

# Worker Power in the Carceral State

## 10 Policy Proposals Against the Criminalization of Workers

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*Fighting criminalization is also a worker power issue. When reentry and workers' rights advocates organize together to challenge the criminal punishment system, working conditions improve for all.*

**T**he criminal punishment system – widely-recognized to target and disadvantage Black, Indigenous, Latinx people, and people who are cash-poor<sup>1</sup> – locks workers into cycles of bad work and reincarceration.

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<sup>1</sup> Race and class disparities in the criminal punishment system cannot be explained away by greater offense rates. Instead, these class and race disparities are structured into an ostensibly “class-blind” and “color-blind” criminal law. In practice, this willful “blindness” permits criminal law institutions to reflect, intensify, and generate additional forms of class and race inequalities in the larger economy. See, e.g., Sentencing Project, *Report to the United Nations on Racial Disparities in the US Criminal Justice System*, April 2018, <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>. Such targeting and inequality is widely recognized and occurs through a variety of policing and prosecutorial strategies such as geographically concentrated racial profiling, prosecutorial bias, insufficient indigent defense funding, and sentencing discrimination. These targeting strategies are well-documented and have resulted in radical, racialized disparities. In NELP’s headquarters state, New York, Black people comprise 15 percent of the population and 43 percent of the jail population and 45 percent of the prison population. See, e.g., Vera Institute of Justice, *Incarceration Trends in New York*, December 2019, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-new-york.pdf>. See also, The National Judicial College, *Most Judges Believe the Criminal Justice System Suffers from Racism*, July 14, 2020, <https://www.judges.org/news-and-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/>. For instance, there is anti-Black racism in arrest, whether bail is set, the amount of bail, whether a person or their family can afford bail, in what pleas may be offered by a prosecuting attorney, in conviction, in sentencing lengths, in parole, and in capital punishment. Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, July 2016, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

We do not offer the following proposals as ends in themselves, but as potential means – through popular organizing and advocacy campaigns – to raise deeper challenges against the central role of anti-Black punishment in the labor market.

Criminalized workers have long theorized and articulated the many connections between criminalization and work. And they have long organized for better wages and conditions both within and without prison and jail walls. In NELP’s headquarters state of New York for instance, self-described “body shops” are private labor brokers<sup>2</sup> that target workers on parole supervision for temporary construction laborer jobs, one of the deadliest jobs in New York City.<sup>3</sup> Workers under supervision programs like parole are made desperate for work by court-surveillance; court-imposed financial obligations; conditions of release that regularly include “seeking and/or maintaining employment,” curfews, and home and workplace visits; and, ultimately, the threat of reincarceration. For court-supervised workers, such supervision conditions drive desperation for any work and can silence workers from refusing or complaining about bad pay, dangerous work, or harassment at work.<sup>4</sup> Employers exploit limitations put on court-supervised workers and offer these workers less in wages and benefits compared to other workers.

In response, construction workers in New York City organized in 2021 to win city and state-level bills to bring transparency and accountability to what is often an opaque dynamic between the criminal punishment system and the labor market. These victories included requiring labor brokers to register with New York City’s business licensing department; to report every two years on practices including average wages and benefits; to maintain insurance for workers’ compensation, disability, and unemployment; and to provide adequate notice to each worker in the worker’s primary language regarding each new assignment and the employer’s obligations, including work hours, benefits, and pay.<sup>5</sup> More must be done, but campaigns such as

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<sup>2</sup> For the purposes of this paper, a labor broker is an establishment primarily engaged in hiring and paying workers who perform work for third-party companies— known as “host employers”— for limited periods of time. These workers are often considered the employees of the labor broker, even though direct supervision of the workers is usually provided by the host employer. See Laura Padin, National Employment Law Project (NELP), *Eliminating Structural Drivers of Temping Out: Reforming Laws and Programs to Cultivate Stable and Secure Jobs*, March 2020, <https://www.nelp.org/publication/eliminating-structural-drivers-temping-reforming-laws-programs-cultivate-stable-secure-jobs/>.

<sup>3</sup> Based on the most recent data from 2020, more than one construction laborer dies on the job per month in New York City, with 19 deaths at work in 2019 and 10 in 2020. US Bureau of Labor Statistics, *Fatal Occupational Injuries in New York City, 2020*, [https://www.bls.gov/regions/new-york-new-jersey/news-release/fatalworkinjuries\\_newyorkcity.htm](https://www.bls.gov/regions/new-york-new-jersey/news-release/fatalworkinjuries_newyorkcity.htm).

<sup>4</sup> “When you’re released on parole you have to work in unsafe conditions and walk on eggshells. If you breathe wrong, you’re fired and that’s a violation of your parole. These body shops know this and exploit it.” Duane Townes, former body shop laborer and member of Laborers’ Local 79 Fight Back Campaign, Real Reentry for New York, <https://www.realreentry.org/>.

<sup>5</sup> New York City Department of Consumer and Worker Protection, “DCWP Begins Licensing Construction Labor Providers, Increasing Transparency in the Industry,” June 9, 2022, <https://www1.nyc.gov/site/dca/media/pr060922-DCWP-Begins-Licensing-Construction-Labor-Providers.page>.

the Laborers' show us the beginnings of what can be achieved when pro-worker formations like unions organize to challenge the criminal punishment system.

This policy agenda for reentry and workers' rights advocates outlines how the criminal punishment system degrades working conditions for all workers as well as previews pro-worker policy recommendations to address the criminalization of workers. We do not offer the following proposals as ends in themselves, but as potential means – through popular organizing and advocacy campaigns – to raise deeper challenges against the central role of anti-Black institutional punishment and criminalization in the labor market.

## 1

# Fissured Work and Anti-Black Criminalization

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Over the last 50 years of US deindustrialization, the domestic labor market has gradually shifted from long-term, direct-hire jobs with employer-sponsored benefits and high unionization rates to fissured work: shorter-term, increasingly precarious contract jobs with lower wages, fewer benefits, and more obstacles to collective worker action.<sup>6</sup> The rise of unregulated, third-party labor brokers that operate and profit between employers and workers – especially in industries that underpay workers — is central to this history of workplace degradation and destabilization. Brokered jobs are often concentrated in industries that could not be wholly exported abroad like logistics, construction, and service. Labor brokers hire and pay workers who perform work for third party companies, known as “host companies.” Brokers profit by charging the host employer a markup on the hourly workers’ wages. Brokers compete with one another by driving down the cost of labor, the only cost they control, which incentivizes paying poverty wages and cutting corners on meaningful training and workplace safety and health standards. These workers often work alongside the host employer’s permanent workforce, resulting in a second-tier workforce who do the same or similar work as workers hired directly by the host employer, but for less pay, nearly non-existent benefits, and no job security. The labor broker system drives down wages and insulates the host companies from workers’ compensation, unemployment taxes and union drives, allowing host employers to control working conditions without being responsible for them.<sup>7</sup> Labor brokers are an engine of occupational segregation, sorting Black and Latinx workers into this second-tier status and other forms of bad work.<sup>8</sup>

Over the same five decades, the US has increased its incarcerated population by 500 percent to approximately 2.4 million people – crowning itself the world’s most incarcerated – under a sprawling system of punishment and surveillance that targets Black and Latinx people.<sup>9</sup> The criminal punishment system additionally supervises and

Incarceration, surveillance programs, migrant detention camps, and the politics that make them possible combine to make up what legal scholars and historians have dubbed the “carceral state.”

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<sup>6</sup> Padin, NELP, *supra* note 2; This phenomenon has been dubbed “the fissured workplace.” See, e.g., David Weil, “The Fissured Workplace: Why Work Became So Bad for So Many and What can be Done,” <https://www.fissuredworkplace.net/>

<sup>7</sup> Padin, NELP, *id.*

<sup>8</sup> Black workers comprise 25.9 percent of workers employed by labor brokers while they comprise 12.1 percent of the overall workforce. Latinx workers comprise 25.4 percent of workers employed by labor brokers while they comprise 16.6 percent of all workers. *Id.*

<sup>9</sup> *Supra* note 1. See, e.g., The Sentencing Project, Trends in US Corrections, August 2020, <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>

Court-surveilled work under the threat of jail should not be championed as meaningful reform but seen for what it is: preserving and expanding a permanent underclass of workers of color locked into long cycles of bad work and jail.

surveils another 3.9 million people under the threat of reincarceration.<sup>10</sup> Incarceration, surveillance programs, migrant detention camps, and the politics that make them possible combine to make up what legal scholars and historians have dubbed the “carceral state,” a sprawling governance system that regularly outsources its punishment and surveillance activities to private actors, both non- and for-profit.<sup>11</sup> This globally unprecedented expansion of incarceration and surveillance occurred simultaneously with another element of the carceral state: the radical defunding and deterioration of social service, public health, and welfare functions of government at all levels.<sup>12</sup>

The twin expansions of fissured work and anti-Black criminalization have significantly contributed to the rise of a variety of structures of worker criminalization, including labor brokers that target workers on parole and other forms of court-surveillance. NELP’s concern with labor brokers and

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<sup>10</sup> Bureau of Justice Statistics, US Department of Justice, *Probation and Parole in the United States, 2020*, December 2021, [https://bjs.ojp.gov/content/pub/pdf/ppus20\\_sum.pdf](https://bjs.ojp.gov/content/pub/pdf/ppus20_sum.pdf)

<sup>11</sup> “Carceral state”-related academic literature links criminal punishment and immigration legal systems in the US to its origins in white supremacy including in anti-Black slave patrols, land dispossession of indigenous people, the conquest of northern Mexico, and the threat to white nationalism posed by Asian migrants particularly in the West. More recently, legislated expansions of the carceral state have been race neutral in language, though not in outcome: the War on Crime, the War on Drugs, the War on the Border, the War on Terror, etc. *See, e.g.*, “... From the beginning of the Republic, the organization of legal authority – prosecutors and police—at the local level, has been an outgrowth of the need for a race-based system of social control that could turn the general laws of the state into the precise instruments of a defense of whiteness, whether against Black, Mexican, Chinese, or Native American peoples as needed by location,” Jonathan Simon, “Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today,” *Northwestern University Law Review*, June 2017, <https://lawcat.berkeley.edu/record/1128090>; Kelly Lytle Hernandez, Kahlil Gibran Muhammad, Heather Thompson, “Introduction: Constructing the Carceral State,” *Journal of American History*, June 2015, <https://academic.oup.com/jah/article/102/1/18/686730>; Noah Zatz, “The Carceral State at Work: Exclusion, Coercion, and Subordinated Inclusion,” *Criminality at Work*, Oxford University Press, April 2020, <https://escholarship.org/uc/item/17q0h9jb>. Faculty and students affiliated with University of Michigan’s Carceral State Project

write that “the surveillance, policing, confinement, and exclusion of migrants and mixed-status communities have been fundamental to the development and growth of the US carceral state.” University of Michigan Carceral State Project, *Immigration and the Carceral State*, <https://sites.lsa.umich.edu/dcc-project/publications/immigration-and-the-carceral-state/>.

<sup>12</sup> The carceral state is differentiated from the “welfare state.” For a history of the transformation of governance from welfare to racialized punishment over past fifty years, *see, e.g.*, Joe Soss, Richard Fording, and Sanford Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race*, University of Chicago Press, 2011. Contemporary and overlapping social movements with roots in Black feminist organizing, queer organizing, and abolitionist organizing have repeatedly challenged inflated and overfunded municipal, state, and federal budgets that expand punishment and surveillance, and that deepen radical, racialized economic inequality. *See, e.g.*, Chicago Community Bond Fund, *Money for Communities, Not Cages: The Case for Reducing the Cook County Sheriff’s Jail Budget*, October 2018, <https://chicagobond.org/wp-content/uploads/2018/10/money-for-communities-not-cages-why-cook-county-should-reduce-the-sheriffs-bloated-jail-budget.pdf>; Mobilization for Black Lives, *The Breathe Act Proposal, Section 1: Divesting Federal Resources from Incarceration and Policing and Ending Criminal Legal System Harms*, [https://breatheact.org/wp-content/uploads/2020/09/The-BREATHE-Act-V.16\\_.pdf](https://breatheact.org/wp-content/uploads/2020/09/The-BREATHE-Act-V.16_.pdf)

other structures of worker criminalization is that they overemphasize the anti-recidivist or rehabilitative quality of *any* work, while underemphasizing risks endured by court-surveilled workers both to (1) racist discrimination, lost earnings, and dangerous working conditions, and (2) working under the threat of jail. As social movements challenging criminalization and incarceration continue to grow, we are especially concerned that court-surveilled work under the threat of jail will be championed by some as meaningful reform and not seen for what it is: preserving and expanding a permanent underclass of workers of color locked into long cycles of bad work and jail.

The rise of labor brokers that form to target workers on court supervision programs like parole is one structure of worker criminalization, and the following section outlines others.

## Seeing Structures of Criminalization and Work

Criminalized workers have long theorized and articulated the many connections between criminalization and work. And they have long organized for better wages and conditions within and without prison and jail walls. Perhaps the most famous of these organizing campaigns is the Attica Prison uprising of 1971, where participants' demands included the right to unionize.<sup>13</sup> These linkages also have roots in criminal laws against “sedition” targeting abolitionists organizing against anti-Black slavery, resistance against the Black Codes and chain gangs, and the criminalization of labor organizers in the early 1900s.<sup>14</sup>

Criminal legal systems operate at municipal, state, and federal levels. These systems create, directly manage, and broker populations of workers, 1. whose work is often excluded from basic workers' protections set forth in employment law, and/or 2. who are otherwise locked into cycles of underpaid, insecure, and dangerous work and reincarceration. The following list is non-exhaustive, but serves to briefly describe basic structures of criminalization and work:

### A. Arrest and/or Conviction Records

- Workers with arrest and/or conviction records face a variety of challenges, including hiring discrimination, lower annual earnings, lower call-back rates from prospective employers, and higher rates of poverty when compared to similarly situated peers without records.<sup>15</sup>

<sup>13</sup> See, e.g., Akira Rose, *A History of the Attica Uprising*, September 2021, <https://www.afsc.org/story/history-attica-uprising>.

<sup>14</sup> See, e.g., Douglas Blackmon, *Slavery by Another Name: The Re-enslavement of Black Americans from the Civil War to World War II*, Penguin Random House Press, January 2009, <https://www.penguinrandomhouse.com/books/14301/slavery-by-another-name-by-douglas-a-blackmon/>; Talitha LeFlouria, *Chained in Silence: Black Women and Convict Labor in the New South*, University of North Carolina Press, March 2016, <https://uncpress.org/book/9781469630007/chained-in-silence/>; Kelly Lytle Hernandez, “Hobos in Heaven: Race, Incarceration, and the Rise of Los Angeles, 1880-1910,” *Pacific Historical Review*, 2014, [https://history.ucla.edu/sites/default/files/u184/hernandez/phr8303\\_03\\_hernandez.pdf](https://history.ucla.edu/sites/default/files/u184/hernandez/phr8303_03_hernandez.pdf); University of Washington IWW History Project: Industrial Workers of the World 1905-1935, *Arrests, Prosecutions, and Other Violence 1906-1920*, <https://depts.washington.edu/iww/persecution.shtml>. Additionally, the Labor Management Reporting and Disclosure Act (LMRDA) currently bans people with certain convictions from employment as union staff, including as union organizers. <https://www.dol.gov/agencies/olms/compliance-assistance/publications/prohibition-against-certain-persons-holding-union-office-or-employment>.

<sup>15</sup> Over the course of an entire career, the Brennan Center estimates that Black workers with an arrest or conviction record earn \$37,000 on average annually, while similarly situated white workers with an arrest or conviction record earn \$49,000. Black workers without an arrest or conviction record earn \$39,000 on average annually, while similarly situated white workers without an arrest or conviction record earn \$52,000. Terry-Ann Craigie, Ames Grawert, Cameron Kimble, Brennan Center for Justice, *Conviction, Imprisonment, and Lost Earnings*, September 2020, <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>. See also, Devah Pager, “The Mark of a Criminal Record,” *American Journal of Sociology*, March 2003, <https://doi.org/10.1086/374403>.

## **B. Incarcerated work**

- Incarcerated workers perform a wide variety of work within carceral facilities, including upkeep work for the facilities themselves, work for other state agencies, agricultural work, and for private businesses – either for no- or low-pay subject to a variety of fees;
- “Work release” programs that broker and manage incarcerated workers for work outside of the carceral facility, including for private businesses and public sector jobs like custodial work in county buildings, park maintenance, etc., either for substandard pay or regular pay subject to a variety of fees.<sup>16</sup>
- Employers’ use of incarcerated workers to undermine unionization efforts.<sup>17</sup>

## **C. Supervised and surveilled work at the threat of reincarceration**

- Parole, probation, and diversion programs that mandate seeking and/or maintaining employment at the threat of reincarceration.<sup>18</sup>

## **D. Bail at the threat of reincarceration**

- Conditions of release from jail prior to conviction (and often prior to the filing of charges against the defendant) that mandate seeking and/or maintaining employment at the threat of reincarceration and forfeiture of bail money.

## **E. Criminal Legal Debt**

- Fines and fees imposed onto defendants by the criminal legal system operate both as monetary sanction against the defendant, as well as a significant source of revenue for the legal system itself and other basic municipal services. These court-imposed financial debt structures can result in

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<sup>16</sup> American Civil Liberties Union and University of Chicago Law School Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, June 2022, [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf)

<sup>17</sup> See, e.g., “Work-release inmates brought in as New Orleans sanitation workers continue protest,” *WDSU New Orleans News, Weather, and Sports*, May 8, 2020, <https://www.wdsu.com/article/livingston-work-release-inmates-now-picking-up-garbage-in-new-orleans-east/32418004>; Mindy Isser, “Black New Orleans City Waste workers build power against a crisis,” *Scalawag Magazine*, June 17, 2020, <https://scalawagmagazine.org/2020/06/new-orleans-hoppers-strike/>.

<sup>18</sup> Han Lu, Laura Padin, Maya Pinto, NELP, *Local 79 Fights the Criminalization of Laborers*, May 2021, <https://www.nelp.org/publication/local-79-fights-the-criminalization-of-laborers/>. See also, Josh Seim and David J. Harding, “Parolefare: Post-prison Supervision and Low Wage Work,” *RSF: Journal of the Social Sciences*, April 2020, <https://www.rsfjournal.org/content/6/1/173>; Jesse Jannetta, Justin Breaux, Helen Ho, The Urban Institute, *Examining Racial and Ethnic Disparities in Probation Revocation*, April 2014, <https://www.urban.org/sites/default/files/publication/22746/413174-Examining-Racial-and-Ethnic-Disparities-in-Probation-Revocation.PDF>.

long-term payment plans under the threat of reincarceration and can extend probation and other forms of court-supervision to ensure payment compliance.<sup>19</sup>

## F. Community service

- Community service hours can operate as a direct punitive sentence (unpaid work in both public and private sectors at the threat of incarceration), or, in other instances, is utilized by judges as a mechanism through which cash-poor defendants are permitted to meet court-imposed financial debt. Community service sentences can result in workers working at the threat of reincarceration working alongside regularly employed workers.<sup>20</sup>

## G. Addiction and other rehabilitation programs

- Criminal court sentencing to addiction treatment programs have “turned tens of thousands of people into an unpaid, shadow workforce.”<sup>21</sup>

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<sup>19</sup> See, e.g., Sian Miranda Singh O’Faolain, Toya Ex Lewis, Alfred Marshall, Stand with Dignity, New Orleans Workers Center for Racial Justice, *NOLA Shakedown: How Criminalizing Municipal Fines & Fees Traps Poor & Working Class Black New Orleanians in Poverty*, September 2019, <https://www.nolashakedown.org/report>; Brittany Friedman, Alexes Harris, Beth M. Huebner, Karin D. Martin, Becky Pettit, Sarah K.S. Shannon, Bryan L. Sykes, “What is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, January 2022, <https://www.rsfjournal.org/content/8/1/221>; Briana Hammons, Fines & Fees Justice Center, *Tip of the Iceberg: How much Criminal Justice Debt Does the US Really Have?*, April 2021, <https://finesandfeesjusticecenter.org/2021/04/28/new-ffjc-report-how-much-criminal-justice-debt-does-the-u-s-really-have/>; US DOJ Civil Rights Division, *Investigation of the Ferguson Police Department*, March 2015, [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>20</sup> See, e.g., Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person, Noah Zatz, “Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles,” *UCLA Labor Center*, Oct. 2019, <https://www.labor.ucla.edu/publication/communityservice/>.

<sup>21</sup> Reveal News, a project of The Center for Investigative Reporting, has produced a series of award-winning reports documenting approximately 60,000 people seeking and/or sentenced to treatment have been exploited by addiction rehab facilities and corporations like Shell and Walmart. Shoshana Walter, “All Work. No Pay,” *Reveal News*, <https://revealnews.org/all-work-no-pay/>. See also, Samir Ferdowsi, “Senators Demand Investigation Into Rehab Centers that Use Patients for Free Labor,” *Vice News*, November 2020, <https://www.vice.com/en/article/n7vzdg/senators-demand-investigation-into-rehab-centers-that-use-patients-for-free-labor>.

## 3

## The Criminal Punishment System Drives Black Poverty and Hides Black Unemployment

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Research studies clearly document how poverty and unemployment are both exacerbated and generated by the criminal punishment system, targeting Black people and those who are already living in poverty.

- An estimated 60 percent of those who have been incarcerated remain jobless a year after release;<sup>22</sup>
- People with incarceration histories are four to six times more likely to be unemployed than similarly situated peers without a record;<sup>23</sup>
- Only 55 percent of formerly incarcerated people make any earnings whatsoever one year after release, with the median earnings barely exceeding \$10,000 annually;<sup>24</sup>
- The Brennan Center for Justice recently concluded that formerly imprisoned people can expect to earn approximately 52 percent less in annual income than similarly situated peers who have never been incarcerated;<sup>25</sup>
- Black people without a court record earn less annually and receive fewer call backs from prospective employers than white people with a court record;<sup>26</sup>

These studies strongly suggest that anti-Black racism both in the criminal punishment system and within the broader labor market compound one another's effects, shaping work opportunities more than – and in addition to – the presence of an arrest or conviction record alone.

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<sup>22</sup> Leah Wang and Wanda Bertram, Prison Policy Institute (PPI), “New data on formerly incarcerated people’s employment reveal labor market injustices,” February 2022, <https://www.prisonpolicy.org/blog/2022/02/08/employment/>

<sup>23</sup> Dallas Augustine, Noah Zatz, and Naomi Sugie, UCLA Institute for Research on Labor and Employment, *Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box*, July 2020, <https://irle.ucla.edu/publication/why-do-employers-discriminate-against-people-with-records-stigma-and-the-case-for-ban-the-box/>.

<sup>24</sup> The Brookings Institution used IRS data to track labor market outcomes and economic characteristics of incarcerated people. Adam Looney and Nicholas Turner, Brookings Institution, *Work and Opportunity Before and After Incarceration*, March 2018, <https://www.brookings.edu/research/work-and-opportunity-before-and-after-incarceration/>

<sup>25</sup> Craigie, Grawert, Kimble, Brennan Center, *supra* note 15.

<sup>26</sup> *Id.* See also, Devah Pager and Lincoln Quillian, “Walking the talk? What employers say versus what they do,” *American Sociological Review*, <https://scholar.harvard.edu/pager/publications/walking-talk-what-employers-say-versus-what-they-do>.

- Formerly incarcerated Black women in particular bear the highest rate of unemployment among all formerly incarcerated groups.<sup>27</sup>

These studies strongly suggest that anti-Black racism both in the criminal punishment system and within the broader labor market compound one another's effects, shaping work opportunities more than – and in addition to – the presence of an arrest or conviction record alone.<sup>28</sup>

The criminal punishment system also hides the US labor market's limitations and inequities.<sup>29</sup> Arrest and incarceration physically remove individuals at risk of unemployment, under-employment, and joblessness from formal labor markets. Once incarcerated, the Bureau of Labor Statistics and Department of Labor do not include incarcerated people in their measure of unemployment, under-employment, or joblessness. For instance, federal data reveals that the labor force participation rate for Black men (64.4 percent) is lower than that of white men (67.8 percent), but, in reality, that disparity is more stark because of the exclusion of racially targeted incarceration.<sup>30</sup> With over 2 million incarcerated and with Black men who are cash-poor disproportionately targeted in their “prime working age,” this concealment is political: it confuses any assessment of the US labor market's claims of achievement in race equity and economic security.<sup>31</sup>

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<sup>27</sup> Alfonso Serrano, “Out of Prison, Out of Jobs: Unemployment and the Formerly Incarcerated,” *Colorlines*, July 2018, <https://www.colorlines.com/articles/out-prison-out-jobs-unemployment-and-formerly-incarcerated>. In part because women are more likely to be occupationally segregated into industries that perform more criminal background checks – e.g. retail and carework – formerly incarcerated women face greater unemployment rates than formerly incarcerated men. NELP, *Reentry and Employment for the Formerly Incarcerated and the Role of American Trades Unions*, April 2016, <https://www.nelp.org/publication/reentry-and-employment-for-the-formerly-incarcerated-and-the-role-of-american-trades-unions/>; and Lucius Couloute, Daniel Kopf, PPI, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, July 2018, <https://www.prisonpolicy.org/reports/outofwork.html>.

<sup>28</sup> The anti-Black impact of arrest and/or conviction records compounds the anti-Blackness already present in the labor market. See, e.g., Christian Weller, “African Americans Face Systematic Obstacles to Getting Good Jobs,” *Center for American Progress*, Dec. 2019, <https://www.americanprogress.org/article/african-americans-face-systematic-obstacles-getting-good-jobs/>.

<sup>29</sup> Professor, former political prisoner, and organizer Angela Davis famously writes, “Prisons do not disappear social problems, prisons disappear human beings. ... Homelessness, unemployment, drug addictions, mental illness, and illiteracy are only a few of the problems that disappear from public view when the human beings contending with them are relegated to cages.” Angela Davis, “Masked Racism: Reflections on the Prison Industrial Complex,” *History is a Weapon*, September 1998, <http://www.historyisaweapon.com/defcon1/davisprison.html>.

<sup>30</sup> US Bureau of Labor Statistics, “Employment status of the civilian population by race, sex, and age,” July 2022, <https://www.bls.gov/news.release/empsit.t02.htm>.

<sup>31</sup> Sandra Susan Smith and Jonathan Simon, “Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor,” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, March 2020, <https://www.rsjournal.org/content/rsfjss/6/1/1.full.pdf>.

## 4

## The Criminal Punishment System Cycles Workers into Incarceration, Bad Work, and Reincarceration

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The threat of reincarceration for people surveilled by community supervision programs (e.g. diversion, probation, or parole) is real. While national race and parole data are scarce, in New York State for instance, there are approximately 35,000 New Yorkers under parole supervision on any given day and Black and Latinx New Yorkers are supervised at 6.8 and 2.5 times the rate of white New Yorkers.<sup>32</sup> A 2021 study published by Columbia University Justice Lab found that in 2019, 40 percent of all people incarcerated in New York prisons were incarcerated for “technical rule violations.”<sup>33</sup> Technical rule violations while on parole are not allegations of criminal activity, but instead are violations of parole rules that regularly include “seeking and maintaining employment;” paying for parole supervision; passing and paying for alcohol or drug tests; satisfactory payment of court-imposed financial debts related to fines and fees; completing court-mandated classes; maintaining curfew; and unannounced workplace or home visits by supervision officers.

Those accused of technical rule violations in New York, for instance, can be held in jail for several months with no right to a bail setting as allegations are resolved. Such procedural practices for parole revocation are commonplace throughout state criminal punishment systems.<sup>34</sup> Researchers have additionally found that the threat of reincarceration – i.e., incarceration pending resolution of alleged technical violations – is disproportionately shouldered by Black and Latinx people on court-surveillance programs. In New York City, Black and Latinx people on parole are 12 and 4 times more likely to be reincarcerated for alleged technical violations than white people on parole.<sup>35</sup> Week- to month-long periods of reincarceration drive the obvious economic consequences of heightened vulnerability to poverty, homelessness, joblessness, and exploitation faced by court-surveilled workers and workers with records.

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<sup>32</sup> Kendra Bradner and Vincent Schiraldi, Columbia University Justice Lab, *Racial Inequities in New York Parole Supervision*, March 2020, <https://justicelab.columbia.edu/content/racial-inequities-new-york-parole-supervision>.

<sup>33</sup> Columbia University Justice Lab, *The Enormous Cost of Parole Violations in New York*, March 2021, <https://justicelab.columbia.edu/cost-of-ny-parole-violations>.

<sup>34</sup> Supreme Court decisions under *Gagnon v. Scarpelli*, 411 US 778 (1973) and *Morrissey v. Brewer*, 408 US 471 (1972) provide the procedural rules for parole and probation. For a state-by-state survey of procedural rules governing parole hearings and parole revocation hearings, University of Minnesota: Robina Institute of Criminal Law and Criminal Justice, *Profiles in Parole Release and Revocation: Examining the Legal Framework in the United States*, April 2016, <https://robinainstitute.umn.edu/publications/profiles-parole-release-and-revocation-examining-legal-framework-united-states>

<sup>35</sup> Columbia University Justice Lab, *supra* note 32.

## Proposed Policy and Legislation

To untangle the many ways criminal punishment systems can degrade worker power, a variety of proposals are offered below. We do not offer the following proposals as ends in themselves, but as potential means – through popular organizing and advocacy campaigns – to raise deeper challenges against the role of anti-Black institutional punishment and criminalization in the labor market.

### 1. *Monitor and Promote Job Quality for Court Surveilled Workers and Workers with Records*

While experts and advocates have promoted employment as the “greatest predictor of recidivism,” the quality of that employment is often less emphasized.<sup>36</sup> In significant part, this speaks to the real economic pressures court-supervised workers and workers with records face in a doubly discriminatory labor market.<sup>37</sup> The long list of economic pressures court-supervised workers and workers with records face (and the desperation for income and resources these pressures drive) after release from incarceration is well-documented.<sup>38</sup>

The exclusion of incarcerated workers from basic worker protection laws is emblematic of a long dynamic of structural racism and employer power – spanning centuries.

<sup>36</sup> In one recent study, researchers found that for workers on parole and workers discharged from parole in Michigan, “employment has a negligible impact on recidivism... This may imply that, due to the increasing precarity of work in the United States, much of the [low-quality] employment available to parolees may not be able to provide economic benefits or social integration that are thought to link post-prison employment to reduced criminal justice contact.” In LaBriola’s study, quality is defined by “average earnings, job tenure, firm-wide earnings per employee, and state-level union coverage.” J. Labriola, “Post-prison Employment and Future Criminal Justice Contact,” *RSF Journal*, 2020 <https://www.rsfjournal.org/content/6/1/154>. See also, Richard Rosenfeld and Amanda Grigg, Eds., National Academies of Sciences, Engineering, and Medicine, *The Limits of Recidivism: Measuring Success After Prison*, 2022, <https://nap.nationalacademies.org/catalog/26459/the-limits-of-recidivism-measuring-success-after-prison>; Libby Doyle, Urban Institute, *Why Recidivism Isn’t a Strong Metric for Determining a Housing Program’s Success*, February 2022, <https://housingmatters.urban.org/articles/why-recidivism-isnt-strong-metric-determining-housing-programs-success>; Jeffrey A. Butts and Vincent Schiraldi, “Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections,” *Harvard Kennedy School: Executive Session on Community Corrections*, March 2018, [https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism\\_reconsidered.pdf](https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf).

<sup>37</sup> The anti-Black impact of arrest and/or conviction records compounds the anti-Blackness already present in the labor market. Weller, *supra* note 21.

<sup>38</sup> Such pressures include wage garnishments associated with court fines and fees, consumer debt, healthcare debt, child support debt, and tax debt; inability to establish rental histories resulting in higher deposits; monthly parole and probation supervision fees (in Louisiana for instance, the parole fee is \$65 per month); mandated drug and alcohol test fees; suspended driver’s license from unpaid traffic fines while incarcerated; inability to pay fees associated with recovering identity documents. Several states ban people with conviction records from accessing basic benefits like SNAP, some of which are lifetime bans.

Underemphasis on job quality is additionally the result of broad and pervasive anti-worker narratives such as scarcity<sup>39</sup> and deservedness<sup>40</sup> that work to justify and legitimize racism and poverty. By challenging anti-worker narratives that formerly incarcerated workers deserve less at work and that any job is a good job, reentry and workers' rights advocates can help mitigate the reach of criminal punishment into the workplace. These narrative changes require popular social movements that can usher in broad cultural transformation, but individual reentry organizations can begin by monitoring, documenting, and promoting job quality measures for court surveilled workers and workers with records.

Such job quality measures include living wages;<sup>41</sup> access to benefits including family leave,<sup>42</sup> paid sick days,<sup>43</sup> and parental leave;<sup>44</sup> stable work schedules;<sup>45</sup> reasonable commutes;<sup>46</sup> opportunities for promotion; equity in wages; strong anti-retaliation protections;<sup>47</sup> and union representation.

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<sup>39</sup> See, e.g., Sarah Jaffe, "The Fight for \$15 Confronts the 'Labor Shortage' Narrative," *The American Prospect*, May 2021, <https://prospect.org/labor/fight-for-15-confronts-the-labor-shortage-narrative/>.

<sup>40</sup> See, e.g., Chuck Collins, *Disrupting Narratives that Justify Inequality and Poverty*, March 2019, <https://inequality.org/great-divide/disrupting-narratives-inequality-poverty/>.

<sup>41</sup> NELP, *Raise the Minimum Wage*, <https://raisetheminimumwage.com/>.

<sup>42</sup> Kemi Role, NELP, *Testimony on Legislative Proposals for Paid Family Leave before US House of Representatives Ways and Means Committee*, January 2020, <https://www.nelp.org/publication/testimony-legislative-proposals-paid-family-leave/>.

<sup>43</sup> More than half of Latinx workers and nearly 40 percent of Black workers in the US cannot earn a single paid sick day, "forcing them to choose between their health and the health of their families and their economic security when they get sick or need to care for a sick loved one." National Partnership for Women and Families (NPWF) and UNIDOS US, "Latinos and Their Families Need Paid Sick Days," September 2020, <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/latino-workers-need-paid-sick-days.pdf> and NPWF and NAACP, "African Americans and Their Families Need Paid Sick Days," January 2017, <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/african-american-workers-need-paid-sick-days.pdf>.

<sup>44</sup> National Partnership for Women and Families, *State Paid Family and Medical Leave Insurance Laws*, May 2022, <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf>.

<sup>45</sup> "Unstable and unpredictable scheduling practices give rise to household economic insecurity... it is fundamentally unequal, as workers of color, and particularly women of color, are exposed to the most unstable and unpredictable work scheduling practices." Daniel Schneider and Kristen Harknett, UC Berkeley Institute for Research on Labor and Employment, "It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality," October 2019, <https://shift.hks.harvard.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>

<sup>46</sup> The Urban Institute, *The Unequal Commute: Examining inequities in four metro areas' transportation systems*, October 2020, <https://www.urban.org/features/unequal-commute>.

<sup>47</sup> Laura Huizar, NELP, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation*, June 2019, <https://www.nelp.org/publication/exposing-wage-theft-without-fear/>.

## 2. *Community-Based Organizations Set a Job Quality Floor*

In addition to monitoring and promoting job quality measures, reentry organizations and other direct-service and advocacy organizations can set a job quality floor for their members.

Organizations can initiate or look for opportunities to work with workers' organizations to identify and affirmatively establish a job quality floor regarding wages, benefits, and other conditions of work in industries that hire reentry workers, workers under court-supervision, and workers with records. In some jurisdictions, reentry organizations represent a significant market share of underpaid labor. A strategy of collaboration between reentry organizations and workers' organizations could open new opportunities. This collaboration may well involve building coalitions with unions, worker centers, and other worker formations to additionally leverage local and legislative action.

Worker center models provide useful direction. Worker centers provide services, advocate for workers' rights, and organize to address workplace problems. They are commonly organized by and for undervalued workers like immigrant workers or within undervalued industries like domestic work. Worker center members generally develop participatory and democratic structures and often see themselves as part of an international workers' movement. Some workers centers create structures for workers to collectively negotiate with potential employers. These hiring hall structures allow workers to set and enforce a floor for worker conditions, share work opportunities among its members in ways members find equitable, and can provide a base to advance broader political reforms.<sup>48</sup>

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<sup>48</sup> See, e.g., Kim Bobo and Marien Casillas Pabellon, *The Worker Center Handbook: A Practical Guide to Starting and Building the New Labor Movement*, August 2016, Cornell University Press; Rebeca Harris, "Living-Wage Hiring Halls: A Model Solution for Improving Job Quality," *Social Innovations Journal*, April 2017, <https://socialinnovationsjournal.org/sectors/92-nonprofit-community/2430-living-wage-hiring-halls-a-model-solution-for-improving-job-quality>.

### 3. Amend the 13<sup>th</sup> Amendment and Corresponding State Constitutions

The exclusion of incarcerated workers (in prisons, jails, migrant detention camps, and “secure facilities” like detention homes) from basic worker protection laws is emblematic of a long dynamic – spanning centuries – of structural racism and employer power. This exclusion reminds all workers of how far employers are willing to lower the floor, demonstrated first on workers marked as not belonging or undeserving and incarcerated by the criminal punishment and immigration legal systems.

Worker protection laws like the federal Fair Labor Standards Act (FLSA)<sup>49</sup> and the Occupational Health and Safety Act (OSHA) and state-level worker-protections ought to be inclusive of incarcerated workers and read broadly. For instance, FLSA establishes minimum wage, overtime pay, and retaliation protections affecting employees in both the private sector and in federal, state, and local governments. FLSA specifically was designed to dissect labor arrangements by looking beyond labels employers might attach to workers to deprive workers of core rights and protections.<sup>50</sup> “Trainee,” “volunteer,” or “independent contractor” are familiar such labels, but “prisoner,” “inmate,” and “detainee” function in a similar way for the sprawling map of private and public actors profiting from incarcerated workers.<sup>51</sup>

Today, several campaigns led by directly impacted people across the country target reforms at state and federal levels recognizing that, as workers, incarcerated and detained people need and deserve wage and safety protections.<sup>52</sup> The ACLU estimates that two out of three incarcerated people

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<sup>49</sup> Through FLSA, Congress sought to “lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions,”<sup>49</sup> by “ensuring to all our able-bodied working men and women a fair day’s pay for a fair day’s work.” *A.H. Phillips, Inc. v. Walling*, 324 US 490, 493 (1945) (quoting “Message of President to Congress,” May 24, 1934; 29 USC § 202(a)).

<sup>50</sup> *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 33 (1961); see also *Real v. Driscoll Strawberry Assoc.*, 603 F.2d 748, 755 (9th Cir. 1979) (stating that “economic realities, not contractual labels, determine employment status”); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (explaining that “where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act”); see also NELP, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal State Treasuries*, October 2020, <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/>.

<sup>51</sup> See, e.g., Worth Rises, *The Prison Industry: Mapping Private Sector Players*, May 2020, <https://worthrises.org/theprisonindustry2020>.

<sup>52</sup> See, e.g., “In the last three years, three states have abolished slavery in their state constitutions. In 2018, Colorado became the first state since Rhode Island – the only state to have fully abolished slavery prior to the passage of the Thirteenth Amendment – to end the exception and abolish slavery. Following in its footsteps, Utah and Nebraska also led successful campaigns to abolish slavery in 2020... We have momentum!” *End the Exception: A Campaign to Abolish Slavery for All*, <https://endtheexception.com>. See also, Vidal Guzman, *A #Fixthe13thNY Campaign Fact Sheet*, <https://thenext100.org/afixthe13thny-campaign-fact-sheet/>; Madison Pauly, “Prisoners are Getting Creative to Pull Off a Massive Strike This Week,” *Mother Jones*, August 20, 2018, <https://www.motherjones.com/crime-justice/2018/08/prison-strike-inmate-labor-organizers/>.

work.<sup>53</sup> Incarcerated workers work in a variety of settings, including in upkeep and maintenance for carceral facilities themselves, fundamental state services, agricultural work, and for a variety of private corporations. Without the basic floor of the right to refuse work, minimum wage laws, the right to unionize, and workplace safety standards, there is no compelling consideration of incarcerated labor except as an extension of anti-Black slavery, the Black Codes era, and convict leasing – where racist narratives justifying workplace exploitation as “rehabilitating” or “civilizing” proliferated.<sup>54</sup>

While ethical reasons to end involuntary servitude and to include incarcerated workers in basic worker protections ought to be self-evident – especially within the US context and history of anti-Black slavery and protecting white slavers – prison work programs additionally impact workers after release. Prison labor programs: 1. message to workers they should expect less from the labor market on release, and 2. message to employers that formerly incarcerated workers deserve less in pay, benefits, and safety.<sup>55</sup> Dignified pay and safe working conditions while incarcerated would not only be a necessary first step to symbolically challenge the continuing legacy of anti-Black slavery and involuntary servitude enshrined in the 13<sup>th</sup> Amendment but would also protect against the downstream impact of incarcerated work on workers once released.

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<sup>53</sup> “... Almost 2 million people are held in prisons and jails across the US. Of the more than 1.2 million people incarcerated in state and federal prisons, over 65 percent work. We estimate that at least 791,500 people incarcerated in US prisons perform work as part of their incarceration. Because of a lack of available data, our estimate excludes people confined in local jails or detention centers, juvenile correctional facilities, and immigration detention facilities.” ACLU, *supra* note 11.

<sup>54</sup> For more on the uses and justifications of low-level offenses (such as “vagrancy” laws) and convict leasing by both private corporations and state employers, *see* Blackmon, LeFlouria, and Lytle-Hernandez, *supra* note 14.

<sup>55</sup> “After years of working for pennies on the dollar inside, twelve dollars an hour sounds great to someone coming out of prison – even if you could never make the costs of living in New York City with that pay,” Bernard Callegari, Lead Organizer and member of Laborers Local 79 Fight Back Campaign, *supra* note 4.

#### 4. *Unemployment Insurance Eligibility for Currently Incarcerated Workers*

Like all workers, incarcerated workers deserve access to basic workplace rights like unemployment insurance (UI).<sup>56</sup> Incarcerated workers ought to be eligible for UI if they cannot find work on release or if their incarcerated work ends for any reason outside of their control.

Incarcerated people shoulder a variety of direct financial needs. Monetary sanctions (and subsequent court-imposed financial debts and payment plans) are a central feature of the US criminal punishment system, operating as direct punishment or as an “alternative to incarceration” that follows a person long after release from incarceration.<sup>57</sup> Incarcerated workers’ wages, where they are paid, are used to pay for such sanctions and other needs, including: so-called “room and board” fees and other fees to the prison itself;<sup>58</sup> to support loved ones; to pay prison healthcare fees while incarcerated;<sup>59</sup> to supplement food, toiletries, and other needs while incarcerated;<sup>60</sup> to pay probation or parole supervision fees upon release; and to meaningfully save for housing and other needs upon release.<sup>61</sup>

Although the federal government sets a national framework and UI’s basic requirements through the Social Security Act and the Federal Unemployment Compensation Act, states have wide latitude in setting program specifications through state law, such as eligibility and disqualification

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<sup>56</sup> “From the start the unemployment insurance system was built to serve white, male, full-time workers and their employers, and it continues, to this day, to disproportionately shut out Black workers and other workers of color, particularly women of color. Changing this system -- reforming unemployment insurance at the federal level -- is critical to advancing racial justice in the economy.” NELP, *Reforming Unemployment Insurance is a Racial Justice Imperative*, Feb. 2022, <https://www.nelp.org/publication/reforming-unemployment-insurance-is-a-racial-justice-imperative/>; The unemployment compensation program – a partnership between the federal government and the states – serves as a critical component of workers’ social safety net, “offer[ing] an economic line of defense against the ripple effects of unemployment.” It provides monetary support for unemployed workers while they search for a new job and, in doing so, acts as an economic stabilizer and stimulus during economic downturns. U.S. Dep’t of Labor, Unemployment Compensation, Federal State Partnership, May 2019, <https://oui.doleta.gov/unemploy/pdf/partnership.pdf>.

<sup>57</sup> *Supra* note 18.

<sup>58</sup> L.B. Eisen, Fines and Fees Justice Center, *Charging Inmates Perpetuates Mass Incarceration*, May 2015, <https://finesandfeesjusticecenter.org/articles/charging-inmates-perpetuates-mass-incarceration/>. See also, Jean Trounstein, Prison Legal News, “Fighting the Fees that Force Prisoners to Pay for Their Incarceration,” November 2018, <https://www.prisonlegalnews.org/news/2018/nov/6/fighting-fees-force-prisoners-pay-their-incarceration/>.

<sup>59</sup> See, e.g., Tiana Herring, Prison Policy Initiative, “COVID looks like it may stay. That means prison medical copays must go,” February 2022, [https://www.prisonpolicy.org/blog/2022/02/01/pandemic\\_copays/](https://www.prisonpolicy.org/blog/2022/02/01/pandemic_copays/) and Luci Harrell, “Contrary to popular belief, healthcare in prison is far from free. Sometimes it can cost your life,” *Scalawag Magazine*, June 2022, <https://scalawagmagazine.org/2022/06/prison-healthcare/>.

<sup>60</sup> See, e.g., Joe Fassler, Claire Brown, “Prison Food is Making US Inmates Disproportionately Sick,” *The Atlantic*, December 27, 2017, <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/>.

<sup>61</sup> “Just like other employers, the Bureau of Prisons sets inmate-worker job descriptions, pay grades, and performance standards for federal prisons, and state prison systems do the same. Like other employees, prisoners are required by their employer to clock in and work a minimum number of hours a day. Yet, despite working for years while in prison, incarcerated workers remain ineligible for unemployment insurance upon their release.” Isabelle Holt, “The Case for Unemployment Insurance for Incarcerated Workers,” *On Labor*, March 2022, <https://onlabor.org/the-case-for-unemployment-insurance-for-incarcerated-workers/>.

provisions, weekly benefit amounts, and maximum weeks of benefits. Generally, work performed while incarcerated is statutorily excluded from “employment” under the Federal Unemployment Tax Act.<sup>62</sup> As a result, most work performed by incarcerated workers does not count toward the accrual of unemployment insurance benefits. However, there are exceptions such as prison work release programs where work occurs outside the prison. In 2020 in Maine, for instance, the state Department of Labor determined that incarcerated workers at an Applebee’s chain restaurant qualified for COVID-related unemployment insurance when the restaurant temporarily shut down in response to the pandemic, just as its unincarcerated workers did. The Maine Office of the Attorney General concluded that “employment of inmates by private employers to perform work outside the prison is not exempted from unemployment coverage.” Fifty-three incarcerated workers, newly unemployed by closure of their workplace, were ultimately determined to be eligible for the standard state unemployment benefit and the federal Pandemic Unemployment Assistance payment.<sup>63</sup>

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<sup>62</sup> 26 U.S.C. § 3306(c)(21).

<sup>63</sup> While Maine attempted to halt and seize unemployment payments to newly unemployed incarcerated workers, Maine eventually reached a settlement agreement repaying the seized payments and reenrolling workers into its unemployment insurance program. American Civil Liberties Union Maine, *State Agrees to Return Unemployment Benefits Seized from Incarcerated Workers*, April 2022, <https://www.aclumaine.org/en/press-releases/state-agrees-return-unemployment-benefits-seized-incarcerated-workers>; Stephen Betts, “State to repay inmates for seized unemployment benefits,” *Portland Press Herald*, April 26, 2022, <https://www.pressherald.com/2022/04/26/state-to-repay-inmates-for-seized-unemployment-benefits/>.

## 5. ***Unemployment Insurance Eligibility for Court-Surveilled Workers and Workers with Records***

Court-surveilled workers and workers with records already face vulnerability to hiring and licensing discrimination,<sup>64</sup> job instability,<sup>65</sup> dangerous jobs,<sup>66</sup> and discriminatory pay.<sup>67</sup> While data is scarce, court-surveilled workers and workers with records are likely overrepresented – as all workers of color are overrepresented – in brokered jobs through temp agencies where workers face increased vulnerability to illegal employer conduct such as wage theft and dangerous working conditions.<sup>68</sup> State unemployment insurance programs should be amended to ensure that court-surveilled workers and workers with records do not face unfair barriers to the UI System. Such changes include the following:

- Eliminate threshold earnings-based eligibility requirements, and instead impose a reasonable minimum hours-worked eligibility requirement, such as an average of 10 hours per week, so that workers who are underpaid are not penalized for earning less money;
- Expand eligible reasons for separation to include workers who leave their jobs because they are threatened with jail by an employer;
- Expand the definition of “qualifying workers” to include people returning to the labor market after incarceration;
- Create and maintain a federally funded “Jobseeker’s Allowance” through general revenue that would serve all jobseekers who do not have recent, recognized employment history, including people recently released from incarceration.<sup>69</sup>

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<sup>64</sup> Beth Avery and Han Lu, NELP, *Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies*, October 2021, <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>; Beth Avery and Maurice Emsellem, NELP, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, December 2019, <https://www.nelp.org/publication/fair-chance-licensing-reform-opening-pathways-for-people-with-records-to-join-licensed-professions/>.

<sup>65</sup> “Formerly incarcerated people... had an average of 3.4 jobs throughout the four-year study period [2010-2014], suggesting that they were landing jobs that didn’t offer security or upward mobility.” Wang, Bertram, PPI, *supra* note 16.

<sup>66</sup> Lu, Padin, Pinto, NELP, *supra* note 12.

<sup>67</sup> Craigie, Grawert, Kimble, Brennan Center, *supra* note 15.

<sup>68</sup> Workers with criminal records who spoke with ProPublica listed dozens of reasons that temp jobs were their first and often only jobs after leaving prisons. While failed background checks and the need for food and rent were common themes, longstanding criminal justice policies were often equally powerful factors... “For most workers, employment was a condition of their parole.” Emily Corwin, “A Tax Credit Was Meant to Help Marginalized Workers Get Permanent Jobs. Instead It’s Subsidizing Temp Work,” *ProPublica*, August 23, 2022, <https://www.propublica.org/article/work-opportunity-tax-credit-temp-permanent-employment>. See also, NELP, *Temp Workers Demand Good Jobs*, Feb. 2022, <https://www.nelp.org/publication/temp-workers-demand-good-jobs/>

<sup>69</sup> Unlike regular unemployment benefits that are managed and distributed from a state trust fund funded by employer taxes, the Jobseeker’s Allowance would be federally funded through general revenue and include all jobseekers who don’t have recent, recognized employment history. “In the current UI system, workers without recent work history are ineligible for UI, even when they are involuntarily unemployed. ... UI benefits should be expanded to include people seeking to ‘reconnect with or newly attach to the labor force’ through a Jobseeker’s Allowance.” NELP, *Reforming Unemployment Insurance*, June 2021, <https://s27147.pcdn.co/wp-content/uploads/Reforming-Unemployment-Insurance-June-2021.pdf>.

## 6. *Work Opportunity Tax Credit Reforms*

The Work Opportunity Tax Credit (WOTC) – a federal tax credit certified at the state level – provides employers tax credits for hiring workers with records but without imposing any obligations onto employers regarding job quality or retention. Without labor standards and transparent oversight, the WOTC incentivizes employers and temp agencies to target court-supervised workers with temporary, underpaid jobs.<sup>70</sup> The WOTC should be amended so that it creates financial incentives for employers to provide a pathway to stable employment with living wages and benefits.

These amendments include the following labor standards to determine employer eligibility for the tax credit:

- Eliminate employers' partial tax credit for workers employed for fewer than 400 hours in a year. Currently employers can obtain 25 percent credit of an employee's wages for only 120 hours of work per year (i.e. only about three weeks of full-time work);
- Require a high-road minimum wage, such as \$18 per hour, and benefits like health insurance and paid leave;
- Require an employer to retain a WOTC-claimed worker for at least one year and require employers to offer WOTC-claimed workers full time work for those workers who want it;
- Require employers to submit information to the Department of Labor (or to the state agency administering the WOTC) regarding the employer's training programs, who is accessing them, retention rates of WOTC-claimed workers, and other job quality factors;
- Require employers applying for the credit to pay temporary WOTC-claimed workers with wages equal to that paid to permanent workers performing similar work;
- Require employers to provide WOTC-claimed temporary workers with training for permanent positions;
- Provide additional credit for host companies that hire brokered workers permanently; and
- Eliminate the credit entirely for temp agencies and other employers that have a poor track record for retention and training.

Whether the WOTC achieves its stated goals of encouraging employers to hire and retain workers “who have consistently faced significant barriers to employment” is unclear. Few studies exist. States can increase transparency and accountability in the use of the WOTC by additionally requiring regular reporting regarding median wages and benefits; category of WOTC-eligible worker; median length of employment; job assignment; number and percentage of workers who are under court-surveillance; and whether and how the employer is in communication with probation or parole officers or other criminal legal system representatives, including third-party reentry organizations.<sup>71</sup>

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<sup>70</sup> Corwin, *supra* note 67.

<sup>71</sup> Laborers Local 79 Fight Back Campaign successfully campaigned and passed a WOTC transparency bill in 2020 at the state level. Senate Bill S2802, 2021-2022 Leg Session. <https://www.nysenate.gov/legislation/bills/2021/S2802>.

## 7. Retaliation Protections

Workers in the US generally bear the burden of enforcing their own labor protections – it is up to workers to come forward to report violations such as unsafe working conditions, wage theft, or discrimination. When a worker comes forward to report a workplace violation, we know it is common for employers to often retaliate or threaten to retaliate against the worker. A national survey found that 43 percent of workers who complained to their employer about wages or working conditions experienced retaliation.<sup>72</sup>

Workers under court supervision programs like parole or probation are particularly vulnerable to employer retaliation. By reporting (or threatening to do so) to parole or probation officers, employers can coerce workers into silence about wages or working conditions. Duane Townes, former body shop laborer and member of Laborers Local 79 Fight Back Campaign, explains that “When you’re released on parole you have to work in unsafe conditions and walk on eggshells. If you breathe wrong, you’re fired and that’s a violation of your parole. These body shops know this and exploit it.”<sup>73</sup>

As NELP’s 2019 report on retaliation and wage theft shows, just six states, including the District of Columbia, offer workers meaningful retaliation protections.<sup>74</sup> Even in states where retaliation protections exist, they do little to support a worker immediately after they have lost some or all their pay due to retaliation. Such complaints can take months to resolve, silencing workers from raising wage and safety issues. To achieve adequate protection for workers who suffer retaliation and to defer employers from retaliating, a basic retaliation protection law must contain the following elements:

- A right to monetary damages for the worker who suffers retaliation in addition to lost pay;
- A right for workers who prevail in their retaliation case to recover attorney’s fees and costs so that workers, especially workers in underpaid jobs, will have a better chance of finding attorneys who will represent them;
- A right to bring a retaliation complaint to a government agency and go directly to court;

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<sup>72</sup> Retaliation can take many forms, including harassment, being fired, threats to call immigration or criminal court authorities, demotion, reducing a worker’s hours, change a worker’s schedule to a less favorable one. All workers need strong protections so they will not be vulnerable to employer harassment and retaliation when they report violations of wage laws, unsafe working conditions, or other workplace laws. Just six states, including the District of Columbia, have retaliation protection laws for workers exercising their minimum wage or overtime rights. Huizar, NELP, *supra* note 39. One novel tool is the establishment of employer-sponsored retaliation funds accessible to any worker who files a complaint related wage theft, workplace safety, and work at the threat of jail. NELP, *Retaliation Funds: A New Tool to Tackle Wage Theft*, April 2021, <https://www.nelp.org/publication/retaliation-funds-new-tool-tackle-wage-theft/>; NELP, *The Top 5 Enforcement Tools for Local Minimum Wage Laws*, Dec. 2015, <https://www.nelp.org/publication/the-top-5-enforcement-tools-for-local-minimum-wage-laws/>.

<sup>73</sup> Laborers Local 79 Fight Back Campaign, *supra* note 4.

<sup>74</sup> Huizar, NELP, *supra* note 39.

- A government-imposed fine against the employer; and
- An employer-sponsored retaliation fund available to all workers who have filed a complaint that provides meaningful financial relief.<sup>75</sup>

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<sup>75</sup> NELP, *Retaliation Funds: A New Tool to Tackle Wage Theft*, April 2021, <https://www.nelp.org/publication/retaliation-funds-new-tool-tackle-wage-theft/>.

## 8. *Discipline and Firing Protections*

Contact with the criminal punishment system should never be automatic grounds for firing from a job. A growing movement of workers and labor organizations is calling for the adoption of “just-cause” legal protections to prohibit firing without warning or good cause. Such protections would establish a basic framework for fairness in discipline and termination and prevent abrupt, unfair, or arbitrary determinations. The core of a just-cause employment system is a requirement that an employer show there is a justifiable reason for terminating a worker.<sup>76</sup>

Based on NELP’s recent estimate, one in 11 US workers has been disciplined by an employer because of contact with the criminal punishment system.<sup>77</sup> A just-cause policy targeted to protecting workers with records would clarify that contact with the criminal punishment system is not automatic grounds for discharge or discipline. These protections would expand “Fair Chance” policies from hiring to firing. Key components of such protections would include:

- Prohibit automatic discipline or firing for mere contact with the criminal punishment system;
- Require the employer to give fair warning to a worker before any firing and show that a firing was for a good reason based on policies that the employer has previously communicated to workers. This would reverse the current system where the burden is on the worker to demonstrate that their firing was for an impermissible reason;
- Individualized assessment by requiring the employer to show that a firing resulting from knowledge of a worker’s arrest and/or conviction would harm the employer’s business. The employer must be able to show demonstrable actual harm (such as loss of customer base or loss of sales) that is more than just speculative; and
- Provide the worker fair notice of the rationale for potential firing and the opportunity to review and dispute records.

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<sup>76</sup> NELP, *Just Cause Job Protections: Building Racial Equity and Shifting the Power Balance Between Workers and Employers*, April 2021, <https://www.nelp.org/publication/just-cause-job-protections-building-racial-equity-and-shifting-the-power-balance-between-workers-and-employers/>.

<sup>77</sup> Contact with the criminal punishment system include arrest, interaction with a police officer, arrest or conviction record, probation, parole, or court supervision status and other kinds of interactions. NELP/YouGov Survey of 1500 US workers, 2022.

## 9. *State Workers' Compensation Program Reforms to Financially Incentivize Safety*

Court-supervised workers are pressured to stay silent about safety concerns in some of the most dangerous jobs because of the threat of violating conditions of release.<sup>78</sup> Tierra Williams, a Local 79 organizer and former body shop worker, reflects that “Body shop workers face the real threat of re-imprisonment if parole officers discover they are out of work. Complaining about job conditions, sexual harassment, and other mistreatment can cost these workers their freedom.”<sup>79</sup> Additionally, according to the Occupational Safety and Health Administration (OSHA), new workers are at greater risk of injury.<sup>80</sup> Many newly released, formerly incarcerated workers are “new” multiple times a year.<sup>81</sup>

State workers' compensation programs can be amended to provide the right incentives for employers so that they invest in training and safety measures that minimize safety risks for all workers, including court-surveilled workers. These measures include the following:

- Require the employer be responsible for providing workers' compensation to its brokered workers and prohibit the employer from contracting around such a requirement through a labor broker;
- Require that employer's workers' compensation premiums be based on an experience rating that includes the workers' compensation claims filed by its workers; and
- Require that an employer's experience rating be based in part on the safety investments – such as trainings and safety equipment – provided to workers.

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<sup>78</sup> In New York City, where Laborers Local 79 are organizing to challenge labor broker practices that target workers on parole, more than one construction laborer dies on the job per month in New York City, with 19 deaths at work in 2019 and 10 in 2020. BLS, *supra* note 3. Construction death rates remain five times as high as all industry deaths and contractors' reliance on inexperienced and untrained laborers are a source of fatal injuries. New York City Department of Health, *Fatal Injuries among New York City Construction Workers*, July 2017, <https://www1.nyc.gov/assets/doh/downloads/pdf/survey/construction-fatalities.pdf>.

<sup>79</sup> Laborers Local 79 Fight Back Campaign, *supra* note 4.

<sup>80</sup> The increased risk is partly because employers do not provide adequate training to new workers that assure safe conditions. Occupational Safety and Health Admin., Policy Background on the Temporary Worker Initiative, July 15, 2014, <https://www.osha.gov/memos/2014-07-15/policy-background-temporary-workerinitiative>.

<sup>81</sup> “Formerly incarcerated people... had an average of 3.4 jobs throughout the four-year study period [2010-2014], suggesting that they were landing jobs that didn't offer security or upward mobility.” Wang, Bertram, PPI, *supra* note 16.”

## 10. *Protect Workers with Records from Impacts of Targeted Labor Brokering*

Labor brokers hire and pay workers who perform work for third party companies, known as “host employers.” Brokers profit by charging the host employer a markup on the hourly workers’ wages. Brokers compete with one another by driving down the cost of labor, the only cost they control, which incentivizes paying poverty wages and cutting corners on meaningful training and workplace safety and health standards.<sup>82</sup> These workers often work alongside the host employer’s permanent workforce resulting in a second-tier workforce who do the same or similar work as workers hired directly by the host employer, but for less pay, nearly non-existent benefits, and no job security. The labor broker system drives down wages and “insulates the host companies from workers’ compensation, unemployment taxes, union drives, and the duty to ensure that their workers are citizens or legal immigrants,” allowing host employers to control working conditions without being responsible for them.<sup>83</sup> Labor brokers are an engine of occupational segregation, sorting Black and Latinx workers into this second-tier status and other forms of bad work.<sup>84</sup> Labor brokers that target court-surveilled workers in particular for low wage work ensure the silencing of workers’ voices in some of the most dangerous professions<sup>85</sup> at the threat of reincarceration and depress wage and safety standards for all workers.<sup>86</sup>

Reentry and workers’ rights advocates can look towards Laborers Local 79 Fight Back Campaign which organized for New York City Council to:<sup>87</sup>

- Require labor brokers to register with city or state business licensing departments and set limitations on labor brokers;

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<sup>82</sup> Padin, NELP, *supra* note 2.

<sup>83</sup> *Id.*

<sup>84</sup> Black workers comprise 25.9 percent of workers employed by labor brokers while they comprise 12.1 percent of the overall workforce. Latinx workers comprise 25.4 percent of workers employed by labor brokers while they comprise 16.6 percent of all workers. *Id.*

<sup>85</sup> For instance, Laborers Local 79’s campaign against body shops focused on organizing construction laborers, one of the deadliest jobs in New York City. Construction death rates remain five times as high as all industry deaths and contractors’ reliance on inexperienced and untrained laborers are a source of fatal injuries. New York City Department of Health, *supra* note 67. More than one construction laborer dies on the job per month in New York City, with 19 deaths at work in 2019 and 10 in 2020. BLS, *supra* note 3. Nationally, the labor broker industry has expanded in the “Laborers and Freight, Stock, and Material Movers” occupation, as categorized by the Bureau of Labor Statistics, has an injury rate is 3.4 times the average rate and saw an increase of more than 61,000 temporary workers nationally between 2014 and 2017. Laura Padin and Maya Pinto, NELP, *Lasting Solutions for America’s Temporary Workers*, August 2019, <https://www.nelp.org/publication/lasting-solutions-american-temporary-workers/>.

<sup>86</sup> See, e.g., Noah Zatz, “Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work,” *Law and Social Inquiry*, December 2019, <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/get-to-work-or-go-to-jail-state-violence-and-the-racialized-production-of-precarious-work/75240FEFBE2355E8CD24595F84633CDF>.

<sup>87</sup> The provisions set forth in this document were among the aims of the Laborers’ campaign, however not all were successfully passed during NYC’s 2021 legislative session. See NYC Department of Consumer and Worker Protection, *supra* note 5.

- Require all registered labor brokers to provide annual reporting on their business and labor practices;<sup>88</sup>
- Require that brokered workers receive wages and benefits equal to permanent or direct-hire workers;
- Require all registered labor brokers to provide adequate notice to each worker in writing in the worker's primary language regarding each new assignment, including the name and contact information for the company where the worker will be working, a description of the job the worker will be performing, employer obligations under relevant law, including work hours, benefits, and pay;
- Require all registered labor brokers to post wage bonds that will cover their workers' claims for unpaid wages;
- Require all registered labor brokers to maintain adequate insurance for workers' compensation, general commercial liability, unemployment, and disability;
- Ban labor brokers in hazardous or risky industries, such as construction, where extensive training and experience is critical to enforcing health and safety standards; and
- Ban on practices that impede workers from moving to permanent employment at the host company, like no-hire provisions and conversion fees.<sup>89</sup>

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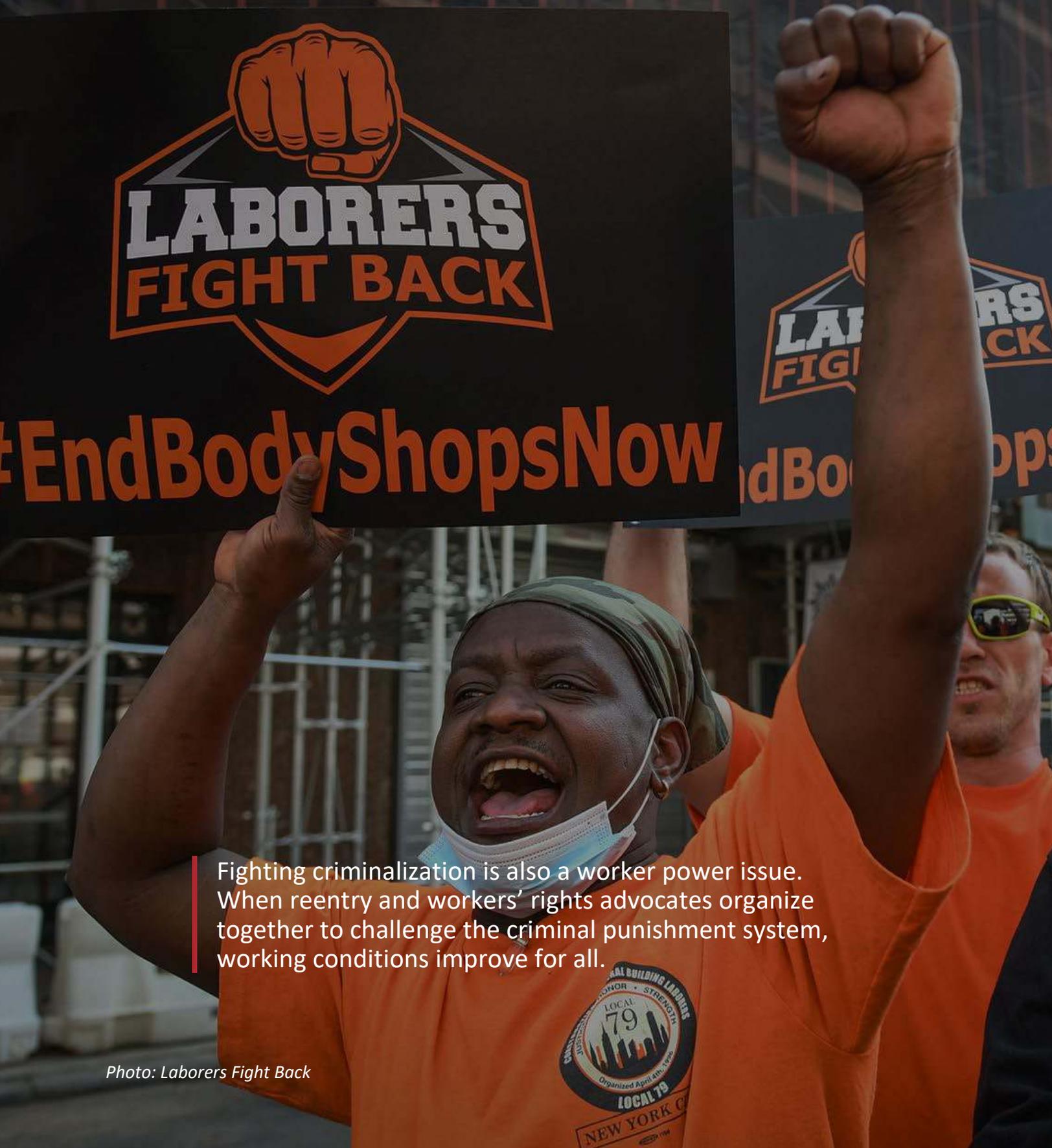
<sup>88</sup> Including information such as the number and percentage of workers they employ as employees and as independent contractors; detailed recordkeeping for each worker and assignment; the demographics of their workforce, including race, gender, and ethnicity of workers by occupation; median wages and benefits provided; median length of employment; number and percentage of workers who are under court-surveillance; and whether and how labor brokers are in communication with probation or parole officers or other criminal legal system representatives, including third-party reentry organizations.

<sup>89</sup> "Conversion fees" are fees labor brokers like temp agencies charge host companies for hiring temp workers permanently. See Padin, Pinto, NELP, *supra* note 73.

# Acknowledgments

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Many people and communities helped with research, analysis, and frameworks that formed the basis of this paper, several highlighted in citations. Special thanks to the Laborers Fight Back Campaign, including Bernard Callegari, Karla Cruz, Nicole Vecchione, Oona Adams, and Tamir Rosenblum. To participants in NELP’s “July Conversations: Criminalization x Work,” including Ana Karen Flores, Ariel Nelson, Brandon Williams, Cynthia Cornelius, Darren Mack, Josh Pichon, Jhumpa Bhattacharya, KD Dixon, Kendall Dix, Mark Birhanu, Sandra Johnson, Sheila Maddali, Toya Ex Lewis, and Tyler Sprague. To colleagues including Amy Traub, Anastasia Christman, Beth Avery, Cathy Ruckelshaus, Eleanor Cooney, Frank Gattie, Irene Tung, Kemi Role, Laura Padin, Mónica Novoa, Najah Farley, Noah Zatz, and Shayla Thompson for their camaraderie and feedback.



Fighting criminalization is also a worker power issue. When reentry and workers' rights advocates organize together to challenge the criminal punishment system, working conditions improve for all.

Photo: Laborers Fight Back