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Beyond Enforcement:

Making Labor Standards Smarter For the 21st Century

A Report to the California Department of Industrial Relations

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Introduction & Overview

In the last generation, the situation of low- and, particularly, minimum-wage workers has worsened. This is in large part due to a number of interrelated large-scale changes in the US economy, including increased globalization and immigration, technological advance, and the shift away from heavy manufacturing. It is also due in part, however, to decreased enforcement of the labor standards that represent one of the key advances of 20th Century economic regulation. The decline in enforcement is itself the result of two interrelated phenomena: the presence throughout the 1980s and large portions of the 1990s of administrations at both the federal and state levels disinclined to enforce economic regulation generally and labor standards specifically, and a secular erosion worldwide in the support and resources available for governmental enforcement efforts of all kinds.

There is substantial evidence that increased labor standards enforcement increases wage levels for workers paid sub-minimum wage. California's own recent experience with increased compliance resulting from increased labor standards enforcement in the San Francisco garment industry demonstrates that increased enforcement produces results. Howard Wial, an economist at the Keystone Research Center, a union-funded "think tank" in Pennsylvania, in an unpublished monograph on minimum-wage enforcement, performed an analysis of the relationship between the wages of low-wage workers and federal government resources devoted to enforcing the Fair Labor Standards Act (FLSA) over various periods through the Carter, Reagan, Bush and Clinton Administrations. Wial concludes that there is no significant relationship between enforcement resources and the wages of low-wage workers paid just above the minimum wage, or even the *share* of workers paid less than the minimum wage – but the more enforcement resources the government devotes to the FLSA, *the higher the average wage of workers receiving subminimum wages relative to the minimum wage*. In other words, labor standards enforcement does tend to raise the wages of those

illegally being paid less than the legal minimum. And a more recent study by a long-time critic of minimum-wage increases, David Neumark of Michigan State University, finds that while "living wage" laws – which represent local increases in the minimum wage – tend, as classical economists critical of such laws argue, to reduce employment somewhat among low-wage workers in urban areas, on balance the higher wages brought about by the laws appear to outweigh the effects of such job losses, resulting in a moderate decline in urban poverty.[1]

In sum, labor standards represent the promise of a better life for those at the bottom of the economic ladder – and enforcement of these laws helps turn that promise into reality.

Unfortunately, there will never be sufficient resources to police every potential or even likely labor standards violator. In the last twenty years, the number of employers in California almost doubled, while the Division of Labor Enforcement (DLSE) enforcement staff was cut by a net of 6%. Not surprisingly, then, a sweep of California garment shops in 2001 by the US Department of Labor found that an astounding 67% were in violation of wage and hour laws.[2] A representative of the United Farm Workers told the state legislature not long ago that even a significant proposed increase in staffing levels for the division's agricultural section was ultimately unavailing: "We've been waiting 34 years for this bus called enforcement to show up," he said. "It ain't coming."[3] **The current budget environment only makes it *more* imperative to find another solution.**

The disappointments of labor standards enforcement are not unique, however: There is a larger, global, secular decline in governments' financial and political ability to engage in enforcement activities of all types. The challenge to those seeking to achieve social and economic goals through governmental enforcement is to understand this changed environment – and how to put it to work for public objectives.

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[1] "The Case for Living-Wage Laws: Even a skeptic finds that they help," BUSINESS WEEK (April 22, 2002), p. 26.

[2] N. Cleland and M. Dickerson, "Davis Cuts Requested Labor Law Funding; Workplace: Budget would still geow by $2 million, but advocates say far more is needed," *Los Angeles Times* (July 27, 2001), Part 3, page 1.

[3] A. Furillo, "California Panel Approves Funds to Enforce Labor Laws," *Sacramento Bee* (May 10, 2001).

From "Big Government" to *Smart* Government

"A phenomenon that has been discernible (at least dimly) for two decades or more is becoming vividly clear as we settle into the twenty-first century. Changing markets are challenging governance. . . . As Susan Strange has argued, the balance between states and markets shifted after the 1970s in a way that made the state just one source of authority among several and left 'a yawning hole of non-authority or non-governance.'"[4]

In trying to explain why this occurred, two leading scholars note that

> [t]echnology happened, of course, especially information technology.. . . Globalization happened, too. International transport and communication costs plummeted, cross-border information flows proliferated, and trade (in goods and services) and transnational investment (both portfolio and direct) exploded. National borders became flimsier barriers to opportunity and competition. At the same time, the intertwining of national economies through stepped-up trade and investment frustrated many conventional tactics for steering or constraining market forces.
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> Finance evolved.. . . And politics changed. The collapse of communism, the shattering of the Soviet empire, and the Thatcher and Reagan governments were only the most visible examples of a broader and deeper trend. A generally diminishing ardor for intervention is partly explained by, and partly explains, the shrinking role of fiscal policy and the strictures international capital markets impose on national politics.. . .
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> But why did these categorical transformations – particularly the last three, globalization, financial evolution, and the political turn from collectivism – occur when they did, and more or less together . . .? Part of the explanation

[4] J. Donahue and J. Nye, Jr., "Market Ascendancy and the Challenge of Government," in John Donahue and Joseph Nye, Jr., eds., GOVERNANCE AMID BIGGER, BETTER MARKETS (Brookings Institution Press 2001), at 1, 1-2.

is that the trends are mutually reinforcing.[5]

Changes in governing and technology have been inter-related since the dawn of human history. The discovery of agriculture led to the invention of the state. The discovery of bronze and invention of the chariot led to the first age of empires. The invention of movable type, the attendant rise in literacy and availability of information helped spawn democratization. Advances in electronic communication technology undergirded the ability of "totalitarian" regimes to monitor the totality of their citizens' lives – and further advances have played an increasing role, in places such as China and Yugoslavia, in citizens' ability to undermine continued totalitarian oversight.

Since governing involves the employment of power, and technology shapes the avenues availability for such employment, the inter-relation of governmental and technological change should hardly be surprising. After all, if "knowledge is power," then changes in the state of knowledge must bring with them changes in the status of power.

The rapidly evolving state of technology in our society is therefore bringing with it dramatic changes in the nature of government, in both its internal activities and its external relations with other power centers.

The relationship between government and the technological realities of the larger society in which it exists was neatly summarized by Robert D. Kaplan in *The Atlantic Monthly*: "The massive ministry buildings . . ., with their oxen armies of bureaucrats, are the products of the Industrial Age, when American society reached a level of sheer size and complexity that demanded such institutions. This leaden colossus must somehow slowly evolve into a new, light-frame structure of mere imperial oversight."[6] This is no longer a statement of ideology so much as physical reality: As has in fact been true for several decades now, in the coming years governments will increasingly lose sovereignty in many areas to private sector, or "non-state,"

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[5] J. Donahue and R. Zeckhauser, "Government's Role When Markets Rule," in John Donahue and Joseph Nye, Jr., eds., GOVERNANCE AMID BIGGER, BETTER MARKETS (Brookings Institution Press 2001), at 282, 284-85.

[6] R. Kaplan, "Travels Into America's Future," *The Atlantic Monthly* (August 1998).

actors, as the world becomes a much more complex web of differentiated but over-lapping power structures.

But that is not the end of the changing nature of public and private: As part of this same evolution, "government" will, in turn, come much more to resemble private enterprise in both its operations and its objectives; government will come to rely even more on private sector actors to carry out a broader range of its traditional functions; and at least some private sector actors will arise to carry out some of the social functions over which government largely asserted hegemony during the twentieth century.

Many contend that globalization is leading to the utter demise of the state, as it loses control over currency, capital flows, and trade, due largely to electronic media.[7] This both understates and overstates the problem. Neither the "power" of multinational corporations nor their ability to move operations (and thus jobs) across borders is all new. The shift of large portions of the world economy, particularly in the developed nations, to intangible (knowledge) services as well as the shift of large portions of the world's wealth to intangible assets drive and constitute a shift in sovereignty from states to economic actors – but this serves to point up not just the great potential for *further* power shifts from state to non-state actors but also the *limitations* on such shifts: The state is losing power where it cannot exert *physical* control; the state *retains* power where it *can* exert physical control. With the expanded range and importance of the intangible, relative state power is declining – but as long as human beings themselves remain tangible phenomena, the vast bulk of whom remain attached not just to such tangible necessities as food and shelter but also to specific *places*, entities that derive power from physical control over such tangible items as persons and places will continue to exist. And, following Weber's definition of the state as the entity exercising the legitimate monopoly over force within any particular border, there will always, in that sense, be "states," with not insignificant power.

However, as control over resources shifts increasingly to those who control intangible wealth, much of the power formerly held by geographic states will shift concomitantly to the entities controlling such wealth. Simultaneously, the bedrock function of the state as the holder of a monopoly of force – even a monopoly of *legitimate* force – is waning: In the US already,

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[7] See THE SOVEREIGN INDIVIDUAL.

private security guards employed by businesses and the wealthy exceeds the total number of police officers in the country; even without the increasing move to privatization of prisons, it is clear that even the provision of “law and order” – and thus the legitimate exercise of force – is a focus of public disinvestment and shift to the private market. This shift is evident at larger levels, as well: International narcotics gangs and, now, terrorist organizations like those of Osama bin-Laden are largely indistinguishable from (and is some cases have largely superseded) traditional states, at least the less powerful or advanced.

This does not mean the demise of the state so much as a shift in its focus: from being the sole power-entities on the world stage to being one important type among many power-entities that can exercise force (direct or indirect, legitimate or illegitimate) against individual human beings and which must be mediated with by similar power-entities. The availability and use of force will be more widespread and diffuse, as will be power generally: Capital will flow across borders or cease instantly in response to attempts to regulate it; people, at least those of means, will be highly mobile (if not as much as capital); and technology will strengthen offensive capabilities even as it increases points of vulnerability. We are already seeing the political and economic effects of these changes, and they clearly mean a decreasing ability to centralize coercion, leaving either a *laissez-faire* state of nature, or a world of multifarious (and often overlapping) internally non-coercive (*i.e.*, largely exitable) but externally competitive groupings of individuals, as the basic alternatives. In the latter model, “states” or “governments” are a kind but only *one kind* of likely actors; government, then, will, like all other concentrations of power in this new, multi-polar world, be necessarily less coercive, but pose external competition to other power concentrations – not just states but also non-state actors, not just political or military but also economic.

Globalization is thus opening up new avenues of governmental purpose – serving, for instance, as a “consumer co-op” of sorts, or a mutual betterment society, rather than as a coercive regulator of human or economic affairs. At the same time, it is eroding some of the traditional prerogatives of the state, which is losing control over currency, capital flows, and trade, due largely to electronic media. As one result, the state’s power to tax is being undermined. The most obvious manifestation of this is the now-hotly-debated subject of Internet

taxation. But this debate is of relatively short-term importance, because the ability to move assets – in fact, the ability to render them *non*-existent in *any* geographic location – more seriously threatens governments' long-term ability to identify them, count them, value them, and hence *tax* them – and then *seize* them (or any other assets) to enforce payment. The weakening of governments' ability to extract resources and compel performance is self-reinforcing – and engenders its own political opposition, as well.

Recent events are arguably "swinging the pendulum" back somewhat in the other direction: The Enron scandal and related revelations as to manipulation of the deregulated energy market in California, the Arthur Anderson prosecution and revelations of even more widely spread accounting improprieties, the probe by the New York Attorney General into stock touting by Merrill Lynch and other brokerages with financial interests in the stocks they push – all of these are undermining faith in the private sector and, more importantly, in the ability of the market to police itself. Perhaps this will create political momentum for a return, in some ways, to a more "regulatory state" reminiscent of the New Deal era; as yet, however, this does not appear to be the case. And all the reasons already cited – particularly the advances of technology and globalization that render less effectual governments' ability to coerce compliance and extract resources for their own purposes – make a *full* return swing of the "pendulum" prohibitive: Time is an arrow, not a pendulum.

Private actors will thus, necessarily, increasingly "do government" either on behalf of, or as alternatives to, government, as governments' own resources – financial, practical and political – are increasingly limited. Of course, not only are "mixed economies" of public and private sectors, "public/private partnership," even dual spheres of public and private *regulation* nothing new: Governmental use of private actors, institutions and resources *to carry out governmental regulatory functions* has a hoary pedigree, as well. "The public goods produced by government are in many ways distinct from the private goods produced by firms, but at a basic level the same Coasian[8] insights apply. Although it is unusual for us to think about government subcontracting of regulatory duties, at

[8] Ronald Coase, the Nobel Prize-winning economist, theorized that firms are organized to produce internally those products that they could make themselves more cheaply than to buy on the open market.

least at a conceptual level, it makes sense that government should only internally produce 'public goods' when internal public production is cheaper than external contracting."[9]

Long-standing examples of government "contracting" externally for regulatory services abound. For instance, at the height of the New Deal era in 1936, the Comptroller of the Currency required banks to hold only investment-grade securities, as determined by private rating services. Other such requirements followed in other areas. In 1975, the SEC designated ratings of Moody's, Standard & Poor's, and Fitch as the only ones that may be used to satisfy credit-worthiness regulations. For nearly seven decades, then, the federal government has relied on purely private actors to carry out the complex task of determining compliance with regulatory standards.

The same has been true at the state level for some time: Compliance with automobile emission standards, for instance, is almost universally verified not by state employees but by private auto shops certified for inspection purposes by the state. Similarly, in California, "inspections of cranes and hoists used in factories are conducted by licensed repair firms.. . . Cal-OSHA inspectors merely check whether or not cranes and hoists have up-to-date certifications."[10]

A further manifestation has been "the tide of growing judicial recognition of privately written rules," "the increasing tendency 'for the forms of private legal systems to be judicially recognized, as for example, in a medical malpractice suit in which the code of ethics of the American Medical Association is invoked; in a suit involving the internal relations of a trade union in which the union's constitutional provisions are accorded legal status by the court; or in a suit by a student against a college or university in which the institution's disciplinary rules are judicially recognized.'"[11]

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[9] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 103.

[10] Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 173.

[11] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 123 (quoting W. Evans, "Public and Private Legal Systems," in W. Evans, ed., LAW AND SOCIOLOGY: EXPLORATORY ESSAYS (New York 1962)..

Reliance on the private sector to conduct extensive oversight and enforcement of governmental regulations has even been extended from specified private actors to *the public generally*. The "No Sweat" campaign instituted by former US Labor Secretary Robert Reich utilized consumer choices as an enforcement mechanism for labor standards – and applied them to downstream marketers of garments in order to coerce *them* into enforcing labor standards among garment manufacturers. Both aspects of the strategy brought to bear pressures to comply and penalties for non-compliance that government itself could not muster.

Ultimately, of course, the public sector has always depended upon private actors – "the public" – to accomplish the larger part of its aims: All regulatory schemes, whether criminal or civil, rely in the first instance upon the willingness of the vast majority of the population to comply without direct governmental intervention – and, in fact, to carry out much of the "enforcement" through informal community mechanisms such as norm-setting, peer pressure and even informing.[12]

Private sector actors and mechanisms thus coexist along with purely governmental entities as part of a larger enforcement structure that governmental entities can use in its entirety to promote compliance with their aims. For instance, in the financial markets – perhaps the paradigm of today's world of "bigger, better markets" –

> [t]he public regulator – the securities commission – . . . is concerned primarily with the sanctioning model, or . . . '"symbolic" order. The task of the "symbolic" regulator is to enforce the rules, principally by detecting violations and violators. The essentially self-regulated stock exchange, in contrast, is concerned about . . . "behavioral" ordering. This can be achieved . . . "through any number of strategies, including sanctions, threats, rewards, incentives, persuasion, design of

[12] "The IRS knows that each 1 percent increase in voluntary compliance produces between $7 and $8 billion in additional revenue. So the central thrust of its emerging strategy is to inculcate in citizens a heightened sense of responsibility toward taxes. The IRS realizes that the best approach to enforcement, as in policing and environmental protection, is to minimize the need for it." Malcolm Sparrow, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE (Westport, CT 1994), at xxiii.

facilities, and ideological manipulation, that might produce the desired result."[13]

The ultimate question, then, is how can government best utilize this array of public *and* private resources to "produce the desired *result*." "Good policy analysis is not about choosing between the free market and government regulation. Nor is it simply deciding what the law should proscribe. If we accept that sound policy analysis is about understanding private regulation – by industry associations, by firms, by peers, and by individual consciences – and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation."[14]

Utilizing the private sector to achieve public aims, moreover, need not consist of what two authors have called "the naiveté of trusting companies to regulate themselves."[15] "Self"-regulation is perhaps the most effective way in which the state can regulate individual behavior – but it always requires the back-up of public enforcement, no matter how far in the background, in order to be effective. For instance, tax collection is perhaps the area in which government has most relied on "voluntary" compliance and "self"-enforcement: "Under this system of 'voluntary' compliance, it cost Revenue Canada only slightly more than one dollar to collect one hundred dollars of income taxes,"[16] an enviable record of efficiency. Nevertheless, this voluntary self-enforcement on the part of the bulk of the population depends, at least in part, upon the existence and judicious but well-publicized application of potentially severe governmental sanctions. In fact, a regulator's ability to "contract out" compliance oversight to a more-efficient private self-regulator "derives in large measure from his power of threat and coercion.. . . In this sense, the increased sanctioining power

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[13] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 5 (quotating P. Stenning, C. Shearing, S. Addario, and M. Condon, *Controlling Interests: Two Conceptions of Order in Regulating a Financial Market*, in *id.*).

[14] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 3.

[15] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 106.

[16] N. Brooks and A. Doob, *Tax Evasion: Searching for a Theory of Compliant Behavior*, in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 120.

and specificity of rules that have accompanied the legalization of regulation *increase* the inspector's ability to elicit cooperation, provided that he uses those powers to that end." Very simply, "more legal power gives him more to trade for cooperation."[17]

Smarter Labor Standards Delivery for the 21st Century

In sum, the state must proceed on two tracks simultaneously:

- increasing the force – and enforcement – of government sanctions, but also

- expanding the government's focus to attainment of the law's ultimate objective of not so much *enforcement of*, as *compliance with*, labor standards. A new approach that goes ***beyond*** traditional enforcement is therefore needed to ensure that all Californians receive minimally adequate compensation for their labor. This approach would recognize the emerging realities of today's economic and political landscape as well as a wide range of academic developments as to the best and proper utilization of governmental resources:

    - Defining the state's objective as the increased attainment of identified ***outcomes*** – in this case, adequate reward for work, especially by those at the bottom of the economic ladder – through increased ***compliance*** with specific legal standards, rather than increased enforcement and imposition of penalties, *per se*, for violation of those standards.

    - Extending the concept of ***enforcement beyond the state*** to include citizen enforcement by "private attorneys general"; marketplace enforcement by the chain of production, by competitors, by consumers, and by gatekeepers; self-enforcement; and social enforcement.

As Wial, the labor economist, wrote, improvements in enforcement funding and the structure of labor standards

[17] Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 131.

legislation “are only a foundation on which to build a more comprehensive approach to enforcement. If enforcement is to be improved more than marginally, we must abandon the FLSA’s current assumption, rooted in a classical liberal view of the relation between the state and society, that (virtually) the only enforcers of the statute should be a government agency and individual workers. This assumption limits enforcement capability by excluding those collective social actors that can be effective enforcers, either by themselves or in combination with individuals and government.. . . . In place of this limiting assumption, we should build into the statutory scheme an explicit recognition that regulation is in fact always accomplished through a system that combines the coercive powers of government, business, and other social actors, including groups intermediate between the individual and the state.”

DIR senior managers have categorized different classes of employers and provided suggested estimates as to the percentages of employers falling into each category:

15% **Hostile compliers** –

Those who intentionally violate the law and need criminal sanctions to be brought into compliance.

30% **Hesitant compliers** –

Those who need enforcement stimulus to comply because they wait until cited for violations before comply.

30% **Clueless (‘inhabitants of the parallel universe’)** –

Those without knowledge of minimum labor law standards, are not connected to any employer or social network to get information about the law and how to comply, and need civil enforcement actions to comply.

15% **Spontaneous compliers** –

Those who comply immediately with minimum standards once they are announced rather than wait for enforcement personnel to visit the workplace.

10% **Industry leaders** –

Those who set and follow standards which exceed the minimum labor standards enforced by government.[18]

This taxonomy of employer categories also sets out a taxonomy of enforcement and compliance strategies that corresponds fairly well with those developed by researchers studying how police, revenue collection, and regulatory enforcement agencies have segmented their activities. In response, **Public Works** has designed, and recommends that California adopt, a two-pronged, six-tiered program to modernize the state's labor standards regime:

- **Enhancing the Labor Commissioner's enforcement ability**, maximizing the reach of his limited resources by converting the current universal-but-thin system of complaint investigation and enforcement into a focus-in-depth system by

  - Developing a broader **"Crack-Down Tier"** program for identifying and targeting serious offenders ("hostile compliers"), streamlining the judicial enforcement process, and increasing penalties.

  - Creating a **"Correction Tier"** middle-range of corrective, rather than punitive, measures to increase compliance by serious but less-than-criminal violators ("hesitant compliers") and serve as a diversionary track for cases DLSE chooses not to prosecute.

  - Diverting *de minimis*, isolated claims to a minimal-process administrative system designed to make it easier and more efficient for workers to obtain

[18] "Summary of Discussion," DIR Senior Managers Planning Conference of May 12, 1999.

compensation and non-stigmatizing for employers to allow redress through a **"Complaint Tier."**

- **Expanding enforcement beyond the governmental to the economic and civic spheres** through a variety of mechanisms allowing DLSE to leverage private-sector resources and private actors to carry out the redefined objective of increased compliance, by

  - Instituting a **"Compliance Tier"** of negative and positive incentives focused on individual firms not meriting civil or criminal prosecution but needing additional measures to promote compliance (the "clueless").

  - Encouraging a **"Cooperative Tier"** of generalized incentives designed to create a more cooperative environment promoting private labor standards compliance and public assistance rather than enforcement for *all* employers (i.e., increasing the universe of "spontaneous compliers').

  - Creating a **"Congratulatory Tier"** for firms with exemplary compliance records, internal systems, and public citizenship ("industry leaders"), resulting in reduced regulatory oversight and meaningful governmental recognition and rewards.

This interlocking series of complementary increases and decreases in oversight, penalties, and process-layering will reward good employers for the first time and more heavily penalize the worst employers, will reduce the governmental and regulatory burden on the vast majority of businesses and increase compliance for the vast majority of workers, and hopefully thereby earn the support of both business and labor as well as legislators across the political spectrum.

Proposed New Labor Standards Structure	
Enforcement System • **Crack-Down Tier:** streamlined enforcement & increased penalties for serious offenders. • **Correction Tier:** diversionary track, corrective measures. • **Complaint Tier:** easier compensation for workers in *de minimis* and isolated situation.	**Compliance System** • **Compliance Tier:** negative and positive incentives for problem firms. • **Cooperative Tier:** generalized private compliance and public assistance efforts. • **Congratulatory Tier:** recognition, rewards, & reduced oversight for exemplary performers.

SECTION I

STRENGTHENING CALIFORNIA'S ENFORCEMENT SYSTEM FOR LABOR STANDARD VIOLATORS

Section 90.5 of the California Labor Code declares that "[I]t is the policy of this state to vigorously enforce minimum labor standards in order to ensure that employees are not required or permitted to work under substandard unlawful conditions and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." Unfortunately, this policy of vigorous enforcement, along with several structural elements of the enforcement scheme designed to make it less onerous upon and more efficient for workers and innocent employers, in reality likely inhibits meaningful enforcement of labor standards.

In addition to investigations and enforcement actions undertaken by the state's Division of Labor Standards Enforcement (DLSE) (Labor Code, secs. 210, 225.5, & 1193.6), and private lawsuits by agrieved employees authorized under the state Labor Code (secs. 218 & 1194), amendments adopted in 1976 (Stats. 1976, ch. 1190, secs. 4-11, pp. 5368-5371) allow an employee to seek administrative relief through DLSE filing a wage claim with the chief officer of DLSE, the state Labor Commissioner. (Labor Code, secs. 98-98.8.) These administrative procedures are commonly known as the "Berman" hearing procedure after the name of the legislation's sponsor.

According to the late Justice Stanley Mosk, writing for the California Supreme Court, "The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims."[19] While the procedures prescribed offer several streamlined advantages – pleadings are limited to a complaint and answer, there is no discovery process, and if the employer fails to appear or answer there is no default but the Labor Commissioner may proceed to determination of the

[19] *Cuadra v. Millan*, 72 Cal.Rptr.2d 687, 689 (Cal. 1998).

claim – nonetheless the law as a whole contains numerous requirements that have the effect of diverting voluminous amounts of DLSE's already-limited resources to a process that invites additional proceedings and ultimately renders DLSE's expenditure of resources largely pointless:

- As the intent of the Legislature in establishing this procedures was, while creating an "informal" setting for resolving employee-employer disputes, to "preserv[e] the right of the parties," even if an employer fails to answer or appear – which would constitute default in virtually any other proceeding – the employer may request a new hearing if the determination goes against him. (Labor Code, sec. 98.1)

- If either party appeals, the claim is heard *de novo* before a state municipal or superior court. (Labor Code, sec. 98.2). As the California Supreme Court recently explained, "Although denoted an 'appeal,' unlike a conventional appeal in a civil action, hearing under the Labor Code is de novo. A hearing *de novo* literally means a new hearing, that is, a new trial. The decision of the commissioner is entitled to no weight whatsoever, and the proceedings are truly a trial anew in the fullest sense."[20]

- Since the court proceeding is a trial *de novo*, a further right of appeal lies to the state court of appeals. "Review is of the facts presented to the trial court, which may include entirely new evidence."[21]

In short, the entire proceeding before the Labor Commissioner is essentially little more than a form of non-binding arbitration encouraging multiple layers of appeal and delay – and one requiring considerable expenditure of resources by DLSE regardless of the relative merits of the claim:

- Section 98 of the Labor Code has been interpreted to impose a legal duty upon the Labor Commissioner to

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[20] *Post v. Palo/Haklar Associates*, 98 Cal.Rptr.2d 671, 675 (Calif. 2000) (internal quotations and citations omitted).

[21] *Id,*

investigate every claim filed with DLSE.[22]

- While, after investigation, the Labor Commission may determine that the claim does not merit conduct of a hearing, in reality "the filing of a claimant's administrative complaint 'usually results in a [Berman] hearing before a Hearing Officer,'" which, the state Supreme Court has commented, "is as it should be."[23]

- Once – as is "usually" the case – the matter proceeds to a full Berman hearing, "[t]he commissioner is required to determine all matters arising under his or her jurisdiction," including filing a decision containing a summary of the hearing and his reasoning.[24]

DLSE is thus required to expend a significant amount of resources investigating, hearing and deciding a caseload that it cannot choose, control or prioritize – and which is then subject to trial *de novo* and subsequent appeal in the courts, in all of which DLSE is further obligated to defend its (and usually the employee's) position.

Moreover, such public enforcement processes (as opposed to adjudicatory systems) – driven by private complaints – are generally counterproductive. Because "[m]any complaints come from disgruntled employees, conniving competitors, or citizens who are simply mistaken about the law or the facts," private filers of complaints "– especially when they have received no special training – can tie up inspectors on legally unfounded or substantially trivial claims, or divert their

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[22] *Id*. at 696 (Labor Commissioner's "statutory duty to investigate a claim" is "clearly mandated by section 98." An older case states what would appear to be the better rule: "While the subdivision (a) of the statute [Labor Code sec. 90.5] generally states the legislative intent to vigorously enforce minimum labor standards, subdivision (c) clearly grants the Labor Commission the right to adopt an enforcement plan and to identify priorities for investigations. Consequently, the Labor Commissioner has discretion to determine which investigations to conduct. The statute creates no duty, express or implied, which requires Division to investigate or take action on every complaint which is filed with the Division." *Painting & Drywall Work v. Aubry*, 253 Cal.Rptr. 777, 778, 206 Cal.App.3d 686, 687 (Calif. 1988). The latter case does not interpret section 98, however, to which the Supreme Court has apparently opted not to apply the same logic.

[23] *Cuadra*, 72 Cal.Rptr.2d at 696 (quoting briefs of the labor commissioner in the case).

[24] *Post*, 98 Cal.Rptr.2d at 674-75.

energies toward enterprises with comparatively decent compliance records."[25]

"The Bay Area Pollution Control District, for example, . . . repealed a regulation requiring manufacturing firms to report to the agency by telephone every breakdown in production or abatement equipment that might cause the firm to exceed legal emission levels. A district enforcement official estimated, however, that only 200 of the 10,000 or so reports received had involved significant pollution problems. Now, he said, the number of calls is greatly reduced, saving agency officials the labor of recording and responding to each call (as they had to under the repealed regulation)."[26]

Bruce Vladeck, subsequently appointed US Social Security Commissioner by President Clinton, observed in his study of quality-of-care regulation of nursing homes that "most of those involved in the survey process believe that the correlation between complaints and serious deficiencies is tenuous and that, when manpower is scarce, responding to spontaneous complaints may not be the best way to employ it."[27]

Given that DLSE's resources are already substantially below what it needs adequately to enforce existing labor standards, requiring it to expend substantial amounts of those limited resources on efforts not of its own choosing and priority – and to do so through a system calculated to multiply both the volume and fruitlessness of these efforts – makes little sense. Instead, the legislature ought to allow the Labor Commissioner to "triage" his resources by:

- Ending the requirement of universal investigation, prosecution and multi-tiered review.

- Replacing it with a tiered "Crack-Down, Correction & Complaint" System.

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[25] Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 166.

[26] Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 140.

[27] Bruce Vladeck, Unloving Care: The Nursing Home Tragedy (New York 1980), at 160.

The objective in allowing DLSE to prioritize its caseload and target its enforcement actions is to free up more resources for those cases that deserve the most attention – the 15% of employers whom DIR staff has identified as "**Hostile compliers** – Those who intentionally violate the law and need criminal sanctions to be brought into compliance." Less serious cases are not to be ignored – but they are to be channeled into alternative processes that consume fewer resources than full-scale investigation and enforcement efforts by limited DLSE staff.

For instance, in all such cases the alternative of a privately-pursued complaint must – and currently does – exist. Unfortunately, as will be discussed, this alternative process is currently not an appealing enough option to invite its use by aggrieved workers over the "Berman" procedure. The private complaint process therefore needs to be streamlined and strengthened in order to make it a truly viable option for complainants – and a lighter burden than litigation for well-meaning, if erring, employers. If that is done, however, there is no reason why the agency-enforcement system cannot and should not be better focused on punishing intentional, severe, widespread or repeat offending. "An enforcement strategy that allows the more appropriate sanction to be chosen on a case-by-case basis offers the best of both worlds. Criminal prosecution is available for the worst offenders. Yet administrative penalties can be assessed against the offending firms that would escape punishment entirely if prosecution were the only sanction available."[28]

This report therefore recommends a tripartite, tiered structure for addressing violators and enforcing labor standards:

- a **"Crack-Down Tier"** program for identifying and targeting serious offenders ("hostile compliers") that streamlines the judicial enforcement process and increases penalties.

[28] R. Brown and M. Rankin, *Persuasion, Penalties, and Prosecution: Administrative v. Criminal Sanctions* in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 348.

- a **“Correction Tier”** middle-range of corrective, rather than punitive, measures to increase compliance by serious but less-than-criminal violators (“hesitant compliers”) and serve as a diversionary track for cases DLSE chooses not to prosecute.

- a **“Complaint Tier”** minimal-process administrative system designed to make it easier and more efficient for workers to obtain compensation and non-stigmatizing for employers to allow redress of *de minimis*, isolated claims.

Subsection I.A

Improving Targeting, Streamlining Prosecutorial Process, and Increasing Punishment for Those in the Crack-Down Tier

The **"Crack-Down Tier"** is intended to accomplish three inter-related ends:

- identifying and targeting the most serious offenders ("hostile compliers").
- streamlining the judicial enforcement process so that these offenders can be more easily and more successfully brought to justice.
- increasing penalties on them when they are.

1. Improving Targeting

The first step in erecting the new Crack-Down Tier is properly to identify those employers that belong in it. Clearly, for starters, these must in one sense be the **"worst cases"** – those employers who repeatedly, willfully, and flagrantly violate the law. But in another sense these must be the **"best cases" to prosecute** in order to maximize the effective use of DIR's resources.

As Professor Murray Friedland writes, "The tax enforcement system can give us insights into questions of compliance. Why is it that . . . the system appears to work reasonably well, yet the criminal law is very rarely invoked and virtually no one is sent to jail? There are less than 300 prosecutions each year in Canada or England for tax evasion. The prosecuting authorities select clear-cut cases to prosecute. In England the success rate is over 95 percent. By prosecuting clear cases, the authorities are more or less assured that other taxpayers will not sympathize with the wrong-doers, and thus the 'dramatization of the moral notions of the community,' to use Thurmond Arnold's phrase, will be more starkly presented. For

the most part, National revenue relies on behavioral ordering such as matching income with disclosure, audits, and reassessment."[29]

Similarly, Malcolm Sparrow notes that, while the California and Massachusetts state tax agencies "are both known for their organizational commitment to promoting voluntary compliance,"

> [b]oth use strategic targeting of enforcement efforts. Both have professional media liaison operations designed to support carefully crafted public images of their agencies, their policies, their procedures, and their investigative capabilities. Both have almost 100 percent conviction rates for cases taken to court.
>
> The Franchise Tax Board of California targets both the number and types of cases accepted for investigation at a given time. The Criminal Investigation Bureau's "annual Plan" in Massachusetts targets resource allocation to certain industries, trades, tax types, geographical regions, or suspicious taxpayer behaviors for special proactive investigations.
>
> There are significant differences in organizational philosophy and structure between the California and Massachusetts agencies. But, in both states, cases are not accepted for full investigation unless prosecution is almost certain to be successful, the publicity generated is almost certain to be favorable, and the pursuit of the case fulfills some identifiable strategic purpose.[30]

The same approach is applicable to all other areas of enforcement and compliance. The Robens Committee in Britain, for instance, assigned to review how better to enforce environmental regulations, "argued that inspectorate resources

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[29] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 8 (internal quotation omitted).

[30] Malcolm Sparrow, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE (Westport, CT 1994), at xxiii.

should be concentrated on 'problem areas' and 'spot checks' rather than regular, systematic assessments."[31]

Beside the fact the most egregious violators cannot be brought to heel by any other means, "general deterrence" has always been an important function of law enforcement: "The occasional use of the law was deemed useful to the extent that it showed the regulated that these inspectorates had 'teeth.' Exemplary prosecutions were also regarded as useful for their general deterrent effect."[32]

The question then is which cases or offenders should be referred to the Crack-Down Tier (as opposed to the Correction Tier, or being left simply for the Complaint Tier process). In doing so, DIR needs to make increased use of surveys to measure compliance in low-wage, high violation industries, for purposes of better targeting. As DIR's senior managers have already recognized, the department must develop a system for collecting, analyzing and utilizing better data for targeting firms and industries:

> profiling employer demographic types (by industry, size, scale of economy, HR type resources, workforce characteristics) could help enforcement staff have higher success rates in getting compliance. The profiles also would vary by regional differences, e.g. northern California vs. southern; predominantly non-English speaking workers, etc. It boils down to improve methods for targeting employers by developing the employer profiling data, distributing profiling data to DIR enforcement/compliance personnel, adjusting the profiles for regional differences.[33]

Thus, DIR should evaluate industry-specific surveys developed by the US Employment Standards Administration in its own enforcement and inspection targeting efforts over the past decade. The federal Wages & Hours Division also selects targeted industries in accordance with the results of surveys that

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[31] Bridget Hutter, COMPLIANCE: REGULATION AND ENVIRONMENT (Oxford 1997), at 151.

[32] *Id.* at 232

[33] "Summary of Discussion" from the DIR Senior Managers Planning Conference of May 12, 1999,

are designed to measure compliance in low-wage, high-violation industries. Since 1994, the WHD has conducted such surveys in selected geographical locations in the garment, residential health care, agriculture, restaurants, hotel/motel, and poultry processing industries; the surveys, which over-sample past violators, are part of a new long-term effort to ensure that establishments inspected by the WHD do not become repeat violators of the FLSA.[34]

In addition, DLSE's actual field experience will likely produce effective subjective evaluations of workplaces that should be targeted for investigation and enforcement. "It might be useful, therefore, for agency managers to emulate the [California Highway Patrol's Motor Carrier Safety Unit], which bases the frequency of inspections on *qualitative* assessments of individual enterprises' compliance efforts, or the New Haven housing code agency, which concentrated on buildings owned by those 'large' landlords who had developed a reputation among inspectors for recalcitrance and poor maintenance."[35]

Creation of a Crack-Down Tier goes further, however, than targeting certain actors simply for heightened *scrutiny*: It must (as id discussed further below) make them subject to heightened *punishment*. **Fundamentally, those employers who exhibit gross, multiple or systemic, willful, and repeat violation of the laws should be subject to the Crack-Down Tier and its heightened penalties:**

- **Employers who have been cited previously by DLSE should come in for increased scrutiny and – when found in violation – increased penalties.**

- **Those subject to multiple actions in the Complaint Tier (discussed below) should also be considered by DLSE for investigation, and this fact should be an "aggravating factor" moving a convicted**

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[34] Wood and Wood, "The Fair Labor Standards Act: Recommendations to Improve Compliance," 1983 *Utah L. Rev*. 529, 560.

[35] Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 170. See also Bridget Hutter, COMPLIANCE: REGULATION AND ENVIRONMENT (Oxford 1997), at 229: "The final strategy, *command regulation*, is a sanctioning approach most probably involving legal action. In the case of this sample this strategy was reserved for a minority of cases, notably the most risky industries, so judged because of the activity they were engaged in, or the character of the 'offender,' or both of these."

employer in the higher penalty tier. As opposed to prior violations cited by DLSE, however, *several* prior private complaints (rather than just one), at least some of which have been demonstrated to be valid, should be required to trigger greater scrutiny and/or punishment; otherwise, frivolous complaints would be encouraged and the Complaint Tier's main purpose – to provide an expeditious way for employers to admit and rectify small violations – would be undermined.

- Most crucially, however, as discussed in more detail later, various "low-road" employment practices – and thus related legal offenses – are likely to "cluster" among certain industries and certain firms within those industries. For instance, before OSHA, occupational safety inspections in Texas were keyed to above-average worker compensation claim rates:[36] It is certainly not much of a stretch to assume that employers with higher workplace injury claims are more likely to have workplace health or safety problems. It is not much greater a leap of logic to suspect that such firms might also be more likely to be underpaying or overworking their employees. Other aberrant behaviors not directly related to the labor force, however – failure to comply with environmental controls and failure to pay taxes – would also tend to indicate both a lax attitude to legal requirements *and* a business model predicated on cutting costs (rather than improving quality) in any way possible; these, then, are also indicators of likely labor standards violators.

  In fact, DIR has already demonstrated this in its own recent experience: In late 2000, the department launched two separate series of enforcement sweeps in the residential construction industry in two different counties. The first sweep found a number of health and safety violations, but very few wage and hour violations. For the second sweep, therefore, DIR utilized the Employment Development Department's database to determine employers that may not have paid their employment taxes, and targeted those employers; this targeted sweep found nearly

[36] Manual Gomez, Richard Duffy, and Vince Trivelli, AT WORK IN COPPER: OCCUPATIONAL HEALTH AND SAFETY IN COPPER SMELTING (New York 1979), vol. 2, p. 202.

quadruple the number of wage and hour violations or unlawful cash payment of employees. AS DIR Director Steve Smith testified before the Little Hoover Commission, "[I]f they're criminal in one area, they're criminal in a lot of areas generally. When they don't pay their employment taxes, they've probably not got workers' compensation. They probably are cash paying all over the place and . . . once you find them bad in one area, they're probably bad in a variety of areas. We may as well take advantage of that and be more effective.[37]

DIR should be able to take advantage of that fact not just in targeting its investigation and enforcement efforts, but in applying penalties to such violators when they are found and convicted. **Heightened "Crack-Down Tier" penalties thus ought to be made statutorily applicable to labor standards violators who have also been (or are concurrently) found to have violated occupational health & safety, workers compensation, environmental, or tax laws, as well.**

2. Streamlining the Prosecutorial Process

Swiftness and certainty of punishment is perhaps more crucial than severity to deterring offenders. The civil complaint process in labor standards cases needs to be streamlined to make the prospect of sanction more timely.

The current multi-layered Berman hearing system, in fact, was not originally intended by its authors. "As originally introduced, the bill enacting the Labor Code provisions at issue authorized the commissioner to make a final determination after the hearing on a wage claim, subject to review by the courts, but *not* under a de novo standard. (Assem. Bill No. 1522 (1975-65 Reg. Sess.) sec. 13.)"[38]

The current system, by which DLSE pursues individual wage claims through an administrative process appealable to the courts for proceedings *de novo*, ought to be repealed.

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[37] Testimony before Little Hoover Commission.

[38] *Post*, 98 Cal.Rptr.2d at 676-77.

Instead, **the Labor Commissioner should be authorized to proceed directly to state court on behalf of any aggrieved claimant, filing either a civil or criminal complaint, as appropriate.** Offenders would be given one proceeding-of-record, not two as under the current system. A single right of appeal would lie to appellate court, with findings of fact reviewed only for support in the record.

While this plan would grant the department discretion whether to ignore or investigate individual complaints, **"trigger" criteria can be set – such as receipt of either a sufficient number of similar complaints[39] or sufficiently compelling supporting evidence[40] – that would move an alleged offender into Crack-Down or Compliance Tier treatment**. In such complaint-triggered investigation, however, the agency can be given the option of responding in the first instance with an informal communication instructing the employer to investigate the complaint itself and respond within a limited timeframe with written notice of remedial action that has been taken.[41]

3. Increasing Punishment

Not only is the currently mandated system of labor standards enforcement too unfocused and too slow, when it allows DLSE finally to catch up with an offending employer the penalties are too often insignificant. The combination of a small probability of punishment, long delay in its arrival, and light penalty when it occurs provides scant disincentive, and conveys

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[39] "For violations not observed by agency inspectors, the Bay Area Air Pollution Control District will not commit itself to action against an alleged polluter unless it receives complaints from five different individuals." Eugene Bardach and Robert Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (Temple University Press 1982), at 167.

[40] "In 1979, after its backlog of discrimination complaints had grown to 99,000, the Equal Employment Opportunity Commission, rather than continuing to investigate all complaints as given, began to require complainants first to provide some supporting evidence." *Id.*

[41] The Interagency Task Force on Workplace Safety and Health appointed by President Carter recommended such a procedure in OSHA cases. "A follow-up telephone call to the *complainant* would help the agency test the company's good faith, decide whether an inspection is necessary, and deter acts of discrimination against such complainants by employers." *Id*. at 167-68; the author notes that "OSHA recently adopted such a plan for certain informal complaints after a Senate bill threatened to require it. The plan is strongly opposed by unions." *Id.* at 168 n.37.

insubstantial public opprobrium, for non-compliance with labor standards.

"Employers will choose to comply with OSHA standards if OSHA establishes effective financial incentives for doing so. The Employer, consequently, must find it more attractive financially to make the safety improvements than to risk an adverse OSHA inspection."[42] California must similarly make clear that labor standards violations do not pay, either. Under existing labor standards laws, both state and federal, "[t]he 'bottom line' for most employers is that they will pay no more and, in fact, may pay less for noncompliance, even if caught, than they would pay for compliance."[43]

- For starters, **California needs substantially higher criminal and civil penalties for all classes of labor standard violations prosecuted under this system.** The state's labor standards penalties are currently among the lowest in the nation. Violation of any provision of minimum wage law is a misdemeanor punishable by fine not less than $100 or imprisonment not less than 30 days or both. The civil penalty for an employer who pays less than minimum wage is only $50 for each intentional violation, and $$250 for subsequent violations; similar penalties plus 25% of the wage withheld apply to late payment of wages.[44]

  In contrast, for instance, Alaska requires payment of double the wage due, plus a fine up to $1000; Connecticut and Delaware impose fines up to $5,000, the District of Columbia and Hawaii fines up to $10,000. A Hawaii employer who fails to pay wages without "equitable justification" is liable for double the wages due plus interest. Texas makes it a felony to intend not to pay wages when hiring an employee and then fail to do so, while in West Virginia knowingly, willfully and fraudulently disposing of or relocating assets with intent to deprive employees of their wages or benefits is a

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[42] W. Kip Viscusi, "The Structure and Enforcement of Job Safety Regulation," 49 JOURNAL OF LAW & CONTEMPORARY PROBLEMS 127, 134 (1986).

[43] Wood and Wood, "The Fair Labor Standards Act: Recommendations to Improve Compliance," 1983 *Utah L. Rev.* 529, 570.

[44] Cal. Labor Code §1199 (criminal penalty); §1197.1 (a) and (e) (civil penalty); §210 (for failure to pay wages in timely fashion); § 225.5 (extra penalty for violation of payment method, other laws).

felony punishable by a fine of up to $30,000. And in Washington State, if an employer having the ability to pay fails to pay employees their wages, the director of the state Department of Labor can require them to post a bond with sufficient surety to guarantee payment to those employees within six months; if the employer fails to provide the bond, the director can bring suit and obtain an order enjoining that employer from doing business in the state. In 1997, New York State enacted the toughest wage laws in the county: The Unpaid Wages Prohibition Act raises penalties against employers who repeatedly do not pay their workers to up to $20,000, and makes repeated non-payment a felony. [45] **California ought to raise penalties for employers who qualify for the Crack-Down tier to the highest levels in the nation.**

- Frequent record-keeping violations are a pervasive feature of labor standards violation, especially among employers who refuse to pay back wages. Employers benefit from falsifying payroll records because such records are often the only evidence that enforcement agencies have to back up charges of wage or hour violations. Unfortunately, there is no effective penalty for falsifying these records.[46] The civil fines for willful or repeated violations do not even apply to recordkeeping violations at all.

    - **California should institute increased penalties for falsifying records and for willful or repeated failure to keep records.**

    - In addition, employees who file private complaints under the Complaint Tier should be able to recover, as an automatic minimum, the minimum wage for up to 40 hours per week (less any wages actually received) for each week that they can document (directly through pay stubs or circumstantially, as through regular pay deposits

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[45] National Employment Law Project, A Survey of State Wage Enforcement Laws: Models for Successful Reform (October 1997).

[46] *Id.* at 554. See also U.S. House of Representatives, Committee on Government Operations, "The Labor Department's Lax Enforcement of Wage and Hour Laws: Workers Are Being Shortchanged" (Washington, DC 1992); US General Accounting Office, THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT (Washington, DC 1985).

and work papers) that they worked at least one hour, against any employer who contests a wage claim but is unable to produce adequate records in compliance with the law's requirements (plus any other appropriate penalties discussed herein). **The objective is to make employee recoveries against employers who fail to keep adequate records as large and as automatic as reasonably possible.**

- California should also amend its existing labor standards law to improve the following penalty provisions:

  - **Liquidated damages should be awarded automatically in all cases prosecuted by the Labor Commissioner under the Crack-Down Tier program.** Employers often escape liability for liquidated damages if they raise a plausible good faith argument to excuse their noncompliance. "Consequently, liquidated damages provide no real incentive to comply with the FLSA as they are rarely sought and not routinely awarded even when sought."[47] Cases of good faith violation belong in the Complaint Tier; if the violations are serious enough to qualify for the Crack-Down Tier, and the employer is guilty, there should be no defense of "good faith" or "mistake" in escaping liquidated damages.

  - **Prejudgment interest also ought to be imposed automatically.** "Prejudgment interest, like liquidated damages, is an attempt to compensate the employee for the employer's failure to satisfy his statutory obligations under the FLSA. It also can serve as an incentive to encourage prompt compliance by the employer with the provisions of the FLSA."[48] "The [Wages and Hours Division] does not routinely seek either prejudgment or installment interest for employees. As a result, employers have interest-free use of employees' back wages. Employees, moreover, do not

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47 Wood and Wood, "The Fair Labor Standards Act: Recommendations to Improve Compliance," 1983 *Utah L. Rev.* 529, 557.

48 *Id*.

receive adequate compensation because 'inflation may have eroded [the] value of the wages owed them.'"[49]

- **Once an employer has been adjudicated in violation, DLSE ought to have authority administratively to assess and collect these penalties without additional civil enforcement action.** The US Controller General has recommended that the Department of Labor be authorized to assess back wages owed, interest on back wages and civil money penalties for minimum wage, overtime compensation and recordkeeping violations of the FLSA.[50] Some federal regulatory schemes provide for imposition of administrative penalties without resort to the courts: "Under recent amendments to the Civil Aviation Act, the federal minister of transport may levy administrative penalties of up to $1,000 for certain aviation safety offences. If a penalty is not paid, the matter is referred to the Civil Aviation Tribunal for adjudication. [A] handful of regulatory agencies have similar enforcement powers, one of them being the Occupational Safety and Health Administration (OSHA)."[51]

- **The definition of "employer" should be expanded to include successors, the largest shareholder of a corporation, or the individual owners of a sole proprietorship, LLC, or partnership.**

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[49] *Id*., citing GAO Report at 57.

[50] Controller General, United States General Accounting Office, REPORT NO. 60 TO THE CONGRESS: CHANGES NEEDED TO DETER VIOLATIONS OF FAIR LABOR STANDARDS ACT (1981) at vii-viii.

[51] R. Brown and M. Rankin, *Persuasion, Penalties, and Prosecution: Administrative v. Criminal Sanctions* in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 325.

Taken together, these changes "would provide strong incentives for early compliance with" labor standards laws by even recalcitrant employers.[52]

- Finally, if

  deterrence = (likelihood) x (severity of punishment)

  then increased penalties will increase deterrence at all levels of enforcement or allow maintenance of current deterrence levels in the current state of *reduced* enforcement resources or the proposed state of *focused* enforcement. In fact, if monetary penalties are high enough, these can be devoted to financing the Crack-Down and Correction Tier programs on their own; the worst offenders would thereby be made to fund adequate enforcement and prosecution of themselves, while law-abiding taxpayers would need to finance only the more compliance-oriented strategies. Increased penalties for those brought under DIR supervision in the new Crack-Down and Correction programs will also encourage prompt and fair settlement of private complaints by emplo9yees over relatively innocent wage and hour violations under the new Complaint Tier; thus, **creation of a new quicker-and-easier private complaint system for *de minimis* violations and stepped-up enforcement and penalties for scofflaws and recalcitrants are necessary complements in an integrated effort.**

[52] Wood and Wood, "The Fair Labor Standards Act: Recommendations to Improve Compliance," 1983 *Utah L. Rev.* 529, 571.

Subsection I.B

Creating a Correction Tier for Serious Violators that DLSE Chooses Not to Target for Prosecution

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DLSE will not necessarily want – or be able – to pursue punitive enforcement action against every offender, even those meeting Crackdown Tier criteria: Strategic reasons under the targeting strategy discussed in Subsection I.A may militate in favor of concentrating prosecutorial resources elsewhere. Evidentiary or other problems may make the case less attractive. Actions that result in a firm being closed by sanctions rather than brought into compliance may actually hurt the workers DLSE is aiming to help.

The **Correction Tier** is intended to provide "coercive oversight" sufficient to bring offending employers into compliance with sanctions short of civil or criminal punishment – and, eventually, without the necessity of continued coercion. It will be the "last chance" for offenders serious enough to merit tough government action but not beyond all possibility of redemption – the "offender bootcamp" of the regulatory world.

The Correction Tier is thus aimed primarily at the 30% of employers whom DIR staff has identified as "**Clueless ('inhabitants of the parallel universe')** – Those without knowledge of minimum labor law standards, are not connected to any employer or social network to get information about the law and how to comply, and need civil enforcement actions to comply."

The principles of the Correction Tier program are:

- DLSE will be able place offending employers in the Correction Tier rather than Prosecution Tier at its discretion.

- The alternative to voluntary correction and eventual compliance will be prompt removal to the Crack-Down Tier for prosecution.

- DLSE may "graduate" those who achieve correction to the Compliance Tier under the outcomes prong, below. Those in the Compliance Tier who fail to improve can similarly be transferred to the Correction Tier – under threat of further escalation to the Crack-Down Tier – thus establishing a "Tit For Tat" enforcement system in which enforcement and oversight is escalated or diminished in response to the employer's behavior.

- The following requirements will be imposed to achieve correction of the underlying problem:

1. Cure Prior Violations

At a minimum, in order to avoid prosecution under the Correction Tier, **the offending employer must pay all back wages owed to employees, plus interest.**

2. Heavier Enforcement

The employer avoiding prosecution will instead be required to submit a more frequent regime of inspection – not just for labor standards but also OSHA and employment tax regulations, as well as environmental and other tax compliance if the other responsible state agencies choose to participate with DIR in such targeted enforcement actions. In the United States, where regulators are more heavily focused on enforcement-oriented strategies, inspections are, ironically, comparatively more rare than in other countries focused more on compliance. "The difference between the United States and Canada may be partly a result of the greater use of inspection in Canada.. . . US firms are on average inspected by occupational health and safety officers once every ten years, whereas in Ontario it is once a year."[53] By shifting to a compliance-oriented strategy and be allowed to prioritize use of its resources, DIR will be able to increase the frequency of inspection on those actors employers already proven to be problematic – and thus most in need of the oversight.

[53] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 12 (citing P.C> Weiler, *Protecting the Worker from Disability: Challenges for the Eighties* (Toronto 1983), at 106).

Offending employers ought also to be required to pay for these increased audits and inspections – as firms that wish to certify that hey are *exemplary* actors must do, for instance, with audits conducted under the system established and monitored by the International Organization on Standards (ISO). Making offenders pay for the increased oversight occasioned by their noncompliance would provide an even greater incentive for them to decrease the need for and occurrence of these audits –and thus decrease their violations. It would also mean – as with the increased fines recommended under the Crack-Down Tier – that good employers and the public generally do not have to bear the increased price of offenders' misconduct: the offenders do.

Finally, ***anyone*** **would be permitted to file request with DLSE to inspect and review payroll records of a firm subject to Correction Tier oversight, and receive the findings within 10 days.** The proposed interim regulations of the federal Surface Mining Control and Reclamation Act of 1997 similarly provided that *any* person who "suspects or knows" of a violation of the Act or the regulations under it could request an inspection by the Office of Surface Mining (OSM) and some type of enforcement action. The regulations further guaranteed the complainant confidentiality unless electing to accompany the inspector – another right provided in the regulations. They also required the OSM to inform the complainant of its findings within ten days of the inspection.[54] **This procedure for firms already subject to heightened scrutiny and enforcement would supplant the current requirement that DLSE investigate *all* complaints, if filed by aggrieved employees.**

3. Control of Opportunities

Correction and eventual compliance will not be achieved solely through constant governmental oversight – nor can government provide sufficient regulatory resources to keep "at-risk" employers under constant surveillance. Thus, while inspections will be frequent for those in the Correction Tier working to escape placement in the Crack-Down Tier, supplement efforts to monitor correction must be used – and these must depend largely on private actors, including the monitored firm itself.

[54] [Complete CFR cite], section 721.13.

This starts by *controlling the opportunities* for violating by the offending employer itself. This is a well-known concept in other areas of enforcement. Most obviously – and ubiquitously, as it is a form of enforcement applied to virtually every American – "[d]educting income at source . . . reduces the opportunity for cheating on taxes."[55] The broadest, most successful, and perhaps best known example of the phenomenon, however, comes from perhaps the best-ordered, highest-compliance environment in the world: The Magic Kingdom. "[R]egulation is best viewed not simply in terms of the application of sanctions as a response to perceived or threatened violations of rules, but as the constitution and maintenance of order.. . . [W]hat is interesting about Disney World, as a remarkably well-ordered terrain, is not just how sanctions are used (very little), but everything that is done to create the 'Disney order.' In contrast to other forums, where sanctions are central but order is less secure, the ordering of Disney World is a matter less of sanctions than of opportunity management."[56]

The seemingly simple – and soft – expedient of removing opportunities for noncompliance can have potentially very strong compliance effects, overcoming even some of the strongest human compunctions. As one study has demonstrated, removing carbon monoxide from the gas supply in England in the 1960s dramatically reduced suicide by domestic gas (which had accounted for over 40% of suicides in England in 1963), *without a shift to other forms of suicide* – resulting in a dramatic decrease in such deaths. These results arguably say something very important about the efficacy of constraining opportunities: "The study clearly shows that 'blocking opportunities, even for deeply motivated acts, does not inevitably result in displacement . . . and the demonstration considerably strengthens the case for opportunity-reducing or 'situational' means of crime control.'"[57]

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[55] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 6.

[56] P. Stenning, C. Shearing, S. Addario, and M. Condon, *Controlling Interests: Two Conceptions of Order in Regulating a Financial Market*, in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 88, 117

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[57] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 6-7 (quoting R.V. Clarke and P. Mayhew, "The British Gas Suicide Story and Its Criminological Implications," in 10 *Crime and Justice: An Annual Survey* 79 (1988).

As already noted, the maintenance of proper records is the most important element in labor standards enforcement. Employers who violate labor standards also tend to violate record-keeping requirements in order to reduce the government's ability to document and punish their noncompliance. The Correction Tier program aims to stand that incentive on its head and require *proper* record-keeping as a way of avoiding prosecution and punishment; doing so would then constrain the opportunities for most further violating in a relatively less resource-intensive manner. To maintain Correction Tier, rather than Crack-Down Tier, placement, then, **an offending employer should be required to adopt a computer record-keeping system electronically linked to DLSE for real-time monitoring of all wage records and payments.** This is technologically easier to implement than it might sound: Inexpensive on-line bookkeeping systems are already extensively available on the commercial market. All that would be required to turn such systems into a free method of 24/7 monitoring of any at-risk employer would be for the record-keeping system to be properly set up to maintain employee payment records – as to which DIR can provide both the necessary instruction and software, something to be discussed in more detail below, in Subsection II.A – and for DLSE to be given on-line user access along with the employer. DLSE employees would be able to "inspect" the company's books any (and every) day, without warning, and at virtually no cost in time or money; the employer's opportunities for further violating would be constrained, first, by the simple maintenance of the records, compelled under threat of immediate transfer to Crack-Down, and, second, by DLSE's constant and instantaneous access to those records.

4. Self-Enforcement

As noted in the introduction, "self-enforcement," properly conceived, is not about government getting out of the enforcement business and letting offenders police themselves: It is about government creating Hobson's choices that compel self-policing as the better alternative for the offender than further government enforcement – thus allowing the government to achieve its objective with a lesser expenditure of its own resources because of the threat of a greater expenditure by it.

Both the existence of the Crack-Down Tier alternative,

and the three conditions for Correction Tier participation already discussed – immediate retroactive correction, stepped up regulatory presence, and 24/7 control of at least one major avenue of opportunity for continued offending – already create a sufficiently coercive atmosphere to enable self-enforcement to function productively. The three elements of self-enforcement under the proposed Correction Tier plan mirror the steps undertaken in correcting any pathological behavior: recognition – both internal and external – of the problem behavior, acceptance of constraints on continuing such behavior, and supportive services to help achieve not just behavioral but attitudinal change:

- **Disavowal.** The Correction Tier would institute a mandatory, rather than voluntary, version of the National Labor Relations Board's "Disavowal Doctrine"[58]: **An offending employer should be required publicly to advertise, as well as to post at the workplace, a formal and detailed disavowal of all prior violative practices – including information for workers on how they can report and redress violations of their rights in the future.**

- **Internal Responsibility Systems.** Any firm found to be seriously out of compliance with labor standards would be **required to institute an ongoing Internal Responsibility System to prevent and identify further labor standards violations – including a union or workers' committee authorized to consult with management on all labor standards issues, and which would have access to all information on working conditions including payroll records**. Elected worker representatives "would have the same rights to accompany the inspectors in the workplace as the company safety officer. They would have the right to sit in on and ask questions at any exit conference at the end of the inspection and at any subsequent conference. They would receive copies of the inspection report and of any subsequent correspondence between the parties.. . . With minor variations, this has been the thrust of recent occupational health and safety reform in most Australian states. Of course, one could usefully grant the same rights to a nonunion safety representative elected at a

[58] *The Broyhill Company*, 260 NLRB No. 183 (1982), 1981-82 CCH NLRB para. 18,875.

nonunion workplace."[59]

Washington State, Oregon and most Canadian provinces already require such committees in the worksite safety and health field for *all* employers.[60] Ontario's Industrial Standards Act[61] and Quebec's Collective Agreement Decrees Act[62] each provide for union and employer participation in both setting and enforcement of minimum employment standards on a local industry-wide or occupation-wide basis. "A recent Law Reform Commission of Canada study of workplace pollution identified the so-called internal responsibility system (whereby the prime focus of responsibility to control occupational risks rests by legislation with the employer, the supervisor in the workplace, and the worker) as 'perhaps the most distinctive feature of Canadian occupational health and safety law.'"[63]

"The involvement of a third party besides government and business in the regulatory process – the union – is what is increasingly distinguishing occupational health and safety regulation from other areas of regulation" in Australia, as well. "Safety committees and elected employee safety representatives are beginning to play an increasingly important role in regulatory strategy."[64]

Most Australian occupation safety and health agencies espouse the encouragement of workers to form and demand worksite safety committees, and to elect safety representatives as a regulatory strategy, although three

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59 Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 59.

60 US General Accounting Office, *Occupational Safety and Health: Differences Between Programs in the United States and Canada* (Washington, DC 1994), at 14, 27; E. Bernard, "Canada: Joint Committees on Occupational Health and Safety," in J. Rogers and W. Streeck, eds., WORK COUNCILS (University of Chicago Press 1995).

61 Revised Statutes of Ontario, ch. I.6 (1990).

62 Revised Statutes of Quebec, ch. D-2 (1977).

63 M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 13 (citing Law Reform Commission if Canada, *Workplace Pollution* 23).

64 Of Manners Gentle, p. 66.

jurisdictions do not include this among their formal compliance policies. Labor governments in some states have promised to require such committees in all workplaces with more than a minimum number of employees.[65] In most cases, "mine safety regulation has long involved the empowerment of elected workers as safety representatives who have the right to inspect and to stop production when this seems justified. In Queensland, in addition to local miners' safety representatives, full-time state-wide union safety inspectors with the power to stop coal production have $24,000 per year towards their salaries subsidized by the state government, and district workers' representatives for metalliferous mines have their entire salaries paid out of consolidated revenue. The Western Australian Department of Mines pays the entire salaries of five full-time union safety inspectors. Interestingly though, programmes that actively encourage the formation of workplace safety committees have never been a part of the strategy of any mines inspectorate."[66]

- **Mandatory Participation in Supportive Services Programs.** Providing supportive – even "therapeutic" – services to employers who willfully exploit workers might strike some as superfluous. In fact, however, *assistance* in overcoming antisocial behaviors is generally an important element in *forcing* abandonment of such behaviors.[67]

  "Psychology . . . 'has addressed the issue of compliance at some length. Much research has been aimed at identifying the best techniques for gaining compliance from individuals and for modifying their behavior.' The subject has been studied by social psychologists, by developmental psychologists concerned with the socialization of young children, and by behavioral psychologists interested in modifying deviant behavior…. [A]ccording to [psychologist Joan] Grusec, 'children and

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[65] P Grabosky & J. Braithwaite, OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES (Melbourne: 1986), p. 60.

[66] Of Manners Gentle, p. 63.

[67] See, e.g., E. Schnurer and C. Lyons, "The Carrot and the Stick," BLUEPRINTS.

adults who perceive that they have been coerced into conformity should be less likely to internalize moral standards (that is, to behave in accord with societal dictates in the absence of surveillance) than should those with less consciousness of having been coerced. Techniques that minimize feelings of coercion include persuasion, education, and reasoning.' Grusec would combine mild punishment with education that makes the wrongdoer aware of what they have done: 'family violence may be curtailed not only by the presence of punitive consequences, but also by the offender's sensitization to the effects of violence on spouse and children.'"[68]

The field of domestic violence in fact bears many provocative parallels to labor standards enforcement, most notably the economic and related psychological dependence of the abused party that tends to reduce the reporting and punishment of the abuser. "Victims, for example, may be reluctant to report the violence, and there is an obvious disruption of the family relationship. Social and legal measures aimed at preventing violence – for example, targeting of high-risk families with parenting support services – are thus desirable."[69] Research in the field of domestic violence has found that families that experienced therapeutic interventions in combination with police intervention functioned at a higher level, both three months and three years after intervention, than did families that experienced only police intervention, and that spouse-abusers who had undergone court-mandated treatment experienced a recidivism rate of as little as one-tenth that of convicted abusers who had not. In fact, one researcher "speculates that the mechanism whereby arrest-treatment interventions operate to reduce recidivism may be primarily therapeutic rather than deterrent, i.e. that the operative mechanism may be heightened awareness of the negative intra-familial consequences of wife assault rather than of negative criminal justice sanctions."[70]

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[68] M.L. Friedland, ed., Sanctions and Rewards in the Legal System (University of Toronto Press 1989), pp. 8-10.

[69] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 16.

[70] J. Hagan, C. Rogerson, and B. McCarthy, *Family Violence: A Study in Social and Legal Sanctions*, in M. Friedland, ed., SECURING COMPLIANCE: SEVEN

For those dubious that similar dynamics arise in – and similar approaches could fruitfully be applied to – labor standards violations, consider this recent assessment by the respected *Scientific American* of the most extreme form of such violations: "Slavery is not a simple matter of one person holding another by force; it is an insidious mutual dependence that is remarkably difficult for slaveholder as well as slave to break out of."[71] "All this points to the need for a highly developed system of rehabilitation for freed slaves *and slaveholders* alike."[72]

This report therefore recommends that, in addition to the direct control mechanism recommended herein, the State should require that, to avoid prosecution, **firm management must submit to mandatory "Exploiters Anonymous" counseling,** including:

- learning all state and federal labor standards.
- instruction on the reasons for labor standards, and the effects on workers of their violation.
- Education on the potential for employers, especially in low-wage service industries such as caregiving, restauranting, and retail sales, actually to improve their bottom lines through higher labor standards.
- "Business Model" counseling from high-road firm (discussed in detail further below).
- Instruction in the maintenance of proper payroll records, including use of the mandatory accounting software system described above.

CASE STUDIES (University of Toronto Press 1990), at 392, 422 (citing D. Dutton and C. Strachan, "The Production of Recidivism in a Population of Wife Assaulters," paper at Durham Research Conference, 1987). "Evidence is less encouraging as to child (as opposed to spouse) abuse, however, although "existing studies suggest that parenting education, parent support groups, and in-home visitor programs may prevent abusive behavior." *Id.* at 424-26.

[71] K. Bales, "The Social Psychology of Modern Slavery," *Scientific American* (April 2002), at 87.

[72] *Id*. at 88 (emphasis added).

5. Production Chain Enforcement

Section 15(a) of the Fair Labor Standards Act (FLSA) is called the "hot cargo" provision. This provision makes it unlawful for any person "to transport, offer for transportation , ship, deliver, or sell in commerce….any goods in the production of which any employee was employed in violation…" of the Act.

The "Hot Cargo" or "Hot Goods" concept is based upon the theory that retailers and manufacturers are well situated to monitor the wages of their contractors and subcontractors. Oftentimes, they are in a position to control those wages indirectly through the prices that they are able to negotiate with them. In the past, this provision provided limited means as a mechanism to encourage manufacturers to comply with regulatory efforts. However, due to market changes, it has become an important component of regulatory strategy.

At the federal level, the Wage and Hour Division (WHD) of the Department of Labor, now informs manufacturers of the FLSA violations of their contractors. This means that employers can no longer escape a "hot goods" injunction by claiming they received no notice that their contractors were violating the law.

Most of the focus for this strategy has been on the apparel industry. The direct employers in the garment industry are often small, labor-intensive firms that enter and exit the industry easily and are subject to the much greater market power of firms that are closer to the consumer in the chain of production.[73] Therefore, penalizing the latter firms for the FLSA violations of the former can be an effective way of improving labor standards in the industry. One significant change to enforcement activities has been the shift from regulating each facility one by one, to reaching a greater number of apparel producers by looking at how the goods are channeled into the marketplace and using the "hot cargo" provision of the FLSA. As a result, the percentage of contractor shops in New York City voluntarily monitored by manufacturers rose from an estimated 10 percent in 1997 to 51 percent in 1999.[74] Among contractors randomly

[73] See generally, US General Accounting Office, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops* (Washington, DC 1994).

[74] Weil, David, "Controlling Sweatshops: New solutions to an Intrasigent Problem," The Taubman Center Report, Harvard University, 2000.

surveyed by DOL, the presence of only one such monitoring activity raised FLSA compliance even further,[75] and surprise inspections by manufacturers improved compliance almost as much as previous inspections by DOL. This is perhaps because interrupting the flow of goods creates economic penalties arising from FLSA violations that quickly exceed those arising from lost back wages and civil penalties.[76]

The State of California should supplement these efforts with:

- **Enactment of a state "hot goods" statute.**
- **Stepped-up enforcement.**
- **Notification to all downstream purchasers, so that they cannot claim lack of knowledge under the state or federal "hot goods" statute.**

6. Social Enforcement

One enforcement strategy increasingly popular in a wide range of contexts – which this report prefers to denote as "social enforcement" to emphasize its engagement of private actors beyond the immediate chain of economic relations, in society generally – is more widely known as "shaming":

- In most major cities across Canada, local citizens' groups, police and newspapers have incorporated methods designed to shame johns and deter them from future solicitation of prostitutes. This is being accomplished by removing their anonymity. Shaming techniques have ranged from police hiding and jumping out from bushes with flashlights to interrogate prostitutes and johns, to community members conducting "strolls" to patrol prostitutes, photographing customers and recording license numbers. Some local newspapers and radio stations publish the names of johns. "Dear John" letters have been sent to the homes of suspected johns, to indicate to the spouse and family that the individual

[75] Ibid

[76] Weil, David, "Leveraging Time: Regulating US Labor Standards in the Age of Lean Retailing," January 2001

was either engaged in a conversation with prostitutes or was seen patrolling in a known area of prostitution. [77]

- The Department of Revenue in the State of Washington has created a public list of delinquent taxpayers. The list consists of the tax reporting account, the legal entity name and the original amount of filing.

- Some judges have employed similar, creative sentencing employing "shaming" techniques, such as requiring convicted drunk drivers put bumper stickers on their cars notifying others of their record.

As part of a comprehensive targeting strategy, DLSE should be legislatively authorized and funded by the legislature to engage in the following low-cost, high-impact social enforcement strategies:

- Publicizing records of violators on billboards near both the firm's place of business and the business owner(s)' residential neighborhood, with names and pictures.

- Similar postings on the state website.

- Advertisements and inserts in relevant local newspapers, trade publications, and community newsletters.

- In egregious cases, an electronic media advertising campaign in the proximity of the business and/or the business owner's home neighborhood.

- Requiring that an offending firm place notification on all of its own company stationery, advertisements, bills, invoices, and other official communication of the nature and extent of the firm's labor standard violations.

[77] John Howard Society of Alberta, "Prostitution," 2001

Subsection I.C

Creating a Streamlined "Small Claims" Administrative Process for a new Complaint Tier of Technical Violators

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As should be clear by now, this report contemplates that

- as a tradeoff for improved targeting, stepped-up oversight, and tougher penalties for the worst offenders,

- the bulk of labor standards complaints would be transposed to a new Complaint Tier in which

  - the degree of punishment and level of sanction would be substantially reduced for *employers*, but

  - the complexity, cost and delay of the process would all be substantially lessened for *employees*.

The intent is to establish essentially a "traffic citation" or "small claims court"-like system for resolving isolated or *de minimis* wage and hour problems. This will benefit both employers and employees – as well as the state – in numerous ways:

- It will allow DLSE to concentrate its enforcement resources on the worst offenders, while still providing a forum for addressing and resolving wage claims against other employers.

- An administrative process such as this "responds to risk rather than to harm, does not unduly stigmatize offenders who are thought not to warrant moral opprobrium, applies a standard of absolute as opposed to strict liability in at least some cases, entails minimal operating costs, and imposes monetary penalties large enough to have

a reasonable prospect of deterring offenders."[78] In that way, it will be easy to navigate and will provide swift, adequate compensation for employees –

- o in part by encouraging employers to settle at low cost and with no further-reaching consequences or stigma,

- o and in part by reversing the over-legalized process and litigiousness of the current system.

The intention of current California labor law is to provide employees with a convenient and inexpensive alternative to civil litigation for filing wage claims, namely, the "Berman" process discussed earlier; but, as discussed, this process in reality both consumes immense state resources that could be used instead to target, prosecute, and publicize the most egregious cases – thereby improving labor standards compliance generally – and invites tremendous delay, rendering the employee little better off. Low-wage workers are usually poorly informed about their legal rights, usually have small back-wage claims, and litigation costs easily exceed their claims in most cases;[79] obviously, they need a simple and inexpensive forum for resolving such claims. The current process, unfortunately, is not it. Even though many workers prefer to file complaints with government authorities to retain their anonymity,[80] government investigation of a complaint is time-consuming[81] and the multiple appeals and level of due process built into the current Berman procedure only pyramids the delay. For workers living on extremely low wages, such delays are intolerably prejudicial.

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[78] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 12 (internal quotation omitted).

[79] Brock, "Overcoming Collective Action Problems: Enforcement of Worker Rights," 30 U. Mich. L. Rev. 781 (1997).

[80] US General Accounting Office, *Minimum Wages and Overtime Pay: Changes in Statute of Limitations Would Better Protect Employees* (Washington, DC 1992).

[81] The average FLSA investigation consumes approximately one year. Controller General, United States General Accounting Office, REPORT NO. 60 TO THE CONGRESS: CHANGES NEEDED TO DETER VIOLATIONS OF FAIR LABOR STANDARDS ACT (1981) at 47.

In addition, investigation and adjudication by DLSE should be unnecessary in the vast majority of instances: One unpublished labor-affiliated source asserts that most violations are inadvertent and due to employers' lack of knowledge of the law, and that 70 to 80 percent of employers found in violation of FLSA are willing to pay what they owe when informed of their violations. A simple, non-punitive, administrative process for addressing wage claims would thus appear to be all that is required in the vast majority of cases, and would benefit this majority of well-meaning employers by "de-criminalizing" the wage claim process.

Such a step would not be wholly original or unique. "[A] similar approach is now followed by several regulatory agencies which issue tickets for minor infractions."[82] Such approaches have been spreading in Canada: The Waste Management Branch of British Columbia's environment ministry "was given authority to implement a ticketing scheme. The Construction Safety Branch of the Ontario Ministry of Labour tickets workers for not wearing personal protective equipment. In Quebec, the Commission de la Santé et de la Securité du Travail issues a notice of violation for almost all infractions. An employer or employee who receives such a notice can avoid appearing in court by paying the minimum fine."[83] The British Columbia Workers' Compensation Board uses administrative penalties for regulatory offenses.[84]

Such a Complaint Tier for labor standards enforcement in California could be constructed as follows:

1. Individual complainants claiming back wages or overtime payments totaling less than some "small claim" amount would file a simple administrative claim with DLSE.

2. Unions or other designated representatives of employees may file the claim in an employee's stead. This would provide for some alternative other than government investigation and prosecution of the claim in those instances in which individual workers are reluctant to come forward. The Roosevelt Administration's original

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[82] R. Brown and M. Rankin, *Persuasion, Penalties, and Prosecution: Administrative v. Criminal Sanctions* in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 337-38.

[83] *Id.* at 351 n.20.

[84] *Id.* at 325.

plan for FLSA envisioned both an administrative process that avoided litigation before the courts and authorization for unions to act as advocates in cases brought before the agency.[85]

3. The complaint would be processed administratively by DLSE, independent of the court system.

4. If the employee files sufficient evidence to make out a *prima facie* case, the burden-of-proof would shift to the employer, who first would be contacted by DLSE by phone to see if the matter could be settled. In 1995, the federal Wages and Hours Division – which, unlike California's DLSE, does not carry a statutory mandate to investigate all complaints filed with it, was able to conciliate about half of all FLSA complaints through phone conversations with the employer and/or worker; most of the remaining complaints, which usually involved multiple workers or serious violations, were settled out-of-court. The division referred only about one percent of all complaints to the Solicitor of Labor for litigation.[86]

5. If the employer does not agree over the phone to settle the claim, or otherwise chooses to contest it, DLSE would formally serve notice on the employer by mail. The employer would then have two weeks to submit counter-evidence or request a live hearing. (If a full hearing is requested, "hearing fees" would be assessed and attorney's fees awarded under the normal legal standard for these items (i.e., for the prevailing complainant, or for the prevailing complainee in cases found to be wholly specious)).

6. Non-settled complaints would be decided by an Administrative Law Judge, who could adjudicate payment of back wages up to small-claim limit. There would be no fines, penalties or interest under this system. Good faith or misunderstanding would not be at issue, and strict liability would apply; any violations found would therefore be "technical" in nature and carry no other sort of stigma.

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[85] O'Brien, "A Sweatshop of the Whole Nation: The History of the Fair Labor Standards Act of 1938," paper presented at 1997 annual meeting of the American Political Science Association.

[86] Hansen, "California Pursues FLSA Violators," *Compensation and Benefits Review* September/October 1997, at 11-12.

SECTION II

LEVERAGING PRIVATE ENFORCEMENT RESOURCES TO CREATE AN ADDITIONAL *COMPLIANCE SYSTEM*

How is it that a single Australian sheep-dog or cattle-dog can exercise unchallenged command over a large flock of sheep or herd of cattle every member of which is bigger than herself? How is it that a dog can force the retreat of a man, even a man with a knife – when the man is bigger, more intelligent, and more lethally armed?

The first point to make about the regulatory accomplishments of the dog is that dogs are delightfully friendly to other creatures who cooperate with them. Second, dogs are convincing at escalating deterrent threats while rarely allowing themselves to play their last card. They bark so convincingly that a bite seems more inevitable and more terrifying than it is. And they know how to escalate interactively – in a way that is strategically responsive to the advance or retreat of the intruder. Friendliness can turn to a warning bark, then a more menacing growl, posture and raising of fur transforms her – she is bigger and seems ready to pounce, teeth are bared, slightly at first, the dog advances slowly but with a deliberateness that engenders irrational fears that a sudden rush will occur at any moment. The dog's remarkable regulatory accomplishments are based on a [tit-for-tat] strategy (the intruder will be extended friendliness when reintroduced as a friend; the sheep will be protected, led to food and drink when they cooperate). The success is also based on finesse at dynamic interactive deterrent escalation, and at projecting an image of invincibility.[87]

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[87] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 44.

An Overview of the Compliance Approach to Regulation

Over a decade ago, a new paradigm for enforcement began to emerge in the field of policing. This approach called for less reliance on responding to incidents of law-breaking and more attention, instead, to detecting and deterring violations before they occurred, especially though community outreach, encouraging the community to become involved in crime control itself, and attempting to remedy conditions encouraging or leading to law-breaking before-the-fact.

As Malcolm K. Sparrow, a former policeman now teaching at Harvard's Kennedy School of Government, noticed, regulators in such diverse fields as environmental enforcement and tax collection were soon undertaking the same sort of restructuring as policing had experienced. Sparrow observed that a wide range of government agencies – those which, like policing, "deliver obligations" rather than delivering services – were ill-suited to the "customer service" mentality sweeping the political world under the rubric of "reinventing government."

Sparrow also found that, as had been the police before them, those involved in traditional regulatory and enforcement activities were strongly resistant to the new paradigm. His description of the typical sequence of developments encountered by regulatory reform efforts is set out in the margin.[88]

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> Given your agency's traditions of audit, inspection, and enforcement, embracing the new tools of voluntary compliance (education, outreach, partnership, customer service, negotiation, consensus building) has presented considerable cultural challenges, but you and your colleagues have persevered.. . . [H]owls of protest were heard from your traditional allies and advocates of your cause (unless you are a tax agency, in which case you have no traditional allies). Imploring you to return to your old ways, they argued that nothing works like enforcement. . . .
>
> The enforcement chief in particular complained . . .. Enumerating the direct, local consequences of individual enforcement actions could never capture the broader impact on compliance rates. Besides, the enforcement function was more about delivering justice than producing any other kind of results.

Regardless of the validity of these concerns, however, DLSE, like any other regulator, is faced with a practical limitation: In a state with far more employers and workers than DLSE can possibly monitor given its finite resources,[89] *any* regulator must

- target its enforcement resources effectively on the worst offenders, and
- encourage compliance among the rest through cooperative means, including incentives for going beyond minimal compliance, education and outreach, labor-management cooperation, and other creative strategies.

Nonetheless, there are valid questions as to the extent to which "labor standards are different" from other enforcement problems. These include the mobility and evasiveness of potential offenders, the diminished capacity of other non-

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> Other enforcement managers, clearly exasperated that they should have to defend their existence, explained that the reason the agency should maintain its commitment to enforcement was that without a credible deterrent none of the other new-fangled methods would work.
>
> The focus on the customer, imported from the private sector and pressed on you by the reinvention gurus, turned the developing crack in your organization into a fissure. Camps developed. The enforcement camp, accustomed to dealing with egregious violators, found the new language of customer service (especially the private sector notion that they should "delight people so that they come back for more") plainly ridiculous. . . . .
>
> When you tried to promote such activity by diffusing innovations, your efforts were met with the depressing refrain, "It won't work here," which sounded cynical to you at first. When you looked into the matter, however, you found that they were right: It wouldn't work here.

M. Sparrow, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE (Brookings 2000), pp. 12-14.

[89] See coverage of enforcement of the new garment industry law.

governmental "stakeholders" to carry out some of the work of oversight, and the resultant "inobservability" of much of the law-breaking. The question that remains, then, is, What is needed to adapt compliance insights from other areas to labor standards enforcement?

The Theory Behind the Reform

Sparrow and others have described "a classic enforcement mentality, built upon the fundamental assumption that a ruthless and efficient investigation and enforcement capability will produce compliance through the mechanism of deterrence. Senior IRS officials refer to it as 'the blind assumption theory' around which their work has been built for the past several decades."[90]

Sparrow focuses most of his discussion of the reason, and need, for a change in perspective on resource constraints: "There are too many violators, too many laws to be enforced, and not enough resources to get the job done."[91] "[F]ull enforcement is arguably an impossible and even utopian goal, not least because of insufficient resources."[92] For instance, in tax collection, despite a $100+-billion gap between taxes due and taxes paid, "the deficits are scattered over such a broad range of taxpayer categories that pursuing individual enforcement actions would not, in most cases, be cost-effective. Hence the need for the IRS to develop a strategic focus to enforcement efforts, an effective targeting capability, and a broad range of responses to noncompliance patterns."[93] **In sum, the primary reason for reform is not philosophical rejection of the traditional enforcement approach. It is the practical recognition that enforcement will always be imperfect because there will never be an inspector at every worksite all the time and thus regulators must search for ways to use scarce resources most efficiently and effectively.**

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[90] M. Sparrow, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE (Praeger 1994), pp. ix.

[91] *Id*.

[92] B. Hunter, COMPLIANCE: REGULATION AND ENVIRONMENT (Oxford 1997), at 244.

[93] M. Sparrow, IMPOSING DUTIES, at xxi.

As Sparrow also admits, however, part of the reason for the emergence of alternatives to the enforcement mentality is a changed political environment: "Legislative changes washed over your agency, requiring a clear demonstration of the results achieved by your regulatory actions. To justify funding, you now had to demonstrate the connection between specific activities and specific outcomes."[94] In addition, there has been a growing emphasis – both ideological and non-ideological in nature – on both citizens *and* regulated entities as "customers" of an agency, who should be happy with the treatment they receive. But, as Sparrow observes, applying such a philosophy "within these enforcement professions is constrained and constraining in a number of significant ways.. . . The person being prosecuted, forced into compliance, or having his or her property seized is not really the client, is not paying for the service, cannot be expected to be delighted or gratified by the service, and should certainly not be encouraged to come back for more."[95]

Academic developments – most notably in the field of policing – have also driven this change in focus, however. Even at the same time as the rising popularity of "zero-tolerance" approaches – originally promoted by such thinkers as Daniel Patrick Moynihan and James Q. Wilson – which argued for tough enforcement measures against even the smallest acts of deviancy in order to maintain social order and deter the development of larger (and more costly to control) pathologies, researchers and practitioners in criminal justice have increasingly focused on two complementary changes in policing:

(1) preventive, service-oriented approaches – generally known as "community policing" or "problem-oriented policing" – produce more cost-effective reductions in criminal activity than traditional reactive, enforcement-oriented approaches, and

(2) recognizing that, since the vast majority of individuals are not offenders and the vast majority of offenses are committed by a small minority of serial offenders, targeting enforcement action more intensively on those identified as, or likely to

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[94] M. Sparrow, THE REGULATORY CRAFT, p. 12.

[95] M. Sparrow, IMPOSING DUTIES, p. xxviii.

be, serious offenders produces greater reductions in crime *and* does so more cost-effectively.

Since the new approaches to compliance are generally dismissed by enforcers as unrealistic and ineffectual because "soft," it is important that they originated and have proven themselves in the field of law enforcement – probably the *least* "soft" area of compliance delivery – and been, after that, most assiduously pursued in the field of tax enforcement (as in Washington State), where governments of all ideological stripes have an interest in the highest levels of compliance.

As one scholar writes, "The view that conformity to the law may be a matter of negotiation between enforcement officials and those they control is not one that we would necessarily expect to command instant recognition. Yet it is an approach that some would argue is embedded in the history of law enforcement."[96]

If one starts with the criminal law enforcement insight that the vast majority of individuals are not offenders – ***at least where some basic enforcement structure exists to maintain the minimal likelihood of detection and punishment*** – and that finite resources argue for focusing most intensively upon the worst offenders or likely offenders, the general contours of a more intelligent enforcement-and-compliance regime follows. In fact, it is so common-sensical that the general approach has already been embraced by DIR generally and DLSE in particular.

For starters, as Bridget Hutter, who has studied environmental enforcement in Britain, observes, "Agencies cease promulgating the myth of complete coverage.. . . Agencies begin asking what is feasible, what is most important, and what presents the greatest risks." They also come to regard criminal prosecution as just one tool among many, to be used *in the context* of a coherent strategy designed to *procure compliance*.

When the job of regulators is redefined in that way, measurement of job success must also be redefined – from "productivity" to "effectiveness." For instance, "Under an enforcement model, "the number of prosecutions initiated may be regarded as both a sign of success and as an indicator of

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[96] B. Hutter, *op. cit.*, at 13.

work undertaken."[97] Where compliance is the goal, however, the number of prosecutions is a measure of failure, not success. In fact, measures of agency activity – including budgets, personnel, actions taken, and the like – tell us little about whether the agency's objectives are actually being achieved, something it is essential to know in order to understand the most effective way to target resources. Regulatory agencies pursuing more effective compliance strategies therefore de-emphasize productivity measures in favor of measures of effectiveness; for instance, Hutter found that British regulators began to set agency objectives in terms of "environmental quality" – but then had trouble picking appropriate measures.

The difficulty of designing meaningful measures is a significant hurdle to changing bureaucratic behavior and focusing resources on the most effective actions. As just one example of the complexity involved, in environmental context Florida has developed a series of "tiered" measures: contextual information such as ambient air and water quality, or tons of pollutants emitted (Tier 1); facility-based compliance rates and other behavioral changes like adoption of Best Management Practices (Tier 2); process measures like number of inspections and enforcement actions (Tier 3); and, cost accounting information (Tier 4). The four tiers together allow state officials to analyze environmental performance with both traditional and non-traditional measures. Since DIR is interested in fairly narrow and well-defined outcomes – payment of wages and imposition of work hours defined by simple numbers in state law – this should prove the least significant hurdle in the modernization of labor standards enforcement.

Defining the actual activity of regulators, however, becomes much more complex as an agency shifts its focus to compliance, leading, in Sparrow's words, to "a new regulatory craftsmanship, which brings with it the ability to specify risk concentrations, problem areas, or patterns of noncompliance, and to design interventions that effectively control or reduce them. In other words, to *pick important problems and fix them*."[98]

Problem-solving, project-focused work allocation has meant various things in regulatory agencies applying it:

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[97] B. Hutter, *op. cit.*, at 15.

[98] M. Sparrow, THE REGULATORY CRAFT, at 9.

- Emphasizing risk assessment and prioritization.

- Redefining the unit of work from “incident” or “violation” to “pattern” or “problem” or “risk.”

- Adoption of a “project mentality” to deal with problems nominated for attention.

- Breaking down traditional functional divisions – and thus cross-training field engineers, heralding the arrival of convenient “single-point-of-contact” service for industrial managers.

- Distributing resources appropriately between proactive and reactive work: On the one hand, integrating reactive and proactive operations without losing the impetus for adoption of a proactive stance; on the other, developing robust proactive and preventive capabilities without decimating the organization’s capacity to respond effectively to genuine emergencies.

Complications and Concerns Specific to Labor Standards

DIR has recognized the need for such an approach in the labor standards context, as well. As the “Summary of Discussion” from the DIR Senior Managers Planning Conference of May 12, 1999, notes, “Compliance is the goal. When there is no compliance, enforcement is necessary. Enforcement is a means to the goal of compliance.”

Nonetheless, while the literature suggests that reforms of the type contemplated by this project may be fruitfully pursued in any area of regulatory oversight, there is in fact reason to believe that the skepticism greeting such changes in other fields might be particularly apropos in the area of labor standards.

Most generally, compliance strategies (as opposed to traditional enforcement, or what Hutter calls “deterrence”) tend to work better in some circumstances, and with some targets, than others. As Hutter summarizes the literature:

> Compliance systems will generally characterize situations when violations are predictable and preventable; conversely, deterrence systems will

> typify circumstances when violations are unpredictable and preventive actions are not possible. Compliance systems will be preferred where there is a possibility of continuing harm, especially where the process of detecting violations and sanctioning violators is complex, protracted, or costly. These systems will also be preferred when the long-run consequences are more serious than the short-term harms; and when the penalties which may be imposed for non-compliance may be passed on to others and so may be perceived as having no deterrent effect, for example when business can pass on the cost of violations to consumers [or workers]. Compliance systems will also tend to be selected when the regulators can define a distinct known population of violators who can be monitored and controlled whilst deterrence systems will predominate when those subject to control are dispersed and unknown.[99]

Similarly, Hawkins draws "a distinction between forms of deviance which are 'continuing, repetitive, or episodic in character' and deviance which consists of isolated and discrete and bounded incidents, his argument being that a negotiating strategy [*i.e.*, ongoing, cooperative and proactive, not just reactive and punitive] is more likely in the former. He contends that this is largely because the former type of deviance is 'amenable to strategies of correction of control in a way that most forms of isolated crime cannot be' because they are unpredictable as to timing and location."[100]

Even the choice of strategies within the compliance-oriented continuum is affected by the nature of the target: For instance, Hutter concluded that self-regulation – in which "the government laid down standards which companies were expected to meet by, for example, developing systems and rules to secure compliance," involving "worker cooperation [and] regulatory agencies in monitoring whether compliance was being achieved" – was generally "most suited to large, well-informed, and well-resourced companies. It was less-suited to

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[99] Hutter, *op. cit.*, 239.

[100] K. Hawkins, Environment and Enforcement: Regulation and Social Definition of Pollution (Oxford 1994), p. 6.

smaller companies which were not fully aware of the requirements and whose regulatory capacity was generally limited. In these cases the *persuasive strategy* was often considered most appropriate. This was essentially an accommodative strategy which relied upon education, advice, and persuasion."

The biggest problem in the labor standards context is that a larger proportion of the problem is probably concentrated in those firms and circumstances identified as least amenable to compliance-oriented strategies – and most requiring traditional enforcement approaches – than is the case in, say, environmental enforcement:

- The bulk of problems in labor standards enforcement come in such areas as garment sweatshops in Los Angeles involving illegal immigrants, and the construction trades, in which work sites and/or work crews are highly mobile and capable of evading authorities.

- They also tend, for a variety of reasons such as low profit-margins and involvement in other areas of illegal behavior (*i.e.*, immigration), to be less deterred by the mere *possibilit*y of sanctions; actual high-level enforcement actions are necessary.

- In contrast, the bulk of environmental problems in the business context (*i.e*., excluding the highly-polluting but diffuse and mobile automobile) is generated by stationary, identifiable, essentially law-abiding, and generally large worksite. More of the enforcement load can therefore reasonably be shifted to compliance strategies in the environmental, than in the labor standards, arena. (On the other hand, the "regulated community" in tax collection – or criminal law enforcement, for that matter – consists mainly of an extremely large and diffuse mass of small individual actors, yet tax collection and law enforcement have profited from, and in fact led, the compliance paradigm shift.)

In addition, labor standards enforcement encounters prevalent obstacles to many of the specific compliance strategies outlined above:

- "Green tier" strategies are likely to be less efficacious in the labor standards than in the environmental context because the economics differ: Even most recalcitrant firms eventually find that voluntary, internal environmental compliance systems, and even external environmental "auditing," yield improvements to the firm's bottom line, because pollution is ultimately "waste" in both the environmental ***and*** economic senses; reducing such waste not only helps boost environmental compliance, it also saves the firm money. The same generally cannot be said – particularly in low-wage fields, where the labor standards problem is obviously most concentrated – of paying workers more money. While in some service areas – most notably care-giving (where better payment and treatment reduces turnover and improves patient or child care), but also in some low-wage jobs such as restaurant service and retail sales (where better pay attracts better workers who engage less in employee theft) – better worker pay can improve an employer's bottom line, generally speaking, more money for labor represents less money for owners.

- Other alternative enforcement strategies are hamstrung by the lack of effective "communities" that can monitor and enforce in place of the state. For instance, while plants that pollute affect a wider external community – a neighborhood, and sometimes an entire city or region – labor standards violations produce no such negative externalities: Only the workers within the facility are harmed. There is thus little incentive for oversight by an outside community.

- The affected internal community – lower-wage workers – are, by definition, the poorer and less powerful members of the larger political community.

- They often are illegal aliens, as well – which means that the law has created an incentive for the only effective community, the internal workers,

to avoid governmental efforts to help them and, in fact, to assist employers in thwarting them.

- Significant language, literacy and educational barriers also can reduce the effectiveness of the internal worker community (and, sometimes, of employers themselves) in mobilizing alternative enforcement mechanisms ***and*** in making education and outreach efforts efficacious.

- While unions can provide a ready-made alternative monitoring and enforcement structure, firms most likely to fall below or marginally meet labor standards are less likely to be unionized.

Many other questions remain for us to ask, and answer, however, to determine not just what possible strategies exist, but how and when they can most effectively be employed. To return to a point made at the outset, "While most [regulators] would . . . agree[ ] that prosecution was expensive and that it would not be cost-effective to prosecute a large proportion of violators, they differ[ ] about the point at which prosecution was cost-inefficient."[101] "The important point to recognize is that all enforcement officials use both accommodative and sanctioning techniques. What is at issue is the balance."[102]

A Structure of Compliance

Just as the enforcement system itself encompassed subtle gradations in offender-level and thus appropriate DLSE response, so too must a compliance system apply a tiered approach depending upon context – from those employers who are clueless or hesitant compliers verging on noncompliance, to the vast middle ground of employers doing their best to comply with the law who could benefit from greater responsiveness from state government, to those employers willing to go beyond the minimum requirements of the law to become labor standards leaders.

This report therefore also recommends a tripartite, tiered structure for assisting law-abiding employers and

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[101] B. Hutter, *op. cit*, at 232.

[102] *Id*. at 245.

promoting widespread *compliance* with labor standards:

- a **“Complaince Tier”** program addressed to those identified cases in which compliance risks shading into noncompliance (“hesitant compliers”).

- a **“Cooperative Tier”** to increase the numbers of those who comply immediately with minimum standards (“spontaneous compliers”) by creating a broad culture of compliance *without* government enforcement.

a “Congratulatory Tier” that rewards **those who set and follow standards that exceed the minimum labor standards enforced by government (“industry leaders”)**.

Subsection II.A

Instituting a Compliance Tier Focused on Individual Firms not Meriting Prosecution but Needing Additional Measures to Promote Compliance

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The enforcement system of Section I of this report is addressed to those employers who are already violators of the state's labor standards laws. This Section outlines a parallel "compliance system" designed for the vast bulk of employers who play by the rules – or at least attempt to – and creates a similar three-tiered structure for dealing with different (and encouraging higher) levels of compliance with the law.

The first of these – the **Compliance Tier** – is addressed to those identified cases in which compliance risks shading into noncompliance; it is intended to turn borderline cases of "gray" toward the light *before* they require *enforcement*. Aimed at the 30% of employers whom DIR staff has identified as "**Hesitant compliers** – Those who need enforcement stimulus to comply because they wait until cited for violations before comply," this Compliance Tier can also be targeted on:

- Violators in the Correction Tier who have shown significant enough improvement to be "downgraded" to the Compliance Tier of the Compliance System.

- Employers who have been taken through the Complaint Tier of the Enforcement System frequently enough to merit additional on-going oversight under the Compliance Tier.

- Potential violators who do not yet rise to the seriousness level of the Crack-Down or Correction Tiers under the Enforcement System.

A number of measures will be created and encouraged to increase compliance by identified border-line offenders from outside traditional government enforcement channels:

- **Controlled Use of Sanctions/Enforcement**

Even the process of enforcing and sanctioning itself is not an all-or-nothing proposition; rather, it too consists of gradations – often described as a sanctions or enforcement "pyramid" – with techniques of persuasion at its broadest base. Persuasive techniques themselves are graduated, starting from the education and advice of the preceding heading and "stepping up" as conditions warrant to evidence gathering which can then be shared with a non-complier to educate him to the problem and convince him to comply, to "shaming," *i.e.*, the dissemination of this evidence to others (higher-ups in the firm if the compliance problem appears to be the fault of a recalcitrant manager rather than firm-wide attitude; workers and labor organizations; customers and suppliers; the general public).

The pyramid then further "steps up" (in, hopefully, narrower and narrower classes of cases) to

- Warnings (alerting the non-complier to the imminence of enforcement action).

- Notices (requiring specified improvement by dates certain, or prohibitions on certain activities until compliance is attained). And finally,

- Prosecution and punishment.

Such an approach has been termed an "Insistent Model," in contrast to a Persuasive Model. It is clearly for use with those for whom mere persuasion is insufficient – those who turn out to be more hesitant or clueless than others. "The *insistent* strategy is a less benevolent and less flexible approach than the persuasive strategy [discussed under the next heading]. There are fairly clearly-defined limits to the tolerance of officials adhering to this strategy. They are not prepared to spend a long time patiently cajoling offenders into compliance and they expect a fairly prompt response to their requests. When this is not forthcoming then officials will automatically increase the pressure to comply and will readily initiate legal action to achieve their objectives should they encounter overt resistance to their requests. However, it is important to stress that the ultimate objective of these enforcement moves is to gain compliance, not to effect retribution, and this is one of the major differences between the insistent and sanctioning strategies. As Braithwaite, Walker, and Grabosky (1987) note, there is an

important and empirically significant middle ground between the sanctioning and compliance models identified in the binary model of enforcement. The insistent strategy forms part of this middle ground, which includes the 'Token Enforcers' described by Braithwaite *et al*."[103]

In sum, while the emphasis is on gaining compliance, such an approach is neither toothless nor fawningly conciliatory. How does it differ, then, from traditional enforcement? In defining its mission as ***achieving compliance*** with regulatory goals – ***not*** as detecting and punishing ***non***-compliance – thereby leading to a different ordering of priorities and targeting or resources. For instance, Philadelphia food inspectors conduct scheduled rather than surprise health inspections of restaurants. They believe that this works better than surprise inspections because the restaurants are cleaner when they are given a chance to do what they think is perfect; this enables the inspectors to focus not on the ketchup bottles that aren't clean but rather on more important issues – which are usually requirements that the restaurants either don't know, don't understand, or find difficult to comply with. The inspectors then enter into a scheduled arrangement with the owners for fixing the problems and follow-up visits.

- **Alternative Enforcement**

Interestingly, the academic literature has observed of community policing that it "tends to broaden the scope of police actions, and it tends to distribute more widely the responsibility for producing results." In other words, not only do the police act differently, but also community members become involved in the "law enforcement" process – observing, reporting and discouraging non-compliance. But the literature has not extended this insight, as it has with the others discussed, from traditional policing to other areas of regulatory enforcement.

There is evidence, however, that some compliance can be achieved in environmental and workplace regulation through similar reaching out for community involvement and monitoring – something in between *self*-monitoring and full oversight by the government.

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[103] B. Hutter, *op. cit.*, at 16.

One option is cooperative oversight between the agency and the firm itself. For instance, in an experimental program launched by the federal OSHA in Maine, targeted plants were offered two options: The facility could choose to work with the agency in identifying and correcting hazards itself and also by implementing comprehensive safety and health programs to sustain the effort. The company's other choice was a dramatic increase in enforcement agency inspections. Perhaps not surprisingly, nearly all targeted plants chose to enter into partnership with OSHA. As a result, the number of OSHA-identified hazards jumped from 37,000 over the preceding 8 years to 174,331 in just the next two years – and nearly 70% of these (118,671, or more than 3 times the number of violations found in the preceding 8 years) had been corrected within that time.

The Maine program did not involve outsiders in the process, however. In a number of environmental situations, though, "Stakeholder Audits" have proven an effective way to increase safety and meet community concerns. In a Stakeholder Audit, the company pays for an expert chosen by the outside “stakeholders” – such as workers and/or the surrounding community – as a result of a negotiated agreement. This expert works with the community and company to define the scope of the facility audit. The audit is then performed and its results (barring legitimate trade secrets) are shared with the community and company. This is followed by a negotiated agreement between the community group and company specifying actions to correct problems uncovered by the audit. These agreements typically become legally binding. So far, stakeholder audits and negotiated agreements have come about because of accidents that created public relations or other problems between a company and active citizens' group. Companies have perceived it in their interest to cooperate with such an audit and reach an agreement. But many others have resisted since there is no legal mandate to cooperate.

“Occupational health and safety regulation in Australia is being reshaped at the moment by taking on board important elements of the conciliation model. Tripartite structures on which business, workers, and government are represented are being set up at all levels of occupational health and safety regulation, such that the inspector is becoming more a facilitator of workers acquiring an involvement in their own safety by electing safety representatives, and establishing safety committees to conciliate safety disputes. The intention in most

states is that inspectors will spend less of their time reminding employers of the requirements of the rulebook, and more time explaining to workers how they can monitor the safety of their workplace and establish structures to ensure that grievances uncovered by this monitoring are addressed."[104]

As DIR has recognized, in some firms "there is an internal institutional structure that assists our compliance work, i.e. the union monitors, reports, challenges the employer to improve working conditions. Unions can help DIR identify the bad actors, which can help us be selective about where to target our resources." Consideration should be given to what other "communities" besides unionized workers might have an interest in effective "community policing" of labor standards, generally and at specific firms; these might include minority and immigrant networks, and other state or federal agencies that interact with employers on different (if sometimes inter-related) issues, such as the INS or EDD.

In addition, competing employers can be a source of "community policing" of labor standards: As the DIR senior managers observed, "Some employers complain we use our resources to find and cite them for minor violations, i.e. late filing, while hundreds of neighboring employers not being inspected never file or comply, e.g. in the garment industry." These employers should have a natural interest in reporting, and enforcing sanctions against, competitors who are gaining an unfair competitive edge through labor standards violations. Incentives for reporting by other employers can also be created where they do not already naturally exist, in much the same way that prosecutors use plea bargains to leverage small-bit arrests into major cases: Waivers and/or reductions of sanctions could be promoted for less-than-model compliers if they provide useful information on employers who are even *worse* violators.

- **Assistance in Compliance/Education**

As one former IRS Commissioner observed to Sparrow, what regulatory agencies need is to "improve voluntary compliance – strategies that combine traditional enforcement actions with education, outreach, and simplification of regulations and legislation. The ultimate objective is not to maximize yield through costly, intrusive, and burdensome

[104] Of Manners Gentle, p. 229.

enforcement efforts. The objective is to enhance voluntary compliance."[105]

The vast majority (60%) of employers, according to the estimates devised by DIR managers, fall into categories in which they do not comply, either from calculation or "cluelessness," until told to do so. Before sanctioning such employers, compliance could be achieved in many cases for lower cost through various forms of outreach and education – as the literature puts it, "a wide array of informal enforcement techniques including education, advice, persuasion and negotiation." As the 1999 DIR Senior Managers Planning Conference concluded, "Often new employers are not in compliance because they are uninformed about the requirements and short on resources so cut compliance corners. We (DIR) used to leave small employers alone. If we can engage small (new) employers, we may be able to push them out of the 'hostile' or 'clueless' categories and into one of the others." Increasing dissemination of information would also even further improve the performance of the 15% of the employer population who comply immediately with standards when they are announced.

For Australian occupational safety and health regulators, "law enforcement is only a part of their function. Safety education is an important involvement to a greater or lesser degree with all of them. Even with routine inspections, persuasion is regarded as a more important function than enforcement. Indeed, seven of the eight general occupational health and safety inspectorates indicated . . . that education and persuasion were more important functions for them than law enforcement, and six of the eight thought that they devoted more resources to education and persuasion than to law enforcement."[106] This is particularly true in the mines – the area longest regulated by Australian safety and health officials – where, "[w]hen inspectors feel a need for punitive action, they are likely to get management or the union to mobilize private justice systems rather than prosecute. Essentially, mine inspectors act as catalysts to get managers to write down their own safety rules. Mines inspectors are as much technical advisors as they are watchdogs."[107]

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105 Cite.

106 Of Manners Gentle, 59-60.

107 Of Manners Gentle, p. 66.

The flip side of the coin from providing informational efforts about *how* to comply is making it *easier* to comply (while still attaining the same outcomes): There is less need to educate about mandates that are easily understood. As noted at the 1999 Senior Managers Planning Conference, "One problem for employers is that compliance in some areas is too complex and confusing." Thus, it was decided that "enforcement activity should include," among other things, "[d]efin[ing] compliance" and "[s]et[ting] clear benchmarks – clarify[ing] the rules." **A complete review of all labor standards is beyond the scope of this report, but should be undertaken – and the results implemented – by DLSE.**

All such assistance in compliance should increase rates of compliance at lower cost than enforcement action, at least among that segment of the regulated population who are uninformed, lazy or face impediments to compliance rather being hostile to compliance.

1. Focusing Public Efforts on "Compliance" Rather Than Just "Enforcement"

Firms that exhibit signs of, or potential for, noncompliance need to be identified, targeted – and then brought into a culture of compliance reducing the future need for more costly oversight and, hopefully, obviating the future need for enforcement tier action. This report recommends four specific steps DLSE can undertake to make its interaction with such "at-risk" firms *compliance*-, rather than *enforcement*-, oriented:

- **Experiment with a pre-arranged "compliance audit," rather than a surprise "inspection," system.**

  As California's Department of Industrial Relation reported in their 1998-9 Biennial Report regarding Cal/OSHA's Targeted Consultation and Targeted Inspection Programs, targeting employers in the highest-hazardous industries such as construction, agriculture, manufacturing and nursing care services has proven what Cal/OHSA officials have long recognized: employers with workplaces containing the highest

proportion of fatalities, injuries, illnesses and worker's compensation losses often benefit from assistance.[108]

- **Develop an inspection schedule that reduces or increases as a firm comes more or less into compliance.**

  While traditional enforcement emphasizes punitive sanctions for regulatory noncompliance, newer regulatory strategies equally emphasize the need for rewarding firms that demonstrate sustained compliance over time. By focusing fewer enforcement resources on firms that have proven their adherence to the law, more resources can be devoted to firms with fewer tendencies to comply with regulatory requirements. DLSE can use output measures to economically allocate regulatory resources. By categorizing firms based on their level or frequency of violations, a compliance rewards program can provide the division with the ability to maximize its resources for monitoring compliance. For example, for firms that score well, inspections could be scheduled every two years as opposed to annually. Conversely, if a firm scores poorly, DLSE can increase inspections or schedule them more frequent. Output measures can ultimately be used to effectively and efficiently allocate resources, especially when, as is the case with DLSE, demand for oversight and inspections exceeds the supply of regulators.

- **Institute a mixed, balanced approach to penalties.**

  While reduction of penalties is a necessary component of working cooperatively and openly with potentially offending firms, absolution need not be delivered in a way that allows (or even encourages) employers to "game" the system by obtaining advantages from shirking their responsibilities and then simply "fess up" (and that is why the Complaint Tier of this report's enforcement strategy requires that businesses escaping both heavier enforcement and its stigma to "settle up" in full with claimants, including interest).

  The necessary balance can be struck by policies such as that adopted by the US Environmental Protection Administration in the preceding decade. In 1995, EPA issued a "Voluntary Environmental Self-Policing and Self-

[108] California Department of Industrial Relations 1998-1999 Biennial Report, p.3.

Disclosure Interim Policy" that offered dramatic incentives for companies that evaluated their own operations for compliance and then voluntarily disclosed and corrected their violations. **While the "punitive" or gravity-based component of the penalty might be reduced, EPA continued to recover any economic advantage that companies might have gained from their noncompliance.**

- **Provide amnesty programs for those who bring themselves into compliance.**

  Amnesty programs have been especially effective in the area of tax collections. In 1992, the Internal Revenue Service (IRS) announced a program to provide comprehensive support for nearly 10 million nonfilers, thus making tax amnesty programs the oldest form of amnesty waiver programs.[109] IRS amnesty waivers provide ordinary taxpayers who may have inadvertently made a mistake in filing their returns the financial incentive to voluntary disclose their personal or business records to federal tax authorities. Often used in conjunction with voluntary compliance programs, the incentive grants a taxpayer amnesty either through the removal of interest fees or prosecution penalties, and in some cases both.

  The Washington State business tax amnesty program does not penalize taxpayers for past errors or inaccurate reporting. Voluntary compliance is encouraged by waiving penalties and fines. In return, taxpayers are required to pay their taxes and participate in free or low-cost educational programs in which a state auditor reviews the business' activities and advises them on proper regulatory compliance requirements, answers questions and offers recommendations.

  Amnesty waivers have a clear application to improved wage and hourly rate compliance. By encouraging voluntary compliance in a non-confrontational, non-punitive, educational environment, the division could improve compliance rates and reduce DLSE's administrative burden with minimal monitoring of

[109] "Full amnesty could encourage provider self-disclosure." Journal of the Healthcare Financial Management Association; Westchester, Jul 2000; Michael M Mustokoff; Robin L Nagele; and Jonathan L Swichar.

regulatory requirements. Amnesty waivers are justified when lack of compliance is related to misinformation, and when specific policies are difficult to understand.

Washington's Amnesty Programs

The State of Washington's Department of Revenue (DOR) enlists two types of voluntary disclosure programs, Tax Consultation Services and the Voluntary Disclosure Program, which rely on amnesty waivers to encourage voluntary program participation. The Tax Consultation Service is a free service designed to educate taxpayers on how state taxes apply to a business' activities.[110] Program participation includes a visit from a state auditor who advises the business on how to properly report taxes, record business transactions and calculates their taxes. The Voluntary Disclosure Program offers businesses that do business in the state, but presently are not registered or pay state taxes, to resolve all tax liabilities with the state.[111] Like the Tax Consultations Service, the Voluntary Disclosure program provides a free education session to businesses that chose to participate. The DOR uses amnesty waivers to ensure businesses that they will not be audited or penalized if errors are found.

While businesses that already have been contacted or are currently under investigation by the DOR do not qualify for the amnesty waiver, the amnesty waiver offers several incentives for those businesses that are eligible to participate. For instance, businesses that decide to voluntarily participate in either the Tax Consultation Service or the Voluntary Disclosure Program might have their penalties either partially or fully waived. A second advantage provided under the amnesty waiver is that the retroactive review period is limited to four years instead of seven years. This advantage could significantly reduce a business' payment and interest fees. An interested business can locate information about these programs on the DOR web site where information on such topics as participation benefits, qualifications, sample agreement and contact information are located.

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110 www.dor.wa.gov, key words "Tax Consultation Services."

111 www.dor.wa.gov/News/news_main.asp, Voluntary Disclosure Program On Web Helps Businesses Get Registered and Resolve Past Tax Liabilities.

The Environmental Amnesty Program

The US EPA uses an amnesty program that encourages regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental requirements.[112] While the EPA's amnesty program does not guarantee absolute amnesty for an entity that voluntarily comes forward, it does provide explicit protection from prosecution. In addition to protection from prosecution, the amnesty waiver also includes other incentives such as elimination or reduction in penalties. However, several conditions must be met before amnesty can be fully awarded. Some of the conditions include:

- The entity must cooperate fully with the EPA's investigation.
- The entity must agree in writing to take steps to prevent a recurrence of the violation.
- Only the entity itself is protected – individuals still may be referred for prosecution.[113]

While the EPA requires entities that choose to participate to meet a set of conditions, the amnesty program enables the agency to incorporate a balanced approach to both traditional enforcement and voluntary disclosure. Furthermore, a 1999 evaluation of the agency's amnesty program revealed an overall increase in compliant entities. Specifically, the 1999 evaluation found that over a three-year period, 455 entities have disclosed violations at 1,850 facilities and the rate of disclosure had increased each year.[114] The EPA also reported that the amnesty program was also effective in promoting disclosure of violations at the enterprise-level, thereby promoting the correction of system-wide problems.

The Antitrust Amnesty Program

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[112] "Full amnesty could encourage provider self-disclosure." Journal of the Healthcare Financial Management Association, July 2000; Michael M Mustokoff; Robin L Nagele; and Jonathan L Swichar.

[113] Ibid., p.5.

[114] Ibid., p.5.

The Department of Justice's (DOJ) Antitrust Division introduced a full-amnesty program in 1993.[115] The amnesty program is described as the division's most successful program, since it offers a participating entity and its directors, officers and employees absolute guarantee of amnesty from criminal prosecution. Like the EPA, this amnesty program requires that the disclosing entity satisfy six criteria prior to the DOJ beginning its own investigation. The DOJ moved to a full-amnesty program only after realizing that leniency together with a self disclosure program didn't produce satisfactory results. Since the full-amnesty program has been implemented, it has greatly increased the success of the self disclosure program. In the first year of the program's inception, the DOJ reported that the revenues generated from enforcement activities were in excess of $200 million.[116]

Any amnesty waiver program should include an educational program where DLSE auditors would go out to the participating businesses' locations and review their payroll records in order to evaluate how the business can more efficiently operate within California labor standards.

And unlike Complaint Tier or Correction Tier admission, participation in such an amnesty program should play *no* role whatsoever in future assessment of Crack-Down Tier eligibility.

- **Make compliance assistance available.** In 1995, US EPA issued an "Interim Policy on Compliance Incentives for Small Business," intended to promote environmental compliance among small businesses by providing incentives for participation in compliance assistance programs and prompt correction of violations. Under the interim policy, EPA eliminated or reduced the civil penalty where a small business had made a good-faith effort to comply with applicable environmental requirements by receiving compliance assistance from a non-confidential government or government supported program and the violations were detected during the compliance assistance. The policy does not apply if the violation is caused by criminal conduct or has caused actual serious

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115 Ibid, p. 6.

116 Ibid, p. 6.

harm or imminent and substantial endangerment to public health or the environment.

2. Self-Enforcement

Self-enforcement has already been discussed as a means for addressing firms in the Corrections Tier. Here the concept of self-enforcement is expanded beyond those in the Correction Tier – who face the prospect of prosecution if they do not institute such efforts – to firms in the Compliance Tier, who are not yet serious violators but are at-risk of becoming ones. For these firms, the alternative to improving self-compliance is not yet prosecution; rather, along with the "carrots" for improvement discussed in the preceding section, the "stick" to induce improvement is the possibility of intensified inspection under the existing regulatory structure.

Many are understandably concerned with the notion of "self-enforcement" replacing *governmental* enforcement of standards. The system recommended here, however, proceeds from the understanding that the only meaningful and workable form of "self-regulation" is "enforced self-regulation" – which "means that . . . when there is a failure of private enforcement . . . the rules are then publicly enforced."[117]

For instance, in contrast to the general OSHA situation in Australia, "[f]or decades, mine safety laws have required mines to write their own special rules on safe transportation in the mine, roof support, tipping waste, and a variety of other matters; to communicate these rules to workers through organized training; to nominate personnel with responsibility for ensuring compliance with the rules; to conduct at least weekly inspections to monitor compliance with both general regulations and company rules; to record breaches detected by these inspections and by other means in a record book maintained for the purpose at the mine; and so on. In short, mine safety regulation has long put into practice the notion that management must take the responsibility for writing, communicating, and internally enforcing codes generated by industry under the supervision of highly qualified government inspectors."[118] In Quebec, also, each "firm specifies a

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[117] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 6.

[118] Of Manners Gentle, p. 63.

prevention program outlining the steps that will be taken to comply with the law and the time by which the steps will be taken. A refundable safety bond is posted to ensure compliance."[119] While less common in the United States, such "privatized" enforcement arrangements have long existed in US law, as well. For instance, under the Mine Safety and Health Act regulations, specially designated miners conduct pre-shift examination of the mine for safety hazards and, besides reporting them to mine officials and posting a warning to fellow miners, notes the condition in a book kept at the site for inspection.[120]

In the case of labor standards, there is really no need or scope for private instead of public rules: The issue is not how best to attain a general public goal such as a safe workplace, but attainment of very specific goals such as a specified minimum wage level or maximum work week. The monitoring of compliance, however, need not be carried out by government enforcement staff.

In short, this approach represents a modification of the Maine 200 OSHA approach, under which the 200 companies with the highest number of injuries were offered a choice of working in partnership with the enforcement agency to improve safety, or face stepped-up enforcement. Specifically, steps deemed necessary to constitute sufficient compliance would include the following:

- **Disavowal – as under the NLRA – and Disclosure:** The company must rectify any outstanding problems by disclosing and publicizing the fact of the underpayments, how employees can gain compensation, and what steps will be taken in the future to ensure compliance.

- **Worker/Stakeholder Oversight:** The company must either allow an independent internal union or create some other acceptable worker/stakeholder oversight and audit structure.

"The primary function of governmental inspectors would

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[119] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 13 (citing Law Reform Commission of Canada, *Workplace Pollution* at 82).

[120] 30 C.F.R. sec. 75.303 (1981).

be to ensure the independence of th[e] internal compliance group and to audit its efficiency and toughness, Naturally, old-style direct government monitoring would still be necessary for firms too small to afford their own compliance group. State involvement would not stop at monitoring. Violations . . . would be punishable by law."[121]

3. Private Enforcement

As opposed to "self-enforcement" – including by the cooperative use of third-party private actors such as workers and/or stakeholders – "private enforcement" denotes the use of such private third-parties in an *adversarial* capacity to achieve public aims. This is, in fact, an extremely widespread system in the United States for enforcing public policy goals – what with our well-known litigiousness dating back at least to de Tocqueville's observation that there is no public issue in the US that is not eventually reduced to litigation.

Private litigation can be a powerful force to enforce legal standards and encourage compliance – often far more powerful, efficient, and cost-effective than government regulation and enforcement. In the field of labor standards, however, this option has been little utilized, except for authorization of individual (and small dollar) suits by aggrieved worker-claimants; as discussed earlier in this report, these have the twin results of imposing little deterrent or punitive effect upon employers while distracting and sometimes overwhelming the government's ability to investigate, adjudicate and punish more – or more egregious – offenders. A number of more efficacious options exist, however, to create strong deterrent and punitive effects through private litigation – thereby *increasing* compliance with labor standards while *reducing* enforcement costs to the public:

- **Encourage a "Private Attorneys General System."**

  One of the biggest impediments to effective private enforcement – especially by low-income individuals and those with small claims – is the high cost of litigation.

  - This has been remedied in a wide range of

[121] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 106.

situations by the statutory creation of **attorney-fees provisions** allowing prevailing parties to recoup their attorney fees along with their damage claims. The US Supreme Court has referred to the resulting arrangement as a "private Attorneys General" system.[122] California should similarly **authorize attorney fees for prevailing private plaintiffs in labor standard cases** (attorney fee awards for prevailing defendant should be awarded only – as is now the law under most other such "private Attorneys General" statutes – when the court finds that the action was frivilous or vexatious.

- Alternatively – or in addition, to ensure that the costs of such litigation can be funded up-front – a California could **establish a fund to pay the legal expenses of indigent complainants**, as the State of Victoria, Australia, has provided in OSHA cases. "[I]t is Victorian government policy to provide legal aid for disadvantaged litigants in environmental cases, although no such case had arisen at the time of writing."[123] This willingness to assist private litigants is noteworthy because of the Victoria government's uniquely pro-prosecution mentality.[124]

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122 Citation.

123 P Grabosky & J. Braithwaite, OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES (Melbourne: 1986), p. 37.

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> "Of all environmental regulators interviewed, only the Victoria EPA chairman said that he placed a great degree of importance on enforcement as part of overall pollution control strategy, that enforcement received more of EPA's resources than education, and that he would be concerned if the number of prosecutions brought by EPA were to decline. EPA directives specify that 'except where the solicitor believes there is insufficient evidence, no obstacle shall be placed in the way of any officer who puts forward a proposal for prosecution.'
>
> "Victoria is the only jurisdiction in Australia where a pledge to undertake more prosecutions for environmental offences (or any other kind of business offences) has been made in an election campaign. It was made in 1982 by the then opposition and subsequently fulfilled by the Cain

- **Grant standing to sue over labor standard violations to unions or designated employee representatives** (such as workers' associations). Quebec's health & safety statute allows a "parity committee" consisting of equal numbers of employer and union representatives to sue for back wages, plus a 20% penalty; if it prevails, it may keep this penalty to finance its operations.[125] Union representatives "would have the same standing as the government inspector to pursue enforcement action.. . . Of course, one could usefully grant the same rights to a nonunion safety representative elected at a nonunion workplace. But that raises issues of where this individual would turn for technical assistance and for legal assistance in going to trial. These problems are remediable in principle by public funding of legal aid, hazardous chemical information bureaus, and the like. . . . Beyond rights, the state can cede real decision making power to weaker parties and can resource them so that they can hire technically competent consultants to help them use that power effectively."[126]

- Yet another way to aggregate individual worker claims – thereby making them more economical to litigate, safer for individual employees to bring, and harder for a multiply-offending employer to ignore – would be for California to **authorize private class actions for labor standard violations**. Such class actions would have to include an opt-out provision for those individual employees who would rather pursue their own claims

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> Labor government.
>
> "Fines imposed under the Victorian act are higher than penalties for environmental offences in any other Australian jurisdiction.. . . Over 96 per cent [of Victorian environmental prosecutions] resulted in conviction on at least one charge."

Id. at 38.

[125] J. Bernier, "Juridical Extension in Quebec: A New Challenge Unique in North America," 48 *Relations Industrielles* 745, 750 (1993); J-G Bergeron and D. Veilleux, "The Quebec Collective Agreement Decrees Act: A Unique Model of Collective Bargaining," 22 *Queen's Law Journal* 135, 151-52 (1996).

[126] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 59.

separately.

- Similarly, but further expanding the universe of potential litigation threats for labor standard violations – in cases where the violations are multiple or repeated, and thus more money is at stake, but, as is often the case, the low-wage (often immigrant) workers cannot or do not want to be located – is to **allow recovery of damages by third-party plaintiffs or relators**, as in *qui tam* actions.

- **Empower the most exploited workers, illegal immigrants.** The State of California should attempt to work with the INS to develop narrow amnesty agreements or financial rewards for immigrant workers who report, and testify against, employers violating labor standards. While this might appear to create an extra incentive for illegal immigration, that would be a short-term phenomenon as the employment market for illegal aliens dries up if it becomes lucrative for illegals to come over, work in sweatshops and then put their employers out of business. As Ayres & Braithwaite argue, cooperation between the government, employers and employees "may also allow us to move to a regulation model from a prohibition model for some areas of the black economy. " For instance, "if conditions are imposed on brothel licenses by a tripartite committee, we might secure an evolution of cooperation in the battles against AIDS, declining amenity for neighborhoods, assault of prostitutes, and ensnarement of teenage girls, while forestalling the evolution of police corruption. A variety of third players might perform this role – the women's movement, the church, a prostitutes' union."[127] Creating similar conditions in the workforce for illegal immigrants could similarly help to ameliorate the labor market realities that makes their exploitation attractive to some employers.

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[127] Ian Ayres & John Braithwaite, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford University Press 1992), at 60.

4. Competitor Enforcement

Among those most interested in upholding labor standards are the law-abiding competitors of any firm violating or potentially those standards. The Private Attorneys General model can be expanded by **permitting business firms to sue other businesses for damages that result from the defendants' violations of the FLSA.**

Such suits would be based on the idea that paying subminimum wages and failing to pay required overtime compensation are unfair methods of competition.[128] This approach, which would require a statutory amendment, would borrow from federal antitrust law, under which lawsuits by business competitors are an important tool.[129]

5. Production Chain Enforcement

As already discussed, labor standards violations can often be effectively combated by enforcement efforts aimed at suppliers and purchasers of violator firms. The disruption of a violator's economic relationships can extend beyond the enforcement realm, however, bringing non-governmental pressures to comply with labor standards on a wide range of firms at comparatively low cost to the government.

> "DOL has extended this strategy further by using the threat of "hot cargo" disruptions to induce manufacturers to adopt voluntary Compliance Monitoring Agreements (CMAs). Under these agreements, manufacturers guarantee that all their contractors will comply with FLSA and conduct (or contract for) an array of monitoring activities to ensure that they do. Manufacturers may agree to require that their contractors use time clocks (as opposed to paper accounts) to record employees' work time and wages, allow monitors to review payroll records and interview employees, obtain prior approval before subcontracting work, and allow unannounced visits by

[128] The FLSA in fact characterizes low,labor standards as "an unfair method of competition in commerce." 29 U.S.C. sec. 203(a)(3).

[129] Clayton Antitrust Act, secs. 4 & 16.

manufacturer representatives to inspect working conditions. [130]

In sum, once a "Hot Goods" statute is enacted, its reach can be effectively multiplied without commensurately expanding government enforcement resources simply by **using the statute's presence to encourage private firms to contractually obligate their suppliers to comply with labor standards and institute appropriate measures to ensure compliance** – and obviate their obligation to pay suppliers who do not observe these standards.

Pressure from others in the firm's "stream of commerce," whom the government can more easily reach than many labor-standards violators, can be extremely effective in securing compliance. "In order to discourage overloading of trucks, a number of American states have made the shipper and the receiver liable to a fine as well as the driver. 'Drivers are pleased to report,' states one safety expert, 'that in these states there is no longer any pressure to take overloads.'"[131] Thus, California should consider expanding such pressures by **targeting not just downstream purchasers but also "gatekeepers" – lawyers, auditors, accountants, lenders – who should not knowingly be involved in assisting legal violations.**

[130] Weil, David, "Controlling Sweatshops: New solutions to an Intrasigent Problem," The Taubman Center Report, Harvard University, 2000.

[131] M. Friedland, M. Trebilcock, and K. Roach, *Regulating Traffic Safety*, in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 165, 186.

Subsection II.B

Encouraging a "Cooperative Tier" to Create a More Cooperative Environment Promoting Private Labor Standards Compliance for *All* Employers

Where the Compliance Tier is aimed at changing the behavior of specific employers at risk of slipping into noncompliance, the **Cooperative Tier** is intended to increase the numbers of "spontaneous compliers" – the currently-15% of employers whom DIR staff has identified as "Spontaneous compliers – Those who comply immediately with minimum standards once they are announced rather than wait for enforcement personnel to visit the workplace" – a by creating a broad culture of compliance *without* government enforcement.

Under this Cooperative Tier, a variety of mechanisms will be established to create and encourage an environment of broader participation in the cooperative maintenance of labor-standards:

1. Supportive Services

From the time of the first public campaigns to establish labor standards, it has been observed that violations of labor standards cluster: The same shops tend to commit multiple violations.[132] Shops that violate the minimum wage also employ children, commit health and safety violations, and rely on illegal immigrants. Such shops also tend to "feel" different. As MIT economist Michael Piore argues, this suggests that what is involved is something more holistic than a set of discrete violations: Violations are built into the way certain employers do business.

To illustrate this point, Piore uses the example of the

[132] Michael J. Piore, "Labor Standards and Business Strategies," in Stephen A. Herzenberg & Jorge F. Perez-Lopez, eds., LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY (Washington, DC: US Dept. of Labor, Bureau of International Labor Affairs 1990), pp. 35-49.

classic apparel sweatshop. In early 20th-century America, sweatshop employers crowded workers into tenement basements to economize on rent and paid a piece-rate for each unit of production. As in the earlier home work system, piece rates insulated employers from the impact of low productivity. Violations of labor standards grew directly out of the logic of sweatshop production: Crowding of sewing machines to reduce rental costs led to blocked doors and created fire hazards; low piece rates meant long work hours to earn a livable income; employer indifference to low productivity contributed to child labor.

Standards violations tend to disappear when businesses adopt a different way of doing business)or "business strategy"). In the case of apparel production (and other manufacturing), the introduction of capital associated with higher-volume, mass production required employers to worry about productivity so that they could hold down capital cost per unit. As a result, employment of young children dwindled. Health and safety standards became easier to comply with because employers took control of shop layout to foster an efficient work flow. Wage and hour violations became less critical to profitability. Employers now had an incentive to raise wages enough to hold onto productive workers. In the contemporary garment industry, best-practice firms implement team work (also called "modular production) instead of piece rates, and often cater to high-end or fashion-sensitive markets. They rarely commit labor standards violations because this would be incompatible with the levels of productivity, quality, and production flexibility their business strategy mandates.[133]

In sum, in virtually all industries, labor standards violations concentrate in a subset of firms and are ***a symptom of particular competitive or business strategies***, which we will call "low road" strategies (low-wage, low-skill, high-waste). In other firms *within the same industry* – "high road" firms (high-wage, high-skill, low-waste) – violations are rare. The State of California can increase labor standards compliance by **helping to shift industry practice toward the high road and away**

[133] While there has been a reemergence of what are called "sweatshops" in the US apparel industry since 1980, many of these operations are simply low-wage, mass production operations as opposed to the true sweatshops of the kind found 100 years ago. Under the pressure of global competition, and with access to vulnerable (often illegal) workers, some employers are still led to violate wage and hour regulations. Employment of young children, and the haphazard layout of classic sweatshop operations have not remerged on a large scale within the United States, however.

from the low road approaches under which violations are *built into* the way firms do business.

Making the high road more common and the low road less prevalent is likely to require a mixture of positive and negative strategies – of carrot and stick. A more effective labor standards strategy would therefore consist of efforts not just to "block the low road" with effective punitive measures against low labor standards but also to "pave the high road." Labor standards play the most positive role when they induce employers to switch from a strategy in which violations are endemic, to one in which they are not. A minimum hourly wage played such a role in the elimination of classic sweatshops early in the twentieth century by forcing employers to worry about productivity, in turn discouraging the use of child labor and leading employers to control the work flow in a way that improved health and safety – but changes in profitable business strategy helped accomplish the same objectives. The factors that make labor standards important to workers in specific firms and sectors are precisely the factors that such standards difficult to enforce:

- Extreme competitive pressures.
- A labor-intensive production process facilitating competition based on wage costs.
- Dilution of management responsibilities because of subcontracting networks.
- A multitude of small firms that are easily opened, moved, or closed.
- An economically vulnerable workforce.
- An extralegal component.

The overarching goal of labor standards policy should be to increase the share of businesses pursuing high-road business strategies – in which violations are unlikely – and to reduce the share pursuing low-road strategies. Enforcing labor standards in a low-road environment is like swimming upstream: With a powerful enough stroke, it is possible – but if a switch in the stream of business strategy can be induced, enforcement efforts would thereafter be swimming *with* the current and accomplish better results with less effort.

Thus, labor standards enforcement is probably least effective when employers do not know how to transition to a new, higher-value way of doing business in which compliance would be the rule. Higher levels of compliance can therefore be achieved through efforts to educate and assist low-road businesses to move toward high-road business approaches. For instance, in 1994 the US Department of Labor published a *Road to high performance, a guide to better jobs and better business results*, which outlined how to improve performance at nuclear power plants through the implementation of workplace practices.[134] A set of workplace practices were developed based on information obtained from successful nuclear plants. A questionnaire then was mailed to 70 nuclear power plants across the United States to determine the extent to which each of these high-performance practices was implemented. A 73% survey response rate was reported, enabled the Department to analyze the implementation level of the recommended workplace practices and to assess their relationship to nuclear power plant performance.

This report therefore recommends that California launch a major "Business Strategy Improvement" program incorporating a variety of approaches to helping to promote high-road business strategies among the business population generally and small employers particularly:

- **Developing industry-specific expertise within DIR on converting to high-road strategy.** DIT already has internal teams that focus on specific industries, such as agriculture, apparel, and construction; this industry-based focus should be strengthened and expanded into additional areas such as long-term care, trucking, janitorial work, and telemarketing. These specialists should be major contributors to the development of not just targeted *enforcement* strategies, but industry-specific improved business strategies. These strategies should spell out the organizational practices common in high-road firms and specify how DIR will contribute to a shift from low-road to high-road practices, and thus improve *compliance*. Ideally, DIR would:

    - Encourage key staff to learn about organizational, technological and market trajectories of their

[134] "High Performance Work Practices and Nuclear Plant Performance," AIP Associates, www.alwaysimproving.com.

assigned industries, with an eye to understanding how these might facilitate strategic efforts to “pave the high road.”

- Encourage interaction between industry teams to diffuse innovative approaches from one industry context to another.

- Recruit managers from best-practice industry leaders and from “reformed” firms who can advise on how they were able to make the change.

- Access technical assistance from the Institute of Industrial Relations. The California legislature, with the backing of organized labor, recently created the $5 million-per-year Institute of Industrial Relations within the University of California. This Institute is perhaps the largest concentration of intellectual resources nationally viewing the economy through a high-road/low-road lens. The Institute should be favorably disposed to facilitating, and evaluating, the implementation of these recommendations.

- **Providing an extensive statewide program of "Business Model" Counseling** educating more employers in low-wage industries – such as caregiving, restauranting, and retail sales – in the potential to improve their bottom lines through higher labor standards. This effort would include:

  - **Assistance in learning what government-to-business assistance programs individual firms might be eligible for** (including more widespread use of the Advanced Earned Income Tax Credit, as discussed in the next subsection).

  - **Conducting regional and statewide conferences.**

  - **Creating industry-specific private sector advisory teams.**

  - **Making industry-specific “high-road mentors” available**. Service as such a mentor to other firms would be a requirement of high-road recognition

and regulatory relief discussed in Section II-C, below.

- **Instituting an education campaign aimed specifically at employers**, perhaps through inserts in mailings of other agencies with which businesses must deal (*e.g.*, businesses tax and licensing entities).

- **Providing educational training to factory owners on how to bid and renegotiate prices and delivery dates.** Many retailers pressure manufacturers to produce merchandise cheaply and quickly; the contractors then find they have to cut corners to meet manufacturers' demands, resulting in long hours and little compensation for the work. Oftentimes, owners of small factories do not know how to bid and/or negotiate prices and delivery dates. And, even when they do, they face the prospect of contractors taking their business elsewhere, if they attempt to re-negotiate price and delivery dates. This results in many low-road business strategies. To alleviate such business pressures, the State should provide educational training to factory owners on how to bid and renegotiate prices and delivery dates – including how to include language in contracts to protect against unreasonable demands that either force loss of revenue or tempt non-compliance with labor standards.

- **Developing and making available accounting software** (especially friendly for small business and unsophisticated factory owners/managers) that assists in calculating proper wages for piecework, overtime and meeting other wage requirements. It has been reported from the field that non-compliance can be due to lack of knowledge in knowing how to translate piece-rate earnings into hourly wage to determine whether or not they comply with minimum wage and hour laws. This type of software could also include forms and methodologies for regular reporting. An alliance of brand manufacturers, small business and universities could be formed to help fund and implement such a project. The national labor standards group Verite' has expressed an interest in working with DLSE to create such an alliance

to help support the development of such software, and has a great deal of content data that could expedite the development of such software.

2. Incentives

As one author notes, "Rewards . . . could be more widely used than they are now. Many institutions, including religious bodies, prisons, universities, and businesses, rely more on rewards than sanctions."[135] The State could create a warmer climate for labor standards compliance by making compliance more financially beneficial to firms tempted to pay workers less.

- **Institute "Labor Standards Experience Rating."** Employers currently pay insurance premiums related to their workforce – such as workers' compensation (WC) and unemployment compensation (UC). Like other types of insurance, these premiums are "experience rated" – i.e., employers pay rates tied to their actual experience generating laid-off or injured workers. Among the experience factors that the State could mandate be included in such calculations in the future could be a firm's record in complying with labor standards; those with good compliance records could receive lower rates under the WC and UC programs, while those who have been cited could experience higher premiums in accordance with the frequency and severity of their violations. This is not a spurious connection: Firms that violate labor standards tend to violate other laws designed to protect workers (and the community), as well, and thus are likely to constitute poor employment risks. Tying WC and UC rates to labor standards would provide an additional means not only for the State to punish labor standards violators – but also to financially *reward* labor standards *compliance*.

- **Reward Labor Standard Compliance With an Earned Income Tax Credit for Employers.**

  The earned income tax credit (EITC) was originally developed to provide low-income families with financial

[135] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 10.

assistance and reward them for working. The same goal could be accomplished with an "Employer-EITC" for smaller, less financially viable businesses that often resort to underpaying employees.

Creating an E-EITC available to less financially viable businesses that can verify that they are complying with labor standards would build off the present EITC tax system to subsidize payment of appropriate minimum wages *and* maintenance of proper records to document such payment. (It would also, of course, subject employers who falsely claim the credit to the generally higher penalties for tax fraud.)

The current Advanced EITC (AEITC) allows those taxpayers who expect to qualify for the EITC and who have at least one qualifying child to receive part of the tax credit in each paycheck during the year as opposed to an annual lump sum amount. Like withholding taxes generally, the AEITC requires employer involvement: Although the payments don't cost employers any money, the employers are responsible for subtracting the advance payments that have been added to their workers' paychecks from the total taxes withheld from all employees they would otherwise deposit with the IRS.[136] Those employers who already use an automated payroll system can more easily distribute the tax credit. While some employees might not be aware of the AEITC payment options, under federal law, employers are obligated to administer these payments for any eligible employee who files a W-5.

(Through the AEITC, employers, at no or little cost to themselves, can help increase employees' take-home pay. Those employers who choose to capitalize on the opportunities to raise the participation rates in the AEITC program by supplementing wage rates with the support of the IRS could increase an employer's competitive advantage in the market place. **The State should expand its advertising and marketing efforts of this program by emphasizing the benefits for businesses that participate.**)

In addition to the AEITC, the State could offer an E-EITC building off this already-mandated record-keeping

136 www.usda.gov/oce/oce/labor-affairs/aeitc.htm.

infrastructure – but it would treat employers not just as fiscal administrators but also as primary beneficiaries of the new tax credit. Small businesses paying minimum wage would receive a small tax credit subsidizing them for each minimum-wage worker they employ; the credit would phase out as wages rise, as under the existing EITC. The credit would not be available, of course, for sub-minimum wage jobs; paying minimum wage would thus become economically more advantageous than paying somewhat-below-minimum – and with the advantage of legal legitimacy, lower risk of punishment and lower compliance costs, this should exert pressure on firms paying wages an extensive range below minimum, to raise wages up to minimum legal levels. It will also provide a financial incentive for more firms to comply with labor standards record-keeping requirements.

Obviously, such a tax credit would cost money. But it would also bring substantial amounts of both business and individual income now hidden from tax onto the public tax rolls. It would reduce dependency and increase economic activity. It could also reduce the need for costly enforcement. The exact magnitude of these effects is beyond the scope of this report, but it is far from clear that this strategy would cost the State appreciably.

3. Employee Enforcement

Informed and educated workers can be powerful allies to labor standards enforcement officers. Workers who are: aware of the laws that govern their employers, fully understand how their wages are calculated, know their rights and benefit plans can effectively file accurate complaints and inform DLSE inspectors of wrongful labor practices.

Most research on work environments reveals a direct connection between an educated work force and a high-quality workplace. It may appear that educating workers is a rather direct and straightforward venture. The realities, however, of reaching multi-lingual, immigrant workers who are very dependent upon their employer and who frequently work for employers, who themselves are transient and immigrant in such a large and diverse state as California, oftentimes, leaves the DLSE inspectors without a potent enforcement partner in the

employee.

Such efforts can be coordinated with similar public education endeavors of the federal Department of Labor and groups such as the Workers Rights Consortium (WRC), a non-profit organization created by college and university administrations, students and labor rights experts. The WRC's purpose is to assist in the enforcement of manufacturing Codes of Conduct adopted by colleges and universities; these Codes that act as monitoring benchmarks are designed to ensure that factories producing clothing and other goods bearing college and university names respect the basic rights of workers. There are more than 100 colleges and universities affiliated with the WRC.[137] Students can visit the web site and find out factory ratings of those who produce university apparel for their campus. The site also enables students to organize “No Sweat” campaigns on their campuses.

Another example of how the public can be activated to place consumer pressure on businesses that do not comply with regulations is the Centers for Medicare and Medicaid Services’ *Nursing Home Compare Report Card* posted at a web site (www.medicare.gov). All survey reports of all nursing homes throughout the nation are now reported in an easy to understand format for consumers searching for a nursing home. Deficiencies are explained and rated against state and national findings. Perhaps DLSE could also release findings on labor standard practice violations in a format that the public would understand and also post this on the Internet.

The following strategies are proposed to empower employees so that they can create and strengthen their partnership with the enforcement team of the DLSE:

- **Develop a wage calculator that could also be designed as an interactive, online tool in multiple languages to assist workers, especially those doing piece rate work, to calculate what is owed them.** This tool would also help calculate overtime wages and back-pay. Reports have shown that there is substantial evidence that employees consistently work more overtime hours than allowed by most codes of conduct and labor laws. Furthermore, many workers become easily confused on determining how much they are owed

[137] Workers Rights Consortium website at www.workersrights.org

as a result of their subcontracted piecework.[138] One of the most common and growing infractions of employers is not paying workers adequately for piece work and/or overtime. Nor do employers make it easy for employees to understand or decipher how their wages were calculated for their individual paycheck.[139]

- **Offer life skill's education in the context of worker's rights.** For example, teach math by way of calculating piecework, wages, taxes, and deductions. Teach English by way of asking students to file a written complaint, read and interpret benefit plans, read and interpret posters that list their rights and workplace labor standards. Also, seize the opportunity to cross-train instructors of English as a Second Language (ESL) on labor standards, so that they can incorporate teaching workers about labor standards and worker rights in their lesson plans.

- **Launch a public outreach campaign to employees** that would include the following components:

  - Distribute phone cards that list the top three violations against workers on the back of the card with 800 numbers that they can call, The card would include 15 to 30 free minutes so that workers would be inclined to use and keep the card.

  - Develop "leave-behind" written materials for Inspectors to give to workers following an onsite inspection. These should be multi-lingual, and easy to understand.

  - Send out pre-paid mailers to high-risk communities (e.g., those with a high percentage of immigrant population), or distribute pamphlets through neighborhood organizations and churches, with survey information to identify trends

[138] Independent University Initiative Final Report, Dara O'Rourke, Business for Social Responsibility Education Fund, Investor Responsibility Research Center, October 2000.

[139] Interviews with Katie Quan, Director of the John F. Henning Center for International Labor Relations, and Mil Niepold and Larry Brown , senior principles of Verite', an independent, non-profit social auditing and research organization that ensures that people worldwide work under safe, fair and legal working conditions in 61 countries (May 2002).

and red flags of potential infractions of labor standards. The survey would both educate workers and educate DLSE.

- Develop posters that are easy and inviting to read. Current postings posted in the workplace by government agencies are very heavy on text, extremely large and overwhelming according to several of the key informants that we interviewed.

- Conduct meetings with small and large newspaper editorial boards. Issue frequent press releases and approach the ethnic press for interviews and run ads in their papers on labor standards, how and where to file a complaint.

- Post placards in buses, featuring hotline number and “Did You Know?” information on worker rights.

- Create Public Service Announcements in multiple languages that inform workers of their rights and how to file complaints.

- Cross-train other departments on labor rights (e.g. human service agencies) who have a high degree of interaction with individuals who are at high risk of being exploited by employers.

- Enlist universities to credit internships and coursework for students to assist in educating workers as to their rights, enhance their understanding of these rights and assist them in filing complaints. Students could also teach workers on how to resolve disputes with their supervisors and employers.

- Translate audits and inspections to workers. Despite international, national and state laws, codes and labor standards enforcement, the process rarely involves the workers beyond the on-site interview. [140] Factory reports should be translated and sent back to the factory in question for workers to review and comment on. Reports – or at a minimum – basic performance reports could also be posted in the factory so workers can be aware of and challenge a factory’s assertions. tudents could assist

[140] Independent University Initiative, ibid.

workers in understanding the results of audits, how to respond to them and how they can monitor and improve their working conditions.

- Identify and work with local community groups who have credibility and ethnic ties to workers to share educational material and information. Also use these groups for capacity building of the employees so that they can better monitor their work environment, effect change and where needed, file complaints. These groups can also be effective in helping workers file complaints without fear of reprisal. Many workers will not talk to Inspectors during a walk through of a factory, as they fear the employer will terminate them. Some factories teach (especially immigrants) how to "entertain" monitors by telling them what to say, some have gone to such extremes as to telling workers that DLSE inspectors are really from the INS, which of course, silences the workforce.[141] Thus, holding off-site sessions and interviews with workers is highly advisable.

- There are many university, non-profit, advocacy, and labor organizations that would be willing partners with DLSE to create an alliance of worker education programs that reach down into the neighborhoods helping workers recognize the violations of their rights and learning how to correct them. Faith-based organizations can be especially effective among many communities and ethnic groups.

- There are Community Technology Centers within schools, storefronts and non-profit organizations in many neighborhoods throughout the country. The DLSE could become a partner with these centers and provide user-friendly software on worker rights, and how to file complaints. The wage calculator could also be provided to these groups. A partnership could also be formed with education community and the State Department of Education to provide wireless laptops to migrant farm families wherein they could learn about their rights, file complaints online and their children could use the computers for distance and online education.

[141] op cit

- Develop a strong partnership with the John F. Henning Center for International Labor Relations, who during key informant interviews with the Director Katie Quan, expressed a strong interest in collaborating with the Department of Labor. The Center could be especially helpful in providing worker rights education to immigrant and ethnic communities. Their rapport, cultural competency and proficiencies in multiple languages allows them to reach workers in trusted environments. The information they receive from workers could better enable DLSE to target their stretched resources to investigating those factories where workers report abuses of labor practices. It also provides a vehicle for DLSE to educate workers within their communities.

4. Competitor Enforcement

Recognizing the interrelationship between labor standards and business strategies has a number of important implications, as already discussed. In addition, it means recognizing that not all employers are alike – and some employers actually *favor* better labor standards enforcement. For high-road employers, compliance results directly from a positive human resource strategy necessary to raise productivity, quality, and service levels. These high-road employers can be critical allies in efforts not just to "export" compliance but also to enforce labor standards. These employers may have a vested interest in not being undercut by lower-wage, higher-waste competitors. They may also have a moral commitment to higher standards.

The State can leverage these distinctions within the business-competitor community to improve labor standards enforcement at low cost, through:

- Creating and promoting a toll-free number specifically for businesses to "rat" on other business violators.

- Providing rewards for firms that report other violators.

- Offering reduced sanctions for non-compliant firms that report ***worse*** violators.

5. Collective Responsibility

The interest of other firms in the same industry can also be brought to bear to pressure potential violators into compliance and to promote a general environment of compliance, by creating a greater sense of community, and a community of interests, among all such firms. Possible mechanisms include:

- **Creation of regional, industry-specific councils** to increase communication among competing firms, disseminate best-practices, coach low performers, and identify potential violators and properly "socialize" them to their industry-competitors' high-performance norms.

- **Provide collective reward and sanction.** Modeled off "incentive games such as 'safety bingo' . . . that give an incentive for thinking about safety and also introduce peer pressure by fellow workers to take care."[142] "Safety bingo" involves an on-going bingo game in which prizes are awarded to participants so long as their collective safety record remains clean. "Now comes the critical point. One accident by a driver that is that driver's fault, and causes the driver to be off work for more than that day, wipes out not only that person's bingo card but *all* the other bingo cards in the division. Everyone must start the game again with a clean card. So the person with the accident is letting down perhaps 300 other drivers, many of whom might have been close to winning a prize.. . . [O]verall, as in the case of drunk driving, . . . peer pressure, when it can be directed to traffic safety ends, has an important potential to change behavior."[143]

  Similarly, the State could tie increases and decreases in compliance rates (the share of workers paid below minimum wage and average wage of those paid below minimum wage, as determined by the US Current Population Survey) to the eligibility for Congratulatory Tier status (discussed below in Part II.C), the "experience rating" of the Workers Compensation and Unemployment

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[142] M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 13.

[143] M. Friedland, M. Trebilcock, and K. Roach, *Regulating Traffic Safety*, in M. Friedland, ed., SECURING COMPLIANCE: SEVEN CASE STUDIES (University of Toronto Press 1990), at 165, 222-23.

Compensation programs, and the incidence of other financial or regulatory impacts, of *the entire group* – i.e., all in the regional industry.

6. Social Enforcement

Informed and activated consumers can have a powerful effect on the behavior of those from which they buy goods and services. When accountability is transparent, consumers can readily identify which brand manufacturers, retailers, employers and producers practice solid and fair labor practices. With this knowledge, they are then in a position to reward or punish vendors by how they use their pocketbooks.

Most of the public has been aware of the necessity to regulate manufacturers as to meeting quality and safety standards of their products. But in recent years, under the bright lights of an inquiring media and active consumer groups empowered by the networking capabilities of mass communications and the globalization of the Internet, *how* goods and services are produced has increasingly become a factor in consumer purchasing behavior. The goal of employer advocacy groups is to convince producers that treating their employees to first-rate labor practices is as important to their brand, as is the quality of the product itself.

Perhaps the most successful example of such publicity- and market-based compliance mechanisms is the International Organization for Standardization (ISO). ISO is a worldwide federation of national standards bodies from 140 countries. Established as a non-governmental organization in 1947, its mission is to promote the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services, and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity. ISO's work results in international agreements that are published as International Standards.[144] The two most recognized standards developed by ISO are ISO 9000, quality management standards and ISO 14000, environmental standards. ISO 9000 and ISO 14000 certification are market driven in nature: By achieving this type of certification, companies can assure customers that they have

[144] International Organization for Standardization

a quality or environmental management system in place thereby resulting in a more consistent product or that they are meeting environmental requirements in a consistent manner. Oftentimes, companies will require their suppliers to achieve certification in order to continue their business relationship.

DLSE can take advantage of this recent form of product branding by facilitating partnerships and alliances with entities that enlighten consumers into taking action with their pocketbook when labor standards are ignored. The following strategies are presented with this focus in mind:

- Build public awareness of the need for labor standards, collective benefit, collective responsibility (responsible business leaders, consumer advocates, religious and community leaders, etc.)

- Engender outside community by promoting labor standards as a “civil rights” issue to enlist advocacy group involvement.

- Launch a widespread “Don’t Pick a Scab” publicity campaign, involving mass media and websites – providing both specific, negative information about violators (as already discussed) and general information promoting public cooperation in efforts to sanction low-road firms and violators and to reward high-road, high-compliance firms. The federal WHD, for instance, categorizes retailers according to their records of working with FLSA violators and publishers its lists of retailers on the Internet, hoping that their concern about public reputation will motivate them to avoid doing business with violators.

Subsection II.C

Creating a "Congratulatory Tier" for Firms With Exemplary Records, Resulting In Reduced Regulatory Oversight and Meaningful Rewards

A leading focus of regulatory change in recent years has been to ease enforcement burdens on those with a proven record of compliance. This follows logically from the criminal law model in which most actors are recognized as generally in compliance and enforcement resources are focused on bad actors, not good. In the environmental context, this is known as creating a "green tier" of regulation for better performers. In the compliance system devised for DLSE it is referred to as the **Congratulatory Tier**, and is aimed at the 10% of employers whom DIR staff has identified as "**Industry leaders** – Those who set and follow standards which exceed the minimum labor standards enforced by government."

At the DIR 1999 Senior Managers Planning Conference, one conclusion was that compliance efforts should include "[r]ecognition and systematic rewards for those employers who comply." Although these two points were not connected in the DIR discussion, the agency's managers did recognize that "[a]nother missing piece is the unwitting complicity of consumers who purchase goods and services from employers not in compliance. Our strategy needs also to target consumer responsibility and purchasing leverage." One other effect of such a program, it was noted, is "dividing employer opposition to our targeted efforts."

1. Beyond-Compliance Requirements

To qualify for the Congratulatory Tier, an employer should be required to:

- **Have a clean record of no prior labor standards violations**. Under Colorado's Environmental Leadership

Program, [145] applicants must have a good environmental compliance record for at least two years and no serious infractions in their history. (They are also asked to document their recent history of air emissions, wastewater discharges, hazardous waste, solid waste, toxic release inventory (TRI) wastes and releases, energy use, and water use, though there are no stated requirements for past performance.) A company must also have an Environmental Management System (EMS) and a pollution prevention (P2) program in place.

- **Institute an Internal Responsibility System.** As discussed earlier, this would include:

  - **a system for ensuring no wage and hour violations.**

  - **a workers' committee or union.**

  - **records-sharing with the workers' committee or union,** which certifies to the State the employer's continued compliance.

  - **making the worker's committee/union report public.** Reporting the results of a firm's performance is a key component to realizing output measures' general effectiveness to improving overall performance within an industry. For example, reporting provides an opportunity for the public and government, or both to make judgments about the degree to which firms are meeting standards and improving their overall performance. In addition, reporting fosters awareness, dialogue, reward and in some cases punishment.

  In addition, qualifying employers should be required to implement:

  - **A system for monitoring wages paid by all suppliers.**

  - **A contractual provision with all suppliers**

[145] http://www.newenvironmentalism.org/comflex.htm

requiring the contractor to reimburse the firm for all lost revenues in the event that the contractor's violations are a cause of a "hot goods" injunction against the manufacturer.

- **Agree to serve as a mentor for other firms**, including opening up the internal workings of the firm so that other firms can learn from their success.

- **Go above and beyond the minimum legal requirements for labor standards enforcement.** For example, companies are required by law to pay overtime for its employees who work more than 40 hours per week. However, through the stakeholder process, companies could begin to develop employee benefits that exceed minimum requirements, such as flex time or a designated paid time for employees to devote to community service. Levi Strauss & Co., for instance, developed and implemented Global Sourcing and Operating Guidelines, which rest fundamentally on its Business Partner Terms of Engagement. Global Sourcing and Operating Guidelines are another example of output measures that have been standardize throughout the corporation's supply chain. Specifically, these guidelines became a model for codes that regulate the behavior of suppliers and subcontractors. The employment standards include output measures used to test the corporation's overall performance in relation to: minimum wages or prevailing wages, setting reasonable working hours not to exceed 60 hours per week, not using child labor less than fourteen years old or prison or forced labor, maintaining a safe and healthy work environment and not discriminating among employees or using punishment or coercion to discipline workers.[146]

- **Agree to Crack-Down Tier penalty-levels for any labor standards violations not promptly reported and corrected.** Modern regulatory and policing structures require "the growth of trust systems which . . . is consequent upon the growing inability to observe directly all that goes on around us. Trust, it is argued, has replaced surveillance and the development of trust systems has changed the nature of wrong-doing . . .. These are fragile relationships, but nevertheless they are

[146] Haufler, Virginia, "A Public Role for the Private Sector," Carnegie Endowment for International Peace: Washington, D.C. (2001), p. 61.

the basis of contract which partly rests on the premise that there will be no cause to invoke the enforcement machinery."[147] Thus, penalties for breaking this trust must be quite heavy. In addition, screening for entrance into the trusted group (which DIR staff estimates at 10% at the most) can reduce the probability of trust-breakers – and also justifies even heavier penalties when a breach occurs. In general, severity of penalty increases as degree of oversight, and thus likelihood of detection, decreases. Sufficient likelihood of detection must remain, however; it has been repeatedly demonstrated in the crime context that likelihood, rather than severity, of punishment is the stronger deterrent.

2. Beyond-Compliance Rewards

Employers who qualify for the Congratulatory Tier should be statutorily entitled to receive:

- **Acknowledgement and Promotion.** The one requiring the least change in government routines – but which is generally most overlooked by governments – is simply to ***acknowledge*** superior compliance. Businesses view relations with government and government inspectors negatively if the only citations that ever result from such are relations are negative; as in all areas of human behavior, good behavior should be acknowledged and rewarded. Georgia's Secretary of State, for instance, established a program for annually recognizing businesses that complied with their environmental and OSHA requirements by passing inspections without violation. High-performing industry leaders can also receive an award or other form of recognition which could be displayed on their product or utilized in their advertising. Examples include:

    - The "No Sweat" labeling labor standards campaign launched by former US Secretary of Labor Robert Reich.

    - The quality-branding some states have achieved for their businesses' commercial products (most

[147] B. Hutter, *op. cit.*, 239-40.

notably, Washington State apples and, more recently, California cheese).

- The US Secretary of Labor's Opportunity Award honors one Federal contractor each year that has established and instituted comprehensive workforce strategies to ensure equal employment opportunity.

- Another example of a type of workplace practice rating is the US Commerce Department's Malcolm Baldridge National Quality Award Criteria.

The State should acknowledge and promote Congratulatory Tier firms through:

- Public citation.

- A marketable and recognizable "seal-of-approval" (like its "IT's the Cheese" logo, supported by state-paid advertising to build public recognition.

- A series of specially-promoted websites where consumers can find, and be encouraged to patronize local Congratulatory Tier businesses – particularly in targeted industries (and their downstream industries), such as "Nursing Home Report Card," "Construction Comparison," Rewarding Restaurants," "Market Watch" [for produce and super markets), and "Clothes Make the Californian" (for apparel stores). The Clean Clothes Resource Center of Bangor, Maine, for example, has launched a community organizing effort by acknowledging those retailers that sell clothes that are ethically-produced through the Clean Clothes Retailer Partnership and by informing consumers through the Bangor Clean Clothes Consumer Network of retailers that do and do not practice fair labor standards.[148]

- **Reduced Compliance and Oversight Costs.** A more substantial carrot that the State should extend to industry leaders is regulatory simplification and oversight reduction, in which the number of forms and reports to be

[148] www.pica.ws/cc/index.html.

filed is reduced and/or the filings simplified (including through single-point-of-contact bureaucratic reforms, coordination with other enforcement actors, and electronic/internet reporting), and the number and frequency of inspections is reduced.

- **Eligibility for State Contracts.** The State should mandate that only firms meeting "Congratulatory Tier" standards will be eligible to receive state contracts.