

# Winning Wage Justice: Strategies for Effective Local Wage Law Enforcement

*While the U.S. economy continues to see an improvement in the jobless rate, wages have been flat or falling for much of the labor force. This dynamic has prompted a record number of municipal leaders to tackle this problem locally with city minimum wage ordinances that substantially raise the wage floor for low-paid workers in their communities.<sup>1</sup> Many cities have created agencies to enforce these wage standards. This document provides strategies and recommendations to assist agencies in effective and efficient enforcement to realize the promise of these laws.*

## Before the First Complaint: A Strategy for Enforcement

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Wage theft is a pernicious problem that poses many enforcement challenges.<sup>2</sup> Before the first complaint is processed, agencies should consider a proactive approach that strategically uses agency resources. Agencies that undertake targeted enforcement strategies in collaboration with community organizations ensure more effective enforcement and a better return on investment than agencies that use a purely complaint-driven “first in first out” system. Often, complaints are made by workers in higher-paying, higher-compliance industries, who have better knowledge of their rights under the law. A reactive complaint-driven enforcement strategy fails to address the bulk of violations.

### Partner with Community Groups

Community groups bring to agencies their expertise and their existing relationships with low-wage workers. These groups can partner with agencies to do outreach to workers, for example, “know your rights” presentations or intake clinics where agencies meet with many workers. These groups can also share their expertise as to which industries and employers are most flagrantly breaking the law. Agencies should reach out to these groups and foster relationships of education and case referral.

### Target Enforcement and Prioritize Complaints

Enforcement is most effective at increasing compliance when an investigation affects not only the employees in the complaint, but also deters other employers from breaking the law. Focusing enforcement on a highly non-compliant industry or geographic area can have a greater deterrent effect. Agencies might also give priority to cases affecting multiple workers or affecting particularly visible employers in the area. Agencies should also collaborate with

other agencies—e.g. state labor enforcement agencies, the U.S. Department of Labor—in case there are potential violations that would be covered by other agencies, and vice-versa.

## Starting a Case: Contact Between Workers and the Agency

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### Make the Complaint Process Accessible

- **Make the complaint process accessible in different languages.** Complaint forms should be available in the languages spoken by the local workforce. Agencies should prioritize the hiring of staff who can communicate to workers in those languages.
- **Allow multiple formats for filing complaints.** Complaints should be accepted online, by phone, and in writing.
- **Allow anonymous and third party complaints.** Retaliation against workers who file complaints is one of the greatest barriers to enforcement. To shield workers from employer retaliation, complaints should be accepted on an anonymous basis or from third parties, such as worker centers and community organizations.

### Interview Workers and Collect the Right Information

Agencies can process investigations more quickly when they collect relevant information as early as possible in the investigation process. This includes not only information regarding the violations faced by the complaining individuals, but also information related to the employer or employers, record-keeping practices, and other employees.

In particular, agencies should make sure to capture certain information related to:

- **Joint employer issues.** Workers are often not aware that multiple companies or entities can be an employer. Agencies should ask about the different companies involved in the workplace, and forms or screening checklists should allow for more than one employer. Capturing this information is important to make sure that the investigation proceeds against all relevant parties and better ensures the agency can collect damages. The relevant facts will depend on your jurisdiction.
- **Independent contractor misclassification.** Similarly, many workers are not aware that they are misclassified as independent contractors. Agencies should ask about the relationship between the worker and the employer and not assume that the title or independent contractor label given to the worker is correct. The relevant facts will depend on your jurisdiction.

### Explain and Enforce Retaliation Protections

Early in the process, the agency should inform workers that retaliation is unlawful and will be pursued by the agency. The agency should give examples of unlawful retaliation and tell workers to contact the agency if retaliation occurs. Agencies should make clear that retaliation around immigration status is also unlawful and that the agency is separate from immigration enforcement.

The agency should make clear that it will take precautions to minimize the risk of retaliation, for example, keeping complainants' information confidential from the employer for as long as possible, or allowing employees to testify by phone.

If retaliation is alleged, the agency should fast-track the investigation. Without quick action, employers can succeed in using unlawful tactics to scare off witnesses and pressure workers to withdraw their complaints.

### **Include Community Groups in the Process**

Community groups have a closer relationship with workers than the agency and are often trusted within worker communities. They can help workers understand an often alien process, and make workers more comfortable sharing information with investigators. This comfort can be important where workers might be reluctant to share certain facts—for example, if they were paid in cash under the table.

## **Investigating the Complaint and Contacting the Employer**

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### **Align Investigation Resources with Enforcement Priorities**

In line with the agency's enforcement priorities, the mode of investigation should depend on the potential impact of the complaint. For example, for low-value or low-impact claims, the agency may elect to contact the employer by phone or letter, whereas for high-value and high-impact claims, the agency may elect to conduct investigations in person, with more research and surveillance prior to the initial contact with the employer.

### **Get the Background Before Notifying the Employer**

The agency should collect as much information as possible before contacting the employer:

- **Research the employer.** Search any databases, licensing agencies, or publicly available websites, including yellow pages and other online advertising sources. If there are potentially multiple employers, research those individuals or entities as well.
- **Surveillance and in-person investigation.** Investigators can observe the worksite without notifying the employer and note the number of employees who arrive at the worksite, the business hours, days of operation, etc.
- **Collect any additional information from complaining parties that was missing from the initial interviews.** For example, where records are maintained, the contact information of other potential workers who could be interviewed, and the names of owners and managers.
- **Be prepared to serve the employer with appropriate investigation tools.** Using this background research, have a subpoena or other investigation tools permitted in your jurisdiction (e.g. orders to appear, interrogatories, requests for admissions) ready to serve on the employer upon notifying them of the investigation.

### **Contacting the Employer: The Risk of Retaliation Begins**

When the agency contacts the employer, the risk of retaliation begins. Agencies should make clear to employers that retaliation is illegal and that if it occurs, the agency will pursue retaliation charges against the employer. Give examples of what illegal retaliation would include—for example, termination, threats both express or implied, and unfavorable changes to working conditions.

Consider presenting the investigation as a “compliance check” as opposed to a complaint-driven investigation. Keep the identity of any complainants confidential and if the jurisdiction permits, make clear that complaints can be filed anonymously or by third

parties. As emphasized below, frame the investigation as about compliance for all employees to protect against retaliation for the complainant.

### **Collect the Right Information and Documents**

Collect information regarding potential violations against all employees. For example, demand the wage records of all employees, not only those who spoke to the agency. Wage theft likely affects multiple employees. Furthermore, this practice will ward against retaliation and maximize the deterrent effect of the investigation.

If interviewing employer representatives, ask open-ended questions. E.g., ask how payroll is conducted and how workers are paid, as opposed to asking “do you pay minimum wage?”

Serve subpoenas or any other investigation tools promptly. Relevant information and documents may include: Legal entity and licensing information; the name and contact information of workers and independent contractors; payroll documents, including paystubs; records of payment, e.g. bank statements; time cards; work schedules. If your jurisdiction permits on-site investigation contemporaneous to service, consider this route as employers frequently doctor, falsify, or destroy existing records.

Emphasize the employer’s obligation to provide information and the consequences of withholding documents. Inform employers that if they were given the opportunity to produce documents and the employer failed to produce, the agency will operate under a presumption that there are no records and any worker allegations are correct. The agency should have a clear internal process for making sure that where an employer fails to provide adequate records, the worker’s testimony should control for purposes of calculating damages.

Other legal mechanisms can prevent employers from impeding investigations through withholding or falsifying documents, such as civil penalties for failure to produce documents, or evidentiary rules that prohibit employers from relying at hearing on documents previously withheld. If possible, agencies should consider promulgating regulations or seeking case law to this effect. If legal mechanisms like these exist in the jurisdiction, the agency should communicate this to employers.

### **Keep the Complainants in the Loop**

During the course of investigation with the employer, the agency should get back in touch with the workers and/or community group regarding the employer’s version of the facts. It is important to reconnect with the complainants to get context for documents provided by the employer and to learn if any documents are inaccurate or misrepresentative.

## **Settlements and Hearings**

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### **Settlement Strategy Should Reflect Agency Priorities**

The agency should make internal policy decisions regarding settlement that reflect its enforcement priorities. Settlement can be beneficial for all parties and an effective use of agency resources. However, a practice of settling for wages owed without liquidated damages or penalties can be an ineffective strategy if it provides little deterrence, and does not allow for closure for the employer, as employees cannot be required to waive their rights

in those circumstances and can continue to pursue other remedies against the employer. An internal policy regarding what types of settlements are appropriate in different types of cases that reflects agency priorities can guide these decisions and ensure that policies are not applied unevenly across investigators.

### **Settlement Discussion Should Involve Workers and Community Groups**

The agency should discuss settlement with the worker and any community group or representative prior to any agreement. Open communication regarding expectations is necessary to foster the trusting relationship between agency and community that will encourage workers to report violations. The agency should also include workers and any community group or representative in any settlement conferences. Settlement conferences can often be foreign and confusing for workers, and community groups can explain and expedite the process.

### **Creative Settlement Terms Can Promote Long-lasting Compliance**

Agencies should also consider non-monetary settlement terms that will lend themselves towards education or enforcement. For example, settlements that provide for public statements by employers, notice readings or presentations to workers at the worksite, ongoing monitoring for a period of years by the agency, onsite compliance committees, or walk-through inspections can be effective ways to ensure a settlement has lasting effects. Community groups can play a role in coming up with creative settlement terms and can be involved in their enforcement as well.

Employers often ask for settlements to be confidential, in hopes that fewer employees—past or present—will similarly complain about violations. As a general matter, confidential settlements should not be approved. Because they are confidential, they fail to deter employers from illegal activity. They can also keep a repeat violator from being held accountable by employees or the public. If an agency does agree to allow confidential settlements in certain unusual situations, these efforts should reflect agency policy priorities, based on evenly-applied policy, as opposed to ad hoc decisions of individual staff.

### **Public Relations for Education and Deterrence**

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The agency should consider putting resources into publicizing important settlements, decisions, or investigations in news and social media. For example, the agency might put favorable settlement agreements on the agency website, along with a press release. This publicity serves a dual role. It educates workers about their rights and the services the agency can provide. It also educates employers about their obligations and deters illegal activity by emphasizing that there is a “cop on the block.”

### **Collections**

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The agency should invest resources into collections, and work with private collection agencies if needed to recover monies for workers. Unfilled judgments are almost worse than none at all, because they erode trust in the enforcement agency.

## Data Collection and Evaluation

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Finally, evaluation of the agency's program and agency employees should reflect the enforcement strategies and priorities of the agency. For example, evaluating agency staff based on the number of complaints processed does not reward a proactive outreach-oriented enforcement strategy, which is likely a better use of public resources in ensuring broad compliance. An agency might instead evaluate employees based on worker interviews conducted, give credit for multi-employer and strategic enforcement projects, and for educational presentations with partner community groups.

Similarly, any data collection and evaluation of the agency's effectiveness should align with the agency's enforcement strategy. For example, if the agency only collects data on the number of complaints processed and is only evaluated on the number of complaints processed, the evaluation method would not incentivize the most effective type of enforcement. An agency should be sure to record the evaluation data that will reflect its enforcement strategy—for example, the number of clinics held at community groups, the number of settlements with ongoing monitoring or access, the number of educational workshops, or the number of workers who have seen remedies. An agency should also collect data on the amount of money actually collected, as opposed to the amount of dollars assessed, as the latter does not reflect the actual remedies received by workers.

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## Endnotes

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1. National Employment Law Project, City Minimum Wage Laws: Recent Trends and Economic Evidence (April 2016), available at <http://www.nelp.org/publication/city-minimum-wage-laws-recent-trends-and-economic-evidence-on-local-minimum-wages/>; Tung et al., The Growing Movement for \$15, National Employment Law Project (November 2015), available at <http://www.nelp.org/publication/growing-movement-15/>.
2. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities, at 3, National Employment Law Project (September 2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.