their own protections from retaliation. When it comes to wages, for example, cities and counties like San Francisco,<sup>62</sup> Santa Fe,<sup>63</sup> Los Angeles City,<sup>64</sup> Los Angeles County,<sup>65</sup> Berkeley,<sup>66</sup> Oakland,<sup>67</sup> San Jose,<sup>68</sup> and San Diego<sup>69</sup> have adopted retaliation-specific provisions.

**In addition to passing laws that protect workers from retaliation, advocates and policymakers must take into account the need to coordinate effective protection and enforcement with agencies. Efforts to improve agency enforcement could consider, for example, fast-track procedures for retaliation cases, as well as increased funding for enforcement.** One agency model specific to retaliation to consider is the California Labor Commissioner’s creation of a separate Retaliation Complaint Investigation Unit.<sup>70</sup> The Unit may issue determinations concerning retaliation claims, and the Commissioner is authorized to issue cease and desist orders and “may order, where appropriate, rehiring or reinstating the aggrieved employees, reimbursing them for lost wages and interest thereon, paying civil penalties, and posting a notice acknowledging the unlawful treatment of the employees.”<sup>71</sup> A growing body of literature and initiatives around the enforcement of labor standards for low-wage workers also emphasize the importance of including community organizations in enforcement procedures in order to more effectively protect workers’ rights and deter employer violations.<sup>72</sup>



# IV

## Effective Retaliation Protection for Workers: The Essential Components

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**At a minimum, retaliation protection laws must offer adequate monetary damages to workers after they experience retaliation and also deter employers from retaliating against workers who exercise their basic rights.** These principles of compensation for harm through damages and other forms of deterrence already form the commonsense backbone of a variety of existing labor (and other) protections. Minimum wage laws, for example, increasingly guarantee workers not just the pay that an employer unlawfully withheld but also two or three times that amount in damages, in addition to a range of other potential punitive measures aimed at deterrence.<sup>73</sup> The reasoning is simple—if an employer only has to pay the wages that they should have paid in the first place, the employer has zero incentive to comply with the law.

### **A retaliation law must, at a minimum, include:**

1. A right to monetary damages for workers in addition to lost pay to compensate workers and also punish or deter retaliation.
2. A right for workers who prevail in their case to recover attorney's fees and costs.
3. A right to bring a retaliation complaint to a government agency and directly to court.
4. A government-imposed fine.

### **A. Monetary Damages *In Addition to Lost Pay***

When workers have experienced retaliation, allowing them to recover only the amount that they would have earned had they not been retaliated against is wholly insufficient; it still leaves workers worse off than if they had not experienced retaliation. And employers have little incentive to comply with the law if their only punishment is to pay the wages they should have paid their workers in the first instance. **A worker must be able to recover monetary damages that amount to *more than simply the amount of pay a worker lost due to the retaliation.* Workers risk incurring a wide range of financial and emotional costs when they come forward and risk retaliation; retaliation protection laws must account for that risk.**

More specifically, in addition to the actual pay that a worker may lose due to retaliation, workers who assert their basic rights face a wide range of serious financial costs, including:

- fees and penalties for missed payments when they are fired or lose some of their income;
- a reduction in their credit score after being unable to meet financial obligations;
- eviction;
- difficulty finding a new job due to “blacklisting” by an employer or a bad reference from an employer;
- repossession of a car or other property, and
- suspension of a license when a worker cannot pay for things like child support, taxes, and traffic fines.<sup>74</sup>

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These economic losses can be difficult, if not impossible, to quantify.

**In many cases, an employer will retaliate in ways that do not directly affect a worker's pay.** Instead of firing a worker, for example, an employer may retaliate by changing a worker's schedule to a less favorable one or by subjecting the worker to harassment, scrutiny, discipline, or other discriminatory treatment. **Employers may also threaten or actually take steps to "blacklist" a worker or make it more difficult for a worker to obtain other employment** in a particular industry or area. Importantly, as a result of a 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>75</sup> undocumented workers who lack authorization to work in the United States may not be eligible for "backpay" compensation from a court or agency regardless of whether they lost part of their income due to retaliation after being fired. When it comes to lost pay, they may only be eligible for pay based on hours they have already worked.

Workers who experience retaliation separately find that retaliation comes with a significant emotional cost from fear, trauma, financial insecurity, and more.<sup>76</sup> In an extreme example of this, immigrant workers sometimes fear retaliation that at any point can subject them to deportation and separation from their families and communities.

When a worker chooses to challenge an employer's retaliation, they almost invariably find that protecting their rights requires a significant investment of time, money, and energy. For example, they must often find a lawyer, face questioning and formal depositions, meet repeatedly with government agency officials or legal counsel as part of an investigation or litigation, risk further retaliation against

themselves or their families, and much more. While, in theory, the possibility of reinstatement as a remedy appears valuable, it often does not offer true relief. As law professor Clyde Summers put it when assessing the remedy of reinstatement in the NLRB context, "reinstatement with backpay is less adequate than first appears" and "is apparently considered by most wrongfully discharged employees of no practical value."<sup>77</sup> This stems from the fact that many workers find a new job before prevailing in their retaliation claim and "the employee often prefers to remain there rather than return to a hostile environment."<sup>78</sup> In addition, a worker may fear additional retaliation if they return to their previous employer.<sup>79</sup>

Based on the real and significant financial as well as emotional costs tied to retaliation, a retaliation law must allow a worker to recover a minimum and meaningful amount of damages apart from potential "backpay." This type of guarantee could specify, for example, that a worker who suffers retaliation will receive backpay plus an additional amount as compensatory damages, *or* \$10,000, *whichever is greater*. As shown in Part V, various states have enacted retaliation laws that accomplish this.

Punitive damages for workers separate from lost pay can also serve an important deterrent purpose. David Weil has explained that "[d]eterrence only works if employers have an incentive to change behavior even before being investigated" and that "[c]hoosing to comply in this way reflects an employer's assessment that the benefits of complying voluntarily (without an actual investigation) outweigh the costs of not doing so."<sup>80</sup>

Courts and enforcement agencies can use punitive damages to try to ensure that a worker's effort to hold an employer accountable will have a deterrent effect for that employer and potentially other employers who learn about the potentially high cost of retaliation.

## WHAT DOES IT COST WORKERS TO PROTECT THEIR RIGHTS WHEN THEY FACE RETALIATION?

-  **Lost Wages**
-  **Attorney's Fees & Costs**
-  **Additional Retaliation Against Family**
-  **Immigration-Related Retaliation**
-  **Time To Pursue a Claim or Court Case**
-  **Financial Insecurity**
-  **Suspension of a License (e.g., Driver's License)**
-  **Fees & Penalties For Late Payments (e.g., Utilities; Car Payments)**
-  **Repossession of a Car or Other Property**
-  **Lower Credit Scores**
-  **Inability to Pay Child Support**
-  **Being Subject to Invasive Questioning Or Depositions**
-  **Inability to Pay Taxes**
-  **Trauma**
-  **Stress**



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## **B. Attorney’s Fees and Costs for Workers Who Prevail**

**A retaliation protection law that adequately compensates workers who experience retaliation must allow workers who prevail in their complaint to recover the attorney’s fees and costs they incurred.**

Low-wage workers often find it impossible to find low-cost or free (i.e., pro bono) legal assistance. Even low-income individuals with access to legal aid organizations still frequently fail to qualify for free legal aid due to extremely low income cutoff levels for those programs. According to the Center for American Progress, in 2015, “an individual had to make less than \$14,713 per year—a family of four, less than \$30,313 per year—to be eligible for Legal Services Corporation aid,” which constitutes the “biggest source of funding for civil legal aid for low-income Americans.”<sup>81</sup> Our nation’s underfunding of legal aid assistance also makes it difficult for Legal Services Corporation programs to meet demand for legal help.<sup>82</sup> Hiring a private attorney, on the other hand, costs an average of \$200 to \$300 per hour.<sup>83</sup>

By ensuring that a retaliation protection law provides a worker the right to recover attorney’s fees and costs if they prevail in their case, we can give workers a much better chance to obtain legal assistance. Attorneys will know that even if they cannot charge their clients at the front-end for their services, they stand to recover their costs when their clients win their case. Given the challenges low income individuals face in finding a lawyer, NELP has previously explained that the best provisions concerning attorney’s fees and costs will make an award of those costs mandatory and not up to the discretion of a judge.<sup>84</sup>

## **C. Right to Bring a Retaliation Complaint to a Government Agency And Directly to Court**

**A retaliation protection law must give workers a right to hold their employers accountable for retaliation in both an administrative process handled by a government agency and through a private lawsuit filed with the appropriate court.** (The right to file a complaint directly in a court of law is sometimes referred to as a “private right of action.”)

An administrative process for handling retaliation cases can guarantee at least one path for worker relief and employer accountability under a retaliation protection law. A guaranteed, government-run option for workers to bring retaliation claims remains necessary given how difficult it can be for a low-wage worker to find a low-cost or pro-bono lawyer, as discussed above. Administrative agencies also build up expertise in their particular areas of enforcement, which contributes to a more streamlined, specialized process with more efficient investigations of a complaint, mediation, a speedy hearing when appropriate, and an agency order that may nevertheless be appealed to a court when necessary. Further, guaranteeing that workers can access an administrative process allows workers to access justice even when their retaliation case may not involve enough money to satisfy the jurisdiction requirements set by different courts.

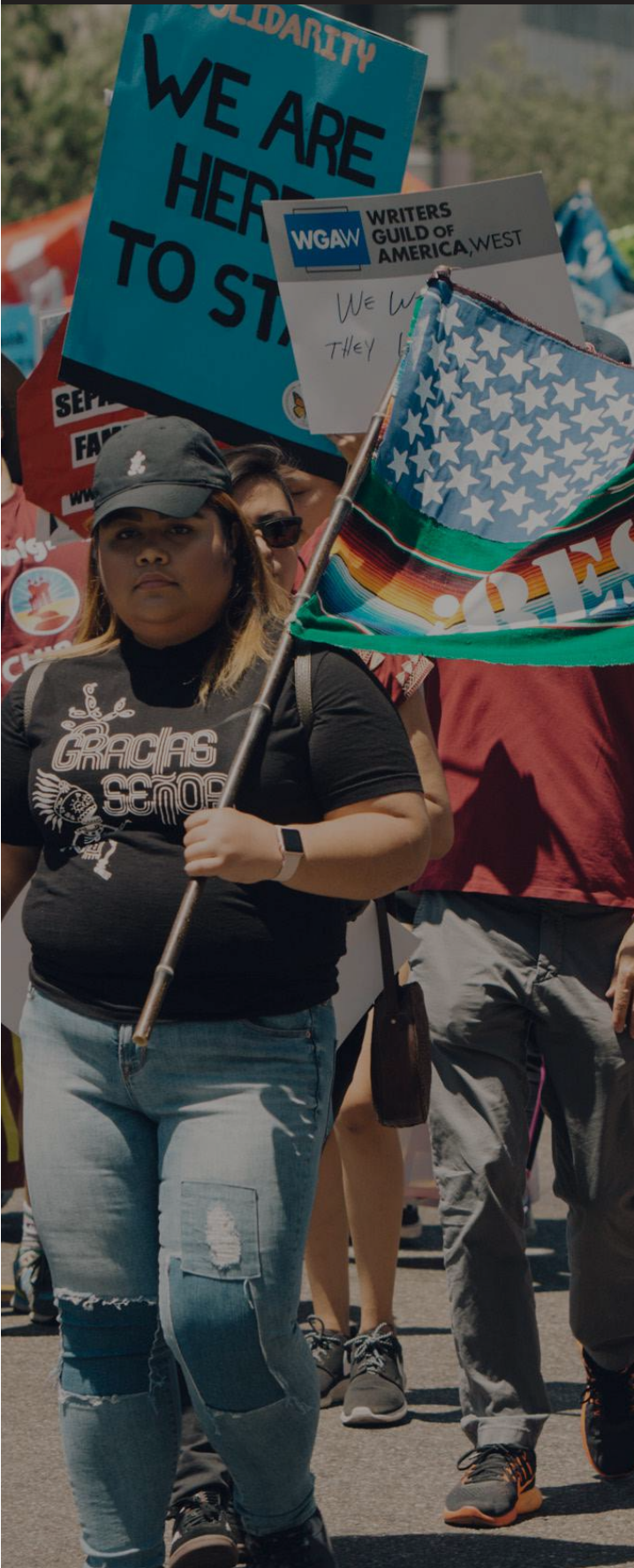
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In addition to preserving an administrative process for workers to pursue their claims, a retaliation protection law must give workers the express right to bring complaints directly to a court. Administrative agencies will not always have sufficient resources to respond to all complaints, leaving courts as the only path for relief. An administrative agency may also use its discretion to pursue an enforcement strategy that it considers strategic but does not require the agency to take on every single complaint that it receives. Depending on the state or locality, workers also face the possibility that some administrative agencies may not prioritize retaliation complaints or the protection of workers, more generally. Thus, policymakers should ensure that regardless of what a state enforcement agency may be able to offer a worker who has experienced retaliation at any particular point in time, a worker will retain the option of filing their retaliation complaint in court.

#### **D. Government-Imposed Fine**

Finally, to ensure that a retaliation law can effectively deter employers from unlawful retaliation, **retaliation protection laws should clearly allow enforcement agencies to order employers to pay a significant fine for wrongdoing.** The option of imposing a significant fine, separate from any monetary damages payable to workers directly, should put employers on notice that retaliation exposes the employer to a significant cost even if the employer has retaliated against only one worker. The combination of available monetary damages for workers and government fines should aim to reach an amount that will lead an employer to conclude that the risk of being held accountable and fined for retaliation outweighs the potential gains from engaging in retaliation.

## WORKER STORY



The following worker story comes from the Raise the Floor Alliance in Chicago, Illinois:

After experiencing unfair labor practices and hearing rumors of an unprecedented I-9 (employment authorization form) audit at their job, nine workers in the Chicago area began to meet with each other to share their concerns. On top of a hostile work environment, the workers faced continuous wage theft, often had to work through their lunch breaks, were refused overtime pay, and were forced to work at additional worksites with no pay. The workers also knew that Latinx workers were being targeted for the audit while their fellow non-Latinx coworkers were not. They brought their concerns to their employer and asked if the employer could address their issues. After being ignored several times, the workers went to a management meeting and threatened to strike.

The group of workers then began to gather additional support through petition signatures, and they organized collective actions that led to a meeting with management. The workers asked management to explain in writing why the workers were being asked to re-verify their employment authorization, but management refused and told the workers that they could either submit the new forms or be fired.

These workers have been left without employment and with no way of recovering stolen wages that amount to several thousand dollars. Currently, the workers have no means of providing for their families, and the experience has negatively and significantly impacted the workers' and their families' emotional well-being. After standing up for their rights, they were fired and they were made examples of at the workplace for anyone who asserts their rights.





## Most States Fail to Provide Essential Retaliation Protections

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This report offers an assessment of state-level retaliation protection laws that aim to protect workers who assert their basic minimum wage rights. In this area, NELP’s analysis demonstrates that only six states, including the District of Columbia, currently offer retaliation protection laws that contain the essential elements outlined in Part IV for potentially adequate compensation and deterrence. In addition, having a strong law on the books is not enough. Ongoing work is required to make retaliation protection laws useful for workers.

In order to assist advocates in understanding how their state stacks up against other states when it comes to basic retaliation protection for workers exercising their rights, this report breaks down NELP’s analysis of retaliation protection laws (in the minimum wage context) into three tiers:<sup>85</sup>

**Tier 1: These states have adopted retaliation protection laws for workers exercising their basic minimum wage rights that contain all four essential elements identified by NELP:**

- a right to monetary damages in addition to lost pay (through *either* an administrative process or a private lawsuit);
- a right for a worker who prevails to recover attorney’s fees and costs;
- a right for a worker to bring a retaliation complaint to a government agency and directly to court; and
- the potential for a government-imposed fine.

**Tier 2: These states have adopted retaliation protection laws for workers exercising their basic minimum wage rights that contain all essential elements identified by NELP except for clear authorization for government-imposed fines.**

**Tier 3: These states have adopted retaliation protection laws for workers exercising their basic minimum wage rights that allow workers to recover monetary damages in addition to lost pay through a private lawsuit filed in court.**

While NELP’s analysis focuses on retaliation laws in the minimum wage context, the findings presented here likely indicate that retaliation protection laws in other contexts would also benefit from an assessment and efforts to strengthen them.

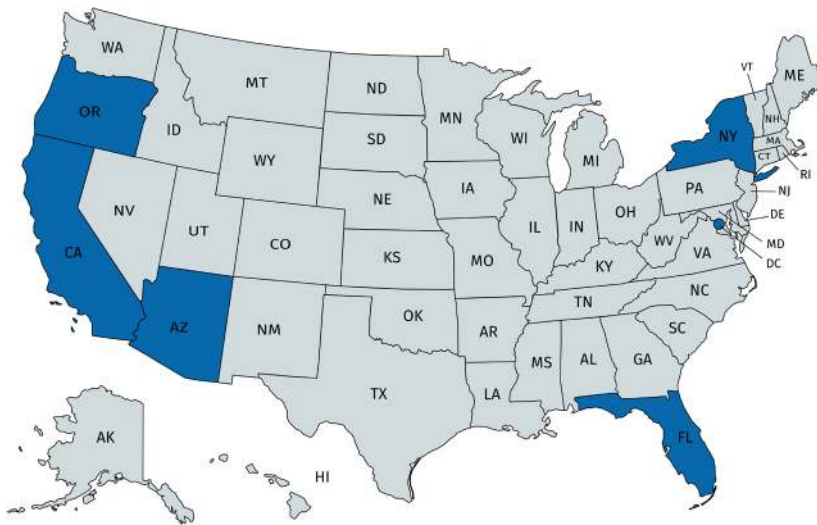
Workers in every state need and deserve retaliation protection laws that contain, at a minimum, the essential elements for adequate compensation and deterrence so that workers may realistically exercise the basic labor rights they have fought to secure. **Moreover, workers and advocates pushing for a**



**better future for workers in today’s economy and particularly in low-wage sectors should, of course, aim to go beyond this minimum, and they should also ensure that workers can actually use the remedies under these laws.** As discussed in more detail below, NELP’s recent consultation with practitioners in states where the retaliation protection laws contain what NELP considers the minimum essential elements highlighted challenges that call for even bolder policies and improvements. Past NELP publications, such as *Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft*<sup>86</sup>, offer some ideas on how to build stronger, more effective retaliation protection laws, and advocates should continue to propose new ideas.

### **A. Tier 1: Six States Have Enacted Retaliation Protection Laws That Include the Essential Elements for Potentially Adequate Compensation and Deterrence**

**Figure 1. Tier 1 States**



**Only six states, including the District of Columbia, have enacted retaliation protection laws that clearly provide workers exercising their basic minimum wage rights with the four essential elements for potentially adequate compensation and deterrence** discussed above: Arizona, California, Florida, New York, Oregon, and the District of Columbia. Two of these states, Arizona and Florida, adopted these retaliation protections through voter-approved ballot initiatives.<sup>87</sup> See **Figure 1** for a map highlighting these six Tier 1 states.

California and the District of Columbia expressly allow for damages of up to \$10,000 for workers.<sup>88</sup> New York expressly allows for liquidated damages of up to \$20,000.<sup>89</sup> In Arizona, workers who suffer retaliation may recover at least \$150 per day, which could amount to a meaningful sum for a worker.<sup>90</sup> For example, a worker recovering \$150 per day over a period of 30 days would recover \$4,500.

In Florida, however, damages available for workers depend on wages owed. Workers who experience unlawful retaliation are entitled to recover “the full amount of any unpaid back wages unlawfully withheld plus the same amount as liquidated damages,”<sup>91</sup> and workers may be entitled to additional “legal or equitable relief as may be appropriate to remedy the violation.”<sup>92</sup> State statute in Florida prohibits punitive damages.<sup>93</sup> Ultimately, limiting compensation to situations where wages are owed may leave some workers

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without monetary compensation entirely if their employer did not retaliate in a way that affected pay or if a worker's immigration status would preclude a damages award based on certain forms of unpaid wages. Regarding the second essential element (a right for a worker who prevails to recover attorney's fees and costs), all six of these Tier 1 states allow prevailing workers to recover attorney's fees and costs incurred in pursuing a court case alleging retaliation. All six of these states also clearly allow workers to bring complaints concerning retaliation violations to a government agency and directly to court.<sup>94</sup> Finally, all six of these states allow the state to impose a fine on an employer who has unlawfully retaliated against a worker. See **Appendix 1** for a more detailed breakdown of the relevant statutes underlying NELP's analysis of these Tier 1 states.

As noted above, the four basic elements required to qualify as a Tier 1 state represent only the bare minimum, and even in these states, consultation with attorneys representing low-wage workers about the implementation of these laws has overwhelmingly emphasized that these laws remain under-utilized by low-wage workers as well as difficult and time-consuming to enforce. The practitioners NELP consulted believe existing laws remain under-utilized for the following reasons:

- It can be extremely difficult to prove retaliation.
- Government agencies tasked with enforcement of the retaliation laws are often under-resourced and cannot act quickly to investigate retaliation complaints.
- Retaliation laws in these states can address retaliation after the fact, but they continue to expose workers to immediate financial and emotional consequences that dissuade workers from holding employers accountable.
- Workers who file a retaliation complaint (through private litigation or an administrative process) generally face a slow process that can last years.

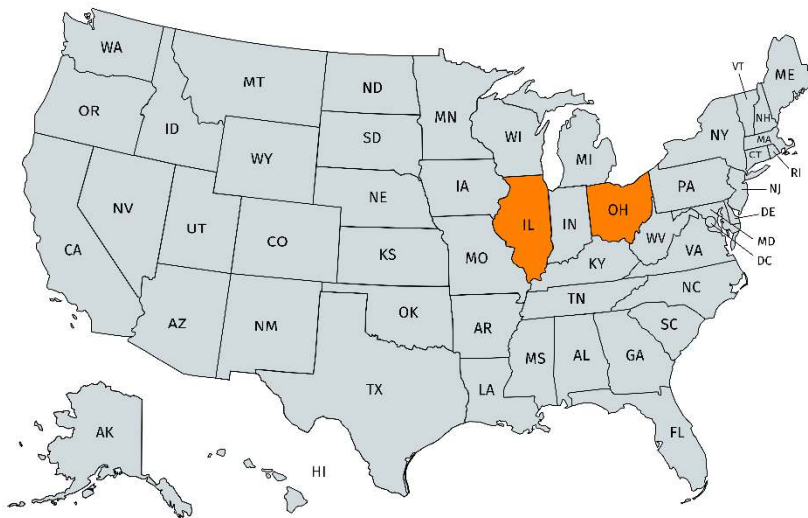
Even in Arizona and the District of Columbia,<sup>95</sup> where the retaliation laws analyzed specify that there will be a presumption of retaliation when a worker alleges retaliation within 90 days of engaging in some exercise of their rights, proving retaliation remains difficult. Despite the initial presumption of retaliation, employers may nevertheless argue that other reasons prompted the allegedly retaliatory action, and the process can require extensive, time-consuming fact-finding as well as a subjective weighing of the evidence.

Consequently, **even the relatively stronger retaliation laws captured under Tier 1 remain under-utilized and call for additional attention, discussion, and policy proposals to better protect workers.**

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## B. Tier 2: Two States Have Enacted Retaliation Protection Laws That Include the Essential Elements for Potentially Adequate Compensation and Deterrence Except for Government Fines

Figure 2. Tier 2 States

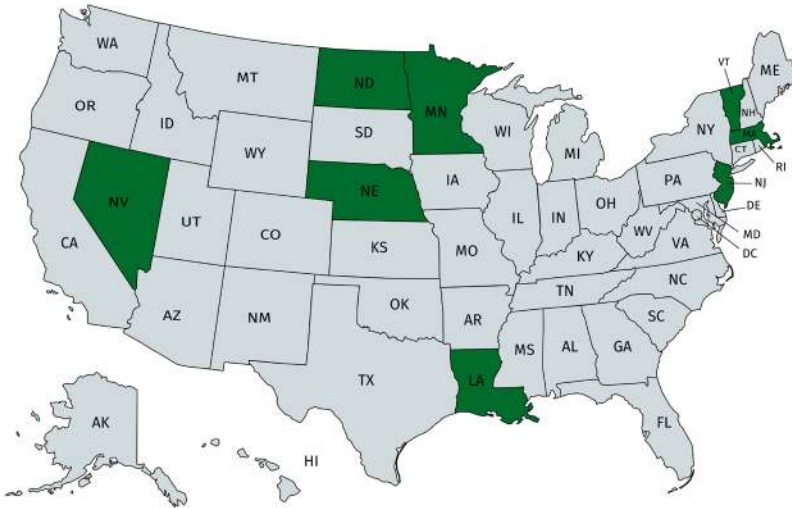


Two states, Ohio and Illinois, have adopted retaliation protection laws for workers exercising their basic minimum wage rights that provide workers with a right to monetary damages in addition to lost pay (in either an administrative process or through litigation), a right to recover attorney’s fees and costs in a private suit, and a right to bring a retaliation complaint to a government agency and directly to court. The only element missing compared to states in Tier 1 is a provision clearly allowing the state to impose a civil fine on an employer that unlawfully retaliates against a worker.

Ohio’s retaliation protections resulted from a voter-approved initiative in 2006.<sup>96</sup> Regarding compensation for workers, Ohio allows the state or a court to award damages for prevailing workers in an amount “sufficient to compensate the employee and deter future violations” but not less than \$150 per day that a retaliation violation continued.<sup>97</sup> Illinois law contains more general language when it comes to compensation, allowing “all legal and equitable relief as may be appropriate.”<sup>98</sup> Such general language allows for adequate compensation, but it does not guarantee it, unfortunately. While most laws giving workers a right to file a claim in court give workers between one to three years to file their claim, a period that is referred to as the statute of limitations, Illinois notably gives workers up to 10 years to file a claim.<sup>99</sup> A longer statute of limitations can prove extremely valuable for low-wage workers who often do not have knowledge about their rights.<sup>100</sup>

### C. Tier 3: Eight States Allow Workers to Hold Employers Accountable for Retaliation in Court and Give Workers an Opportunity to Receive Potentially Adequate Damages

Figure 3. Tier 3 States



Eight states that do not clearly allow workers to file retaliation complaints with a government agency to recover compensatory or punitive damages nevertheless allow workers to file a complaint in court and recover damages beyond unpaid wages (in addition to attorney’s fees and costs). These eight states are Louisiana, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, North Dakota, and Vermont. As with any other tier identified in this report, the fact that a state has adopted a retaliation protection law that meets a tier’s standards does not mean that workers have found that law to be effective in practice.

It means only that the state’s law meets the basic elements NELP has identified. On the other hand, the tier classifications in this report do not capture robust efforts by government agencies to do what they can with the laws on the books to protect workers from retaliation and hold employers accountable. Ultimately, worker advocates, agencies, and policymakers must closely evaluate how laws in their state have been implemented to leverage what is available and build upon existing statutes to ensure that workers have access to the retaliation protection they need.

Notably, several of the retaliation protection laws identified for this section include provisions that will hamper those laws’ potential. When it comes to the first essential element (monetary damages in addition to lost pay), Massachusetts, for example, clearly bases the monetary compensation that is available for workers who experience retaliation on wages owed.<sup>101</sup> So, while Massachusetts offers some compensation beyond actual wages owed, it may leave some workers with only a small amount or no award of compensatory damages and without any punitive damages. The state’s protections therefore fail to capture the full extent of the financial and emotional costs and risks that workers experience. North Dakota requires workers to prove some level of willfulness or malice in order to receive potentially adequate



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Six states do not offer workers a clear statute protecting them from retaliation in the wage theft context: **Alabama, Georgia, Mississippi, South Carolina, Texas, and Wyoming.**<sup>231</sup>

Another seven states have adopted retaliation protection laws that only clearly create criminal penalties for employers who retaliate against workers in the wage theft context: **Alaska,**<sup>232</sup> **Kansas,**<sup>233</sup> **Maryland,**<sup>234</sup> **New Mexico,**<sup>235</sup> **Oklahoma,**<sup>236</sup> **Pennsylvania,**<sup>237</sup> **and West Virginia.**<sup>238</sup>

compensation. Under North Dakota’s law, to recover compensatory and punitive damages, a plaintiff must prove that the defendant was guilty by “clear and convincing evidence of oppression, fraud, or actual malice.”<sup>102</sup> These requirements only make it more difficult for workers to protect their rights. As noted above, workers and their attorneys already generally find proving retaliation a difficult task even without these additional “state of mind” requirements.

Also, as outlined in **Appendix 3**, the states in Tier 3, as a whole, do not guarantee a clear minimum in compensatory or punitive damages for workers. While allowing damages that can go beyond unpaid wages is useful for workers, low-wage workers weighing the many risks and costs of coming forward to report retaliation would benefit from stronger provisions that *guarantee* meaningful compensatory and punitive damages for all workers who suffer retaliation.

Two states, Missouri and Tennessee, technically have retaliation protection laws on the books that allow workers to recover damages or penalties beyond backpay or actual damages in some situations. However, their application is so limited by statute as to appear almost irrelevant for most low-wage workers who seek protection from retaliation for asserting their minimum wage rights. Under Missouri’s law, for example, plaintiffs in most cases are only entitled to actual damages.<sup>103</sup> It is only if the employer’s conduct was “outrageous” or if the employer acted with an “evil motive or reckless indifference” to the rights of others that a worker may recover twice the amount of backpay or medical bills directly related to the violation.<sup>104</sup> Also, the statute’s private right of action does not apply if a worker has a private right of action under another statutory or regulatory scheme.<sup>105</sup> Moreover, the law does not appear to protect employees who report wrongdoing to their employer when the employer is the wrongdoer.<sup>106</sup> Under Tennessee’s retaliation protection law, known as the Tennessee Public Protection Act,<sup>107</sup> it appears that the statute’s protections apply only if the employee can show that the claim serves a public purpose and furthers the public good, an inquiry that will no doubt make it difficult, if not exceedingly rare, for a worker to hold an employer accountable for retaliation.<sup>108</sup>

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## **D. Beyond Tiers 1, 2, 3: The Vast Majority of States Have Not Adopted Retaliation Protection Laws That Offer Potentially Adequate Compensation for Workers and Deterrence**

Based on the above, only 16 states, including the District of Columbia, fit within Tiers 1, 2, or 3. **The vast majority of states do not currently offer workers retaliation protection laws that include the most basic elements necessary to provide potentially adequate compensation for workers as well as deterrence for employers.**

**A number of states do make retaliation a crime, but those statutes generally classify retaliation as a misdemeanor and, as such, appear to fail to deter employers from retaliating against workers.**

See **Appendix 4** for a list of state criminal retaliation protection statutes. District attorneys and attorneys general also retain discretion when it comes to deciding whether to prosecute any particular crime. Without the right political will or community pressure, criminal prosecutions based on retaliation against workers remain unlikely throughout the country. The use of criminal prosecutions and the criminal justice system, more broadly, to enforce basic labor laws separately raises important ethical, philosophical, strategic, and practical questions. For example, some advocates may oppose the use of labor protections to further expand mass incarceration that disproportionately targets people of color.<sup>109</sup> Overall, while criminal statutes may offer one way to penalize retaliation, a robust civil system that allows workers to hold their employers accountable through either an administrative process or the courts should form the basis of any approach to protecting workers from retaliation.

## **Conclusion**

Advocates and policymakers who want to ensure that workers have meaningful protection when they come forward to hold employers accountable should consider strengthening existing laws by building upon the very basic elements highlighted in this report and making sure that workers can actually access the remedies that these laws provide. Given that practitioners around the country caution that even relatively stronger laws remain under-utilized, the field of retaliation protection clearly calls out for greater innovation and bolder proposals that can help workers truly assume the risks and costs of coming forward to hold employers accountable when they violate the law. Policymakers should also pay special attention to the resources made available to state labor departments and other agencies charged with enforcement of workers' basic rights—any agency tasked with enforcement must have the staff and resources to quickly investigate and resolve retaliation complaints.

# 1 Appendix 1. Tier 1 States

STATE (TIER 1) <sup>110</sup>	STATUTE	DAMAGES TO WORKER IN COURT ACTION OR ADMINISTRATIVE PROCEEDING	STATE PENALTY	PRIVATE RIGHT OF ACTION	ATTORNEY'S COSTS & FEES
<b>1. ARIZONA</b>	Ariz. Rev. Stat. Ann. § 23-364 (2019)	No less than \$150 per day that violation continued in an administrative action or court action. Workers may also recover unpaid wages, unpaid earned sick time, other amounts, and any other appropriate relief. <sup>111</sup>	Allowed <sup>112</sup>	Yes <sup>113</sup>	Yes <sup>114</sup>
<b>2. CALIFORNIA</b>	Cal. Lab. Code § 1102.5 (West 2019) <sup>115</sup>	In administrative or court action, up to \$10,000 per violation from corporation or limited liability company and damages for injury suffered. <sup>116</sup>	Allowed (In addition to other penalties, an employer that is a corporation or limited liability company is liable for up to up to \$10,000 per violation.) <sup>117</sup>	Yes <sup>118</sup>	Yes <sup>119</sup>
<b>3. FLORIDA</b>	Fla. Const. art. X, § 24 (2018); Fla. Stat. Ann. § 448.110 (West 2019)	In administrative or court action, liquidated damages for owed wages as well as other legal or equitable relief that may be appropriate to remedy the violation. <sup>120</sup> Punitive damages are not available, however. <sup>121</sup>	Allowed (\$1,000 per violation.) <sup>122</sup>	Yes <sup>123</sup>	Yes <sup>124</sup>
<b>4. NEW YORK</b>	N.Y. Lab. Law § 215 (McKinney 2019)	Among other relief, in administrative actions, liquidated damages of up to \$20,000 may be awarded along with all appropriate relief.  In court actions brought by workers, liquidated damages shall be awarded of up to \$20,000 per aggrieved employee along with all appropriate relief. <sup>125</sup>	Allowed (Civil penalty of \$1,000–\$10,000. If the employer has violated the retaliation provision within the preceding 6 years, the civil fine shall be \$1,000–\$20,000.) <sup>126</sup>	Yes <sup>127</sup>	Yes <sup>128</sup>
<b>5. OREGON</b>	Or. Rev. Stat. Ann. § 653.060 (West 2019) <sup>129</sup>	In a civil action brought by a worker, compensatory damages or \$200, whichever is greater, are available to workers. <sup>130</sup> In an administrative action, the state agency may order the necessary relief to “[e]liminate the effects of the unlawful practice.” <sup>131</sup>	Allowed (Up to \$1,000 for a willful violation.) <sup>132</sup>	Yes <sup>133</sup>	Yes <sup>134</sup>

<b>6. DISTRICT OF COLUMBIA</b>	D.C. Code Ann. § 32-1010 (West 2019)	Among other remedies, in administrative proceedings or court action, liquidated damages equal to civil penalty, which may range from \$1,000–\$10,000. <sup>135</sup>	Allowed (\$1,000 - \$10,000.) <sup>136</sup>	Yes <sup>137</sup>	Yes <sup>138</sup>
	D.C. Code Ann. § 32-1311 (West 2019)	Among other remedies, in administrative proceedings or court action, liquidated damages equal to civil penalty, which may range from \$1,000–\$10,000. <sup>139</sup>	Allowed (May impose penalty of \$1,000–\$10,000. In addition, for 1st offense, an administrative penalty may be assessed by mayor of \$50 for each employee or person whose rights are violated for each day that the violation occurred or continued, and for subsequent offenses, the mayor may assess a penalty of \$100 for each employee or person whose rights are violated for each day that the violation occurred or continued. <sup>140</sup> )	Yes <sup>141</sup>	Yes <sup>142</sup>



# 2 Appendix 2. Tier 2 States

STATE (TIER 2)	STATUTE	DAMAGES TO WORKER IN COURT ACTION OR ADMINISTRATIVE PROCEEDING	STATE PENALTY	PRIVATE RIGHT OF ACTION	ATTORNEY'S COSTS & FEES
1. OHIO	Ohio Rev. Code Ann. § 4111.13 (West 2019)	The state or a court shall award damages in an amount “sufficient to compensate the employee and deter future violations.” <sup>143</sup> And where the violation is also a violation of Section 34a of Article II, Ohio Constitution, the damages shall not be less than \$150 per day that the violation continued. <sup>144</sup>	Not specified.	Yes <sup>145</sup>	Yes <sup>146</sup>
	Ohio Const. Article II, Section 34a	Damages must be enough to “compensate the employee and deter future violations,” but not less than \$150 per day that the violation continued. <sup>147</sup>	Not specified.	Yes <sup>148</sup>	Yes <sup>149</sup>
2. ILLINOIS	820 Ill. Comp. Stat. Ann. 115/14 (West 2019)	An employee who has been unlawfully retaliated against can recover through a claim filed with the department of labor or in a civil action all legal and equitable relief as may be appropriate. <sup>150</sup>	Not specified.	Yes <sup>151</sup>	Yes <sup>152</sup>

# 3 Appendix 3. Tier 3 States

STATE (TIER 3) <sup>153</sup>	STATUTE	DAMAGES TO WORKER IN COURT ACTION BROUGHT BY WORKER	STATE PENALTY	PRIVATE RIGHT OF ACTION	ATTORNEY'S COSTS & FEES
<b>1. LOUISIANA</b>	La. Stat. Ann. § 23:967 (2018)	In a court action, a worker may recover compensatory damages. <sup>154</sup>	Not specified. <sup>155</sup>	Yes <sup>156</sup>	Yes
<b>2. MASSACHUSETTS</b>	Mass. Gen. Laws Ann. ch. 151, § 19 (West 2019)	Not less than 1 months' wages and up to 2 months' wages as damages; <sup>157</sup> or treble damages, as liquidated damages, for any lost wages and other benefits. <sup>158</sup>	Allowed (Up to \$25,000.) <sup>159</sup>	Yes <sup>160</sup>	Yes <sup>161</sup>
	Mass. Gen. Laws Ann. ch. 149, § 148A (West 2019)	Treble damages, as liquidated damages, for any lost wages and other benefits. <sup>162</sup>	Allowed (Up to \$25,000.) <sup>163</sup>	Yes <sup>164</sup>	Yes <sup>165</sup>
<b>3. MINNESOTA</b>	Minn. Stat. Ann. § 181.932 (West 2019)	A worker may recover in a court action, "any and all damages recoverable at law . . . and may receive such injunctive and other equitable relief as determined by the court" or "appropriate relief," including compensatory damages. <sup>166</sup>	Not specified.	Yes <sup>167</sup>	Yes <sup>168</sup>
<b>4. NEBRASKA</b>	Neb. Rev. Stat. Ann. § 48-1114 et seq. (West 2019)	The statute allows for general and special damages. <sup>169</sup>	Not specified.	Yes <sup>170</sup>	Yes <sup>171</sup>
<b>5. NEVADA</b>	Nev. Const. art. XV, § 16 (2019)	In a court action, a worker may recover "all remedies available under the law or in equity appropriate to remedy any violation," including damages. <sup>172</sup>	Not specified.	Yes <sup>173</sup>	Yes <sup>174</sup>
<b>6. NEW JERSEY</b>	N.J. Stat. Ann. § 34:19-3 (West 2019)	In a civil action brought by a worker, the worker may seek all remedies available in common law tort actions, including compensatory and punitive damages. <sup>175</sup>	Allowed (In a civil action brought by a worker, a court may order a civil fine payable to the State of up to \$10,000 for the first violation and up to \$20,000 for each subsequent violation.) <sup>176</sup>	Yes <sup>177</sup>	Yes <sup>178</sup>

<b>7. NORTH DAKOTA</b>	N.D. Cent. Code Ann. § 34-01-20 (West 2019)	Exemplary/punitive damages are available up to twice the amount of compensatory damages awarded or \$250,000, whichever is greater, but only if the claimant is entitled to compensatory damages and only if the defendant is guilty by “clear and convincing evidence of oppression, fraud, or actual malice.” <sup>179</sup>	Not specified.	Yes <sup>180</sup>	Yes <sup>181</sup>
<b>8. VERMONT</b> <sup>182</sup>	Vt. Stat. Ann. tit. 21, § 348 (West 2019)	Compensatory and punitive damages and other appropriate relief is available in a court action brought by a worker. <sup>183</sup>	Not specified.	Yes <sup>184</sup>	Yes <sup>185</sup>
	Vt. Stat. Ann. tit. 21, § 397 (West 2019)	Compensatory and punitive damages and other appropriate relief is available in a court action brought by a worker. <sup>186</sup>	Not specified.	Yes <sup>187</sup>	Yes <sup>188</sup>

# 4 Appendix 4.

## Criminal Retaliation Protection Statutes (States)

STATE	STATUTE	CRIMINAL PENALTY
1. ALASKA	Alaska Stat. Ann. § 23.10.135(6) (West 2018)	YES. <sup>189</sup> \$100–\$2,000 per violation, and/or imprisonment for 10–90 days. Each day a violation occurs is a separate offense.
2. CALIFORNIA	Cal. Lab. Code § 98.6 (West 2019)	YES. <sup>190</sup> Imprisonment for up to 6 months and/or fine up to \$1,000.
	Cal. Lab. Code § 1102.5 (West 2019)	YES. <sup>191</sup> Up to \$1,000 and/or up to 1 year imprisonment; corporations subject to up to \$5,000 and/or up to 1 year imprisonment.
3. COLORADO	Colo. Rev. Stat. Ann. § 8-4-120 (West 2019)	YES. Fine of up to \$500 and/or imprisonment up to 60 days. <sup>192</sup>
	Colo. Rev. Stat. Ann. § 8-6-115 (West 2019)	YES. <sup>193</sup> Fine of \$200–\$1,000.
4. HAWAII	Haw. Rev. Stat. Ann. § 387-12 (West 2018)	YES. <sup>194</sup> Fine of \$50–\$500 and/or imprisonment of up to 1 year.
5. ILLINOIS	820 Ill. Comp. Stat. Ann. 105/11 (West 2019)	YES. <sup>195</sup> Fine of up to \$1,500 and/or up to 6 months imprisonment, plus possible restitution in the form of out-of-pocket damages.
	820 Ill. Comp. Stat. Ann. 115/14 (West 2019)	YES. <sup>196</sup> Fine of up to \$1,500 and/or up to 30 days imprisonment, plus possible restitution in the form of out-of-pocket damages.
	740 Ill. Comp. Stat. Ann. 174/15 (West 2019) et seq.	YES. <sup>197</sup> Fine of up to \$2,500 and/or less than 1 year imprisonment, plus possible restitution in the form of out-of-pocket damages.
6. INDIANA	Ind. Code Ann. § 22-2-2-11 (West 2018)	YES. <sup>198</sup> Fine of up to \$500.
7. KANSAS	Kan. Stat. Ann. § 44-1210 (2019)	YES. <sup>199</sup> Fine of \$250–\$1,000.
8. LOUISIANA	La. Stat. Ann. § 23:964 (2018)	YES. <sup>200</sup> Fine of \$100–\$250 and/or imprisonment of 30–90 days.
9. MARYLAND	Md. Code Ann., Lab. & Empl. § 3-428 (West 2019)	YES. <sup>201</sup> Fine up to \$1,000.
10. MASSACHUSETTS	Mass. Gen. Laws Ann. ch. 151, § 19 (West 2019)	YES. <sup>202</sup>  1 <sup>st</sup> Offense (Willful): Fine of up to \$25,000 and/or 1 year imprisonment.  1 <sup>st</sup> Offense (Non-Willful): Fine of up to \$10,000 and/or 6 months imprisonment.  Subsequent Offenses (Willful): Fine of up to \$50,000 and/or 2 years imprisonment.  Subsequent Offenses (Non-Willful): Fine of up to \$25,000 and/or 1 year imprisonment.
11. MICHIGAN	Mich. Comp. Laws Ann. § 408.483 (West 2019)	YES. <sup>203</sup> Fine up to \$500 and/or up to 90 days imprisonment.
	Mich. Comp. Laws Ann. § 408.421 (West 2019) <sup>204</sup>	YES. <sup>205</sup> Fine up to \$500 and/or up to 90 days imprisonment.
	Mich. Comp. Laws Ann. § 408.483a (West 2019) <sup>206</sup>	YES. <sup>207</sup> Fine up to \$500 and/or up to 90 days imprisonment.
12. MINNESOTA	Minn. Stat. Ann. § 177.32 (West 2019)	YES. <sup>208</sup> Fine of \$700–\$3,000.
13. MISSOURI	Mo. Ann. Stat. § 290.525 (West 2018)	YES. Fine of up to \$750 <sup>209</sup> and/or up to 15 days imprisonment. <sup>210</sup>



<b>14. NEVADA</b>	Nev. Rev. Stat. Ann. § 608.015 (West 2019)	YES. <sup>211</sup> Fine of up to \$1,000 and/or up to 6 months imprisonment; or community service.
	Nev. Rev. Stat. Ann. § 608.190 (West 2019)	YES. <sup>212</sup> Fine of up to \$1,000 and/or up to 6 months imprisonment; or community service.
<b>15. NEW JERSEY</b>	N.J. Stat. Ann. § 34:11-56a24 (West 2019)	YES. <sup>213</sup> Fine of \$100–\$1,000, in addition to reinstatement or wages lost.
<b>16. NEW MEXICO</b>	N.M. Stat. Ann. § 50-4-26.1 (West 2019)	YES. <sup>214</sup> Fine of up to \$1,000 and/or less than 1 year imprisonment.
<b>17. NEW YORK</b>	N.Y. Lab. Law § 215 (McKinney 2019)	YES. <sup>215</sup> Fine of up to \$500 and/or up to 3 months imprisonment.
<b>18. NORTH DAKOTA</b>	N.D. Cent. Code Ann. § 34-01-20 (West 2019)	YES. <sup>216</sup> If willful, fine of up to \$1,000 as an infraction. But if the employer was convicted of another infraction within 1 year prior to the conviction, employer may convicted of a class B misdemeanor, which can result in a fine of up to \$1,500 and/or imprisonment for up to 30 days.
	N.D. Cent. Code Ann. § 34-06-18 (West 2019)	YES. <sup>217</sup> Fine of up to \$1,500 and/or up to 30 days imprisonment.
	N.D. Cent. Code Ann. § 34-14-07 (West 2019)	YES. <sup>218</sup> Fine of up to \$1,000 as an infraction. But if the employer was convicted of another infraction within 1 year prior to the conviction, employer may convicted of a class B misdemeanor, which can result in a fine of up to \$1,500 and/or imprisonment for up to 30 days.
<b>19. OHIO</b>	Ohio Rev. Code Ann. § 4111.13 (West 2019)	YES. <sup>219</sup> Fine of up to \$500 and/or up to 60 days imprisonment, in addition to possible restitution for worker and reimbursement of costs for the state.
<b>20. OKLAHOMA</b>	Okla. Stat. Ann. tit. 40, § 199 (West 2019)	YES. <sup>220</sup> Fine of \$50–\$200 and/or 5–30 days imprisonment.
<b>21. OREGON</b>	Or. Rev. Stat. Ann. § 652.355 (West 2019)	YES. <sup>221</sup> Fine of up to \$1,250 and/or up to 30 days imprisonment.
	Or. Rev. Stat. Ann. § 653.060 (West 2019)	YES. <sup>222</sup> Fine of up to \$6,250 and/or up to 364 days imprisonment.
<b>22. PENNSYLVANIA</b>	43 Pa. Stat. And Cons. Stat. Ann. § 333.112 (West 2019)	YES. <sup>223</sup> Fine of \$500–\$1,000. If the employer defaults on paying the fine, the employer shall be imprisoned for 10–90 days.
<b>23. RHODE ISLAND</b>	28 R.I. Gen. Laws Ann. § 28-12-16 (West 2019)	YES. <sup>224</sup> Fine of \$100–\$500.
	28 R.I. Gen. Laws Ann. § 28-14-19.3 (West 2019)	YES. <sup>225</sup> Fine of not less than \$400 per offense, and/or up to 1 year imprisonment. Each day a violation occurs is a separate offense.
<b>24. UTAH</b>	Utah Code Ann. § 34-28-19 (West 2018)	YES. <sup>226</sup> Fine of up to \$1,000 and/or up to 6 months imprisonment.
<b>25. WASHINGTON</b>	Wash. Rev. Code Ann. § 49.46.100 (West 2019)	YES. <sup>227</sup> Fine of up to \$5,000 and/or up to 364 days imprisonment.
<b>26. WEST VIRGINIA</b>	W. Va. Code Ann. § 21-5C-7 (West 2018)	YES. <sup>228</sup> Fine of \$100–\$500.

<b>27. DISTRICT OF COLUMBIA</b>	D.C. Code Ann. § 32-1010 (West 2019)	YES. <sup>229</sup> Fine of up to \$10,000 and/or up to 6 months imprisonment.
	D.C. Code Ann. § 32-1311 (West 2019)	<p>YES.<sup>230</sup></p> <p>1<sup>st</sup> Offense (Negligent): Fine of up to \$2,500 per affected employee.</p> <p>1<sup>st</sup> Offense (Willful): Fine of up to \$5,000 per affected employee or up to 30 days imprisonment.</p> <p>Subsequent Offenses (Negligent): Fine of up to \$5,000 per affected employee.</p> <p>Subsequent Offense (Willful): Fine of up to \$10,000 per affected employee or up to 90 days imprisonment.</p>

# 5 Endnotes

- 1 See Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013).
- 2 *Id.* at 779 (citing HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000)).
- 3 See, e.g., Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1098–99 (2014) (“Thus, the results reported in Part III support our contention that the bottom-up workplace law enforcement regime may be failing the very workers who most need protection. Workers do not simply progress up the workplace dispute pyramid through consecutive phases of naming, blaming, claiming, and resolution. Instead, our analysis of the Unregulated Work Survey data suggests that workers are shunted off the pyramid, at a minimum, at the naming and claiming stages. We contend that this drop-off occurs because low-wage, front-line workers often lack the legal knowledge and incentives needed for bottom-up workplace law enforcement. Compounding this problem, claiming incentives and legal knowledge are distributed unevenly among workers. As our analysis suggests, the least politically, economically, and socially powerful and secure workers were the least likely to make claims, the most likely to experience retaliation, and the least likely to have accurate substantive and procedural legal knowledge: women, workers without legal immigration status, and workers with low education levels.”); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005) (“The fear of retaliation is particularly debilitating for persons with low-institutional power across multiple dimensions. For example, women who are especially isolated and tokens in their jobs, women in nontraditional employment, and women who are especially vulnerable in their jobs are more likely to be silenced by the threat or fear of retaliation. . . . As the perpetrator’s power increases relative to the target, reporting discrimination is less likely to lead to a positive outcome for the target. The potential for retaliation increases as the power disparity widens between a low-status target and a higher-status perpetrator.”) (citations omitted); Alexander, *supra* note 1, at 785 (“[E]mployers may be particularly likely to engage in anticipatory retaliation against what has come to be called the ‘brown collar’ workforce: low-wage, often undocumented, immigrant workers.”) (citation omitted).
- 4 ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2, 20 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.
- 5 *Id.* at 5.
- 6 *Id.*
- 7 *Id.* at 9. Women were significantly more likely than men to experience minimum wage violations at a rate of 30 percent versus 20 percent for men. *Id.* at 42. Latina women workers experienced minimum wage violations at a rate of 40 percent (versus 24 percent for their male counterparts), and African American workers “had a violation rate three times that of white workers.” *Id.* at 43. Foreign-born workers experienced minimum wage violations at almost twice the rate of their U.S.-born counterparts. *Id.* at 42.
- 8 *Id.* at 3.
- 9 *Id.*
- 10 *Id.*
- 11 RAISE THE FLOOR ALLIANCE & NATIONAL ECONOMIC & SOCIAL RIGHTS INITIATIVE, CHALLENGING THE BUSINESS OF FEAR 11 (2016), [HTTPS://WWW.NESRI.ORG/SITES/DEFAULT/FILES/BUSINESS OF FEAR WEB.PDF](https://www.nesri.org/sites/default/files/business_of_fear_web.pdf). Of the 275 surveys collected, 29 surveys “were excluded from the study because the worker was employed outside the State of Illinois or the location of employment could not be identified.” *Id.* at 5.
- 12 *Id.* at 13.
- 13 *Id.*
- 14 *Id.*
- 15 *Id.* at 12.
- 16 ALABAMA APPLESEED & SOUTHERN POVERTY LAW CENTER, UNSAFE AT THESE SPEEDS: ALABAMA’S POULTRY INDUSTRY AND ITS DISPOSABLE WORKERS 5 (2013), [https://www.splcenter.org/sites/default/files/Unsafe\\_at\\_These\\_Speeds\\_web.pdf](https://www.splcenter.org/sites/default/files/Unsafe_at_These_Speeds_web.pdf).
- 17 *Id.* at 16.
- 18 *Id.*
- 19 *Id.*
- 20 *Id.* at 22.
- 21 Alexander & Prasad, *supra* note 3, at 1087 n.72 (citing Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005)).
- 22 Brake, *supra* note 3, at 38 (citations omitted).
- 23 To support this statement, Brake cites, for example, to a study “describing the results of a study of state employees finding that 62 percent of the women who reported sexual harassment experienced retaliation, with the most assertive responses often triggering the harshest response.” *Id.* at n.59 (citing Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995)). Another study cited by Brake described “the results of [a] study on women who filed sex discrimination complaints against their employer with the Wisconsin Equal Rights Division, finding that 40 percent of the women reported experiencing retaliation. *Id.* (citing Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983)).
- 24 ETHICS RESOURCE CENTER, RETALIATION: WHEN WHISTLEBLOWERS BECOME VICTIMS (A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY) 2 (2012), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/06\\_ERC\\_RetaliationWhenWhistleblowersBecomeVictims.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/06_ERC_RetaliationWhenWhistleblowersBecomeVictims.pdf); Alexander & Prasad, *supra* note 3, at 1100.
- 25 *Id.*
- 26 *Id.* The Ethics Resource Center report shows that in 2011, 22 percent of American workers who reported misconduct experienced retaliation, compared to 15 percent in 2009 and compared to 12 percent in 2007. *Id.* at 5. The report also showed that between 2007 and 2012, “there [was] an 83 percent increase in the rate of retaliation, but reporting [] only increased by 12 percent.” *Id.*
- 27 EILEEN APPELBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 1, 2, 3, 28 (2011), <http://cepr.net/documents/publications/paid-family-leave-1-2011.pdf>.
- 28 A NELP 2014 report describes common outsourcing arrangements in more detail. These include outsourcing when an employer misclassifies workers by converting all of its employees to “independent contractors” “franchisees,” or “limited liability corporations.” CATHERINE RUCKELSHAUS ET AL., NAT’L EMP. L. PROJECT, WHO’S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 7 (2014), <https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf> [hereinafter WHO’S THE BOSS]. Some employers rely on intermediaries, such as temp or staffing agencies to serve as the apparent “employer” even though

workers hired through these intermediaries are not truly temporary workers. *Id.* at 7– 8. In some industries, there exist “multiple layers of contractors, with the first-tier contractor operating as a broker that secures contracts and then contracts with a second tier of sometimes undercapitalized subcontractors.” *Id.* at 8.

29 See DAVID WEIL, BOSTON UNIVERSITY, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION (2010), <https://www.dol.gov/whd/resources/strategiceenforcement.pdf>.

30 RUCKELSHAUS ET AL., *supra* note 28, at 1 (Executive Summary).

31 “Nationally, nearly 90 percent of fast-food workers surveyed in early 2014 reported some sort of wage theft on the job.” *Id.* at 11 (citation omitted).

32 According to NELP’s WHO’S THE BOSS report, workers in the home care industry experience minimum wage violations at a rate of 17.5 percent and overtime violations at a rate of 82.7 percent. *Id.* at 14.

33 Claire Prestel, *A Win For Workers! Employer Can’t Mislead and Coerce Employees With Unpaid Overtime Claims*, PUB. JUST. (Apr. 8, 2013), <https://www.publicjustice.net/blog/win-workers-employer-cant-mislead-and-coerce-employees-with-unpaid-overtime-claims/>.

34 See, e.g., CENTER FOR LAW AND SOCIAL POLICY ET AL., TACKLING UNSTABLE AND UNPREDICTABLE WORK SCHEDULES 2 (2014), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/Tackling-Unstable-and-Unpredictable-Work-Schedules-3-7-2014-FINAL-1.pdf>; HEATHER BOUSHEY & BRIDGET ANSEL, WASHINGTON CENTER FOR EQUITABLE GROWTH, WORKING BY THE HOUR: THE ECONOMIC CONSEQUENCES OF UNPREDICTABLE SCHEDULING PRACTICES 5 (2016), <http://equitablegrowth.org/wp-content/uploads/2016/09/090716-unpred-sched-practices.pdf>; Janelle Jones, *Working People Deserve Schedules That Work*, ECON. POL’Y INST.: WORKING ECON. BLOG (June 20, 2017), <https://www.epi.org/blog/working-people-deserve-schedules-that-work/>.

35 See, e.g., BOUSHEY & ANSEL, *supra* note 34, at 1–2.

36 Jones, *supra* note 34.

37 Maria Sacchetti, *ICE Raids Meatpacking Plant in Rural Tennessee; 97 Immigrants Arrested*, WASH. POST (Apr. 6, 2018), [https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89\\_story.html?utm\\_term=.70bcdef36c51](https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89_story.html?utm_term=.70bcdef36c51).

38 Hamed Aleaziz, *Workplace Arrests Have Soared As The Trump Administration Steps Up Immigration Enforcement*, BUZZFEED NEWS (July 24, 2018, 4:39 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/workplace-arrests-trump-enforcement-ice>.

39 Andrew Khouri, *More Workers Say Their Bosses Are Threatening to Have Them Deported*, L.A. TIMES (Jan. 2, 2018), <https://www.latimes.com/business/la-fi-immigration-retaliation-20180102-story.html>.

40 *Id.*

41 MARSHALL STEINBAUM, THE ROOSEVELT INSTITUTE, A MISSING LINK: THE ROLE OF ANTITRUST LAW IN RECTIFYING EMPLOYER POWER IN OUR HIGH-PROFIT, LOW-WAGE ECONOMY 4 (2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/04/Monopsony-issue-brief.pdf>.

42 Orly Lobel, *Companies Compete but Won’t Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html>.

43 See, e.g., *id.*; MARSHALL STEINBAUM *supra* note 41, at 4–5; Sophie Quinton, *These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses*, USA TODAY (May 27, 2017), <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/>.

44 See, e.g., Hailey Mensik, *Illinois, 10 Other States Take Aim at ‘No-Poaching’ Clauses That Critics Say Limit Fast-Food Workers’ Pay*, CHI. TRIB. (July 9, 2018), <https://www.chicagotribune.com/business/ct-biz-fast-food-non-compete-investigation-20180709-story.html>.

45 29 U.S.C. § 660(c) (2019) (Occupational Safety and Health Act); 18 U.S.C. § 1514A92019) (Sarbanes-Oxley Act); see also CHANNAH S. BROYDE, U.S. DEPARTMENT OF LABOR, SOLICITOR’S OFFICE – REGION IV, WHISTLEBLOWER PROTECTION ENFORCEMENT: A VIEW FROM THE UNITED STATES DEPARTMENT OF LABOR (Aug. 2014), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/am/2014/3b\\_broyde.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/3b_broyde.pdf).

46 29 U.S.C. § 215(a)(3) (2019) (making it unlawful “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee”).

47 29 U.S.C. § 216(b) (2019).

48 See, e.g., Carol Abdelmehseh & Deanne M. DiBlasi, *Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 716 (2004).

49 See *infra* Part V.

50 NAT’L EMP. L. PROJECT, WINNING WAGE JUSTICE: TALKING POINTS ON THE NEED FOR STRONGER ANTI-WAGE THEFT LAWS 3 (2012), <https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJusticeTalkingPoints.pdf> [hereinafter *Winning Wage Justice*] (citing David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL’Y J. 59, 62 (2005)).

51 *Employee Rights*, NAT’L LABOR RELATIONS BD., <https://www.nlrb.gov/rights-we-protect/rights/employee-rights> (last visited Mar. 13, 2019).

52 *Id.*

53 See, e.g., *Discriminating Against Employees Because of Their Union Activities or Sympathies* (Section 8(a)(3)), NAT’L LABOR RELATIONS BD., <https://www.nlrb.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union> (last visited Mar. 13, 2019); *Interfering With Employee Rights* (Section 7 & 8(a)(1)), NAT’L LABOR RELATIONS BD., <https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> (last visited Mar. 13, 2019).

54 See Alexander, *supra* note 1, at 786, 817–18.

55 See, e.g., HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 26, 31 (2000), <https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>.

56 See, e.g., NAT’L EMP. L. PROJECT, IMPACT OF THE FIGHT FOR \$15: \$68 BILLION IN RAISES, 22 MILLION WORKERS (Nov. 2018) (showing dozens of cities and counties have adopted local minimum wages), <https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Impact-Fight-for-15-2018.pdf>; A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES (Oct. 26, 2018) (showing local aid sick leave laws around the country), <https://www.abetterbalance.org/paid-sick-time-laws/?export>; JULIA WOLFE ET AL., ECON. POL’Y INST., ‘fair workweek’ laws help more than 1.8 million



workers (2019) (noting the growth of local fair workweek laws around the country), <https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers/>; Alexia Elejalde-Ruiz, *Chicago to Create Office That Will Enforce City's Minimum Wage, Sick Leave Laws*, CHI. TRIB. (Oct. 31, 2018), <https://www.chicagotribune.com/business/ct-biz-chicago-office-labor-laws-standards-1101-story.html>; Alayna Alvarez, *As More Cities Push for Paid Sick Leave, States Push Back*, PEW CHARITABLE TRUST: STATELINE (Sept. 24, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/24/as-more-cities-push-for-paid-sick-leave-states-push-back>.

57 See, e.g., A BETTER BALANCE, OVERVIEW OF PAID SICK TIME LAWS IN THE UNITED STATES (Oct. 26, 2018) (showing local aid sick leave laws around the country), <https://www.abetterbalance.org/paid-sick-time-laws/?export>.

58 See, e.g., NAT'L EMP. L. PROJECT, IMPACT OF THE FIGHT FOR \$15: \$68 BILLION IN RAISES, 22 MILLION WORKERS (2018), <https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Impact-Fight-for-15-2018.pdf> (detailing the impact of \$15 minimum wage laws in localities like Flagstaff, Los Angeles, San Francisco, Montgomery County, the Twin Cities, Seattle and the District of Columbia); SYLVIA ALLEGRETTO ET AL., CTR. ON WAGE AND EMP. DYNAMICS, U. OF CAL. BERKLEY, THE NEW WAVE OF LOCAL MINIMUM WAGE POLICIES: EVIDENCE FROM SIX CITIES (2018), <http://irle.berkeley.edu/files/2018/09/The-New-Wave-of-Local-Minimum-Wage-Policies.pdf> (examining the “effects of minimum wage policies in six large cities with high citywide minimum wages”).

59 See, e.g., N.Y.C. ADMIN. CODE § 20-927 et seq. (2019) (“Freelance Isn’t Free Act”).

60 See, e.g., WOLFE ET AL., *supra* note 56 (examining laws that “promote workplace flexibility and protect against unfair scheduling practices”).

61 See, e.g., NATIONAL LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 10 (2018 Update) (noting how “cities have moved to cement social progress and protect the rights of marginalized groups through anti-discrimination ordinances” and how “[a]t least 225 local governments prohibit employment discrimination on the basis of gender identity”), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>.

62 S.F., CAL., ADMIN. Code ch. 12R, § 12R.6 (2019).

63 SANTA FE CITY, N.M. Code ch. XXVIII, § 28-1.6(B) (2018).

64 L. A., CAL. Code ch. XVIII, art. 8, § 188.04 (2019).

65 L. A. CNTY., CAL. Code tit. 8, div. 4, ch. 8.101, § 8.101.080 (2019).

66 BERKELEY, CAL. Code tit. 13, ch. 13.99, § 13.99.070 (2019).

67 OAKLAND, CAL. Code tit. 5, ch. 5.92, § 5.92.050 (2018).

68 SAN JOSE, CAL. Code tit. 4, ch. 4.100, § 4.100.070 (2019).

69 SAN DIEGO, CAL. Code ch. 3, art. 9, div. 1, § 39.0111 (2019).

70 *Retaliation Complaint Investigations Unit* (RCI), State of Cal. Dep’t of Indus. Relations, <https://www.dir.ca.gov/dlse/dlseRetaliation.html> (last visited Mar. 14, 2019).

71 JULIE A. SU, 2017 RETALIATION COMPLAINT REPORT (Labor Code §98.75) 1, <https://www.dir.ca.gov/dlse/RCILegReport2017.pdf>.

72 See, e.g., NAT'L EMP. L. PROJECT, THE TOP 5 ENFORCEMENT TOOLS FOR LOCAL MINIMUM WAGE LAWS (2015), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Top-Five-Enforcement-Tools-Local-Minimum-Wage.pdf> (naming “Community Partnerships” as one of the top 5 tools for effective enforcement of minimum wage laws);

JANICE FINE, NEW APPROACHES TO ENFORCING LABOR STANDARDS: HOW CO-ENFORCEMENT PARTNERSHIPS BETWEEN GOVERNMENT AND CIVIL SOCIETY ARE SHOWING THE WAY FORWARD, UNIV. OF CHICAGO LEGAL FORUM (Vol. 2017, art. 7) (2018), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1594&context=ucfl>; TIA KOONSE ET AL., UCLA CENTER FOR LABOR RESEARCH AND EDUCATION AND UC BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, ENFORCING CITY MINIMUM WAGE LAWS IN CALIFORNIA: BEST PRACTICES AND CITY-STATE PARTNERSHIPS (2015), <http://laborcenter.berkeley.edu/pdf/2015/minimum-wage-enforcement.pdf>; TANYA L. GOLDMAN, RUTGERS SCHOOL OF MANAGEMENT AND LABOR RELATIONS CENTER FOR INNOVATION IN WORKER ORGANIZATION AND CLASP, THE LABOR STANDARDS ENFORCEMENT TOOLBOX (TOOL 4: INTRODUCTION TO STRATEGIC ENFORCEMENT) (2018), <https://www.clasp.org/sites/default/files/publications/2018/09/2018-introductiontostrategicenforcement.pdf>.

73 See, e.g., NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE, *supra* note 50, at 17–36.

74 For discussion of the wide-ranging consequences of retaliation for workers and the cascading consequences of financial insecurity and poverty, see JENNIE E. BRAND, CAL. CTR. FOR POPULATION RES., U.C.L.A., THE FAR-REACHING IMPACT OF JOB LOSS AND UNEMPLOYMENT (2014), <http://citeseeerx.ist.psu.edu/viewdoc/download?doi=10.1.1.661.8164&rep=rep1&type=pdf>; DIANA ELLIOTT & EMMA KALISH, URBAN INSTITUTE, NEW YORK: THE COST OF EVICTION AND UNPAID BILLS OF FINANCIALLY INSECURE FAMILIES FOR CITY BUDGETS (2017), <https://www.urban.org/sites/default/files/publication/87726/new-york-cost-eviction-and-unpaid-bills-financially-insecure-families-city-budgets.pdf>; Karen Weese, *Why it Costs So Much to be Poor in America*, Wash. Post, Jan. 25, 2018, [https://www.washingtonpost.com/news/posteverything/wp/2018/01/25/why-it-costs-so-much-to-be-poor-in-america/?utm\\_term=.e4c7bd30c6e0](https://www.washingtonpost.com/news/posteverything/wp/2018/01/25/why-it-costs-so-much-to-be-poor-in-america/?utm_term=.e4c7bd30c6e0); Nusrat Choudhury, *Single Moms Get Sucked Into the Cruellest Debtors' Prisons We've Ever Seen*, ACLU: SPEAK FREELY (Dec. 21, 2018), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/single-moms-get-sucked-cruellest-debtors-prison-weve>; Sheelah Kolhatkar, *The Personal Toll of Whistle-Blowing*, New Yorker (Feb. 4, 2019), <https://www.newyorker.com/magazine/2019/02/04/the-personal-toll-of-whistle-blowing>.

75 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

76 See, e.g., RAISE THE FLOOR ALLIANCE & NATIONAL ECONOMIC & SOCIAL RIGHTS INITIATIVE, *supra* note 11, at 13; Robert Johnson, *Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation After Burlington Northern v. White*, 42 U. RICH. L. REV. 1337, 1342–43 (2008) (quoting Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK AND OCCUPATIONS 107, 121 (1999)) (highlighting a study of whistleblowers finding that “[t]he most common fallout from their whistle-blowing involved: (a) severe depression or anxiety (84%), (b) feelings of isolation of powerlessness (84%), (c) distrust of others (78%), (d) declining physical health (69%), (e) severe financial decline (66%), and (f) problems with family relations (53%)” and noting that based on that same study, “roughly two-thirds of internal whistleblowers lost their jobs and were later blacklisted in their occupations”); Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8(4) J. OF OCCUPATIONAL HEALTH PSYCHOL. 247–265, 262 (2003) (finding in part how “among highly mistreated employees, vocal victims suffered when they experienced any type of retaliation,” describing “greater sadness and anxiety; fewer feelings of tranquility, happiness, and life satisfaction; and more somatic complaints”) (emphasis in original).

- 77 Clyde Summers, *Effective Remedies For Employment Rights: Preliminary Guidelines And Proposals*, 141 U. Pa. L. Rev. 457, 477 (1992).
- 78 *Id.* at 477–78.
- 79 *Id.* at 478.
- 80 WEIL, *supra* note 29, at 81 (May 2010).
- 81 REBECCA BUCKWALTER-POZA, CENTER FOR AMERICAN PROGRESS, MAKING JUSTICE EQUAL 4 (2016) (citation omitted), <https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf>.
- 82 *Id.*
- 83 *Id.* (citation omitted).
- 84 NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE, *supra* note 50, at 31.
- 85 The laws analyzed and categorized in Tiers 1, 2, and 3 do not include state laws concerning only limited circumstances involving blacklisting. See, e.g., CONN. GEN. STAT. ANN. § 31-51 (West 2019); IND. CODE ANN. § 22-5-3-1 (West 2019); IND. CODE ANN. § 22-5-3-2 (West 2019); KAN. STAT. ANN. § 44-117 (West 2019); LA. STAT. ANN. § 23:291 (2018); MO. ANN. STAT. § 290.152 (West 2019); NEB. REV. STAT. ANN. § 48-201 (West 2019); NEV. REV. STAT. ANN. § 613.200 (West 2019); NEV. REV. STAT. ANN. § 613.210 (West 2019); VA. CODE ANN. § 40.1-27 (West 2018); WASH. REV. CODE ANN. § 49.44.010 (West 2019).
- 86 NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE, *supra* note 50, at 55–70.
- 87 Arizona voters approved Proposition 202 in 2006, which included the relevant retaliation protection language. See *Arizona 2006 Ballot Measures*, BALLOTPEdia, [https://ballotpedia.org/Arizona\\_2006\\_ballot\\_measures](https://ballotpedia.org/Arizona_2006_ballot_measures) (last visited Apr. 10, 2019); *Florida Minimum Wage, Amendment 5* (2004), BALLOTPEdia, [https://ballotpedia.org/Florida\\_Minimum\\_Wage\\_Amendment\\_5\\_\(2004\)](https://ballotpedia.org/Florida_Minimum_Wage_Amendment_5_(2004)) (last visited Apr. 10, 2019).
- 88 See Appendix 1.
- 89 *Id.*
- 90 *Id.*
- 91 FLA. STAT. ANN. § 448.110(6)(c)(1) (West 2019); see also FLA. CONST. ART. X, § 24(e) (2018).
- 92 FLA. CONST. ART. X, § 24(e) (2018); FLA. STAT. ANN. § 448.110(6)(c)(2) (West 2019).
- 93 FLA. STAT. ANN. § 448.110(6)(c)(2) (West 2019).
- 94 *Id.*
- 95 ARIZ. REV. STAT. ANN. § 23-364(B) (2019); D.C. CODE ANN. § 32-1311(b).
- 96 *Ohio Minimum Wage Increase, Amendment 2* (2006), BALLOTPEdia, [https://ballotpedia.org/Ohio\\_Minimum\\_Wage\\_Increase\\_Amendment\\_2\\_\(2006\)](https://ballotpedia.org/Ohio_Minimum_Wage_Increase_Amendment_2_(2006)) (last visited Apr. 15, 2019).
- 97 Ohio Const. Article II, § 34a; OHIO REV. CODE ANN. § 4111.14(J) (West 2019) (specifying that the “not less than one hundred fifty dollar’ penalty . . . shall be imposed only for violations of the anti-retaliation provision in Section 34a of Article II, Ohio Constitution”).
- 98 820 ILL. COMP. STAT. ANN. 115/14 (West 2019).
- 99 See 735 ILL. COMP. STAT. ANN. 5/13-206 (West 2019).
- 100 See, e.g., NAT'L EMP. L. PROJECT, WINNING WAGE JUSTICE, *supra* note 50, at 22.
- 101 See Appendix 3.
- 102 *Id.*
- 103 MO. ANN. STAT. § 285.575 (West 2018).
- 104 *Id.*
- 105 *Id.*
- 106 The law only protects individuals defined as protected persons. That definition excludes an employee if “[t]he proper authority or person to whom the employee makes his or her report is the person whom the employee claims to have committed the unlawful act or violation of a clear mandate of public policy . . .” *Id.*
- 107 TENN. CODE ANN. § 50-1-304 (West 2019).
- 108 See *Hall v. Wal-Mart Stores, Inc.*, No. 3:16-CV-2818, 2017 WL 2131649, at \*4 (M.D. Tenn. May 16, 2017), *appeal dismissed*, No. 17-5683, 2017 WL 4122573 (6th Cir. Aug. 15, 2017).
- 109 See, e.g., Ben Levin, *Rethinking Wage Theft Criminalization*, ON LABOR (Apr. 13, 2018), <https://onlabor.org/rethinking-wage-theft-criminalization/>; Terri Gerstein & David Seligman, *A Response to “Rethinking Wage Theft Criminalization”*, ON LABOR (Apr. 20, 2018), <https://onlabor.org/a-response-to-rethinking-wage-theft-criminalization/>; Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655 (2014) (discussing criminal wage theft laws and intersection with immigrant workers).
- 110 The state laws identified do not include state laws or case law that may allow for a general wrongful discharge claim under common law. Maine and North Carolina were not included in Tiers 1, 2, or 3 even though their retaliation laws contained a number of the characteristics for one or more Tiers because the relevant retaliation statutes require a worker to file an administrative complaint and ultimately do not guarantee a private right of action. See ME. REV. STAT. tit. 26, § 833 (2018) (making retaliation unlawful); ME. REV. STAT. tit. 26, § 834-A (2018) (allowing a worker who alleges a violation of rights under section 833 to bring a complaint before the Maine Human Rights Commission for action under Title 5, section 4612); ME. REV. STAT. tit. 5, § 4612 (2018) (stating that “[i]f, within 180 days of a complaint being filed with the commission, the commission has not filed a civil action in the case or has not entered into a conciliation agreement in the case, the complainant may request a right-to-sue letter, and, if a letter is given, the commission shall end its investigation”) (emphasis added); N.C. GEN. STAT. ANN. § 95-242 (West 2019); N.C. GEN. STAT. ANN. § 95-243 (West 2019). A retaliation protection statute in Michigan, MICH. COMP. LAWS ANN. § 408.414a (West 2019), prohibiting discrimination against employees “based on an employee’s choice to request or not request compensatory time in lieu of overtime compensation,” was not included under Tiers 1, 2, or 3 because of its exceptionally narrow application. See MICH. COMP. LAWS ANN. § 408.420 (West 2019) (clarifying that the law does not generally apply to an employer that is subject to the minimum wage provisions of the FLSA, “unless those federal minimum wage provisions would result in a lower minimum hourly wage than provided” in the FLSA); *Vernon v. Go Ventures, LLC*, No. 16-CV-13818, 2017 WL 2002011, at \*5 (E.D. Mich. May 12, 2017) (clarifying that “if an employer is only subject to both [sic] the Workforce Opportunity Wage Act because the state minimum wage exceeds the federal minimum wage, then ‘Section 4a [concerning overtime pay under the Act] does not apply.’”).
- 111 ARIZ. REV. STAT. ANN. § 23-364(G) (2019).
- 112 *Id.*
- 113 ARIZ. REV. STAT. ANN. § 23-364(E) (2019).
- 114 ARIZ. REV. STAT. ANN. § 23-364(G) (2019).
- 115 A number of California statutes provide retaliation protection for workers who exercise their wage and hour rights. See, e.g., CAL. LAB. CODE § 98.6 (West 2019); CAL. LAB. CODE § 98.7 (West

2019); CAL. LAB. CODE § 1019 (West 2019); CAL. LAB. CODE § 1019.1 (West 2019); CAL. LAB. CODE § 1019.2 (West 2019). It may also be possible for a worker to cite to multiple retaliation-related statutes and recover damages or other relief from more than one of those retaliation-related laws. *See Alabado v. French Concepts, Inc.*, No. CV152830FMOAJWX, 2016 WL 5929247, at \*14 (C.D. Cal. May 2, 2016) (showing how a worker may cite to more than one retaliation-related statute and recover damages under more than one retaliation-related provision). However, NELP’s analysis identified only one statute, CAL. LAB. CODE § 1102.5 (West 2019), that clearly satisfies all of the criteria developed in this report for Tier 1 states.

116 CAL. LAB. CODE § 1102.5(f) (West 2019). Case law confirms that workers may recover up to \$10,000 under CAL. LAB. CODE § 1102.5 in penalties for violations of this statute. *See Alabado*, 2016 WL at \*14. Cal. Lab. Code § 1105 provides that nothing in the chapter containing CAL. LAB. CODE § 1102.5 “shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of th[e] chapter.” CAL. LAB. CODE § 1105 (West 2019).

117 CAL. LAB. CODE § 1102.5(f) (West 2019).

118 *See Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d 891, 916 (E.D. Cal. 2017) (“A plaintiff can bring a § 1102.5 claim for damages, which seeks to remedy individual harms.”) (citation omitted).

119 *See Clemens v. Prot. One, Inc.*, No. CIV09CV1424L(CAB), 2010 WL 1445173, at \*3 (S.D. Cal. Apr. 12, 2010) (acknowledging that Cal. Lab. Code § 1102.5 “allows for the imposition of punitive damages, attorney’s fees and costs . . .”).

120 Fla. Const. art. X, § 24(e) (2018); FLA. STAT. ANN. § 448.110(6)(c) (West 2019).

121 FLA. STAT. ANN. § 448.110(6)(c)(2) (West 2019).

122 Fla. Const. art. X, § 24(e) (2018); FLA. STAT. ANN. § 448.110(7) (West 2019).

123 Fla. Const. art. X, § 24(e) (2018); Fla. Stat. Ann. § 448.110(6) (West 2019).

124 Fla. Const. art. X, § 24(e) (2018); FLA. STAT. ANN. § 448.110(6)(c)(1) (West 2019).

125 N.Y. LAB. LAW § 215 (McKinney 2019).

126 *Id.*

127 *Id.*

128 *Id.*

129 OR. REV. STAT. ANN. § 652.355 (West 2019) provides protection from retaliation for workers enforcing their basic wage payment rights and makes a violation of this section an “unlawful employment practice under ORS chapter 659A.” OR. REV. STAT. ANN. § 652.355 (West 2019). A worker may recover compensatory damages and punitive damages through a private right of action for a violation of OR. REV. STAT. ANN. § 652.355 (West 2019). *See* OR. REV. STAT. ANN. § 659A.885 (West 2019). It may also be possible for a worker to recover more than actual damages through the administrative process. *See* OR. REV. STAT. ANN. § 659A.850 (West 2019). However, is it not clear whether the state may impose a civil penalty for violations of OR. REV. STAT. ANN. § 652.355 (West 2019) through the administrative complaint process. Another provision, OR. REV. STAT. ANN. § 659A.199 (West 2019), separately makes it an “unlawful employment practice” for an employer to retaliate against a worker if the worker has “in good faith reported information that the employee believes is evidence of a violation of a state or federal law.” OR. REV. STAT. ANN. § 659A.199 (West 2019). A worker may recover compensatory damages and punitive damages through a private right of action for a violation of OR. REV. STAT. ANN. § 659A.199 (West 2019). *See* OR. REV. STAT. ANN. § 659A.885 (West 2019). It may also be possible for a worker to recover

more than actual damages through the administrative process. *See* OR. REV. STAT. ANN. § 659A.850 (West 2019). However, is it not clear whether the state may impose a civil penalty for violations of OR. REV. STAT. ANN. § 659A.199 (West 2019) through the administrative complaint process. Therefore, neither OR. REV. STAT. ANN. § 652.355 (West 2019) nor OR. REV. STAT. ANN. § 659A.199 (West 2019) are included in Appendix I.

130 *See* OR. REV. STAT. ANN. § 659A.885 (West 2019) (creating private right of action for violations of OR. REV. STAT. ANN. § 653.060 (West 2019) and specifying availability of compensatory damages or \$200, whichever is greater).

131 *See* OR. REV. STAT. ANN. § 653.060 (West 2019) (making a violation of this section an “unlawful employment practice under ORS chapter 659A”); OR. REV. STAT. ANN. § 659A.001 (West 2019) (defining “unlawful practice” as including “any unlawful employment practice”); OR. REV. STAT. ANN. § 659A.820 (West 2019) (allowing an individual to file a complaint with the Bureau alleging an “unlawful practice”); OR. REV. STAT. ANN. § 659A.850 (West 2019) (specifying the type of relief available through the administrative hearing process, which includes the possibility of something more than actual damages in order to “[e]liminate the effects of the unlawful practice”).

132 OR. REV. STAT. ANN. § 653.256 (West 2019).

133 OR. REV. STAT. ANN. § 659A.885 (West 2019).

134 *Id.*

135 *See* D.C. CODE ANN. § 32-1011.01 (West 2019); D.C. CODE ANN. § 32-1311 (West 2019).

136 *Id.*

137 *Id.*

138 *Id.*

139 *See* D.C. CODE ANN. § 32-1311 (West 2019).

140 *See* D.C. CODE ANN. § 32-1311 (West 2019); D.C. CODE ANN. § 32-1307 (West 2019).

141 *See* D.C. CODE ANN. § 32-1311 (West 2019).

142 *Id.*

143 OHIO REV. CODE ANN. § 4111.14(J) (West 2019).

144 *Id.*

145 OHIO REV. CODE ANN. § 4111.14(K) (West 2019).

146 Ohio Const. Article II, § 34a.

147 *Id.*

148 *Id.*

149 *Id.*

150 820 ILL. COMP. STAT. ANN. 115/14(c) (West 2019).

151 820 ILL. COMP. STAT. ANN. 115/14(c) (West 2019).

152 820 ILL. COMP. STAT. ANN. 115/14(c) (West 2019).

153 An analysis of certain retaliation protection laws in the wage and hour context in Illinois (740 ILL. COMP. STAT. ANN. 174/15 *et seq.* (West 2019)), Minnesota (MINN. STAT. ANN. § 177.32 (West 2019)), and Montana (MONT. CODE ANN. § 39-2-901 *et seq.* (West 2019)) found that these laws were not sufficiently clear to include under Tier 3. Tennessee (TENN. CODE ANN. § 50-1-304 (West 2019)) was not included under Tier 3 because the law protecting workers only applies in narrow situations where the employee can show that the claim serves a public purpose and furthers the public good. *See, e.g., Hall v. Wal-Mart Stores, Inc.*, No. 3:16-CV-2818, 2017 WL 2131649, at \*4 (M.D. Tenn. May 16, 2017), *appeal dismissed*, No. 17-5683, 2017 WL 4122573 (6th Cir. Aug.



- 15, 2017).
- 154 LA. STAT. ANN. § 23:967 (2018) (stating that a worker may recover “damages,” which is defined to include “compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal”).
- 155 *Id.*
- 156 *Id.*
- 157 MASS. GEN. LAWS ANN. ch. 151, § 19 (West 2019).
- 158 MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2019).
- 159 *See* MASS. GEN. LAWS ANN. ch. 149, § 27C (West 2019).
- 160 MASS. GEN. LAWS ANN. ch. 151, § 19 (West 2019); MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2019).
- 161 *Id.*
- 162 MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2019).
- 163 *See* MASS. GEN. LAWS ANN. ch. 149, § 27C (West 2019).
- 164 MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2019).
- 165 *Id.*
- 166 MINN. STAT. ANN. § 181.935 (West 2019).
- 167 *Id.*
- 168 *Id.*
- 169 NEB. REV. STAT. ANN. § 48-1119(4) (West 2019).
- 170 *See* NEB. REV. STAT. ANN. § 48-1119(4) (West 2019); NEB. REV. STAT. ANN. § 48-1120.01 (West 2019); NEB. REV. STAT. ANN. § 20-148 (West 2019); *Ludlow v. BNSF Ry. Co.*, No. 4:12CV3113, 2013 WL 3872930, at \*12 (D. Neb. July 24, 2013) (citation omitted) (noting that a plaintiff can bring a claim under the Nebraska Fair Employment Practice Act (NFPA) itself or by invoking section 20-148 to bring a claim without first exhausting the NFPA’s administrative remedies).
- 171 NEB. REV. STAT. ANN. § 48-1119(4) (West 2019).
- 172 Nev. Const. art. XV, § 16.
- 173 *Id.*
- 174 *Id.*
- 175 N.J. STAT. ANN. § 34:19-5 (West 2019).
- 176 *Id.*
- 177 *Id.*
- 178 *Id.*
- 179 N.D. CENT. CODE ANN. § 34-01-20(3) (West 2019); N.D. CENT. CODE ANN. § 32-03.2-11 (West 2019).
- 180 N.D. CENT. CODE ANN. § 34-01-20 (West 2019).
- 181 *Id.*
- 182 VT. STAT. ANN. tit. 21, § 507 (West 2019) protects employees of certain hospitals and nursing homes from retaliation and offers the possibility of compensatory and punitive damages. *See* VT. STAT. ANN. tit. 21, § 507 (West 2019); VT. STAT. ANN. tit. 21, § 508 (West 2019). It was not included in the appendix because it only applies to a narrow category of workers.
- 183 VT. STAT. ANN. TIT. 21, § 348(B) (WEST 2019).
- 184 *Id.*
- 185 *Id.*
- 186 VT. STAT. ANN. TIT. 21, § 397(b) (West 2019).
- 187 *Id.*
- 188 *Id.*
- 189 ALASKA STAT. ANN. § 23.10.135(6) (West 2018); ALASKA STAT. ANN. § 23.10.140 (West 2018).
- 190 CAL. LAB. CODE § 98.6 (West 2019) (making violation a misdemeanor); CAL. PENAL CODE § 19 (West 2019) (outlining punishment for misdemeanors).
- 191 CAL. LAB. CODE § 1103 (West 2019).
- 192 COLO. REV. STAT. ANN. § 8-4-120 (West 2019).
- 193 COLO. REV. STAT. ANN. § 8-6-115 (West 2019).
- 194 HAW. REV. STAT. ANN. § 387-12(a)(4) (West 2018).
- 195 820 ILL. COMP. STAT. ANN. 105/11 (West 2019); 730 ILL. COMP. STAT. ANN. 5/5-4.5-60 (West 2019); 730 ILL. COMP. STAT. ANN. 5/5-5-6 (West 2019).
- 196 820 ILL. COMP. STAT. ANN. 115/14 (West 2019); 730 ILL. COMP. STAT. ANN. 5/5-4.5-65 (West 2019); 730 ILL. COMP. STAT. ANN. 5/5-5-6 (West 2019).
- 197 820 ILL. COMP. STAT. ANN. 174/15 (West 2019) et seq.; 730 ILL. COMP. STAT. ANN. 5/5-4.5-55 (West 2019); 730 ILL. COMP. STAT. ANN. 5/5-5-6 (West 2019).
- 198 IND. CODE ANN. § 22-2-2-11 (West 2018) (making a violation a Class C Infraction); IND. CODE ANN. § 34-28-5-4 (West 2018) (establishing penalty for a Class C Infraction).
- 199 KAN. STAT. ANN. § 44-1210(b) (2019).
- 200 LA. STAT. ANN. § 23:964 (2018).
- 201 MD. CODE ANN., LAB. & EMPL. § 3-428(d) (West 2019).
- 202 MASS. GEN. LAWS ANN. ch. 149, § 27C (West 2019).
- 203 MICH. COMP. LAWS ANN. § 408.484 (West 2019); MICH. COMP. LAWS ANN. § 750.504 (West 2019).
- 204 MICH. COMP. LAWS ANN. § 408.421 (West 2019) protects employees from retaliation when they have served or about to serve on the wage deviation board, when they have testified or are about to testify before the board, or because the employer believes that the employee may serve on the board or testify before the board or in any investigation under the Workforce Opportunity Wage Act. MICH. COMP. LAWS ANN. § 408.421 (West 2019).
- 205 MICH. COMP. LAWS ANN. § 408.421 (West 2019); MICH. COMP. LAWS ANN. § 750.504 (West 2019).
- 206 MICH. COMP. LAWS ANN. § 408.483a (West 2019) prohibits an employer from discharging, formally disciplining, or otherwise discriminating against for job advancement an employee who had disclosed her or her wages, something that an employee is likely to do in determining whether they have experienced wage theft. MICH. COMP. LAWS ANN. § 408.483a (West 2019).
- 207 MICH. COMP. LAWS ANN. § 408.484 (West 2019); MICH. COMP. LAWS ANN. § 750.504 (West 2019).
- 208 MINN. STAT. ANN. § 177.32 (West 2019).
- 209 MO. ANN. STAT. § 558.002(1)(4) (West 2018).
- 210 MO. ANN. STAT. § 558.011(1)(8) (West 2018).
- 211 NEV. REV. STAT. ANN. § 608.195 (West 2019); NEV. REV. STAT. ANN. § 193.150 (West 2019).
- 212 NEV. REV. STAT. ANN. § 608.195 (West 2019); NEV. REV. STAT. ANN. § 193.150 (West 2019).



- 213 N.J. STAT. ANN. § 34:11-56a24 (West 2019).
- 214 N.M. STAT. ANN. § 50-4-26 (West 2019) (making a violation of N.M. STAT. ANN. § 50-4-26.1 (West 2019) a misdemeanor); N.M. STAT. ANN. § 31-19-1 (West 2019) (outlining misdemeanor punishments).
- 215 N.Y. LAB. LAW § 215 (McKinney 2019); N.Y. PENAL LAW § 80.05 (McKinney 2019); N.Y. PENAL LAW § 70.15 (McKinney 2019).
- 216 N.D. CENT. CODE ANN. § 34-01-20(2) (West 2019) (stating that an “employer who willfully violates this section is guilty of an infraction”); N.D. CENT. CODE ANN. § 34-01-20(2) (West 2019) (outlining the punishment for an infraction and Class B misdemeanor).
- 217 N.D. CENT. CODE ANN. § 34-06-19 (West 2019) (making a violation of N.D. CENT. CODE ANN. § 34-06-19 (West 2019) a Class B misdemeanor); N.D. CENT. CODE ANN. § 12.1-32-01 (West 2019) (outlining punishment for Class B misdemeanor).
- 218 N.D. CENT. CODE ANN. § 34-14-07 (West 2019); N.D. CENT. CODE ANN. § 12.1-32-01 (West 2019).
- 219 See OHIO REV. CODE ANN. § 4111.99 (West 2019) (making violation of subsection (B) of § 4111.13 a misdemeanor of the third degree); OHIO REV. CODE ANN. § 2929.28 (West 2019) (outlining permissible financial sanctions); OHIO REV. CODE ANN. § 2929.24 (West 2019) (outlining misdemeanor jail terms).
- 220 OKLA. STAT. ANN. tit. 40, § 199 (West 2019).
- 221 OR. REV. STAT. ANN. § 652.990 (West 2019) (classifying the violation of OR. REV. STAT. ANN. § 652.355 (West 2019) as a Class C misdemeanor); OR. REV. STAT. ANN. § 161.615 (West 2019) (specifying that the term of imprisonment for a Class C misdemeanor may be up to 30 days); OR. REV. STAT. ANN. § 161.635 (West 2019) (specifying that the fine for a Class C misdemeanor may be up to \$1,250). It may also be possible for the state to require a defendant to pay for costs incurred by the state in prosecuting the defendant. OR. REV. STAT. ANN. § 161.665 (West 2019).
- 222 OR. REV. STAT. ANN. § 653.991 (West 2019) (establishing a violation of OR. REV. STAT. ANN. § 653.060 (West 2019) as a misdemeanor); OR. REV. STAT. ANN. § 161.555 (West 2019) (noting that misdemeanors not classified as a particular class are Class A misdemeanors); OR. REV. STAT. ANN. § 161.615 (West 2019) (allowing imprisonment up to 364 days for Class A misdemeanors); OR. REV. STAT. ANN. § 161.635 (West 2019) (allowing fine of up to \$6,250 for Class A misdemeanors). It may also be possible for the state to require a defendant to pay for costs incurred by the state in prosecuting the defendant. OR. REV. STAT. ANN. § 161.665 (West 2019).
- 223 43 PA. STAT. AND CONS. STAT. ANN. § 333.112 (West 2019).
- 224 28 R.I. GEN. LAWS ANN. § 28-12-16 (West 2019).
- 225 See 28 R.I. GEN. LAWS ANN. § 28-14-19.3 (West 2019); 28 R.I. GEN. LAWS ANN. § 28-14-17 (West 2019).
- 226 UTAH CODE ANN. § 34-28-12 (West 2018) (making a violation of UTAH CODE ANN. § 34-28-19 (West 2018) a class B misdemeanor); UTAH CODE ANN. § 76-3-204 (West 2018) (specifying possible term of imprisonment for class B misdemeanor); UTAH CODE ANN. § 76-3-301 (West 2018) (specifying potential fine for class B misdemeanor).
- 227 WASH. REV. CODE ANN. § 49.46.100 (West 2019) (making a violation a gross misdemeanor); WASH. REV. CODE ANN. § 9.92.020 (West 2019) (describing penalties for gross misdemeanors).
- 228 W. VA. CODE ANN. § 21-5C-7 (West 2018).
- 229 D.C. CODE ANN. § 32-1011 (West 2019).
- 230 D.C. CODE ANN. § 32-1307 (West 2019).
- 231 In addition, Virginia appears to only create limited criminal penalties for blacklisting that do not amount to clear protection from retaliation in the wage theft context. VA. CODE ANN. § 40.1-27 (West 2018).
- 232 ALASKA STAT. ANN. § 23.10.135 (WEST 2018); ALASKA STAT. ANN. § 23.10.140 (WEST 2018).
- 233 KAN. STAT. ANN. § 44-1210 (West 2019) makes retaliation in the wage theft context unlawful, but it only clearly establishes a criminal penalty of a fine ranging from \$250 to \$1,000. KAN. STAT. ANN. § 44-1210 (West 2019). Kansas does appear to allow for civil penalties in limited circumstances involving blacklisting, but only after a criminal conviction. See KAN. STAT. ANN. § 44-117 (West 2019) (making certain forms of blacklisting unlawful); KAN. STAT. ANN. § 44-119 (West 2019) (allowing for certain damages in cases involving blacklisting); *Hawkins v. MCI*, No. 04-1328-JTM, 2005 WL 1130267, at \*7 (D. Kan. May 13, 2005) (noting that Kan. Stat. Ann. § 44-117 “was intended to prevent blacklisting and requires a criminal blacklisting conviction of an employer in order to bring a civil blacklisting claim”) (citation omitted).
- 234 MD. CODE ANN., Lab. & Empl. § 3-428 (West 2019).
- 235 N.M. STAT. ANN. § 50-4-26.1 (West 2019); N.M. STAT. ANN. § 50-4-26 (West 2019).
- 236 OKLA. STAT. ANN. tit. 40, § 199 (West 2019).
- 237 43 PA. STAT. ANN. § 333.112 (West 2019).
- 238 W. VA. CODE ANN. § 21-5C-7 (West 2019).



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