

Creating a strategic enforcement approach to address wage theft: One academic's journey in organizational change

David Weil

Brandeis University, USA

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Abstract

Strategic enforcement represents a proactive approach to using limited enforcement resources available to a regulatory agency to protect workers as required by the law. It does so by using enforcement tools, outreach, and collaboration with other government agencies, worker advocates, businesses, and the public to change employer behavior in a sustainable way. Strategic enforcement is critical given the limited resources available to government as well as because of the breaking up (fissuring) of modern employment that increases the prevalence of violations and makes responsibility for compliance more opaque. This article lays out the challenges in instituting such an approach based on the author's experience in leading a major federal workplace agency in the US during the Obama administration. It describes the major elements of a strategic enforcement approach as well as the major organizational innovations that were necessary to put it into place.

Keywords

Fissured workplace, labor standards, strategic enforcement, workplace regulation

Strategic enforcement conceptually can be summarized with a simple definition: *Strategic enforcement seeks to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way.* On first inspection, that definition may appear

Corresponding author:

David Weil, The Heller School for Social Policy and Management, Brandeis University, Waltham, MA 02453, USA.

Email: davweil@brandeis.edu

self-evident. After all, who cannot agree with optimal use of limited resources (the mantra of economics)?

Yet there are important differences in that definition of strategic enforcement from the default behavior of enforcement agencies. First, the severely limited resources available to most enforcement agencies mean that prioritization and triage must be a baseline element of decision-making. It requires challenging default practices like ‘first-in, first-out’ that often are adopted because of their efficacy or perceived fairness but undermine rational allocation of resources. Second, although government workplace agencies typically enforce a specific set of regulations or rules (e.g. recovering back wages for failure to pay the minimum wage or provide overtime compensation), strategic enforcement means focusing on interventions that *change the behaviors* that result in rule violations in the first place. Finally, limited resources require agencies to consider how they can have an impact on compliance even after an investigation ends. Recovering back wages for workers or payment of penalties by employers does not in and of itself assure future compliance. Strategic enforcement requires finding mechanisms that lead to *sustainable and ongoing compliance*. Prioritization, changing behavior, and sustaining compliance requires a very different approach to enforcement than typical of most agencies. And that approach cannot be implemented without major changes to the organization of the agency and how it undertakes its work.

In 2014, I was nominated by President Barack Obama and confirmed by the US Senate to lead the US Department of Labor’s Wage and Hour Division, the federal agency charged with enforcing some of the nation’s most important laws relating to the workplace. Although we undertook major regulatory initiatives during the administration, including in the areas of modernizing overtime exemptions and expanding coverage of minimum wage and overtime laws to millions of home care workers, this article focuses on fundamental changes we undertook to transform the way the Wage and Hour Division (WHD) undertook its basic enforcement responsibilities. By altering our strategic approach to enforcement and instituting a major organizational transformation in the process, we sought to expand the capacity of the agency to ensure that the 130 million workers would receive vital workplace protections. Those changes were guided by more than a decade of academic research that I had undertaken (including an article published in this journal; Weil, 2009).

My experience in ‘sitting in the seat’ and being responsible for making decisions was sobering and humbling given the implications of my decisions.

It also involved the most intense tutorial of my career on the practical matter of taking ideas and translating them into organizational actions, often requiring the development of consensus and occasionally the navigating of deep divides between political and career staff.¹ In that work, I had the good fortune to be taught in the breach by talented and dedicated fellow political appointees and experienced and wise career public servants.²

In this article, I lay out the challenges facing a regulatory agency like the Wage and Hour Division and argue that a different approach to discharging its mission is required. I then discuss eight major elements of strategy that we put in place to

undertake a more proactive and impactful approach to improving compliance with labor standards. Finally, I review the major organizational innovations that we put in place to translate broad strategic directions into action. Throughout, I hope to provide a sense of the interplay of research with practice that was an essential part of the process of organizational change.

The need for strategic enforcement

The WHD's official mission is to 'promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce'.³ The goal underlying this mission is based on a basic principle of fairness: making sure working people in the US receive a fair day's pay for a fair day's work. For the WHD, 'labor standards' is defined by the Fair Labor Standards Act of 1938, which establishes the minimum wage, requires overtime pay for work over 40 hours in a week, restricts child labor, and sets out recordkeeping requirements for employers.⁴ Though this scope is much more narrow than provided, for example, by the International Labour Organization ([stet spelling of 'Labour']) ILO Core Labor Standards or as defined by similarly named laws in other countries, the protections provided by wage and hour laws are intended to provide a basic level of economic security to US workers and allow them to earn enough wages to purchase goods and services to support themselves and their families.

For several decades, I studied and documented the determinants of compliance with health and safety and labor standards (e.g. Ji and Weil, 2015; Weil, 1996, 1999, 2001, 2005a). Yet the actual cases of labor violations – commonly called 'wage theft' in the US – that came across my desk as Administrator or, more evocatively, that I heard about on my frequent trips to the field, from blatant retaliation against workers for lodging a complaint, to obstruction of WHD investigations, to failure to pay overtime due to intentional misclassification of workers as independent contractors – were often jaw-dropping. Violations often meant that janitors, cable installers, carpenters, housekeepers, home care workers, or distribution workers did not receive the basic wages and overtime they had earned – losses typically equivalent to losing several months of earnings and in some cases much more.

The US economy has changed significantly in the 80 years since the passage of the Fair Labor Standards Act (FLSA) and the birth of the WHD. These changes have had major impacts on compliance and how the WHD's efforts and enforcement strategies have evolved. Two changes are particularly notable.

First, the growth of the US economy and expansion of labor standards coverage means that the WHD's statutes cover 7.3 million establishments and 135 million workers.⁵ Under the Obama administration (and despite the ongoing opposition by the Republican-held Congress during 6 of the administration's 8 years), the WHD increased the number of investigators to almost 1000 from a low of 700 at the end of the Bush administration. Yet that is still a tiny number relative to the scale of workplaces the agency oversees. Thinking about how to prioritize and make sure

that the agency's investigators and efforts focused on where we could have greatest impact on compliance therefore became central. Our shorthand for this approach was 'strategic enforcement'.

Adopting a strategic enforcement approach was also crucial for a second reason. As an academic researcher, I studied the transformation of employment relationships across a growing number of industries in what I named the 'fissured workplace' (Weil, 2014). Over the last 25 years, and accelerating particularly in the last decade (Katz and Krueger, 2016), major businesses facing pressure from private and public capital markets increasingly focused on core competencies (e.g. brands, logistics excellence, product development) while shedding many of the activities necessary to carry out that work onto other business organizations. Using a variety of organizational methods, including subcontracting, third-party management, and franchising, major businesses shifted more and more of the work required to create products and services, while maintaining tight control over outcomes. As a result, although consumers still perceive a unitary company as the provider of the product or service they use (e.g. a Hilton Hotel room or Amazon.com delivery), the work undertaken to provide it was undertaken by a complex web of different employers.

This 'fissuring' of employment increases incentives for noncompliance, for example, at the bottom of several levels of subcontractors or between small franchisees whose margins are typically thin and competition fierce. The fissured workplace also creates greater complexity in defining who is responsible for that compliance, given the multiple organizations with a hand in setting working conditions. Consider a modern distribution center. Workers there will be operating under the strict technical and time requirements set by the controlling retailer, via a third-party logistics company that manages the facility who, in turn, hires individual staffing companies who pay their employee sometimes on a piece rate (i.e. truck-by-truck) basis because they consider them as independent contractors. Not a situation very conducive to establishing clear responsibility for compliance for workers, employers, or agency investigators. Addressing the fissured workplace and its impacts is therefore essential to any enforcement approach.

Moving from a reactive to a proactive approach

Prior to the Obama administration, the WHD operated with a strategy and drew on an organizational structure that was fairly typical of workplace enforcement agencies.⁶ The agency pursued workplace-by-workplace resolution of problems. Most investigations were triggered via worker complaints. During both the Clinton and Bush administrations from 1998 to 2008, often more than 75% of investigations arose from worker complaints (Weil, 2010). With tens of thousands of incoming cases, the WHD sought to recover back wages for workers as provided by the law and resolve those cases as quickly as possible and move on. Investigators were evaluated by efficiency metrics linked to the number of cases processed, the time required to do so, and keeping their individual backlogs down.

In short, the WHD approach – again like that of many enforcement agencies – was reactive: respond to complaints and then bring individual offending employers into compliance. On one level, responding to incoming complaints arising from violations is consistent with what the law requires. The WHD has always faced far more incoming complaints than could be handled with the budget appropriated by the US Congress. The agency therefore focused on ways to respond to a huge inbox efficiently, and focused its organizational incentives and attention to increasing the number of complaints it processed with the resources it had. But even an efficient system of complaint response risks leaving the forces driving noncompliance unaddressed and results in an unending game of whack-a-mole.

The foundation of strategic enforcement required shifting a far larger portion of investigations to a proactive approach, chosen on the basis of agency priorities and undertaken as part of a plan to improve compliance. It also required WHD offices sometimes to decide not to pursue complaints, thereby freeing investigator time to pursue proactive, directed investigations. Doing so was possible in part because the law allows workers to undertake back wage claims via private rights of action (e.g. hiring an attorney for an individual or sometimes class action claim).

At the same time, the agency refined methods of triaging complaints so that it pursued incoming complaints where significant problems seemed to be present, in situations related to broader investigation priorities, and where it was unlikely that workers would be able to pursue their claims for back wages. Procedures to more efficiently handle complaints related to singular problems, such as failure to pay last paychecks, were also refined so that investigators' time could be used to greatest effect. Through these efforts – requiring major organizational changes described in the following – proactive investigations grew as a percent of all investigations from 24% in 2008 to over 50% by 2017. Increasing our capacity to undertake proactive investigations was the bedrock of the strategic enforcement approach.

Setting industry priorities

Proactive investigations and triaging complaint investigations require explicitly setting priorities. Priority setting by industries started early in the Obama administration, with analyses that were done to rank industries according to two criteria. First, we prioritized based on the prevalence of FLSA violations (e.g. the number of minimum wage violations per 100 workers) and the severity of those violations (e.g. the total amount of back wages owed per worker who were paid in violation). Rather than use data from past investigations to measure these outcomes, we adapted measures from household surveys done by the Bureau of the Census to create an objective measure of violations across different regions and labor standards violations.⁷ Second, we used WHD administrative data on investigations triggered by worker complaints to estimate the likelihood that workers would exercise their basic rights.⁸ Putting the two criteria together allowed the agency to establish a priority list of low-wage industries with significant underlying violation problems and where workers historically had been unlikely to step

forward on their own. These industries became the focus of WHD activity over much of the Obama administration.⁹ The original list of industries included full- and limited-service eating and drinking, hotel and motels, janitorial, agricultural products, and home health care. These priority industries provided the backdrop for annual agency planning.

The process of setting and negotiating priorities led to important discussions that furthered the aims of strategic enforcement. A region putting forward an industry from the priority list would need to make a case for why enforcement resources should be devoted to it – what evidence suggested that either the problems were greater than shown by the data used to set national priorities or what opportunities to move the compliance needle were present that justified its inclusion. In this way, setting priorities created a platform for deeper discussions of conditions in different offices and regions as well as refinement of the overall understanding of compliance conditions.

Using all enforcement tools

Many enforcement agencies do not fully utilize the tools that have been provided by the laws that established them. So was the case at the WHD. The FLSA allows the agency to collect civil monetary penalties where an employer has shown a repeated, willful, or egregious failure to comply with the law. Yet the agency used its ability to levy civil monetary penalties in less than half of the cases where they were entitled to do so.¹⁰

A second remedy established in the FLSA is liquidated damages, which are payments directly to workers equal to double the amount of back wages owed to them. Liquidated damages compensate workers for those losses sustained several years in the past. In both the Clinton and Bush years, the WHD barely used its ability to collect liquidated damages for workers even though the statute clearly provided for that remedy. Absent the use of these remedies, employers face limited incentives to comply with the law given that the default remedy became payment of the back wages owed to workers. If the remedy remains only recovery of those payments, employers have essentially been provided a no-interest loan by its workforce. By collecting liquidated damages, employers face an economic incentive to comply with the law in the first place, creating incentive to change future behavior.

A different tool that was used sparingly but with considerable effect was the provision of the FLSA that allows the agency to ask contractors, manufacturers, and retailers to not move or accept delivery of goods where investigators had found evidence of significant violations of the FLSA by the producer of the goods – the ‘hot goods’ authority. This tool was used extensively in the garment industry where investigations in 2015 and 2016 found violation rates over 85% among randomly selected workplaces. Because of the importance of speed in many industries, alerting an employer that their goods will be delayed in order to rectify violations creates incentives both to resolve the matter and put in place measures

that will assure future compliance. Although controversial, the use of hot goods authority in agriculture also allowed the agency to focus attention on the significant problems for workers in that industry and bring parties in the supply chain to the table to help resolve them.

In the past, the agency shied away from the above enforcement tools, in part because they require a coordinated approach and close working relationship between the WHD and the Office of the Solicitor.¹¹ In the US, the Secretary of Labor is a cabinet-level officer appointed by and reporting directly to the President. All of the agencies within the Department of Labor report to the Secretary, including the Solicitor of Labor, the top litigator under labor statutes like the FLSA. Despite the fact that agency heads and the Solicitor all work under the Secretary, cross-agency collaboration was limited and did not foster such cooperation. Committing to using these tools was therefore only the first step: figuring out how to change the way that WHD and the Solicitor's office interacted in the National Office and in the field was a separate, difficult, but essential part of making it happen (as discussed later).

The agency also refined other enforcement tools. Although they had been used in particular initiatives in the past, investigative tools like stakeouts, new methods of reconstructing payrolls, interviewing workers, and digging into employer claims of financial inability to pay back wages and damages, all contributed to enhanced enforcement capacities. These steps reflected broader efforts to up the agency's game in response to the challenging practices often encountered by WHD investigators. For example, the WHD trained investigators on how to undertake time studies in the garment and agriculture industries in order to test the veracity of payroll records (often falsified). These studies were particularly important since workers in those sectors are often paid on a piece rate but employer records are often incomplete or in some cases nonexistent. This makes it difficult to assess whether payments to workers are in compliance with minimum wage and overtime requirements.¹²

Outreach – employers

Noncompliance can arise because employers do not fully understand the requirements under the law, so outreach can provide another mechanism for changing employer behavior beyond enforcement.¹³ The task, however, is not simply providing brochures or web links. As in all aspects of strategic enforcement, approaching this question means recognizing differences in employer compliance driven by industry structure and practice, ownership structure, geography, competitive dynamics, and specific company history.

For example, in rolling out the new home care rule in 2016 that provided minimum wage and overtime coverage for two million workers, we used focus groups composed of different covered employers to refine and clarify guidance. I regard this as one of the most successful outreach documents the agency created. Rather than issuing a dry, dense, and legalistic guidance document, the WHD

engaged stakeholders in developing a handbook that reflected detailed input from those who most needed the information.

Employer outreach also requires using a variety of venues and mechanisms to make employers aware of their responsibilities and of the approach and aims of the agency. This entailed creating different forums to bring employers together with the agency and with each other. During the Obama administration, the WHD undertook 18,000 such outreach events across the country.

Another type of employer-focused document that we used to increase impact and change behavior proactively was the administrator interpretation (AI). The AI replaced a form of guidance that had been used extensively by the Bush administration, so-called ‘opinion letters’. Opinion letters were guidance documents directed toward a specific company with a specific type of question that was to provide guidance to that business about future compliance behavior. Although it has some value in terms of its impact on compliance among businesses with reasonable questions under the law, an opinion letter requires dedicating a great deal of time in research and drafting by both the WHD and the Solicitor’s office. Since it is focused on a single employer, that use of resources is problematic in terms of its very limited ripple impact beyond that employer.¹⁴

The idea of an AI was to provide more comprehensive guidance for all employers in an area of major regulatory attention. Because of its broader impacts, an AI requires greater resources than an opinion letter. But on a benefit–cost basis, those additional resources are offset by the broader impacts of the AI on employer communities. We notably used this approach in two AIs addressing the fissured workplace: one dealing with the definition of an employee (particularly important given the problem of misclassification of workers as independent contractors) and a second dealing with the definition and application of the concept of joint employment.¹⁵

Outreach – workers

One of the fundamental challenges facing a workplace regulatory agency is making sure that workers exercise the rights they are provided under the law. The FLSA – and many state workplace laws – provides workers with a right to complain and otherwise exercise rights. The problem is that workers, particularly those who are vulnerable and more likely to be subjected to violations of the law, are unaware or more commonly reluctant to exercise those rights because of fear of reprisal or, in worst-case scenarios, dismissal. In the case of the WHD, it takes an average of 130 violations of overtime provisions to elicit a single worker complaint (Weil and Pyles, 2006).

The fissured workplace can further reduce the likelihood of complaints. For example, workers from a staffing agency may be working side-by-side with employees of the host company – or may have had their status switched from an employee to one of independent contractor. This murkiness undermines the likelihood of complaints. We used a variety of communication tools, beginning

with providing materials in multiple languages, and different media to provide basic information about rights.

However, fear of retaliation is the fundamental obstacle to the exercise of employee rights. Even before the Trump administration, fear of retaliation was significant – and it was and is fear born for good reason. In a study of low-wage workers in three major US cities, in 2008, 43% of workers who had actually complained about a workplace issue in the previous 12 months reported some form of employer or supervisor retaliation.¹⁶ Studies have long shown that exercise of rights significantly increases if workers have a third party present – that is a union.¹⁷ Although unions were usually not present in the actual workplaces we focused on, unions and other workers' advocacy organizations often had significant information about the industries, employers, and sometimes specific workplaces of concern. Those organizations also often were seen as safe and trusted intermediaries for workers.

Worker centers, community organizations, immigrant rights groups, and other advocates play a variety of informational and educational roles, often in immigrant communities. Some function as intermediaries in day-labor markets in construction, landscaping, and agriculture. Strategic enforcement therefore requires finding ways to work with unions, worker advocacy organizations, consulates, and other community groups who could serve as trusted intermediaries.

Establishing trusting relationships between those organizations and a government agency can be complicated. Workplace agencies have legal responsibilities to protect workers by enforcing the law. Unions and worker organizations are fundamentally dedicated to building power to negotiate in the interest of workers. Though overlapping in many respects, the difference in objectives can create tension and requires the development of relationships that allow these organizations to work effectively together.

The frictions sometimes arose around issues like the type of information a government agency needs in pursuing its statutory purposes (e.g. what constitutes a legally defensible record of violation); the type of information the agency can share with worker organizations and when it can do so; the pace of the investigation as well as the types of changes and outcomes that can be achieved. For example, the WHD guards the identity of a complainant carefully. That limits the type of information the agency will share with any party once an investigation has been initiated. The need for confidentiality is sometimes more broadly interpreted by the agency than might be necessary under the law, but it springs from an important desire to protect complainants from discrimination by employers. On the other hand, worker advocacy organizations, which have their own distinctive internal politics, have a need to be able to report to their members on the progress of actions including relationships with regulators in regard to specific investigations. Inevitable tensions ensue.

Despite these complexities, we developed highly effective relationships with worker advocates over time. As in any relationship, they deepened with growing trust between individuals, greater appreciation of the respective roles each

organization played, experience in working through problems, and successful outcomes. Developing a dedicated staff position to undertake the overall outreach role proved to be particularly critical in this respect, as described next.

Strategic communications

In the Stanley Kubrick film, 'Dr Strangelove', the world ends because of a doomsday bomb built to create the ultimate disincentive for a nuclear exchange. The problem was that the side that built the device did not let the other side know of its existence. As is the case in thwarting nuclear exchanges, communication is key to deterrence for any regulatory agency. It also plays other critical roles in achieving agency mission.

An enforcement agency engaged in true strategic communication searches for ways to 'connect the dots' for the various parties who watch an agency's action for messages about its intentions. Working to communicate what an agency is doing, why it is doing it, and how it will choose to do so going forward can have an enormous impact on employers, workers, and the public. The value of strategic communication is complementary to a robust enforcement approach and highly developed methods of outreach. If an agency hopes to have deterrence effects on thousands of employers that it will never have adequate resources to directly investigate, communications is one of the most important mechanisms for amplifying enforcement impact.

At the WHD we spent a great deal of time crafting outreach strategies geared toward specific sectors so that they understood our reasons for focusing on them (e.g. the presence of large numbers of low-wage and vulnerable workers; the presence of significant problems like misclassification of workers as independent contractors rather than employees). Equally, providing information about our outreach efforts signaled to employers our willingness to engage with them and once again our resolve to achieve our mission.

Changing the nature of how we described the impact of our investigatory work is another example of strategic communication. The typical WHD press release prior to the Obama administration summarized the case in terms of the number of workers impacted and the total wages collected in the course of the investigation. Characterizing the outcomes of an investigation in terms of the size of the back wage collections – say \$185,000 for 55 janitors and cleaners in Chicago – might sound like a major outcome to some and a minor one to others.¹⁸ However, translating that into a figure relative to the typical weekly salaries earned by workers – about 8.5 weeks of earnings – is a far more powerful message about the scale of losses to workers involved.

Regulatory agreements

The agreements that an agency creates in the wake of an investigation represent another key tool for strategic enforcement. There are many paths that can be taken

in resolving any given investigation. For many investigations, the final step entails the recovery of back wages and, if appropriate, compensatory damages. This outcome represents the bulk of settlements.

However, an agency also has available to it broader means of resolving investigations that go beyond direct settlements for affected workers. At the WHD we developed a broad range of compliance agreements arising from administrative investigation actions, litigation, and sometimes proactive voluntary arrangements, all of which were designed to have broader and more lasting impacts than simply reaching a settlement with the parties.

The WHD negotiated enhanced compliance agreements (ECAs) in many cases out of investigations that required litigation by the Solicitor. The ECAs included requirements to establish new positions to oversee compliance, undertake training for specified management personnel, provide mechanisms for workers to lodge complaints internally on a confidential basis, and/or establish third-party monitoring systems to undertake ongoing compliance assessment of subcontractors, suppliers, or other business partners. In some cases, such as with large farm labor contractors in California, what began as an ECA grew into more cooperative arrangements between the WHD and the signatory contractors. In the best cases, these arrangements allowed for joint problem-solving as was the case in an agreement between the WHD and CalVans, a nonprofit transportation organization to transport workers to farms in California's Central Valley.¹⁹ The agreement came in the wake of farm-worker deaths from being transported to and from farms by for-profit 'raterios'.

The WHD also negotiated voluntary agreements to create a mechanism for systemic compliance outside of litigation and ECAs. One example was an agreement between Florida Natural, a major producer of orange juice located in the Tampa, Florida area, and the Tampa WHD District Office. That arrangement grew out of a comprehensive analysis by an Assistant District Director who mapped the relationships between a large number of growers, orange wholesalers, and other orange suppliers to Florida Natural. The map included a color coding to indicate past WHD violation histories for the different sources of oranges, with 'red' indicating major problems, 'yellow' indicating the presence of some problems, and 'green' indicating a record of compliance. These maps were shared with executives of Florida Natural as an indication of violations within its supply chain. Although it would have been difficult under the FLSA to establish Florida Natural's responsibility for compliance (e.g. as a joint employer), sustained discussions between the agency and Florida National led to a voluntary arrangement where by the WHD provided training and outreach to growers, Florida Natural signaled to its growers and farm labor contractors its awareness and concern with compliance of potential suppliers, and the agency continued to undertake its core enforcement activities.

Signed in the summer of 2016, the Subway agreement represents perhaps one of the most comprehensive voluntary arrangements entered into by the WHD. The agreement was between the WHD and the corporate entity (Doctor's Associates, Inc.) that owns the Subway franchisor system. Since that system includes some

13,000 outlets across the US, the potential for achieving compliance at scale was significant. Growing out of an informal letter of understanding between the WHD and the Chief Operating Officer at Subway in 2011, the Subway Agreement provides for training, sharing of data regarding compliance as well as the status of outlets, and problem solving to deal with persistent problems.²⁰

Evaluation, performance monitoring, and continuing improvement

Strategic enforcement is not only an approach to achieving the mission of a regulatory agency, but it also represents a mindset for organizational management. One key component is a commitment to evaluating the impacts of different approaches, measuring them to the extent quantitatively and qualitatively possible, and then revising approaches based on those evaluations.

The WHD developed a range of performance measures intended to capture the broader definition of success implied by the agency's mission. Rather than measuring success by inputs, like the number of investigations or the hours devoted to them, measures related to outcomes were developed. In order to measure the efficacy of our targeting approaches, for example, we focused on the percentage of investigations undertaken where violations were detected. That measure was paired with the percentage of overall investigations undertaken at the District Office regional and national levels on a directed versus complaint basis. Aligning both measures allowed the agency to assess at a local, regional, and national level progress on the use of proactive investigations at the same time as gauging improvements in the agency's ability to focus those investigations on workplaces with significant problems.

Figure 1 shows the significant progress made by the agency during the Obama administration in two key respects: increasing the percentage of investigations done on a proactive basis (the green line that moves upward between 2009 and 2017) and improving targeting of those investigations (the black line depicting a downward trend in the 'no violation rate' of directed investigations and the blue line indicating reduction in that rate in complaint investigations). Equally striking is that the large gap between directed and complaint investigations in 2009 decreased steadily so that by 2017 they had an equivalent likelihood of finding violations.²¹

Organizational change to support strategic enforcement

In *Strategy and Structure*, a classic book in business history, the economic historian Alfred Chandler (1962) examined how the modern corporation developed as an organizational system to support business strategy. Regulatory agencies must similarly create organizational structures that support the strategies that have been chosen. If they do not, the investigators, managers, and staff will not have the tools, skills, or incentives to carry out that strategy. In order to make the major changes in direction described above, the WHD had to develop, experiment with, and refine its organizational approaches in a number of important ways to support strategic enforcement.

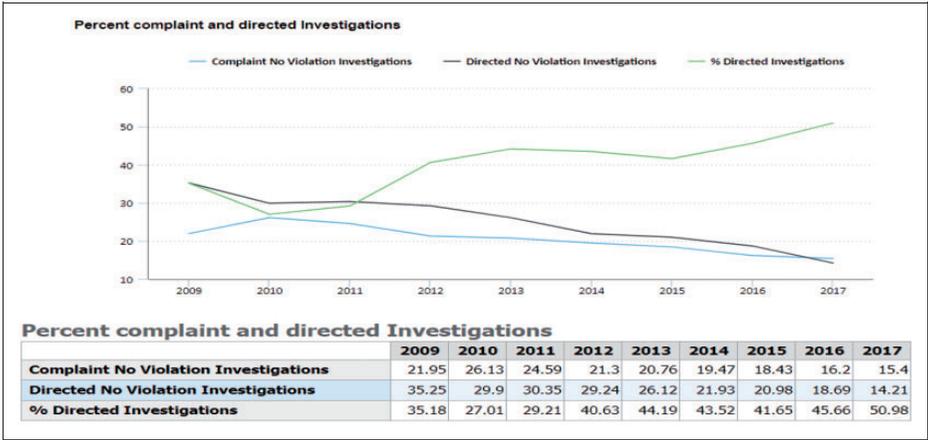


Figure 1. Key performance metrics: percent of complaint and directed investigations with no violations, 2009–2017.

It is easy to assert the need to change an organization to support new strategic directions. Of course, the problem is that organizational structures do not change quickly or easily. People are hired with a set of skills and expectations. Incentives to do certain activities become entrenched. A culture emerges about how the work of the agency is done. Changing that to accommodate a new strategy is hard. It requires buy in and determination. If the organization is not adapted to support the new strategy, new strategic priorities and efforts will remain just so many words. The following sections briefly describe some of the most important changes that we undertook.

Changing decision making processes among agency leaders to provide transparency on budgets and performance measures

Strategic enforcement at the WHD required a level of accountability by key leaders in the organization quite different from traditional approaches to managing a regulatory agency. In particular, it required leaders at the District Office regional, and national level to be accountable for key performance outcomes central to the new approach toward mission. Creating greater accountability also required providing appropriate resources, information, and engagement of key decision-makers so that they had the means to achieve the new objectives that had been given.

This required greater transparency on how budgets were allocated for the different levels of the agency. Regional Administrators were provided greater information on the resources available to their region as well as to the other regions in the agency. The National Office budget was also made more accessible to all of the senior leaders in the agency. Enhanced transparency allowed for more informed discussion about key resource choices necessary to make strategic enforcement effective. The transition to providing more open information was neither simple

nor smooth. It required building systems to provide that information on a monthly basis as well as the development of trust among the key decision-makers about sharing information and plans with one another and being willing to openly debate resource allocation decisions.

Performance outcomes were also explicitly tied to resource allocations. The planning process entailed engaging decision-makers at all levels of the agency in setting performance goals critical to strategic enforcement (beginning with those in Figure 1). In doing so, strategic enforcement discussions could be link the allocation of resources with the achievement of objectives achieved in any period of time. One of the most important impacts of tracking performance outcomes on a monthly basis at the District Office, Regional, and National level were the conversations they generated. Regional Administrators used the measures as bases for discussions with District Office leadership on a periodic basis, as did the National Office in its discussions with each region. As the agency became better at producing and using the data – eventually giving District Offices the capacity to generate these and other key performance outcome reports at a local level and providing leadership with access to one another’s data – the sophistication of discussions of larger enforcement strategy was elevated.

Creating training, performance criteria, incentives, and a culture for investigators consistent with a strategic enforcement approach

At the same time that senior leaders in the organization were provided greater responsibility, accountability, and control over key decisions relating to strategic enforcement, we sought to find ways to give investigators, technicians, and staff the tools they needed to successfully undertake strategic enforcement. As is the case in other parts of organizational structure, this was an iterative process.

The agency devoted significant resources to training investigators in the underlying ideas of strategic enforcement. The curriculum for incoming investigators and for the follow-up training that investigators later took – both fabled parts of WHD culture – were altered to include materials about strategic enforcement and its use. These programs include a 3-week residency program called ‘Basic 1’ taken by investigators in their first 6 months at the agency, and a second intensive training taken in the second year called Basic 2. Investigators make life-long connections between other incoming investigators and their trainers, who are almost all senior career staff members. Integrating the ideas of strategic enforcement in these sessions was therefore critical, but also evolved over many years given the many other educational aims of those training hours. The infusion of new staff at the WHD arising from both a wave of retirements and the hiring of 300 additional investigators in the early years of the Obama administration expanded the pool of those going through training, deepening exposure to these ideas.²²

Investigators want to enforce the law and recover back wages for workers who have not been paid what the law assures. Many investigators I met felt both a moral and legal obligation to do so and distrusted what they perceived as obstacles

to undertaking their work. For many years, the agency used efficiency measures such as the number of violations found per investigation hour completed as important performance evaluation metrics. Measures like that make sense if back wage recovery is the fundamental mission of an agency. It is also consistent with a complaint-driven approach where it becomes critical to quickly log in, assign, and then complete investigations so that investigators can quickly move to the next complaint in their ever filling ‘in-box’.

But a strategic enforcement approach that seeks to improve compliance by changing behavior means that investigators need to be spending their time and focusing on different types of performance outcomes. First and foremost, they needed to spend more time on directed, proactive investigation and less on complaints. That was a hard sell in 2009 (see Figure 1), when the typical directed investigation was far less likely to find violations than a typical complaint investigation.

Strategic enforcement also requires investigators (and colleagues at the District and Regional Offices) to think more deeply about the employers they were investigating, particularly in light of the aims of improving compliance in prioritized and fissured industries. Rather than focusing solely on identifying violations, investigators become more responsible for ferreting out information about the financial, governance, and operational aspects of the company relating to the causes of non-compliance as well as about other organizations that contracted or managed its activities. One new task associated with these activities was ‘mapping’ organizations. Mapping entails gathering and using information about a business to understand its organization as well as its relationships with other entities such as third-party management companies or staffing agencies. Mapping was applied to supply chains, subcontracting systems, hybrid structures involving complex combinations of the third-party managers, subcontractors, and staffing agencies, and for franchise systems in a variety of industries. Through mapping, investigators gained an understanding of what might be required to assure long-term compliance.²³

Finally, strategic enforcement often required an investigator to work as part of a larger team rather than as an individual. In a growing number of cases, investigators needed to coordinate with others in their own District Office, in other District Offices or even in other Regions. Or, it required the investigator to lay out a plan with the Regional Office of the Solicitor before an investigation, rather than providing information on what they found after the fact.

Creating mechanisms to coordinate across District Offices within a region and across regions for national issues (one WHD)

Mapping as a basis of strategic enforcement is only the first step of coordinating complicated enforcement efforts. It can be difficult enough to undertake strategic enforcement in one particular geographic area. But when an enterprise or business organization covers multiple District Offices and given states or regions of the country, or even, covers multiple states and regions, the problems of

coordination become intense. The agency therefore had to grapple with planning and coordination of multi-site and multi-region strategic enforcement efforts. This required levels of engagement and cooperation between parts of the agency that did not have a direct reporting relationship or a level of interaction between the National Office and Regional and District Office personnel that was new in many respects.

The increasing level of coordination around budget and planning benefited efforts to improve cross-District and Regional coordination. By sharing budget and performance goals, for example, Regional Administrators shared more information about what they were doing and how those efforts were progressing. Still, coordination was often hampered by old structures. The WHD had a history of planning at the District Office level. That focus often meant that the agency focused its efforts at the level of the business associated with geography. But as one of the senior career planning analysts remarked to me, ‘businesses don’t organize themselves according to how we are structured’. The agency had created different mechanisms to patch together some level of coordination between District Offices. For example the District Office that was associated with a corporate headquarters was informed – at least in principle – of all investigations pertaining to that company. But that proved only partially effective since reporting often was not associated with a wider plan for enforcement or strategy for compliance. In some cases, it was not even associated with consistent review of patterns of behavior. And those fixes were never applied to business structures common in the fissured workplace, like third-party management or subcontracting relationships not directly linked to corporate structures.

Instead, the agency had to develop new methods of sharing information, coordinating investigations, consolidating records, and pursuing resolutions. Sometimes, the more informal mechanisms – like monthly conference calls or development of ad hoc data gathering tools – proved effective. Other times, coordination developed through litigation strategy and the active role of the Solicitor’s office. In still other cases, coordination came from relationships that developed through a new type of initiative, such as the franchise-wide agreement with Subway, and interactions that agreement required.

Creating specific structures to support outreach efforts and integrate them into enforcement approaches

Developing an outreach capability required developing a new resource within the agency. In 2011, we created a new position, the community outreach resource planning specialist (CORPS). CORPS were initially hired in a small number of District Offices, providing the agency to figure out how the position could be used to greatest effect. There was uncertainty about both the nature of the roles that CORPS should play and about their relationship to other positions in the organization including to leadership. Some investigators distrusted the new position, seeing it as either an encroachment on their own activities or a questionable use

of resources. Early CORPS staff also felt somewhat at sea, having no clear role models to emulate. And, as a prior section discussed, building trust with worker advocates, unions, businesses, and other organizations required time.

Developing a set of guidelines on activities, creating a network of CORPS staff to learn from one another, and sharing examples of how CORPS were being used effectively in strategic enforcement all proved critical to making the position an important resource for enforcement. CORPS undertook a great deal of training and outreach efforts for all communities. Different staff members focused on different areas depending on their comfort level and prior experience. Although some of the early cohort of CORPS would revert to their former experiences as investigators leading them to look at the potential roles narrowly, another set of early staff used the opportunity provided by a clean slate to develop new programs, relationships, and activities.

At the end of the administration, we had created a handbook outlining key roles, responsibilities, and requirements for CORPS. We also rolled out the first national training of CORPS, which integrated field and national leaders into the curriculum. This came after a written job description was completed and negotiated with the staff union. At the end of the Obama administration, the WHD had hired CORPS in 46 of our 54 District Offices. Equally exciting was the promotion of several CORPS into WHD management positions, demonstrating their integration into the agency.

Moving from badminton to an ‘early and often’ culture

Historically, communication between the WHD and the Solicitor of Labor focused predominantly on the most egregious violators and usually commenced after administrative remedies had run their course rather than proactively. Yet many of the approaches to strategic enforcement required close and ongoing coordination with the Solicitor’s office. Success in this area required fundamental changes to standard operating principles in both the WHD and the Solicitor’s office. In particular, it required overcoming what Patricia Smith, the Solicitor of Labor throughout the Obama administration, called the ‘badminton’ approach to agency relationships. In that approach, WHD investigators would undertake their work and, if litigation was called for, would ‘lob’ the case over the net for the Solicitor’s Office to pursue. The staff of the Solicitor’s Office would in turn evaluate the case and often find key pieces of evidence absent, requiring them to lob the case back to the WHD for further investigation. Back and forth a case would go to the mutual aggravation of both sides, to say nothing of undermining the efficacy and efficiency of the overall effort.

Strategic enforcement required far more integrated relationships between these offices, with a clear plan for pursuing significant cases in advance. Significant cases were developed in collaboration, with a coherent plan for collecting information relevant to potential litigation or settlement. In cases involving multiple players in different parts of the country, such as in efforts involving serial violators in the

construction industry, teams of Regional Solicitors and WHD investigators created coordinated investigation efforts, allowing them to gather necessary evidence and insuring that the actions of one area would not undermine planned work in other areas at a later point in time. Creating new operating procedures once again required close attention to training, discussion, and ongoing refinement of organizational procedures, including how and when data was shared. These steps helped to build an 'early and often' culture between the WHD and the Solicitors.

Creating an investigation and agency workforce that looks like the people we sought to protect

The strategic enforcement approach required building trust between the agency and workers. One historic obstacle arose from the fact that our agency did not look like the workforce the agency sought to protect. Equally problematic was that few of our investigators could speak directly to workers who often did not have English as their primary language. Gaining the trust necessary for effective enforcement requires developing a workforce that has those capabilities.

The primary mechanism we used to address this issue was using language capability as a selection criteria in choosing future investigators and technicians for our District Offices. Not only did this create a critical capability in our investigation workforce, but it opened our recruiting to a pool of workers who we had not in the past adequately tapped. In addition, the WHD has a culture of promoting from within. The majority of our District Office regional and national office leadership began their work as investigators. This can be a powerful mechanism to build capabilities and a strong organizational culture. But if the incoming level of the organization from which one recruits is not reflective of the community of workers one is to interact with, those differences are reinforced at every level of one's leadership. By changing our hiring protocols, by the end of the administration more than half of our investigators spoke more than one language, giving the agency the ability to communicate in Spanish, Mandarin, Cantonese, Portuguese, Polish, Tagalog, Vietnamese, and many other languages. Because of a high level of retirements and other separations, a significant number of relatively recent investigators were able to assume leadership positions in the organization, further expanding the diversity of the agency leadership.

Creating a workplace culture of engagement, creativity, and agility where experimentation is encouraged but accountability clear

Each year, the federal government administers the Federal Employee Viewpoint Survey (FEVS). The FEVS provides a snapshot of how federal workers feel about their job, their treatment at work, their mission, opportunities for advancement and betterment, and other measures of satisfaction. For both the Department of Labor and the WHD, FEVS scores had declined significantly in the first 4 years of the Obama Administration. Secretary of Labor Tom Perez made improving

employee engagement a major emphasis for the Department as a whole and set expectations that agency heads would do so as well. This emphasis was welcome because the leadership of the WHD had independently agreed that improving employee satisfaction and engagement was critical to achieving our larger mission.

We devoted significant attention and resources to employee engagement efforts. Using the survey results as a springboard, we created a series of engagement meetings to allow staff in the National Office to discuss the meaning of survey results and to fashion responses to it. We learned a lot in our first year's efforts. In particular, we learned that a process to address engagement needed to have at its bedrock engaging workers in that very effort. As in other areas of policy, we shared the detailed survey results with managers at all levels of the agency, and also encouraged our leadership to do so with their staff directly. Our engagement efforts were rooted in the agency's mission, and also the basic proposition that our staff feel that their own workplace reflected the principles of respect and fair treatment that the agency sought to enforce in its day-to-day work. By the end of the administration, we had substantially improved our engagement along almost every dimension. One of the most important aspects related to strategic enforcement was responding to employee concerns that they did not understand how their position in the agency fit into the larger mission. Finding different ways to make that connection was critical because of an equally clear message from the FEVS survey results: the staff of our agency embraced the basic mission of the WHD.

Why strategic enforcement? A final story

Imagine working for many years as an employee of drywall installer in residential construction. One Monday, upon coming to work and performing the same activities for the same company, you are told you are now you an individual 'member/owner' of your own LLC (limited liability company), thereby transforming you into an independent contractor. Since you are no longer an employee, you are no longer eligible for overtime pay, unemployment insurance, worker's compensation or a host of other benefits that come with employee status.

This is the scenario that played out in a case involving Arizona Tract, a major drywall labor contractor operating in the southwest.

A complaint-based, reactive approach might have resulted in the case flying under the radar screen of the WHD. Given the workforce, it would have been unlikely for a worker to step forward to lodge a complaint. Even with that information, the agency might not have connected the dots of the larger organizational scheme behind the misclassification, nor would the agency have the external contacts with state agencies or the 'early and often' relationship with the Solicitor's office to build a comprehensive legal approach.

But misclassification of workers was a major priority of strategic enforcement efforts, and both the southwest and western regions of the WHD had developed experience in finding out about such schemes in part because of close ties with both employers and unions in the local construction industry. Accordingly, the WHD

investigation began in southern Utah in conjunction with state labor authorities and the Regional Solicitor. The results of those investigations and larger other efforts to deal with worker misclassification in state led to passage of state legislation in Utah that required LLCs to provide workers' compensation and unemployment insurance to their 'members'. Yet as often happens in the 'cat and mouse' world of enforcement, to avoid legal jeopardy in Utah, the defendants moved their operations south to Arizona.

Strategic enforcement allowed coordination between district, regional, and National Offices and with the Solicitor to quickly lead the WHD to open an investigation of the 'new' company in Arizona. Ultimately, the WHD successfully secured two consent judgments in the federal district court and recovered \$1.1 million in back wages and damages for workers. Along with that recovery, the consent agreement required that these workers were properly reclassified as employees, thereby restoring the rightful protections that come along with that status. The investigation and litigation were publicized widely in the region and shared internally to make other parts of the agency aware of both the misclassification scheme and the methods with which it was combatted.²⁴

There will never be sufficient resources to staff agencies to the level needed to assure complete compliance with workplace laws, so there will always be a need for enforcement agencies to use their resources to achieve greatest impact. I believe our experience at the WHD demonstrates how far one can go in making sure that workers' lives are improved, even given significant limitations on the resources available and under the bright light of oversight. There is much more that can be learned about improving enforcement strategy and its implementation. The challenges faced by men and women subject to violations of fair treatment are reminders of its continuing importance.

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Notes

1. Opportunities to serve in a policy-making position for an agency and over an issue that one has studied intensively are relatively rare in the US and I suspect elsewhere. Following the end of his government service in Washington, DC where he served as,

- among other roles, US Secretary of Labor, my mentor, John T. Dunlop, wrote a scathing article regarding the chasm between academia and the ‘world of practice’ that was published in the *Industrial and Labor Relations Review* (Dunlop, 1977a). In the essay, Dunlop wrote ‘[A]cademic activities in my experience are almost totally irrelevant to the major problems confronting decision makers in government, and in labor and management as well, and, in fact, they have had almost no influence on actual decisions’ (p. 276). Not surprisingly, it engendered a backlash from a number of articles by prominent labor economists that were subsequently published (Rees et al., 1977) and then, fittingly, a combative response to the responders (Dunlop, 1977b). My appraisal of the role of academic research on policy decisions is not so harsh, although I would observe that there remains significant room for improvement in bridging the divide.
2. There were many, many hands involved in bringing the ideas, strategies, and organizational changes summarized in this article to fruition. Much of what is discussed in this article arose from the collective work of political and career staff inside the WHD and colleagues in the wider US Department of Labor with whom we worked closely.
 3. *Wage and Hour Mission Statement*, U.S. Department of Labor: www.dol.gov/whd/about/mission/whdmiss.htm.
 4. The WHD also enforces prevailing wage and benefit requirements for government contractors, family medical leave Act requirements, and protections for guest workers as well as several other statutes. Although we applied many of the principles described in the article to these other statutes, the focus here is on the Fair Labor Standards Act.
 5. *Wage and Hour Division: Resources for Workers*, U.S. Department of Labor: www.dol.gov/whd/workers.htm.
 6. Our efforts began with a deep dive into understanding how the longstanding system operated, and how it fit into the modern workplace. The result was a six chapter report released in 2010, *Improving Workplace Conditions Through Strategic Enforcement* (Weil, 2010; available at www.fissuredworkplace.net/assets/D.Weil.Improving-Compliance-via-Strategic-Enforcement.WHD.2014.pdf) that became the blueprint for many of the changes undertaken by the agency over the subsequent 6 years. The ‘Green Book’ (so named because of its cover) was both a fact base documenting how the agency had traditionally operated and a detailed discussion of how it could change going forward.
 7. Specifically, we looked at the incidence of wages reported in the Current Populations Survey conducted by the Census Department that were below either the federal or state minimum wage for workers covered by the Fair Labor Standards Act to calculate the incidence of minimum wage violations. We used a combination of household survey answers related to reported weekly hours combined with reported payment for overtime hours during the reporting week to calculate overtime violation incidence. We used comparable data to estimate the potential back wages owed for those workers. Although there were a number of assumptions we needed to make to use these estimates, we were primarily concerned about the relative ranking of industries using these measures rather than the absolute levels that made the approach useful for purposes of setting priorities.
 8. Here, we divided the total number of complaints per industry by the estimated number of workers covered by the law in those industries to generate an estimate of the likelihood of complaint. Once again, our primary interest was the relative complaint rates across industries rather than the absolute levels arising from this approach.
 9. The basic list was laid out in the ‘Green Book’ (Weil, 2010: 2) and refined over time. Regions were allowed to add industries not on the list as part of their annual plan, but

had to justify such additions. For example, several regions added fracking given the presence of fissured workplace structures and systemic problems across companies in that industry, even though relative wages in the industry were somewhat higher than the priority industries.

10. One of the more internally controversial findings of my 2010 analysis of past agency practice was that between 1998 and 2008 the WHD assessed civil monetary penalties in only about 43% of re-investigations with repeat FLSA violations – even though the agency had the clear authority to levy them in all of those instances.
11. Unlike other departments of the federal government, the Labor Department relies on the Office of the Solicitor to provide legal service to all agencies. Although the department will also work with the Department of Justice on cases involving criminal activities under laws not directly administered by Labor, or where court decisions are appealed, it provides legal assistance in most instances involving litigation.
12. We applied the research of another academic at the Labor Department, John Lund, to this problem. Before joining the Obama administration, Lund had led the University of Wisconsin's Worker Education program and developed an expertise in time studies. He developed a comprehensive training program for the WHD investigators to apply these techniques to these industries.
13. Representatives of the business community often accuse enforcement agencies of over-using enforcement and underutilizing outreach and education since 'most employers follow the law'. Worker advocates, on the other hand, often regard all outreach as window-dressing that has little impact on employer behavior, under the assumption that most employers will violate the law if allowed to do so. Both views oversimplify the complexity underlying compliance.
14. The second problem of opinion letters was their use by some employers as a 'get out of jail free' card that could be produced as a shield from future accountability (valid or not). The Trump administration removed several of the most important AIs issued during my time at the WHD and reinstated the issuing of opinion letters.
15. Both AIs can be found at www.fissuredworkplace.net/Labor-Department.php.
16. Reported forms of retaliation varied from reduction in hours or pay or being given a less desirable work assignment, to threats of being fired or reported to immigration authorities, to actually being fired or suspended (Bernhardt et al., 2009).
17. The role of unions and other workplace advocates was an early area of my research interest beginning with my dissertation that analyzed the impact of unions on enforcement under the Occupational Safety and Health Act and the Mine Health and Safety Act. See, for example, Weil (1991, 1992, 1999, 2005b) for early studies and Weil (2012) for a summary of evidence. Fine has undertaken a great deal of research in this area (e.g. Fine, 2017; Fine and Gordon, 2010).
18. See WHD, 'Super Maid Ordered to Pay \$184,505 in Back Wages, Damages to 55 Misclassified Employees Following US Department of Labor Lawsuit'. US Department of Labor New Release, 14-1338-CHI, 8 May 2014: www.dol.gov/opa/media/press/whd/WHD20141338.htm.
19. 'US Department of Labor, CalVans to Partner to Expand Safe Farmworker Transportation Plan at Fresno Event'. 9 August 2016: www.dol.gov/newsroom/releases/whd/whd20160808.
20. The Subway agreement can be found at: www.dol.gov/WHD/flsa/SubwayAgreement.pdf.

- A discussion of the agreement can be found at: www.bna.com/subway-dol-compliance-n73014445701/
21. Although these measures proved important in helping move the WHD toward its strategic enforcement goals through much of the administration, I regarded them as works in progress. They did not adequately capture ripple effects, for example, in that they only focused on those workplaces where we had undertaken direct investigations. We discussed the development of tools that might look at compliance patterns in geographic and industry areas. These types of measures would have been better suited to picking up broader affects related to outreach, education, partnerships, and deterrence efforts.
 22. The last trip I made before the end of the administration was to attend the graduation of about 75 new investigators who had received their first training in strategic enforcement. It was exhilarating to see a new generation of investigators with a grounding in the approach.
 23. In my final year at the WHD, we introduced mapping as part of a revised job description negotiated with the staff union for investigators. The process of drafting the revised job description and equipping both managers and investigators to be able to assess performance in that (and other) dimensions of strategic enforcement led to useful discussions throughout the agency. I attended meetings in all five regions to participate in these discussions and underscore the agency's commitment to strategic enforcement principles.
 24. *News Release: Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Construction Workers Who Were Wrongly Classified*, US Department of Labor, 23 April 2015: www.dol.gov/opa/media/press/whd/WHD20150518.htm. A related case involving Paul Johnson Drywall, a company that similarly converted the status of its workforce in conjunction with Arizona Track is described at: www.dol.gov/newsroom/releases/whd/whd20140827.

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Biographical note

David Weil is Professor and Dean of the Heller School for Social Policy and Management at Brandeis University. In 2014, President Barack Obama appointed him to be the Administrator of the US Department of Labor's Wage and Hour Division and was the first Senate confirmed head of that agency in a decade. Weil is an internationally recognized expert in employment policy; regulation; transparency policy; and the impacts of supply-chain and industry restructuring on employment and work. He has authored over one hundred articles and five books, including *The Fissured Workplace* (Harvard University Press, 2014). Weil received his BS at Cornell University and Master's and PhD degrees in Public Policy at Harvard University.