Workers’ rights protection and enforcement by state attorneys general
State AG labor rights activities from 2018 to 2020

Report • By Terri Gerstein • August 27, 2020

Key takeaways

- State attorneys general (AGs) have been playing a key role in enforcing and protecting workers’ rights.
- State AGs have dramatically increased their involvement in this area in recent years; this report documents these activities in detail. Here are just a few examples of the many ways state AGs are protecting workers’ rights:
  - Helping workers attain safer working conditions during the pandemic
  - Recovering stolen wages through civil lawsuits and criminal prosecutions
  - Fighting misclassification of workers as independent contractors instead of employees
  - Cracking down on companies’ use of noncompete and no-poach agreements, which limit job mobility
  - Proposing and supporting legislation to safeguard workers’ rights
- State AG offices engaged in workers’ rights issues should continue to build on the work they’re doing, and more state AGs should join the effort.
- State legislatures should grant explicit authority to state attorneys general to enforce workplace rights laws and should ideally also fund positions for enforcement.
- Worker organizations and advocates should seek to build relationships and work with their state AGs to safeguard workers’ rights in their states.
Introduction

State attorneys general can play a critical role in protecting and enforcing workers’ rights. There has been a significant uptick in the involvement of state attorneys general in this area in the past several years. Most recently, several state attorneys general have been highly active in taking action to protect workers during the coronavirus pandemic.

While there are variations in state attorney general office resources and jurisdiction, these offices often have a range of powers that can enable them to advance and defend workplace protections and ensure that employers comply with the law. This current report details the proliferation of state attorney general activities in support of workers’ rights from mid-2018 to the present. A prior EPI report (Gerstein and von Wilpert 2018) covers activities through mid-2018. (For additional analysis of the role of state AGs in labor enforcement, see Flanagan 2020.)

This report recommends that state legislatures grant attorney general offices jurisdiction and fund positions to enforce workplace rights laws. It also recommends that state AGs (both those who are already engaged and those who have not been active) expand their involvement in this area, using a range of their existing powers and authority. Finally, this report recommends that worker organizations and advocates seek to build relationships and work with their state AGs to safeguard workers’ rights in their states.

Background

The need for increased state and local enforcement of workers’ rights

There is a need for increased state and local enforcement of workers’ rights laws.

Workers are deprived of hundreds of millions of dollars each year as a result of wage theft (Levine 2018; McNicholas, Mokhiber, and Chaikof 2017). For example, in the 10 most populous states in the country, each year 2.4 million workers covered by state or federal minimum wage laws report being paid less than the applicable minimum wage in their state—approximately 17% of the eligible low-wage workforce.

Since the early 2000s, the share of workers subject to forced arbitration and denied access to court has sharply increased, exceeding 55% (Colvin 2018), a figure that is estimated to reach more than 80% of private-sector nonunion workers by 2024 (Hamaji et al. 2019), particularly in light of the United States Supreme Court’s decision in Epic Systems Corp. v. Lewis. This explosive growth of forced arbitration makes the role of public enforcers even more critical, because public enforcers are not bound by the arbitration documents that employees may have signed.
Declining union density—private-sector union membership was a mere 6.2% in 2019 (BLS 2020)—increases the risk of labor law violations: Workers not covered by union contracts are almost twice as likely to experience minimum wage violations as those in a union or covered by a union contract (Cooper and Kroeger 2017). Meanwhile, available resources for enforcement of workplace laws are insufficient, both at the federal and state levels (Hamaji et al. 2019).

It is in this context that state attorneys general have begun to play a greater role in enforcing workplace laws within their states. This report provides an overview of ways in which state attorneys general have taken action to protect workers’ rights in the past two years.

General background on state attorneys general

All 50 states and the District of Columbia, as well as Puerto Rico and other territories, have attorneys general (AGs), most of whom are elected (Tierney 2020). Most offices have a division representing state agencies in trial courts; an appeals division, headed by the solicitor general; a division that brings public advocacy enforcement cases; a criminal division (where such jurisdiction exists); and a front office or executive team, including communications staff, intergovernmental staff, outreach staff, a policy director, and other similar positions.

State attorney general offices vary widely in their jurisdiction, structure, resources, and areas of greatest focus. For example, some offices have considerable resources to investigate and open cases on their own initiative and conduct their own law enforcement, while others have funding structures much more strictly tied to representing state agencies, thereby limiting such opportunities.4

State attorney general offices are unusually nimble and flexible, relative to many other government agencies, and are generally active on a wide range of issues within their states.

Their core work involves representation of the state and state agencies, as well as enforcement of state laws (civil and, in some cases, criminal). However, they also issue opinion letters and advisories, propose legislation, issue reports, educate the public about important rights, file amicus briefs, submit comments and provide testimony on state and federal legislation, and author op-eds. Furthermore, in recent years, they have sued the federal government over major national issues.

In relation to workplace laws, state attorneys general have a different role than state labor departments. State labor departments are generally the primary regulator or enforcer.5 As such, they are generally structured to handle a higher volume of cases. Their primary enforcement staff consists of investigators, not lawyers; they also usually have jurisdiction to enter and inspect workplaces; and they may have statutory or other limitations in dealing with new and emerging issues that don’t fall squarely within their jurisdiction, such as noncompete agreements. State labor departments also lack the ability to criminally
prosecute and usually do not have the ability to file a lawsuit on their own.

In contrast, attorney general offices are not typically high-volume operations; instead, they generally bring cases with a strategic or impact litigation focus, aiming to have a broader effect on an industry or practice. Their primary enforcement staff consists of lawyers; they do not have the authority to enter and inspect, but they generally have the ability to issue subpoenas or the equivalent prior to filing a lawsuit. State attorney general offices also often have jurisdiction to bring criminal charges or file a civil lawsuit.

Given their different yet complementary powers, it is useful for both a state labor department and an attorney general’s office to be involved in enforcing workers’ rights.6

Eight states and D.C. have dedicated workers’ rights units within state AG offices; six were started in the last five years

One of the most significant developments in this area in recent years has been the creation within several state AG offices of new dedicated units focused on labor issues. Five years ago, only three state AG offices had dedicated workers’ rights units: California, Massachusetts, and New York. Since then, six other offices have established workers’ rights units: District of Columbia, Illinois, Michigan, Minnesota, New Jersey, and Pennsylvania.7

The creation of a dedicated bureau ensures that an office will be involved in workers’ rights in a continuous, proactive, strategic, and in-depth manner—not as a one-off in relation to a particular case or issue. Having a dedicated unit also allows specialized attorneys to develop expertise on the relevant legal doctrine, case law, and new developments, as well as expertise in understanding common types of violations, the structures of high-violation industries, and how to use their office’s particular tools to protect the workers in their jurisdiction. When there is a dedicated unit, lawyers can develop ongoing relationships with stakeholders: labor agencies, worker advocacy groups, unions, worker centers (nonprofit community-based organizations focused on workers’ rights), employer associations, and private bar associations, as well as with the network of other state AG offices engaged in this work. Most importantly, establishment of a dedicated unit institutionalizes the work, making it more likely that enforcement of workers’ rights will endure beyond any particular administration.

Many of these units were established and have taken action to protect workers using already existing authority of the attorney general’s office. In several states, however, the legislature has specifically granted attorneys general jurisdiction over these matters, concurrent with jurisdiction of the state labor department or its equivalent. For example, during the 2019 legislative session, both Illinois8 and Minnesota9 passed laws granting jurisdiction to the attorney general’s office; in the case of Illinois, the law not only confers
jurisdiction but also specifically requires the creation of a Worker Protection Unit “dedicated to combating businesses that underpay their employees, force their employees to work in unsafe conditions, and gain an unfair economic advantage by avoiding their tax and labor responsibilities.” In 2017, the D.C. Council passed a law granting labor jurisdiction to the D.C. attorney general’s office.10

While it is not essential for attorneys general to have this kind of labor-specific jurisdiction in order to take action to protect workers, and while several have done so without it and without dedicated funding for the work, it is certainly helpful for an office to have such jurisdiction as well as a dedicated legal team assigned to this area.

Finally, simply establishing a dedicated unit can help deter labor violations. For example, several months after the April 2019 creation of a Payroll Fraud Unit by Michigan Attorney General Dana Nessel, a Grand Rapids law firm partner authored a National Law Review article urging Michigan’s employers to take action before finding themselves the subject of enforcement by the new unit (Lawless 2019). Similarly, several Pennsylvania lawyers authored a piece in the Legal Intelligencer about the first criminal prosecution of labor law violations by Pennsylvania Attorney General Josh Shapiro; the lawyers advised that “[e]mployers in Pennsylvania should stay on their toes” and noted that “[t]his marks the first time that the attorney general has brought criminal charges for prevailing wage violations, which was previously enforced only through civil actions” (Carusone, Williams, and Engel 2020).

State attorneys general play a growing role in protecting workers’ rights

Civil enforcement of laws to protect workers

State attorneys general have used their civil authority to pursue employers who violate a number of laws, including laws related to wages (wage theft, wage payment, minimum wage, overtime, prevailing wage), earned sick time, child labor, payroll fraud and misclassification, noncompete and no-poach/no-hire agreements, sexual harassment, and the platform or “gig” economy.

Protecting workers during the COVID-19 pandemic

During the COVID-19 pandemic, AGs have been taking a range of actions to protect working people, including enforcing stay-at-home executive orders, advocating for safer workplaces in key industries and among key employers, and providing information to the public about key labor issues.

Engaging large national companies regarding worker protections during COVID-19. A number of state AGs have taken action in relation to large national companies. A coalition sent letters to Amazon and Whole Foods, and another coalition sent a letter to Walmart,
seeking information about their paid sick leave, safety, and social distancing practices, as well as about the number of workers infected with COVID at their worksites (Mass. AG 2020g; Ill. AG 2020a). In addition, the New York AG’s office submitted a letter to the court opposing defendant Amazon’s motion to dismiss a workplace safety public nuisance lawsuit filed by public interest organizations (N.Y. AG 2020h). News reports also noted investigations by California’s AG of Amazon’s workplace safety practices (Bartz and Dave 2020). A group of AGs also wrote to the manufacturer 3M urging the company to do more to combat inflated prices for respirators and other needed personal protective equipment (Va. AG 2020).

**Enforcing stay-at-home orders.** Attorneys general have been involved in enforcing various forms of stay-at-home executive orders in several states, including Ohio, Michigan, Minnesota, and New Jersey. Minnesota’s AG sent at least 35 letters to businesses enforcing such orders (Montemayor 2020).

The activities of the Michigan AG’s office provide an illustrative example of this activity. The office created an FAQ website section about employee rights and employer obligations under the state’s stay-at-home orders, which have been evolving since their initial issuance (Mich. AG 2020f). In addition, the office sent the national retailer JoAnn Fabrics a cease-and-desist letter (because it was not an essential business) and sent a similar letter to the home improvement store Menards, because of business practices hazardous to customers’ and workers’ health, including marketing and sales designed to increase customer traffic (Mich. AG 2020a, 2020b, 2020c).

At the pandemic’s outset, the New York AG’s office issued a press release urging workers to report employers who ignore stay-at-home state executive orders; this led to thousands of workers contacting the office (N.Y. AG 2020c). The office has also been investigating safety and retaliation concerns at an Amazon warehouse, as well as issuing a warning specifically to fast-food restaurants (Selyukh 2020; WKBW.com 2020).

Attorneys general have also represented their states in defense of stay-at-home orders. For example, Wisconsin Attorney General Josh Kaul defended the governor’s stay-at-home orders against a constitutional challenge (Richmond 2020); the stay-at-home order was ultimately struck down in court (Hagemann 2020).

**Acting to protect workers’ health and safety.** The Workplace Rights Bureau of Illinois Attorney General Kwame Raoul has collaborated with local health departments to respond to worker complaints of unsafe working conditions; the Bureau was also involved in helping workers with social distancing concerns related to their factory (Sanchez 2020). Similarly, the Pennsylvania Attorney General’s Office informally helped attain safer working conditions, including more masks and hand sanitizer, for workers at an organic food store chain (Greenhouse 2020). California Attorney General Xavier Becerra’s office sent letters to agricultural employers seeking details about their health and safety practices (Cox 2020).

The Fair Labor Division of Massachusetts Attorney General Maura Healey’s office announced the creation of a form for workers to report concerns about unsafe working conditions, with the option to remain anonymous (Mass. AG 2020i, 2020o). Complaint
information (both about COVID-related safety complaints and regular Fair Labor Division complaints) is publicly available via two data sets that are downloadable from the Fair Labor Division office’s website (Mass. AG 2020n, 2020p). The creation of the form and the public disclosure of complaints has led to coverage in numerous local outlets throughout the commonwealth (AP 2020; Huffaker 2020; Copeland 2020a, 2020b).

**Helping essential workers access needed resources.** The D.C. Attorney General wrote to D.C. Mayor Muriel Bowser, advocating for grocery store workers to be designated as extended first responders or a similar designation so that they could access free COVID-19 testing, child care, and other resources for workers so designated (D.C. AG 2020c).

**Protecting “gig” workers.** Since the onset of the pandemic, several attorneys general have taken action to protect workers in the platform-based, or "gig," economy. California Attorney General Xavier Becerra and several city attorneys filed a lawsuit against the ride-sharing platforms Uber and Lyft, not specifically in relation to the pandemic, but informed by its impact on workers’ ability to access paid sick leave, unemployment insurance, and workers’ compensation coverage (Conger 2020; Calif. AG 2020a). On August 10, 2020, the judge issued a preliminary injunction against the companies (Roth, Chapman, and Eidelson 2020); the injunction was temporarily stayed by a California appeals court (Feiner 2020).

In June 2020, Massachusetts Attorney General Maura Healey also sued Uber and Lyft for misclassifying workers (Conger and Wakabayashi 2020; Mass. AG 2020m). Previously, Attorney General Healey had filed amicus briefs in support of an emergency motion by Uber and Lyft drivers seeking a determination that they were employees and thus covered by paid sick leave laws during the pandemic (Mass. AG 2020g). And D.C. Attorney General Karl Racine submitted an amicus brief in a lawsuit filed during the pandemic by a Lyft driver denied paid sick leave because of independent contractor status (Chiem 2020; Berg 2020).

Also, not in response to the pandemic but certainly relevant to these same issues, New York Attorney General Letitia James announced that her office had successfully represented the New York State Department of Labor in a case finding that a Postmates worker was an employee and not an independent contractor (N.Y. AG 2020c).

Pennsylvania Attorney General Josh Shapiro and District of Columbia Attorney General Karl Racine also reached agreements regarding paid sick leave, among other things, with companies including Instacart and DoorDash (Pa. AG 2020b; D.C. AG 2020b; DoorDash 2020).

**Enforcing wage and hour laws.** During the pandemic, AGs have continued to enforce wage and hour laws. For example, Minnesota Attorney General Keith Ellison began pursuing the owner of multiple restaurants for allegedly withholding wages and tips owed to workers recently laid off because of the COVID-19 crisis (Minn. AG 2020a). His office also provided guidance to other workers whose wages may have similarly been withheld (Minn. AG 2020b) and, as of April 2020, had sent wage theft enforcement letters to six employers (Montemayor 2020).
Protecting against unemployment insurance scams. State AGs have also been active in protecting the integrity of state unemployment insurance (UI) systems, and protecting people from UI scams. Some scams related to unemployment insurance have been widespread and highly problematic for already-struggling state agencies that administer unemployment benefits (Baker 2020).

Pennsylvania Attorney General Josh Shapiro issued a press release warning of scams preying on the newly unemployed: fake unemployment websites created with the purpose of stealing personal information or harvesting the data to sell to others (Pa. AG 2020a). Oregon Attorney General Ellen Rosenblum and the U.S. Attorney’s Office for the District of Oregon announced a partnership to counter these and other pandemic-related scams (DOJ OR 2020). The State of Michigan created a task force, including the Attorney General’s Office, with plans to prosecute perpetrators (State of Michigan 2020).

Pushing the federal government to do more to protect workers. Some state AG advocacy has focused on the federal government. A coalition of AGs sent a letter urging the president to fully utilize the Defense Production Act to prioritize production of personal protective equipment (PPE), such as masks, needed by health care workers and first responders across the country, as well as respirators and needed medical equipment (Wisc. AG 2020).

A group of AGs also wrote a letter to the president regarding worker safety in meatpacking plants (Md. AG 2020). Finally, the New York AG’s office sued the Trump administration based on its regulations related to the paid sick leave provisions of the Families First Coronavirus Response Act, arguing that the regulations were illegal because they were overly narrow and did not ensure sufficient eligibility for paid leave (N.Y. AG 2020g).

Educating the public about employee rights. Some state attorney general offices have played an important public education role by providing information on their websites about employee rights and employer obligations. Arizona Attorney General Mark Brnovich issued a press release informing workers of their rights under the state’s paid sick leave law (Ariz. AG 2020). The District of Columbia AG’s office held a tele-town hall about workers’ rights during the pandemic (Racine 2020). Massachusetts Attorney General Maura Healey posted COVID-19-related guidance for employers and workers, including information about unemployment insurance, paid sick leave, wage payment, and other issues, available in multiple languages (Mass. AG 2020h). Vermont Attorney General T.J. Donovan issued workplace guidance on COVID-19-related concerns, to help workers and employers navigate a range of issues that may arise (Vt. AG 2020a, 2020b).

Wage theft

Wage theft occurs when workers are not paid all of the money they are owed for their labor. Forms of wage theft include minimum wage and overtime violations, nonpayment of wages, uncompensated work time, nonpayment of prevailing wage, and similar violations. Some examples of state AG wage theft cases include the following.
District of Columbia. From 2018 through 2020, D.C. Attorney General Karl Racine announced several settlements for wage theft, including at a sheet metal company, a cell phone store, a juice bar chain, a KFC franchisee, and a local restaurant chain (D.C. AG 2018a, 2018c, 2019a, 2019b, 2020e). Racine’s office also obtained a judgment for over $200,000 in restitution and penalties from a home health care company that failed to pay 26 workers for more than 3,500 combined hours of work over a several-week period.

Massachusetts. The Fair Labor Division of the Massachusetts AG’s office brought a number of wage theft cases, including investigations involving supermarkets in Boston, Dorchester, and Quincy, all with wage and hour violations leading to underpayment of workers (Mass. AG 2018c, 2018g, 2019c). The office also resolved a case involving a home health care company with “a pattern of late and underpaid wages” that had affected more than 200 workers (Mass. AG 2019g), as well as in 2020 an overtime case with another home health agency (Mass. AG 2020j). The office imposed a restitution and penalty order of more than $837,000 on a construction company that had violated wage and hour laws (Mass. AG 2018h), recovered $186,000 from a utility company that had failed to pay overtime (Mass. AG 2020q), and even found wage underpayments at the student-run Harvard Shop (Avi-Yonah and Franklin 2019). The office also secured $125,000 from a restaurant chain for wage theft, retaliation, and failure to pay earned sick leave (Mass. AG 2020r). Finally, the AG’s office conducted investigations of several construction companies for prevailing wage violations, which led to citations in 2019 against a construction company (for $580,000) and a roofing and construction company (Mass. AG 2019h, 2019j).

Michigan. In 2019, the new payroll fraud unit in Michigan Attorney General Dana Nessel’s office announced its first civil case, pursued against the owners of a restaurant business who had allegedly sold the business without notifying the workers and without paying the workers their final paychecks (Mich. AG 2019b).

Minnesota. In 2019, Minnesota Attorney General Keith Ellison’s new wage theft unit began investigating downtown St. Paul’s largest property owner for potential overtime violations involving security guards who were assigned to work totaling more than 40 hours a week. The security guards were allegedly paid straight time for all hours worked after being asked to submit time sheets to separate companies within the parent company (Nelson 2019).

New York. In 2020, New York Attorney General Letitia James announced a $250,000 recovery in a case involving an ambulette company that didn’t pay its workers overtime; the settlement also specified that the state AG’s office would monitor the company’s payroll practices for two years (N.Y. AG 2020a). The New York AG office’s 2019 wage and hour cases included a $530,000 settlement with a Brooklyn car wash and a $450,000 settlement with a company that not only underpaid home health aides, but also threatened them with deportation when they complained about unpaid wages (N.Y. AG 2019j, 2019k).

In 2018, then–New York Attorneys General Barbara Underwood and Eric Schneiderman announced settlements with two reality television production companies for $282,000 and $226,000, based on the companies’ failure to pay overtime to production assistants and
associate producers; these workers’ duties did not exempt them from overtime coverage (N.Y. AG 2018b, 2018e).

**West Virginia.** In 2020, West Virginia Attorney General Patrick Morrisey helped secure unpaid wages and benefits such as paid time off for workers whose employer, a hospital, had abruptly closed. One settlement of nearly $1 million covered paid time off, accrued vacation time, and bonus days for a number of employees (W.V. AG 2020b). Another settlement of more than $240,000 covered paid time off for certified nurse assistants and support nurses as well as support staff and cafeteria and maintenance workers (W.V. AG 2020a).

**Earned/paid sick time**

Thirteen states plus the District of Columbia have passed paid sick days laws (sometimes called earned sick time laws), as have 21 localities (including seven within California). These laws require employers to provide a modest number of paid sick days (usually around five per year) to qualifying employees. Some state AGs have played a role in enforcing these laws.

**Massachusetts.** In January 2018, Massachusetts Attorney General Maura Healey imposed a $60,000 penalty on a company that owned 60 Dunkin’ Donuts locations for violating the state’s earned sick time law (Mass. AG 2018d).

**New York.** In December 2019, New York Attorney General Letitia James, along with New York City officials, announced a settlement with Starbucks for violations of the city’s Paid Safe and Sick Leave Law (N.Y. AG 2019c, 2019d). The settlement resulted from a collaborative effort between the AG’s office and the city’s Department of Consumer and Worker Protection, which has primary responsibility for enforcing that law. The settlement requires Starbucks to pay restitution to workers and also to post an educational poster about the Paid Safe and Sick Leave Law in a place visible to workers as well as to customers.

**Child labor**

**Massachusetts.** In 2020, Massachusetts Attorney General Maura Healey resolved two cases with major fast food chains: a settlement with Wendy’s for $400,000 and one with Chipotle for almost $2 million (Mass. AG 2020b, 2020d). Among other violations, Chipotle had minors working far later and much longer hours than permitted by child labor laws. As part of the settlement, Chipotle agreed to pay $500,000 toward a fund to be administered by the AG’s office to benefit young people through education programs about child labor and enforcement of child labor laws, as well as training and workforce development.

The previous year, the Massachusetts AG’s office cited Qdoba for over $400,000 based on child labor violations at corporate-owned locations in Massachusetts (Mass. AG 2019b). The office’s overall enforcement in this area has garnered coverage in the *Boston Globe* (Johnston 2020).
Sexual harassment

**New York.** In July 2020, Attorney General Letitia James secured approximately $19 million for women who had experienced sexual and workplace harassment by Harvey Weinstein. If approved by the relevant courts, the payments will resolve a 2018 lawsuit filed by the office against Harvey Weinstein, Robert Weinstein, and the Weinstein Company LLC (N.Y. AG 2020i).

In January 2020, New York Attorney General James announced a settlement with both a Greenwich Village restaurant as well as the individual who was its owner (N.Y. AG 2019j, 2020a). The settlement required payment of $240,000 in restitution to 11 former employees and provided for a 10-year profit-sharing arrangement for them. However, the restaurant closed several weeks later, leaving the implementation of the profit-sharing provision in question (Moskin and Severson 2020). The settlement—assuming the continued operation of the restaurant—had also required the restaurant to provide trainings on workers’ rights under the law, for its managers and employees; establish a complaint procedure; allow for ongoing monitoring by the attorney general’s office; and remove certain individuals from management positions at the restaurant.

**Washington.** In October 2018, Washington State Attorney General Bob Ferguson announced a consent decree, or a court order to which all parties have agreed, resolving a 2017 lawsuit against an agricultural employer for sexual harassment, discriminatory hiring and sex-segregated employment practices, and retaliation against workers who reported the violations (Wash. AG 2018b). This case provides a good example of an AG office working closely with a worker advocacy organization: The Northwest Justice Project referred the case to the AG’s office, worked on the case with the AG’s office, and represented five workers who intervened as plaintiffs (which means that they joined the case as additional plaintiffs, on the same side as the AG’s office). The consent decree required payment of $525,000 to compensate workers and for fees and costs related to the litigation; it also required establishment of complaint procedures, reports to the AG’s office, and management trainings, as well as prohibition of an individual from holding any supervisory position with the employer.

Civil enforcement addressing noncompete agreements, misclassification, and platform-based company violations

State AGs have also taken action to address some broader workplace trends that have developed over recent decades, such as the proliferation of noncompete and similar provisions in employment contracts, misclassification of workers as independent contractors, and violations by platform-based or “gig economy” companies.
Noncompete and no-poach/no-hire agreements

Noncompete agreements ("noncompetes") prevent people from working for their former employer's competitors, generally within a set geographical radius and for a set duration. They were once used sparingly, to prevent—for example—executives with trade secrets or confidential business information from sharing them with competitors. Now, they're often used more broadly, including for employees with no access to such information. A recent EPI study of a random employer sample (634 companies with 50 or more employees) revealed that nearly half required noncompete agreements for at least some employees, and nearly a third required all employees to sign noncompetes (Colvin and Shierholz 2019). Studies have found that noncompetes adversely affect wages and job mobility (Johnson, Lavetti, and Lipsitz 2019; Lipsitz and Starr 2019).

Most states use a common-law analysis to assess the enforceability of noncompetes. Under this analysis, noncompetes are only enforceable if they protect a legitimate business interest of the employer, are reasonably limited in scope (duration and geography), and do not unduly restrict a worker's ability to earn a living. Some states, particularly in the last several years, have passed statutes specifically limiting or prohibiting noncompetes (Flanagan 2019; Flanagan and Gerstein 2019).

No-poach/no-hire agreements are typically between two businesses (such as a franchisor and franchisee), and under these arrangements, franchisees, for example, pledge not to hire job applicants who are current or recent employees of the company or any of its franchisees, without the approval of the applicants' current employers. These raise potential anti-trust violations, because they involve two or more employers colluding in their agreement not to hire each other's employees.

Several attorneys general have taken enforcement action to address improper use of noncompetes and no-poach/no-hire agreements.

**Illinois.** In 2019, then–Illinois Attorney General Lisa Madigan announced a settlement with a national payday lender, Check Into Cash, related to its use of noncompete agreements (Ill. AG 2019a). Under the agreement, the company may not require store-level employees earning less than $13 per hour to sign noncompetes, and it must notify affected employees of this change; the company was also required to pay $75,000 for the AG's office to use toward public outreach on noncompete agreements. The office also issued guidance about the state law on noncompetes (Ill. AG 2019d). In 2020, Illinois Attorney General Kwame Raoul filed a lawsuit against three staffing agencies and their client for use of no-poach agreements, as well as wage-fixing.23

**New York.** In 2018, then–New York Attorney General Barbara Underwood settled an investigation into a Long Island payment processing firm requiring it to stop using noncompetes (N.Y. AG 2018). The noncompetes had been presented in English only, even though a number of employees had limited English proficiency, and several former employees had been sued or blocked from accepting new jobs because of the noncompetes they had signed. The settlement required the company to discontinue all pending litigation enforcing its noncompetes.
The AG’s office also released educational materials about the state’s law on noncompetes, providing easy-to-understand answers to common questions workers have regarding noncompetes (N.Y. AG 2018).

**Pennsylvania.** Pennsylvania Attorney General Josh Shapiro filed an amicus brief in *Pittsburgh Logistics v. Beemac Trucking*, encouraging the Pennsylvania Supreme Court to affirm a lower court decision that certain restrictive no-poach terms are void as against public policy and harmful to workers.\(^{24}\)

**Washington.** In 2019, Washington State Attorney General Bob Ferguson announced that his office had resolved a lawsuit against a Washington coffee chain based on its use of noncompete agreements (Wash. AG 2019c).\(^{25}\) All employees, including hourly baristas, had been required to sign noncompetes. The settlement requires the chain to void existing noncompete agreements, not require hourly baristas to sign noncompete agreements, and pay $50,000 in fees and costs. Any new noncompete agreements must be specifically approved by the AG’s office on a case-by-case basis and can only be applied to employees earning at least $100,000 per year.\(^{26}\)

Washington Attorney General Bob Ferguson has undertaken an extensive initiative to end the use of no-poach clauses in franchise agreements. In June 2020, his office released a report detailing accomplishments in this area (Wash. AG 2020), including eliminating no-poach agreements at 237 corporate franchise chains across the country and providing testimony before Congress about the subject (Rao 2019).

### Misclassification and payroll fraud

Misclassification occurs when workers are wrongly treated as independent contractors instead of as employees. Workplace laws—including wage and hour, unemployment insurance, workers’ compensation, safety and health, collective bargaining, and anti-discrimination laws—protect employees but do not cover independent contractors.

Payroll fraud occurs when employers pay workers cash wages “off the books” and thereby avoid paying unemployment insurance taxes, procuring required workers’ compensation insurance, and withholding payroll taxes, among other things. Misclassification is sometimes also considered a form of payroll fraud.

Misclassification and payroll fraud lead to violations of a host of laws, including overtime, workers’ compensation, unemployment insurance, and tax laws. Such violations affect workers, who are deprived of critical protections; honest employers, who struggle to compete with low-road competitors who save on costs by violating the law; and also the public coffers, which suffer because of unpaid taxes, among other things.

Several attorneys general have taken action to address payroll fraud and misclassification. As noted previously, the attorneys general of California and Massachusetts have both filed lawsuits against Uber and Lyft based on the companies’ treatment of drivers as independent contractors and not employees. Additional examples are below.
District of Columbia. In 2018, D.C. Attorney General Karl Racine sued Power Design, Inc., a national electrical contractor that had allegedly misclassified hundreds of workers as independent contractors (Thebault 2018). In 2020, AG Racine obtained a $2.75 million settlement in the case (D.C. AG 2020a). Under the consent order, the company must pay restitution to workers who were paid less than the D.C. minimum wage, were not paid the overtime rate for overtime hours worked, or did not receive paid sick leave as required by D.C. law. The company must also pay penalties to the District and funds to support programs that provide apprenticeships, job training, or workforce development opportunities to D.C. residents. The consent order further requires Power Design to implement and report on its measures to ensure compliance with D.C.’s worker protections, and to report on its use of subcontractors.

Along with the investigation, Attorney General Racine released a 2019 report, authored in part by economists commissioned by the office, analyzing the illegal cost savings to employers who misclassify workers (D.C. AG 2019c, 2019e). He also testified in a congressional hearing about misclassification of workers and potential federal legislation to address it (Racine 2019a).

Massachusetts. In 2019, Massachusetts State Attorney General Maura Healey reached a $335,000 settlement with both a cleaning and janitorial services company and the individual who served as its president, for misclassifying workers as independent contractors and violating the state’s earned sick time law (Mass. AG 2019e). The company had been providing janitorial services at all Massachusetts Whole Foods locations; Whole Foods subsequently terminated its contract with the company. The case provides an example of collaboration between the office and worker advocacy groups: The office began its investigation after receiving a referral from Greater Boston Legal Services, Metrowest Worker Center, and the Brazilian Women’s Group.

In 2018, Attorney General Healey cited a medical transportation business and its managers, ordering them to pay more than $460,000 because of worker misclassification and failure to pay overtime (Mass. AG 2018e).


Enforcement involving platform-based or ‘gig’ economy companies

District of Columbia. In 2019, D.C. Attorney General Karl Racine filed a lawsuit against the food delivery company DoorDash for retaining tips meant for workers (D.C. AG 2019d). The company used consumers’ tips to offset the guaranteed amount the company owed to workers, so that workers were almost always paid the same, no matter how much a customer tipped. The lawsuit was brought as an action to protect consumers from fraud, because consumers intended tips to go to the workers; the lawsuit did not address the question of classification of workers (as independent contractors or employees). However,
the lawsuit addresses a practice that is adverse to both consumers and workers.

**Massachusetts.** In 2019, Massachusetts Attorney General Maura Healey resolved an investigation involving a digital platform company that placed dental and other health care workers in offices and treated these workers as independent contractors (Johnston 2019). The settlement required the company to change its business practices so that these workers would be treated as employees going forward.³⁰

In 2020, the AG’s office investigated a staffing and referral company that places workers in public and private school jobs; after finding that the referral company was misclassifying workers as independent contractors, the AG’s office obtained an agreement from the company to modify its practices so that workers would be treated as employees going forward (Mass. AG 2020e).

**Criminal enforcement**

The criminal enforcement powers of state attorneys general vary greatly: In some states, such as Delaware and Rhode Island, state AGs have sole responsibility for criminal enforcement, while in Connecticut, the AG’s office has no criminal jurisdiction. Most states fall somewhere in between these two extremes: They may have jurisdiction over certain specific statutes, or upon request of the district attorney or referral by a state agency, for example. Numerous state attorneys general have used their criminal enforcement powers to pursue criminal charges against employers who commit wage theft, payroll fraud, or other crimes against workers.

The list below describes criminal charges or prosecutions of labor rights cases by state AG offices from 2018 to 2020. In some states, like California, Massachusetts, and New York, AG offices have a history of exercising criminal enforcement of labor rights, going back over a decade or more. Other state AG offices have recently brought what appear to be their first criminal prosecutions of wage theft or similar cases. AGs to date have not generally brought criminal prosecutions related to workplace safety and health, while a number of district attorneys have.³¹ This is an area AGs could consider getting involved in.

**California.** In 2019, California Attorney General Xavier Becerra announced criminal charges against the operators of an underground garment shop licensing scheme (Calif. AG 2019a).³² Garment contractors must be licensed in California; the defendants allegedly engaged in a scheme to defraud the state Labor Commissioner’s Office into issuing licenses to contractors otherwise ineligible because of past labor violations or unpaid taxes, among other factors.

**Massachusetts.** In 2019, Massachusetts Attorney General Maura Healey announced the guilty plea of a cleaning company owner who had misclassified workers in order to unlawfully reduce his workers’ compensation premiums (Mass. AG 2019d). The owner had also obtained several municipal contracts by submitting lower bids than his competitors; he was able to do so because of the money he saved as a result of the misclassification. He was sentenced to one year of incarceration and required to pay $74,000 in restitution, and he was ordered not to bid on municipal projects for two years.
The same year, the AG’s office also announced guilty pleas of owners of a temp agency for wage theft, witness intimidation, and retaliation against warehouse workers, as well as tax and unemployment insurance fraud (Mass. AG 2019k). The AG found that warehouse workers placed by the temp agency were paid below minimum wage, with no overtime premiums, even though they routinely worked 60 to 70 hours per week—and sometimes more. The AG’s office learned about the violations from some of the warehouse workers, who were referred to the AG’s office by a local branch (known as a local) of the United Food and Commercial Workers International Union.

**Michigan.** In 2019, Michigan Attorney General Dana Nessel brought criminal charges against an employer who allegedly withheld more than $52,000 from workers’ paychecks for deferred retirement contributions but failed to deposit the funds into their accounts or pay the employer match (Mich. AG 2019a). The case was referred to the Michigan AG’s office by the U.S. Department of Labor.

**Montana.** In 2019, Montana Attorney General Tim Fox announced the guilty plea of the owner of a construction company charged with felony employer misconduct; the employer was paying employees cash wages in order to avoid paying workers’ compensation and payroll taxes (Mont. AG 2019). \(^{33}\)

**New Jersey.** In 2019, New Jersey Attorney General Gurbir Grewal’s office obtained a guilty plea from a contractor who had underpaid workers—paying below the required prevailing wage—and falsified payroll records (Insider NJ 2019).

**New York.** New York Attorney General Letitia James brought a number of criminal cases in 2019, including a case against the owners and manager of a New York City restaurant for wage theft (N.Y. AG 2019e, 2019l) and a case against the owners of a construction contracting business who failed to pay prevailing wages and falsified records on a publicly funded construction project (N.Y. AG 2019f). The contractors ultimately pleaded guilty; they were debarred (prohibited from bidding on or being awarded any public works contract in the state) for five years and ordered to pay restitution.

Also in 2019, Attorney General James announced the sentencing of a farm owner for child labor violations in relation to the fatality of a 14-year-old worker (N.Y. AG 2019h).

Several criminal prosecutions also occurred in 2018, during the tenure of then–New York Attorney General Barbara Underwood, including cases involving a Hamptons diner owner, who was sentenced to six months of jail time after failing to pay workers (while repeatedly inducing them to keep working with promises to pay); a Long Island food processor (for wage theft, falsified records, and failure to procure workers’ compensation insurance); and three construction companies (for nonpayment of wages and prevailing wage violations, among other things). \(^{34}\) One of the construction cases was referred by the Port Authority Inspector General, while another resulted from a collaboration with the New York State Department of Labor and the New York State Office of the Inspector General. In addition, in 2018, the New York AG’s office announced guilty pleas and convictions of three Queens construction companies pursuant to charges that they failed to pay 150 workers over $370,000 in wages, as a result of misclassifying them as independent contractors to avoid paying overtime (N.Y. AG 2018c).
Pennsylvania. In 2019, Pennsylvania Attorney General Josh Shapiro announced criminal charges against a public works contractor who allegedly underpaid wages, along with other violations (Pa. AG 2019a).

Rhode Island. In 2019, Rhode Island Attorney General Peter Neronha brought charges in his office’s first criminal wage theft case, against a window and solar system installer that had allegedly failed to pay wages to workers and issued the workers bad checks (Providence Journal 2019).

Two more cases followed in 2020: Arrest warrants were issued for Texas contractors who had failed to pay workers on a hotel construction project in Rhode Island (R.I. AG 2020a), and AG Neronha’s office charged the owner of a cleaning company with wage theft and workers’ compensation–related charges (R.I. AG 2020b; Mulvaney 2020).

Washington. In 2019, Washington Attorney General Bob Ferguson filed criminal charges against the owners of a housecleaning business, alleging they had failed to pay their workers all wages owed and had also failed to pay worker’s compensation premiums to the state (Wash. AG 2019d).

Multistate enforcement efforts

Although state attorneys general have long collaborated in joint enforcement efforts in many other areas, such as consumer or anti-trust cases, they have not historically engaged in coalition efforts on labor or workers’ rights issues. However, during the time period covered by this report, there have been several joint enforcement activities by various state AG offices.

No-poach, no-hire agreements. In 2018, a coalition of 11 AG offices, led by Massachusetts Attorney General Maura Healey and Pennsylvania Attorney General Josh Shapiro, sent a letter to eight national fast-food franchisors about the “no-poach” agreements in their franchise contracts (Abrams 2018; Mass. AG 2018f). These no-poach agreements restrict a franchisee’s ability to hire employees of the franchisor or of other franchisees in the same chain. The coalition—which ultimately grew to represent 14 AG offices—announced agreements with four of the franchisors in 2019 (Mass. AG 2019f; Pa. AG 2019b) and with three additional franchisors in 2020 (Mass. AG 2020e). The agreements stipulated that the companies would stop using no-poach agreements and stop enforcing them.

Noncompetes. In 2018, then–attorneys general of Illinois and New York Lisa Madigan and Barbara Underwood announced a settlement with the co-working real estate company WeWork based on its use of overly broad noncompete agreements with its employees (Ill. AG 2018a; N.Y. AG 2018k; Noguchi 2018). The settlement required the company to release over 1,400 employees nationwide from their noncompete agreements and also required that an additional 1,800 employees be subject to much less restrictive agreements. WeWork was required to notify all current and recent former employees of their release from the earlier agreements.
Unpaid wages in mine bankruptcy case. In 2019, then–Kentucky Attorney General Andy Beshear and Attorney General Mark Herring of Virginia sent a joint letter to the U.S. Trustee in a bankruptcy case involving unpaid wages owed to mining employees, noting the hardships caused by nonpayment of wages, including inability to pay mortgages, utility bills, and basic living expenses (Herring and Beshear 2019). Then–Attorney General Beshear subsequently announced that his office had investigated and found a failure by the state’s Labor Cabinet to enforce a law requiring certain mining companies to post a performance bond to cover wage payments in case of unexpected closure (Wave3 News 2019).

Employment-related arbitration. In 2019, D.C. Attorney General Karl Racine led a coalition of 12 state AGs in sending letters seeking information from the two major arbitration providers, the American Arbitration Association and Judicial Arbitration and Mediation Services (D.C. AG 2019f, 2019g). In the letters, the attorneys general highlight problems workers have encountered during arbitration, including stalled proceedings caused by employer failure to pay required arbitration filing fees; the coalition requests documents and data to better understand the cause and scope of these issues.

Amicus briefs

State attorneys general can influence labor and employment policies by filing amicus briefs in labor and employment cases, both individually and through coordinated multistate efforts.

Defending a truck driver against forced arbitration. In July 2018, 15 states filed an amicus brief in the U.S. Supreme Court case New Prime v. Oliveira, in which the Court ultimately agreed with the AGs’ position and held that a truck driver designated as an independent contractor was not subject to forced arbitration, because his “independent contractor” contract fell within a Federal Arbitration Act exemption for employment contracts of transportation workers.

Upholding wage and hour protections for agricultural workers. In May 2018, the Washington State Supreme Court agreed with an amicus brief filed by Attorney General Bob Ferguson stating that agricultural workers who are paid on a “piece-rate” basis are also entitled to hourly compensation for time they spend on other aspects of their jobs.

Protecting local minimum wage and paid sick days laws against preemption challenges. In August 2019, Minnesota Attorney General Keith Ellison filed an amicus brief on behalf of the state Department of Labor and Industries, supporting the City of Minneapolis against a challenge claiming that its city minimum wage law was preempted by state law. In September 2019, the office filed another amicus brief on behalf of the department, supporting Minneapolis against a preemption challenge of its paid sick days law. Both city laws were ultimately upheld (Sepic and AP 2020; Montgomery 2020).
Supporting labor protections for airline workers. In January 2020, California Attorney General Xavier Becerra filed an amicus brief in defense of California’s labor laws and in support of airline flight attendants in a case in which Virgin America argued that it was not subject to California’s labor laws, including wage and hour laws (Calif. AG 2020b). Twenty additional states also jointly filed a separate amicus brief in the case.

In May 2020, a coalition of 19 AGs filed an amicus brief supporting Washington against a challenge by an airline association to the state’s paid sick leave law.

Legislation

Many state attorneys general have units within their office dedicated to drafting and proposing legislation. Some have used their legislative units to introduce bills that enhance worker protections and target abusive practices. Others have assisted with pro-worker legislation in their capacity as counsel to state agencies.

Delaware. In Delaware, the attorney general’s office assisted in developing the Delaware Contractor Registration Act, which requires construction contractors to, among other things, register with the state and disclose prior labor law citations or home improvement/construction fraud convictions of contractors or of people with a financial interest in the contractor’s business. It also allows for five-year suspension of a contractor’s license for certain conduct, includes a civil penalty (between $5,000 and $85,000) for knowing violations, and allows the labor department to require a surety bond as a condition of registration when an applicant has prior violations.

Michigan. In Michigan, Attorney General Dana Nessel played a key role in promoting pro-worker legislative proposals, not yet enacted, that would strengthen whistleblower protections for employees reporting violations and toughen penalties for payroll fraud, among other things (Frost 2019).

Minnesota. During the 2019 legislative session, Minnesota Attorney General Keith Ellison played an instrumental role in achieving stronger anti-wage theft laws (Montemayor 2019).


Washington. In 2020, Washington Attorney General Bob Ferguson, along with the state’s governor, Jay Inslee, began advocating for a domestic workers bill of rights in their state (Goldberg 2020).

Issuing reports

Several attorneys general have issued reports, either about specific issues or as a compilation of their worker protection activities in the year. Massachusetts Attorney General Maura Healey’s office issued *Annual Labor Day Reports* in 2018 and 2019. (Mass. Economic Policy Institute • Harvard Labor and Worklife Program

**General advocacy, public leadership, and outreach**

State AGs have played a highly public leadership role in standing up for workers in their states, garnering media and public attention to the issues affecting working people, and making sure workers are informed about their rights. A full list of activities would be extensive; the following four offices provide illustrative examples.

**District of Columbia.** District of Columbia Attorney General Karl Racine’s office held a know-your-rights virtual event, in conjunction with a number of worker organizations, on July 1, 2020, the effective date of an increase in the District’s minimum wage (Labor Project 2020).

**Massachusetts.** Massachusetts Attorney General Maura Healey’s office received positive media coverage for its overall efforts to protect workers (Rath 2019). The office issued press releases in 2019 and 2020 summarizing enforcement actions in the construction industry (Mass. AG 2019a, 2020a).

**Minnesota.** Minnesota Attorney General Keith Ellison inaugurated a podcast, *Affording Your Life* (Ellison 2019a); two of the Season 1 podcasts covered workers’ rights and wage theft issues (Ellison 2019b, 2019c). His office has also hosted roundtable discussions and listening sessions on wage theft (Minn. AG 2019c; Minnesota AFL-CIO 2020; Durheim 2019).

**Pennsylvania.** Pennsylvania Attorney General Josh Shapiro has conducted numerous outreach events on worker issues, and his office has used social media, including Twitter and Instagram, to expand the reach of these efforts. He participated in a “women in the workplace” listening session with Latina women in the Allentown/Bethlehem area (Shapiro 2019b); a roundtable with local labor leaders in the Lehigh Valley (Shapiro 2019a); and a listening session with drivers for platform-based driving companies (Uber, Lyft, etc.) in Philadelphia (Shapiro 2019c). He also participated in an Uber ride-along in Philadelphia, where, as a passenger, he asked the driver what challenges and difficulties he faced in his work (Shapiro 2019d).
Congressional testimony

Several attorneys general or their staff testified before Congress in 2019, including Illinois Attorney General Kwame Raoul (about wage theft), D.C. Attorney General Karl Racine (about misclassification), and a representative of Washington Attorney General Bob Ferguson (about no-poach, noncompetes, and similar anti-competitive issues).

2019 Labor Day activities

The period around Labor Day has presented an opportunity for state AGs to engage in labor-related efforts. In addition to traditional activities like marching in parades, the following are some examples of how state AGs marked Labor Day 2019.

- **Connecticut.** Connecticut Attorney General William Tong held a hearing on immigrant workers’ rights (Conn. AG 2019).
- **District of Columbia.** D.C. Attorney General Karl Racine released a report (described above) on misclassification and held a public forum related to the release (D.C. AG 2019c; Maher 2019).
- **Illinois.** The office of Illinois Attorney General Kwame Raoul conducted workers’ rights outreach in conjunction with Latin American consulates, with new office “know-your-rights” materials in English and Spanish (Ill. AG 2019c).
- **Massachusetts.** Massachusetts Attorney General Maura Healey issued her office’s annual Labor Day report, as described above (Mass. AG 2019i).
- **Maryland.** Maryland Attorney General Brian Frosh unveiled a labor page on the AG office website (Md. AG n.d.).
- **Washington.** Washington Attorney General Bob Ferguson issued his office’s inaugural Labor Day report, as previously described (Wash. AG 2019a).
Responding to federal rollbacks of workers’ rights

Multistate action: Authoring comments in response to proposed regulations

During the period covered by this report (2018–2020), state attorneys general have been active in advocating in favor of workers’ rights by drafting joint comments on proposed federal regulations on numerous labor-related topics.

Workplace injury reporting. In 2018, seven state AGs, led by the New Jersey AG, wrote a comment letter opposing a proposal by the U.S. Department of Labor (DOL) and the Occupational Safety and Health Administration (OSHA) to roll back the 2016 Workplace Illness and Injury Reporting Rule; the rule had required very large businesses to electronically submit annual reports on employee injuries and illnesses (Grewal et al. 2018). A group of six attorneys general later sued when the proposed rollback was finalized (see “Lawsuits against the federal government,” below).

Child labor. In 2018, 12 state AGs, led by the Massachusetts AG, wrote a comment letter opposing a DOL-proposed rule change that would allow minors (ages 16–17) to operate power-driven patient lifts in health care settings without training or adult supervision (Healey et al. 2018). The Trump administration ultimately abandoned this rule (U.S. DOL 2019).

Joint employment under the National Labor Relations Act (NLRA). In 2019, 25 state AGs, led by the attorneys general of New York and Pennsylvania, submitted comments regarding a proposal by the National Labor Relations Board (NLRB) that would narrow the definition of a joint employer, making it harder to hold higher-level companies “up the chain” liable for workplace violations (N.Y. AG 2019i; James et al. 2019b; Shierholz and Poydock 2020).

Joint employment under the Fair Labor Standards Act (FLSA). In 2019, 18 state AGs, led by the attorneys general of Massachusetts, New York, and Pennsylvania, wrote a comment letter opposing a DOL-proposed rule to narrow the interpretation of joint employment under the FLSA (Healey et al. 2019). The final rule was similar to the original proposal.

Overtime coverage. In 2019, 15 state AGs, led by the New York and Pennsylvania attorneys general, wrote a comment letter opposing a DOL-proposed rule on the salary threshold for the executive, administrative, and professional (EAP) overtime exemption (often referred to as the “white collar” exemption) (James et al. 2019a). The letter notes that the proposed rule would weaken overtime coverage, particularly in comparison with a more protective 2016 proposed rule. The final rule was similar to the proposed rule.

Labor issues in anti-trust cases. In 2019, 18 state AGs, led by the D.C. attorney general, submitted comments to the Federal Trade Commission (FTC) in relation to hearings held by the FTC on competition and consumer protection in the 21st century (Racine et al. 2019).
In the letter, the AGs urge greater consideration of labor issues in enforcement of anti-trust laws, including addressing no-hire and no-poach agreements, noncompete agreements, and labor issues arising in mergers. A group of 19 state AGs, led by the attorney general of Minnesota, later submitted a letter to the FTC, urging the Commission to start rulemaking to classify noncompete clauses in employment contracts as an unfair method of competition and illegal for low-wage workers (Minn. AG 2019b). In March 2020, a group of 19 state AGs submitted a formal comment letter to the FTC (D.C. AG 2020d). The FTC is still considering whether to undertake such a rulemaking.

**Apprenticeship programs.** In 2019, 13 state AGs, led by Washington’s AG, wrote a comment letter urging DOL to modify a proposed rule about apprenticeship programs to ensure their quality and strengthen protections for apprentices (Ferguson et al. 2019).

**Civil rights in the workplace.** In 2019, 17 state AGs, led by California’s and Pennsylvania’s attorneys general, opposed a DOL-proposed rule that would undermine long-established civil rights protections prohibiting workplace discrimination by federal contractors (Shapiro et al. 2019). The proposed rule would make the religious organization exemption “broader and less defined,” leaving it open to abuse by employers.

**Protection of workers saving for retirement.** In 2020, nine state AGs, led by the California AG, authored a comment letter opposing a DOL-proposed rule that would weaken protections for workers saving for retirement by reinstating a test that would allow financial advisers to avoid fiduciary obligations (Calif. AG 2020c, 2020d).

## Lawsuits against the federal government

Several state attorneys general have filed lawsuits against the federal government, challenging diminutions of workers’ rights or otherwise seeking to protect the workers in their jurisdictions.

**Protecting access to paid sick leave.** As described previously, in April 2020 New York Attorney General Letitia James sued DOL (N.Y. AG 2020g), challenging paid sick leave rules issued pursuant to the Families First Coronavirus Response Act (FFCRA). In August 2020, her office prevailed: A federal court invalidated those rules as overly narrowing access to leave in excess of DOL’s authority.\(^{51}\)

**Challenging revisions to the joint-employer rule.** In February 2020, 18 AG offices, led by the New York and Pennsylvania AG’s offices, filed a lawsuit against DOL, challenging a new federal rule narrowing the definition of a joint employer (Penn 2020).\(^{52}\) In June 2020, a federal district court denied a motion to dismiss the challenge.\(^{53}\)

**Defending California labor protections.** In February 2019, California Attorney General Xavier Becerra filed a petition seeking to protect the rights of truck drivers to take meal and rest breaks under California labor rules (Calif. AG 2019b). In March 2020, he filed a lawsuit challenging the Federal Motor Carrier Safety Administration’s efforts to preempt state law and undermine California’s meal and rest break rules (Calif. DIR 2020).

**Protecting worker health and safety.** In March 2019, six state AGs, led by New Jersey
Attorney General Gurbir Grewal, filed a lawsuit challenging DOL and OSHA's rescission of the 2016 Workplace Illness and Injury Reporting Rule, which had required very large businesses to electronically submit annual reports on employee injuries and illnesses (N.J. AG 2019).

**Holding the federal government accountable.** In August 2018, then–New York State Attorney General Barbara Underwood filed a lawsuit against DOL after it failed to respond to a Freedom of Information Act (FOIA) request for records about the new Payroll Audit Independent Determination (PAID) Program. Eleven state attorneys general, led by then–New York State Attorney General Eric Schneiderman, had expressed concerns about the PAID program in an April 2018 letter to DOL (N.Y. AG 2018m), including the concern that the program would require workers to waive rights under state law. A 2020 article authored by a management law firm attributed the modest results of the PAID program to employers’ concern that “if they settle a matter through the PAID program and their state attorney general hears about it, the employer should expect a visit from state enforcement personnel” (Tabakman 2020).

**Representing their states**

**General representation of states**

A core function of state AG offices is representing their states in court. This work is conducted by all state AGs nationwide. In this capacity, state AGs are sometimes called upon to play a critical role in defending important worker protections.

**California.** In California, Attorney General Xavier Becerra has been responsible for defending all challenges to the state’s new law, CA AB5, which adopts the more stringent “ABC test” for determining whether a worker is an employee. Several lawsuits have been filed challenging the law, including a suit by Uber and Postmates (Herrera 2019).

Previously, Attorney General Becerra’s office defended the state against a lawsuit filed by a trucking association; the suit challenged the application of the ABC test to truck drivers, as required by the California Supreme Court’s 2018 decision in *Dynamex Operation West, Inc. v. Superior Court* (the predecessor decision which ultimately led to legislative passage of AB5). Attorney General Becerra secured the dismissal of that lawsuit in 2019 (Calif. AG 2019c).

**Massachusetts.** Massachusetts Attorney General Maura Healey successfully defended against a lawsuit challenging the application of the commonwealth’s Domestic Worker Bill of Rights laws to au pairs (Taylor 2020; Mass. AG 2020c). The final court ruling affirmed that au pairs are entitled to the minimum wage and other labor protections under Massachusetts law.

**New York.** The New York Attorney General’s Office successfully represented the Commissioner of Labor in a case in which the labor department determined that a worker for Postmates was an employee and not an independent contractor under the state’s
unemployment insurance law. The Court of Appeals, the state’s highest court, upheld the Commissioner’s determination against a challenge by Postmates.

The AG’s office is also defending the state against a lawsuit challenging the state’s new law granting collective bargaining and other rights to farmworkers (Clark 2019).

Washington. Washington Attorney General Bob Ferguson successfully defended the state against a lawsuit by an airlines association challenging the state’s paid sick leave law as unconstitutional (FordHarrison LLP 2019).

Representing states in relation to the Supreme Court Janus decision

In 2018, the U.S. Supreme Court issued its decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31, holding that requiring public employees to pay union fair share agency fees to cover the costs of collective bargaining violates the First Amendment. The decision bars unions from requiring workers who benefit from union representation to pay their fair share of that representation. As a result, workers who wish to join in union will be forced to operate with fewer and fewer resources (McNicholas 2018).

The state of Illinois was a respondent in the Janus case, represented by Illinois Attorney General Lisa Madigan. Given the significance of the issue to states, a coalition of 21 state attorneys general filed an amicus brief in support of allowing agency fees.

The Court’s decision led to considerable uncertainty among state and municipal employers about how they should proceed in order to comply going forward. A number of state AGs played an active role in providing guidance to state and local agencies; over a dozen of them issued advisories or guidance documents: California, Connecticut, District of Columbia, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. These guidance documents varied, but overall, they specified that Janus was limited in its impact, applying only to agency fee payers. They also generally noted that the decision did not affect union members, and therefore did not require action from state and local public employers in relation to union members.

These advisories have been cited as persuasive in courts, including in orders issued by an Alaska and a New Mexico court.

In addition, there have been a number of post-Janus lawsuits (Urevich 2019), which state AGs are defending. These cases concern issues such as recovery of already-paid agency fees by nonunion members or ongoing dues payments by union members. In October 2018, nine state AG offices signed on to a letter to the Liberty Justice Center, which had sent letters to a number of states threatening litigation unless they immediately ceased deducting dues and agency fees from employee paychecks (Mass. & Pa. AG 2018). The AGs’ letter noted that the Center had misstated the Janus decision’s meaning.
Conclusion and recommendations

State attorneys general are increasingly playing a significant and impactful role in protecting workers’ rights and advancing worker protections within their jurisdictions. They are protecting people’s hard-earned pay and fighting wage theft, through civil lawsuits and criminal prosecution. They are responding to pressing issues like worker needs during the pandemic, as well as misclassification, the platform or gig economy, noncompetes, and forced arbitration.

We recommend that state attorneys general, state legislatures, and worker advocates build on this valuable work by taking further action, as described below.

State attorney general offices

Become involved. If your office has not yet become engaged in protecting workers’ rights, begin to do so. Learn more about the issue, meet with relevant stakeholder groups, review your office’s jurisdiction, research pressing needs in your state, and begin to map out a plan of action.

Increase involvement. Attorney general offices who have already been involved in actions to defend workers’ rights should continue to develop and increase their involvement in this area.

Establish workers’ rights units. Attorney general offices without dedicated workers’ rights units should consider creating such units, using existing staff and jurisdiction if necessary.

Build on existing workers’ rights units. Offices with dedicated units should continue the good work they are doing and expand the reach of those units.

Coordinate with other states. Multistate coalitions are a valuable tool for enforcing and safeguarding workers’ rights. State AG offices should continue (or begin, if they have not already) to collaborate with other state AGs on workers’ rights issues that cross state lines.

State legislatures

Grant jurisdiction. State legislatures should explicitly grant jurisdiction to attorney general offices to investigate and enforce workplace rights laws (wage theft, misclassification, and others), as has recently occurred in Illinois and Minnesota. This jurisdiction should allow independent work on these issues by attorneys general on their own initiative, in addition to upon referral from another agency.

Set aside funds. State legislatures could also consider allocating dedicated funding to their attorney general’s office for the purpose of enforcing workers’ rights. Enforcement of anti-misclassification laws can also be revenue generators, since employers who misclassify workers are also failing to pay unemployment and other taxes.
Worker organizations and advocates

Engage with state AG offices. Worker organizations and advocates—including unions, worker centers, advocacy groups, legal services providers, and others—should consider ways to engage with their state attorney general’s office, particularly in states where the office-holder has generally taken an interest in worker concerns, low-income communities, or economic, social, and/or racial justice. A full discussion of how to engage effectively with AG offices is beyond the scope of this report, but a meeting to become acquainted is usually a good first step.

For offices with dedicated units, advocates can start by meeting with unit heads. For other offices, worker advocates might ask for a meeting with any number of officials, such as the head of a public advocacy division (if one exists), or a high-ranking individual like a first deputy attorney general (typically the number two person in the office) or the chief of staff, or possibly with intergovernmental staffers who work to build the office’s relationships with stakeholders.

Endnotes

1. In the interest of focus and brevity, this report does not include discussion of the various task forces in which state attorneys general participate, including misclassification and human trafficking task forces. This report also does not detail outreach and educational efforts related to human trafficking; these have generally not focused specifically on labor trafficking. Oregon’s new Labor Trafficking Task Force, started in 2020, is an exception (Wilson 2020).


3. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1634 (May 21, 2018). This case held that requiring workers to waive their rights to class actions pursuant to an arbitration agreement does not violate the National Labor Relations Act.

4. Some useful online resources providing general information about state attorney general offices include StateAG.org (“an educational resource on the office of state attorney general”); the National Association of Attorneys General website (naag.org); and the Conference of Western Attorneys General website (cwagweb.org). Finally, the website attorneysgeneral.org has considerable information about state AGs, including a several databases containing information about multi-state litigation, settlements, amicus briefs, and comments and letters. See State Litigation and AG Activity Database, attorneysgeneral.org (last visited April 7, 2020).

5. The exception is the Massachusetts Attorney General’s office, which is the primary enforcer of the commonwealth’s labor laws.

6. Such complementary and overlapping jurisdiction exists in other areas: Many state attorney general offices enforce environmental, consumer, or civil rights laws even as there are state agencies who are primarily responsible for regulating the relevant industries and enforcing these laws statewide.

8. 15 ILCS 205/6.3.


14. The prevailing wage is a wage higher than the minimum wage that is required to be paid by government contractors, typically when public buildings are built.


17. As of August 2020. To view paid sick time laws by state and locality, see A Better Balance’s interactive online tool (ABB 2020).

18. Paid safe time provides covered employees the right to use accrued leave to seek assistance or take other safety measures if the employee or a family member may be the victim of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking. See NYC Consumer Affairs 2020.


22. “Common law” refers to law developed by court cases and legal precedent, and not stated explicitly in a statute.


28. Settlement Agreement, State of New York v. Fedex Ground Package System, Inc. Id. 402960/10

30. Massachusetts has adopted the “three-part test” (also known as the “ABC test”) for determining employee status. See Mass. AG 2020k.

31. The Center for Progressive Reform has created a first-of-its-kind “Crimes Against Workers” database that lists many state criminal prosecutions of employers. See CPR 2020. See also Byrne 2019; Kashinsky 2019; Osborne 2019; Kings Cty. DA 2017; NY Cty. DA 2016.


34. For the case involving the Hamptons diner owner, see N.Y. AG 2018h. For the Long Island food processor case, see N.Y. AG 2018a. For the three construction company cases, see N.Y. AG 2018d, 2018g, and 2018i.

35. An amicus brief, also known as an amicus curiae (“friend of the court”) brief, is a document regarding a court case that is filed by a party not directly involved in the case.


19 Del. Code Ann. § 3601 et seq.

“Knowing” is defined in the code as “having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.”

See Ill. AG 2019d; Racine 2019a; Rao 2019.

Under the joint-employer doctrine, more than one entity may be a person’s employer, based on a number of factors; while the analysis varies among different statutes and states, and between state and federal law, courts often consider employers’ authority to control certain aspects of the employment relationship, such as authority to determine pay, schedules, and other job conditions. As employers have outsourced various functions to contractors and subcontractors, the workplace has become increasingly “fissured” (Weil 2014). These arrangements have often enabled employers to limit and evade liability for labor standards violations and to avoid the bargaining table—making it nearly impossible for workers to enforce their rights and for unions to negotiate for better working conditions (McNicholas and von Wilpert 2017). A strong joint-employer standard is necessary to combat such employer abuses.


Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees [final rule], 84 Fed. Reg. 51230–51308 (September 27, 2019).


Chapter 296, California Assembly Bill No. 5 (2019). See McNicholas and Poydock 2019 for an explanation of the ABC test.


See Calif. AG 2018; Conn. AG 2018; D.C. AG 2018b; Ill. AG 2018b; Md. AG 2018; Mass. AG 2018b; N.J. AG 2018; N.M. AG 2018; Ore. AG 2018; Pa. AG 2018; R.I. AG 2018; Vt. AG 2018; Wash. AG
2018a. The attorneys general of Alaska, Indiana, and Texas have issued differing opinions (Alaska AG 2019; Ind. AG 2020; Texas AG 2020). These opinions are at odds with the majority of their peers in other states, and the Alaska attorney general’s opinion letter was rejected in court. See Alaska v. Alaska State Employees Association (Super. Ct. Alaska 3d Jud. Dist. Anchorage 2019), Temporary Restraining Order.

63. In legal terminology, an opinion, court decision, or other authority that is “persuasive” does not bind the court legally and is not required to be followed, but it is taken into account and considered compelling and persuasive by the court making a decision.


References

Note: To make it easier to locate references, we have alphabetized citations to Attorney General offices by the name of the jurisdiction, so, for example, the Office of the Attorney General for the District of Columbia is listed as “District of Columbia Attorney General’s Office.”


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