

WHY COMPLAIN? COMPLAINTS, COMPLIANCE, AND THE PROBLEM OF ENFORCEMENT IN THE U.S. WORKPLACE

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I. WHY WE SHOULD CARE ABOUT COMPLAINTS

The conventional image of government regulation of the workplace is of inspectors sent out to factories, construction sites, and service establishments, seeking to ensure that employers comply with promulgated standards. This image fits the statutory framework of many federal workplace standards: government agencies like the Occupational Safety and Health Administration (OSHA) or the Wage and Hour Division (WHD) of the U.S. Department of Labor seek to increase compliance with standards by dispatching their inspectors across different industries and geographic areas. However, critical to that enforcement process, agency staff are deployed either through the planned inspection activities of agencies or in response to complaints lodged by workers under those statutes. Because of limitations in available resources in many agencies, and the often politicized environment surrounding regulatory decisions, complaint activities have become in many cases the primary driver of enforcement activity. For example, in 2004, complaint inspections constituted about 78% of all inspections undertaken by the WHD, the agency within the U.S. Department of Labor in charge of enforcing

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minimum wage and overtime statutes under the Fair Labor Standards Act. This represented a substantial increase in the proportion of complaints over time, which represented about 70% of all inspections in the mid-1990s.

If we care about the adequacy of workplace laws in protecting workers generally and low-wage workers in particular as the group most vulnerable to violations of core labor standards, we must pay more attention to the question of “why complain?” under workplace policies. This raises, in turn, a number of subsidiary questions: How frequently do workers complain in the first place? How does this vary across different statutes and between different types of workplaces? How related are complaints to underlying conditions at work? What other characteristics determine who complains and who does not? In short, what drives complaints and what does this mean for improving protections for workers, particularly those in greatest need of protection?

This article examines these issues by focusing on complaint activity across two of the most important U.S. statutes regulating workplace conditions, the Fair Labor Standards Act (FLSA), which sets minimum wage levels and overtime compensation requirements, and restricts child labor; and OSHA, which regulates safety and health conditions in most private-sector establishments. If worker complaints track closely with underlying workplace conditions—where more dangerous workplaces or greater employer noncompliance with workplace standards give rise to more complaints—a system reliant on complaints may effectively move limited resources to those workplaces most in need of attention. On the other hand, if other factors mediate the relation between deleterious workplace conditions and the likelihood of complaining, we have reason to worry about the adequacy of the regulatory system in applying resources where most needed. This problem intensifies as the total amount of money and number of people allocated to workplace protection decreases over time.

We analyze the relation of complaints, compliance, and enforcement in the following manner. Section II provides a framework for examining the decision to complain, which under most regulatory systems resides with the individual. Our framework suggests that the likelihood of complaining relates to underlying conditions at the workplace as well as a set of factors associated with workers and their employers. Given the significant variation in underlying conditions as well as worker and workplace characteristics,

we predict that complaint activity should vary significantly across industries, with a significant portion of observed variation arising from differences in conditions. Section III provides background on the Occupational Safety and Health Act and the Fair Labor Standards Act and describes the micro-data we use to examine complaint and compliance activity. Section IV presents our empirical results about overall complaint levels and industry-level variation in complaint activity and its relation to underlying compliance conditions for FLSA and OSHA. We show that there is a significant gap between the level of complaint activity and underlying violation rates. Section V turns to possible explanations for the significant gaps between complaints and compliance that were found in our analysis. These relate to the framework presented in Section II and include the absence of workplace agents capable of solving a significant public goods problem associated with the exercise of rights. Section VI presents policy implications given the forgoing discussion, particularly as they relate to the enforcement of workplace policies.

II. WHY COMPLAIN? A FRAMEWORK FOR PREDICTING COMPLAINT ACTIVITY

A complex web of laws and executive orders covers employment practices in U.S. workplaces. In most areas, a division of the U.S. Department of Labor (e.g., the Wage and Hour Division; Occupational Safety and Health Administration) acts as the enforcement agent for regulatory policies. The task of the Labor Department is to ascertain whether companies are complying with the range of workplace regulations, and then change behavior where they are not. Most workplace regulations provide the DOL or other enforcement agents with a variety of civil and in some cases criminal sanctions that provide incentives to change behavior.

Federal labor policies attempt to change employer behavior primarily via the threat of inspection, detection of violations, and levying of penalties. The direct pressure from inspection activities, therefore, or the deterrence effects of enforcement leads to compliance with labor policies. Firms are assumed to act in accordance with the model of crime initially set out by Gary Becker,¹

1. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

where regulatory compliance is a function of its benefits versus costs. For a given level of compliance costs, employers will choose whether or not to comply based on the probability of detection and the expected level of assessed penalties in the event of being detected.

The objectives of labor legislation are therefore translated into practice via enforcement. There are three ways that enforcement can be undertaken under labor regulation: (1) the responsible government agency can initiate enforcement; (2) employees can initiate enforcement (via rights provided them); or (3) a mix of the above, where employees trigger enforcement, bring government action, and/or use private rights through the courts. There is considerable divergence between the enforcement implied in statutes and enforcement as carried out in practice. For example, OSHA's inspection force has never exceeded 1500 and currently hovers around 1100. Long-term budget restrictions reduced the number of investigators at the Wage and Hour Division by 14% between 1974 and 2004 despite the fact that the estimated number of workers covered by statutes administered by the WHD grew by 55% over the same period.²

Resource limitations substantially lower the probability that a workplace will be inspected by the government in a given year. The annual probability of receiving an inspection for one of the 7.0 million establishments covered by OSHA or WHD is well below .001. Similarly, penalties under many statutes are relatively low. The ability of government agencies to fulfill their legislative mandates solely through enforcement is therefore limited. For this reason, the role of workers under workplace policies takes on great importance.

Federal workplace regulations provide employees with important roles that directly affect the implementation of those statutes. Much of workplace regulation, dating back to Fair Labor Standards Act (FLSA) of 1938 and going forward to the Family Medical Leave Act (FMLA) passed almost sixty years later, provides workers with different mechanisms to participate in one or more aspects of the regulatory process. Most important of those mechanisms is the right to trigger regulatory activity itself. Although the right to trigger inspections dates back to some of the earliest state-level labor

2. ANNETTE BERNHARDT & SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUST., ECONOMIC POLICY BRIEF NO. 4, TRENDS IN WAGE AND HOUR ENFORCEMENT BY THE U.S. DEPARTMENT OF LABOR, 1975-2004 (2005).

legislation,³ regulations promulgated during the two most recent surges of workplace legislation/executive orders (1963–74 and 1986–1993) have increased the total number of those providing workers with a right to initiate civil actions, including such laws as Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Employee Polygraph Protection Act (PPA), and the Workers Adjustment and Retraining and Notification Act (WARN). The result has been an enormous increase in the number of cases filed under employment law, relative to other categories of litigation.

There is little reason to believe that workers uniformly exercise rights granted them under labor policies. Studies in several different areas indicate that the propensity to exercise rights varies along systematic lines across different groups.⁴ The willingness of an employee to exercise his or her right to complain and thereby initiate an enforcement action can be expected to depend on the perceived benefits versus costs of exercising that right from the perspective of an individual worker. The benefits of complaining are a function of the impact of labor legislation on the outcome of concern to the worker. For example, initiating an OSHA inspection potentially improves working conditions for the worker by diminishing or removing the risk of an injury or illness. The greater the level of perceived risk faced by workers, the more likely they are to initiate an inspection or otherwise seek to affect redress of the problem. Similarly, the greater the divergence between the wages paid to a worker and the wages he or she is entitled to under the law (e.g., premium pay required for overtime), the more likely a worker is to exercise rights to initiate actions under the FLSA.

In order to ascertain the magnitude of these benefits, workers must acquire information on the *current* and *legally permissible* level of a regulated outcome. The costs of exercising rights include the costs of gathering this information. In addition to information-related costs, workers face significant costs arising from potential employer retaliation (the economic losses associated with retaliatory

3. JOHN R. COMMONS & JOHN ANDREW, *PRINCIPLES OF LABOR LEGISLATION* (4th ed. 1936).

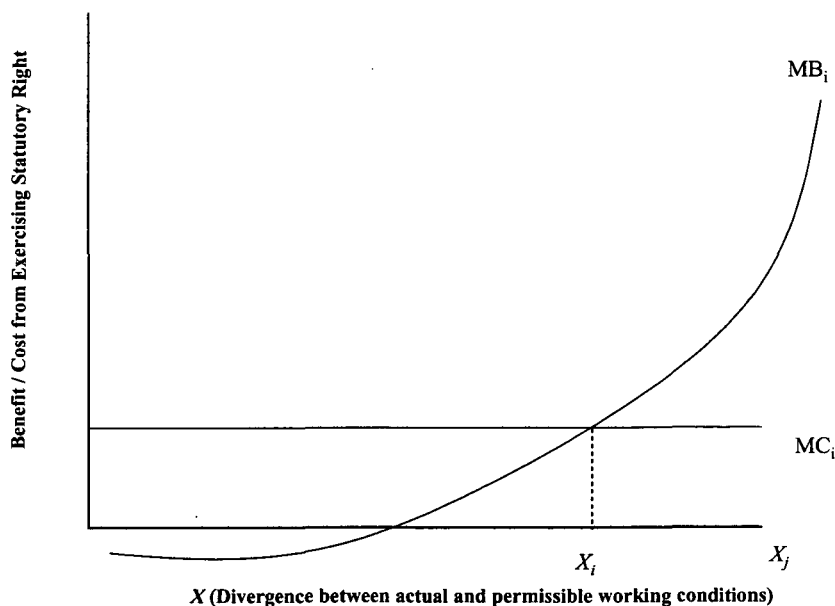
4. For example, a number of empirical studies have shown different propensities for individuals to litigate civil claims. See, e.g., Michele Hoyman & Lamont Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115 (1981); Mitchell Langbert, *Voice Asymmetries in ERISA Litigation*, 16 J. LAB. RES. 455 (1995); John R. Lott & Russell D. Roberts, *Why Comply: One-Sided Enforcement of Price Controls and Victimless Crime Laws*, 18 J. LEGAL STUD. 403 (1989).

reassignment or, in the extreme, being fired) as well as the potential cost of job loss arising from the chance that compliance will force a firm to (legally) reduce employment.⁵

The decision facing a worker of whether or not to exercise a right is represented diagrammatically in Figure 1. The horizontal axis, X_j , represents the difference between current workplace conditions (e.g., exposure to a health risk; actual wage rate for hours of work) and the regulatory standard for that workplace outcome for workplace j . The value of X_j is defined where:

- $X_j < 0$: If the current workplace provides conditions above permissible levels (i.e., the firm goes beyond compliance required by the standard);
- $X_j = 0$: If the current workplace provides conditions equal to the required levels (i.e., the firm is exactly in compliance with the law); and,
- $X_j > 0$: If the current workplace provides conditions below permissible levels (i.e., the firm is in violation).

Figure 1
Model of Employee Exercise of Rights



5. See Gideon Yaniv, *Complaining About Noncompliance with the Minimum Wage Law*, 154 INT'L REV. L. & ECON. 351 (1994).

This means that as X_j increases, a workplace falls further out of compliance with the regulatory requirement. In the case of health and safety regulations, this means that as X_j increases, worker exposure to risk increasingly goes beyond the risk levels if workplaces complied with standards; for regulations related to compensation like the FLSA, for example, this means that actual pay increasingly falls below that required under the statute.

Given this definition of X_j , the marginal benefit function (MB_i) represents the marginal worker i in a workplace j who has the highest individual preference for compliance with the regulatory standard. As such, this function represents the worker who will first exercise his or her statutory right in the workplace. We assume here that the marginal benefit of exercising a right that moves the firm into greater compliance with the standard is positive and increasing in X_j . Assume also that the costs of exercising a right are constant across different levels of X_j , as depicted by the function MC_i .

If rights are vested at the individual level, worker i will choose to exercise the rights at the state of the workplace X_i^* where $MB_i = MC_i$. Given that the decision is made by the marginal worker with the greatest preference for workplace conditions consistent with regulatory standards (i.e., the lowest tolerance for conditions that are not in compliance), X_i^* represents the level of noncompliance that will trigger the exercise of rights for that workplace, when left to the decision of this “threshold” individual worker.

Figure 1 therefore suggests that if workers have both a reasonably clear understanding of underlying conditions and a sense of how those conditions affect their well-being (as embodied in the marginal benefit function), and do not face prohibitive costs of either collecting or acting on information, a complaint-based system of inspection could result in a reasonable allocation of inspection resources to workplace problems. Under OSHA, for example, workers in more dangerous workplaces or industries would be more likely to complain (and therefore receive attention) than those in less dangerous situations. While limits in agency resources for responding to complaints might still result in less than desirable overall average levels of compliance, at least those resources that were available would be allocated in a manner consistent with the severity of underlying problems.

III. FLSA AND OSHA: COMPLAINT ACTIVITY UNDER TWO STATUTES

Many workplace statutes rely upon workers for initiating actions via complaints. For our purposes, we focus on two of the most important in terms of their coverage and impact on workers: the Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act (OSHA). We do so for several reasons. First, both Acts cover a major percentage of the private sector workforce as well as substantial portions of the public workforce. Second, the Acts pertain to some of the most fundamental aspects of workplace conditions. The FLSA, originally passed in 1938, establishes the federal minimum wage, overtime pay for hours worked over 40 in a work week, and child labor standards, which create the floor for acceptable workplace behavior. OSHA, passed in 1970, represents the core institution for assuring safety and health at workplaces as divergent as banks, restaurants, construction sites, hospitals, and manufacturing facilities. Finally, as noted in the prior section, both agencies have faced long-term limitations in enforcement budgets, often as a result of ideological fights between Congress and the White House.

Analyzing the prevalence of complaints under each Act and relating this to underlying conditions in those workplaces requires data from several different sources. First, we need data on the universe of complaints under each Act. Second, we need comparative data to provide objective measures of "true" underlying conditions (e.g., the number and extent of violations of overtime regulations or the likelihood of injuries) in those workplaces. We obtain these measures through the use of two unique sets of data on complaints under FLSA and OSHA, along with derived measures of underlying conditions from the Bureau of Labor Statistics. In order to be able to compare complaint activity with underlying compliance conditions, we estimate levels of both variables at an industry level.⁶

A. *FLSA Data*

All investigative and administrative activities undertaken by the Wage and Hour Division of the U.S. Department of Labor are

6. Finding a common denominator for classifying industries across the different data sources used here is difficult. Industries are defined in the Current Population Survey (CPS) according to various groupings of SIC codes (and later NAICS).

electronically stored in the Wage and Hour Investigative Support and Reporting Database (WHISARD). WHISARD includes details on a wide variety of characteristics of investigations, including whether or not an employee complaint triggered the initial action. From WHISARD we get our proxy for the actual number of complaints received by WHD, which is the total number of complaint cases pursued (no matter how exhaustively). This proxy underestimates the true tendency of workers to lodge a complaint, as there is some screening process through which a portion of original contacts to WHD falls out. Complaints are deflated by employment to provide our measure of *complaint rate*, the total number of complaint cases per 100,000 workers. We estimate overall complaint rates for years 2001 through 2004, and by-industry rates for years 2001 and 2002.⁷

Information on industry employment as well as information on underlying compliance draws on the Current Population Survey (CPS), a monthly household survey conducted by the Census Bureau for the Bureau of Labor Statistics (BLS). The CPS is widely-accepted as a reliable way of measuring the prevalence of wage and hour violations, as workers themselves (instead of employers, who provide input for most establishment-level surveys) are the most likely to report actual hours worked and actual wages received.⁸ Among many other categories of questions, the CPS asks individuals to report a variety of job-related variables, including the following about their primary job, which were used to estimate FLSA compliance: industry, occupation, usual hours worked per week, weekly or hourly wages, and whether paid on an hourly or salary basis.

We measure FLSA noncompliance by overtime violations for two main reasons: (1) the vast majority of wage and hour violations and

7. We do not report industry-level results beyond 2002 because changes to CPS industry categorizations after 2002 preclude comparisons between 2002 and 2003.

8. Employers' responses are, admittedly, more accurate with respect to what industries their workers belong to, however, since a main objective of this report is to compare complaints with compliance, the need for accuracy in wage and hour reporting (FLSA compliance) undeniably outweighs this concern. In future work, we intend to study complaint rates using other surveys and by-industry using NAICS codes. For other examples that use CPS to estimate compliance in this way, see Ronald G. Ehrenberg & Paul L. Schumann, *Compliance with the Overtime Pay Provision of the Fair Labor Standards Act*, 25 J. LAW & ECON. 159 (1982); Ronald G. Ehrenberg & Paul L. Schumann, *Longer Hours or More Jobs? An Investigation of Amending Hours Legislation to Create Employment* (Cornell Studies in Industrial and Labor Relations, No. 22, 1982); Stephen J. Trejo, *The Effects of Overtime Pay Regulation on Worker Compensation*, 81 AM. ECON. REV. 719 (1991); Stephen J. Trejo, *Overtime Pay, Overtime Hours, and Labor Unions*, 11 J. LAB. ECON. 253 (1993); Stephen J. Trejo, *Does the Statutory Overtime Premium Discourage Long Workweeks*, 56 INDUS. & LAB. REL. REV. 530 (2003).

back wages assessed stem from employers' failure to properly pay overtime (vs. minimum wage); and (2) the universe of workers covered by the overtime provisions is substantially different from that covered by the minimum wage and child labor provisions, making ratios of violations to FLSA-covered workers problematic. One of the trickiest requirements of any analysis of overtime compliance is the need to isolate those workers who are indeed covered by the overtime provisions of the FLSA. After excluding exempt workers, by industry, earnings, and/or occupation, we define workers as being paid in violation if they: (1) usually work more than 40 hours a week at their primary job; and (2) usually do not receive overtime pay at their primary job.

B. OSHA Data

OSHA's Integrated Management Information System (IMIS) contains the complete records of all federal workplace inspections conducted by OSHA including whether an investigation was instigated by a worker complaint. Our measure for the number of complaint inspections by detailed industry category derives from IMIS.⁹ As with WHD, this proxy underestimates the true tendency of workers to lodge a complaint.¹⁰ Complaint rates under OSHA are calculated in a similar fashion as described for FLSA above.

We use BLS statistics on injuries and illnesses related to health and safety violations in the workplace for our measure of underlying compliance. We measure underlying conditions as total cases that involved injuries and illnesses stemming from workplace violations that result in lost workdays.¹¹

9. We are grateful to Joseph DuBois, Director of the Office of Statistics at OSHA, for providing us with these detailed tabulations.

10. Our data for OSHA include only onsite inspections and do not count cases arising from worker complaints that are resolved by phone or fax prior to an inspection. There are no systematic data for counting this group of potential complaints.

11. The BLS separates fatalities from non-fatal injuries and illness; we limit our analysis of OSHA noncompliance to injuries and illness that result in lost workdays, job transfer, or restriction.

IV. RELATING COMPLAINTS AND COMPLIANCE UNDER FLSA AND OSHA

A. Overall Complaint Rates

In 2004, the Wage and Hour Division recovered over \$196 million in back wages for almost 300,000 workers. For the same year, the BLS reported 5,703 workplace fatalities and over 2.2 million cases of individuals suffering job restrictions or missed workdays due to workplace injuries and illnesses. Even by these data, which underestimate the actual extent of workplace violations under FLSA and OSHA, there appears plenty for workers to complain about.¹² How frequently, then, do workers complain?

Table 1 presents the total number of Wage and Hour (WHD) and OSHA complaint cases and the associated complaint rates (complaints deflated by employment and measured as complaints per 100,000 workers), between 2001 and 2004. Overall, the incidence of workers complaining is exceedingly low. Under FLSA, although an average of about 29,000 workers complained each year between 2001 and 2004, when deflated by the total number of workers, this amounts to an average of less than 25 complaint cases for every 100,000 workers. The rate was even lower for OSHA over the same period, averaging a mere 17 complaints for every 100,000 workers.¹³

12. WHD data, in particular, show only a fraction of the actual levels of noncompliance with the FLSA. Violations of the overtime provisions are estimated by many to be extremely common. One group, the Employer Policy Foundation, estimates that “workers would get an additional \$19 billion a year if the overtime rules were observed.” Suzanne M. Crampton, John Hodge & Mitendra Mishra, *FLSA and Overtime Pay*, 32 PUB. PERSONNEL MGMT. 331 (2003); Brenda Sunoo & Mae Lon Ding, *Overtime Abuse: You Could be Guilty*, 78 WORKFORCE 40 (1999).

13. A certain number of original complaints are screened out by the agencies; because the rates we calculate reflect only the total number of complaints that became actual cases pursued by regulators, it is possible that the similar overall complaint rates for WHD and OSHA reflect similarities in institutional capacities more than they imply that workers complain at similar rates for wages/hours issues and health/safety issues.

Table 1
Overall Complaint Rates, WHD and OSHA, 2001 to 2004

	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>	<i>2001–2004 average</i>
WHD complaint cases	28,477	29,879	29,299	28,283	28,985
WHD complaint rate	24.5	25.9	24.8	23.7	24.7
OSHA complaint cases	20,257	20,680	19,726	19,750	21,103
OSHA complaint rate	17.4	17.9	16.7	16.5	17.1

These overall averages, however, mask a high degree of variation in complaint rates across industries. Under the FLSA, rates vary between industries with the highest and lowest rates by a factor of almost 200: the number of complaints per 100,000 workers was 195 for gas stations, the industry with the highest rate, versus only 1.1 complaints per 100,000 workers in elementary and secondary schools. Variation in complaint rates is only somewhat smaller under OSHA, where the industry with the highest level of complaints—fabricated metal products manufacturing (122 complaints per 100,000 workers)—represents one extreme and religious organizations, with only 1.0 complaint per 100,000 workers, represents the other.

B. Relating Complaints and Compliance

WHD and OSHA rely heavily on incoming complaints to guide enforcement activities—investigators will be led to workplaces that need regulatory attention to the extent that complaints accurately reflect the underlying conditions. Ideally, regulators would like to assume two things: (1) that the workers who are complaining are voicing legitimate grievances and representing them accurately (in other words, that employees working under lawful conditions are *not* complaining); and (2) that workers who are experiencing violations will complain. In other words, regulators need to know that they are receiving as few false positives (workers complaining in the absence of violations) and false negatives (workers experiencing violations who do not complain) as possible. The latter type of error is clearly the more critical—investigators want to be sure that “quiet” industries tend to have working conditions that are satisfactory, rather than a

greater number of workers who face obstacles to using their right to complain.

Conceptually, the level of noncompliance by industry can be combined with information on complaint rates to create a 2 x 2 matrix that allows us to analyze industries on the two dimensions simultaneously. The matrix analysis can help to answer questions such as: Are industries with the most frequent and severe violations also those that show the highest frequency of worker complaints? Are there industries that we know to be serious violators that WHD and OSHA are not hearing from? Do investigators spend a disproportionate amount of time on industries that are less egregious violators of the FLSA and OSHA?

Figure 2
Complaint/Compliance Matrix

	High Noncompliance	Low Noncompliance
High Complaint Rate	<u>QUADRANT 1</u> High Complaints High Violations	<u>QUADRANT 3</u> High Complaints Low Violations
Low Complaint Rate	<u>QUADRANT 2</u> Low Complaints High Violations	<u>QUADRANT 4</u> Low Complaints Low Violations

The matrix makes clear that there is information in the level of complaints that can be used by enforcement staff in prioritizing workplace inspections. In a world of limited resources, the agencies must identify the industries/establishments with the highest levels of violations. Among all highly-vulnerable workplaces, however, are differences in the tendencies of workers in those workplaces to voice a concern. The more that workplaces (and industries) lie in quadrants 1 and 4, the more that the type of decision processes described in

Section 2 will lead enforcement resources to be applied in a reasonably coherent manner: that is, more dangerous workplaces or those with greater levels of underlying noncompliance (quadrant 1) will tend to generate more complaints, while those with comparatively better conditions will produce fewer complaints (quadrant 4). However, to the extent that significant numbers of workplaces fall in other quadrants—in particular quadrant 2, where there are high levels of noncompliance but low levels of complaints—there can arise significant problems in terms of enforcement resources reaching the right workplaces.

Tables 2 and 3 provide information on whether or not there is significant overlap of complaints and underlying compliance for FLSA and OSHA. Table 2 lists the industries with the ten highest and ten lowest complaint rates under FLSA in the first two columns and the ten highest and ten lowest in terms of underlying compliance in the third and fourth columns. What is most striking about the table is the lack of overlap between industries with the highest complaint rates and the highest levels of violations. In fact, in only one instance does an industry appear on both lists (automotive repair services at number six among complaints and number two in terms of underlying compliance). In other words, a significant number of the industries with the highest levels of noncompliance with FLSA are not associated with nearly as high complaint rates.

A similar problem is found in Table 3, which compares highest and lowest industries in terms of complaint rates and injury levels for OSHA. The industries with highest complaint activity are found in the manufacturing sector (and also include construction). However, in only two instances—sawmills/millwork (number two in complaint levels and number three in terms of overall injuries); and miscellaneous fabricated metals (number one in complaints and number three in injury rate)—do they overlap.

On the other hand, Tables 2 and 3 indicate that there *is* greater overlap across those industries with lowest levels of complaints and the underlying conditions present in them. Four of the industries with lowest complaint rates under FLSA (general government, colleges and universities, religious organizations, and elementary and secondary schools) also have among the lowest estimated levels of noncompliance. For OSHA, five of those industries with lowest levels of complaints also have lowest injury rates (banking; accounting, auditing, and bookkeeping; security and commodity companies; legal

services; and religious organizations). Thus, it seems that industries with relatively fewer problems tend to have lower complaint rates.

Nonetheless, our complete findings including all industry groups (not just the highest and lowest in Tables 2 and 3) portray only modest overlap between complaints and compliance. For the Wage and Hour Division, there are three industries that are in the highest 20 for both complaints and violations, and for OSHA, nine in the top 20. In many cases, the level of violations appears wholly unrelated to the level of complaints. The gasoline service stations industry, for example, is one that highlights this kind of gap—the industry is ranked number 1 for complaint rate and number 137 for overtime violations (out of 176 total industries). The Wage and Hour Division hears more frequently from workers employed by gas stations than those in any other industry (relative to industry employment), yet the industry is near the bottom when it comes to actual violations reported in the CPS household survey. This means that a significant number of industries lie outside quadrants 1 and 4 of Figure 2 (and most troubling, many of them are in quadrant 2).

Table 2
Fair Labor Standards Act: Highest/Lowest Complaint Rates and Compliance Rates by Industry, 2001–2002

<i>CPS Industries with Highest Complaint Rates</i>	<i>Complaints per 100,000 workers</i>	<i>CPS Industries with Highest Violation Rates</i>	<i>Employees paid in violation of overtime, per 100,000 workers</i>
Gas stations	195	Oil and gas extraction	18,262
Detective and protective services	128	Automotive repair and related services	14,454
Services to dwellings and other buildings (pest control and janitorial)	83	Bakery, sugar, and confectionery products (manufacturing)	13,424
Personnel supply services (e.g., employment agencies)	67	Grain mill products and beverage industries	12,697
Hotels and motels	64	Private households	12,113
Automotive repair and related services	56	Groceries and related products (wholesale trade)	11,006
Residential care facilities, without nursing	55	Motor vehicle and miscellaneous vehicle dealers	10,211

Table 2 (continued)
Fair Labor Standards Act: Highest/Lowest Complaint Rates
and Compliance Rates by Industry, 2001–2002

Laundry, garment services, and shoe repair shops	55	Machinery, equipment and supplies (wholesale trade)	10,011
Eating and drinking places	54	Radio, TV and communications equipment (manufacturing)	9,779
U.S. Postal Service	52	Iron and steel foundries, and miscellaneous mineral and stone products (mfg.)	9,215
<i>CPS Industries with Lowest Complaint Rates</i>	<i>Complaints per 100,000 workers</i>	<i>CPS Industries with Lowest Violation Rates</i>	<i>Employees paid in violation of overtime, per 100,000 workers</i>
Drugs, chemicals, and allied products (wholesale trade)	3.9	General government	3,254
Private households	3.8	Nursing and personal care facilities	3,232
General government	3.7	Grocery stores	2,968
Administration of economic programs	3.7	Personnel supply services	2,842
Colleges and universities	3.6	Religious organizations	2,753
Human resource programs administration	3.5	Drug stores	2,745
National security and international affairs	2.4	Department stores	2,255
Public finance, taxation, monetary policy	1.8	Elementary and secondary schools	1,942
Religious organizations	1.6	Colleges and universities	1,814
Elementary and secondary schools	1.1	Offices of dentists and optometrists	1,644

*Of those industries with at least 250,000 workers; Industries appearing in the highest group for both complaint and violation rates or the lowest group for both complaint and violation rates are italicized.

Table 3
Occupational Safety and Health Act: Highest/Lowest Complaint
Rates and Compliance Rates by Industry, 2001–2002

<i>CPS Industries with Highest Complaint Rates</i>	<i>Complaints per 100,000 workers</i>	<i>CPS Industries with Highest Violation Rates</i>	<i>Injuries / illnesses per 100,000 workers</i>
<i>Miscellaneous fabricated metal (manufacturing)</i>	122	<i>Meat products (manufacturing)</i>	10,410
<i>Sawmills, millwork, and miscellaneous wood products (manufacturing)</i>	88	<i>Air transportation</i>	10,250
<i>Iron and steel foundries, and primary and other aluminum industries</i>	73	<i>Sawmills, millwork, and miscellaneous wood products (manufacturing)</i>	7,357
<i>Fabricated structural metal products (manufacturing)</i>	66	<i>Miscellaneous fabricated metal products (manufacturing)</i>	6,941
<i>Construction</i>	61	<i>Nursing and personal care facilities</i>	6,368
<i>Plastics and rubber products (manufacturing)</i>	60	<i>Residential care facilities, without nursing</i>	6,029
<i>Automotive repair and related services</i>	47	<i>Groceries and related products (wholesale trade)</i>	5,912
<i>Blast furnaces, steelworks, rolling and finishing mills (manufacturing)</i>	43	<i>Motor vehicles and motor vehicle equipment (manufacturing)</i>	5,877
<i>Miscellaneous paper and pulp products (manufacturing)</i>	42	<i>Plastics and miscellaneous rubber products (manufacturing)</i>	5,667
<i>Farm machinery and metalworking machinery (manufacturing)</i>	42	<i>Furniture and fixtures, and wood buildings (manufacturing)</i>	5,495

<i>CPS Industries with Lowest Complaint Rates</i>	<i>Complaints per 100,000 workers</i>	<i>CPS Industries with Lowest Violation Rates</i>	<i>Injuries / illnesses per 100,000 workers</i>
Insurance	2.7	<i>Accounting, auditing, and bookkeeping services</i>	367
Computer and data processing services	2.3	<i>Banking</i>	365
Credit agencies	2.1	<i>Credit agencies, not elsewhere classified</i>	353
Banking	1.9	<i>Colleges and universities</i>	313
<i>Accounting, auditing, and bookkeeping services</i>	1.8	<i>Security, commodity brokerage, and investment companies</i>	312
<i>Security, commodity brokerage, and investment companies</i>	1.7	<i>Legal services</i>	284
<i>Legal services</i>	1.5	<i>Beauty and barber shops</i>	267
Child day care, family child care homes	1.4	Offices of dentists and optometrists	173
Savings institutions, including credit unions	1.3	<i>Religious organizations</i>	133
<i>Religious organizations</i>	1.0	Elementary and secondary schools	84

*Of those industries with at least 250,000 workers; industries appearing in the highest group for both complaint and violation rates or the lowest group for both complaint and violation rates are italicized.

C. How Far Do Workers Need to be Pushed Before Complaining?

An alternative way to think about the relationship of complaints to compliance is to consider the number of FLSA violations or workplace injuries that are associated with one complaint—that is, how many violations does it appear to take to trigger one employee complaint? For example, the results in Tables 2 and 3 suggest great divergences in many industries in terms of the propensity to complain, even given comparably poor underlying conditions. It would therefore seem that in some industries, a very significant number of injuries is needed to elicit people to lodge a complaint relative to

others in which workers might be more easily prompted to take action and “drop a dime.”

Because we have calculated underlying violation and injury rates independently of the agencies’ investigative records, we can calculate the ratio of total violations for an industry (based on CPS) or total injuries and illnesses leading to lost workdays (BLS) to the number of complaint cases pursued. The lower the number of violations per worker complaint lodged under FLSA (or, similarly, the lower the number of illnesses and injuries recorded for an industry per complaint lodged with OSHA), the more “vocal” we assume the workers in the industry to be, and therefore the more attention received from government inspectors. The higher the ratio, the greater are the numbers of undetected violations, and/or employers that might be “flying under the radar.” Tables 4 and 5 present the results of this type of comparison for FLSA and OSHA.

Table 4
Estimated Number of FLSA Overtime Violations Associated with One Complaint Case*

	<i>For every complaint case conducted, number of employees in workforce paid in violation of overtime</i>
<i>Average across all industries</i>	<i>130</i>
<i>Highest violations relative to complaint cases</i>	
Electric, gas, and not specified utilities	954
Fabricated structural metal products manufacturing	806
Meat products manufacturing	702
Elementary and secondary schools	654
Savings institutions, including credit unions	636
<i>Lowest violations relative to complaint cases</i>	
Hotels and motels	50
Detective and protective services	44
Personnel supply services (i.e., employment agencies)	30
Automotive rental and leasing, without drivers	31

Gasoline service stations	8
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*Of those industries with at least 250,000 workers

Table 5
Estimated Number of Injuries / Illnesses Associated with
One OSHA Complaint*

	<i>For every complaint case conducted, number of injuries / illnesses for total workforce</i>
<i>Average across all industries</i>	119
<i>Highest violations relative to complaint cases</i>	
Nursing and personal care facilities	661
Child day care and family child care homes	573
Air transportation	559
Savings institutions, including credit unions	529
Department stores	499
<i>Lowest violations relative to complaint cases</i>	
Construction	51
Beauty and barber shops	41
Industrial and miscellaneous chemicals manufacturing	40
Automotive repair and related services	33
Elementary and secondary schools	16

*Of those industries with at least 250,000 workers

Both tables illustrate the extremely large gap between the incidence of complaints and the incidence of underlying violations under both FLSA and OSHA. Table 4 reveals that on average, there were 130 employees paid in violation of the FLSA overtime provisions for every one complaint case concluded by WHD. Particularly high rates of FLSA overtime violations appear to be present for industries like metal fabrication and meat processing, where over 800 and 700 (respectively) violations occur for each complaint lodged. For industries like hotels and motels, the ratio is

far lower, where about 50 violations are estimated to occur for each complaint recorded.

Under OSHA, the gaps are as striking (and perhaps more surprising given that worker safety is involved). Here, about 120 injuries occur for every complaint that OSHA pursues. Once again, the overall average masks the significant level of inter-industry variation. For nursing and personal care facilities, there were over 660 employees affected by a lost workday injury for each complaint lodged in the study period and 500 injury cases for every one formal complaint in the department store sector.¹⁴ Other sectors, including construction have a far lower threshold for complaints, although it is still striking that across all construction sites, there are more than 50 cases of injuries/illnesses resulting in lost workdays for each complaint inspection conducted by OSHA.

D. Regression Estimates of Complaint Rates

Finally, we can use a straightforward regression approach as a final method of assessing the relationship between underlying workplace conditions and observed complaint rates. Although more complete statistical models of complaint behavior could reveal the multiple determinants of observed rates (including characteristics of employees and employers), we estimated simple regressions of the relation between our measures of both compliance and complaints, in order to uncover the extent of their relation in our sample as a whole.

Table 6 presents the results of OLS regressions for both FLSA and OSHA, for 2001 and 2002. Complaint rates (once again at the industry level) are used as the dependent variables. The associated compliance measure for that industry (estimated noncompliance with overtime provisions of the FLSA and lost workday injuries for OSHA) is used as the key independent variable. We also report two other variants of these OLS estimates that include the complaint rate for the other agency (i.e., FLSA for OSHA and vice versa) as control variables. Finally, we employ a lagged approach, with compliance levels in 2001 as a predictor for observed complaint rates in 2002, to

14. As noted, OSHA complaint cases do not include phone/fax responses, that, if included, would raise these ratios of cases to injuries. Also, some of the smaller industries not included in these tables have even more striking results, e.g., guided missiles manufacturing has 800 OSHA violations to each complaint case lodged, and 2786 FLSA violations for each WHD complaint case.

account for delays between being exposed to violations and complaining about them.

Table 6
OLS regressions, OSHA and WHD, 2001 and 2002

	OSHA complaint rates					
	2001		2002		2002 lagged ²	
	(1)	(2)	(1)	(2)	(1)	(2)
OSHA Noncompliance rate ¹	0.005** (0.0006)	0.005** (0.0006)	0.005** (0.0007)	0.005** (0.0007)	0.005** (0.0007)	0.005** (0.0007)
WHD complaint rate		0.077 (0.0670)		0.119* (0.0664)		0.107 (0.0708)
Constant	0.006** (0.0019)	0.005** (0.0022)	0.007** (0.0020)	0.005* (0.0024)	0.007** (0.0020)	0.005** (0.0023)
Adjusted R-squared	0.2864	0.2878	0.2545	0.2646	0.2601	0.2651
N	164	164	162	162	164	164

Estimated standard errors in parentheses. ¹BLS Injuries/illnesses per 100 workers; ²Using 2001 data for control variables. *: 0.05 confidence level; **:0.01 confidence level.

	WHD complaint rates					
	2001		2002		2002 lagged ²	
	(1)	(2)	(1)	(2)	(1)	(2)
WHD Noncompliance rate ¹	0.0008 (0.0006)	0.0005 (0.0007)	0.0006 (0.0005)	0.0002 (0.0005)	0.001 (0.0006)	0.0007 (0.0007)
OSHA complaint rate		0.1557* (0.0912)		0.1959** (0.0913)		0.1500 (0.0949)
Constant	0.0184** (0.0035)	0.0174** (0.0036)	0.0204** (0.0032)	0.0188** (0.0032)	0.0183** (0.0037)	0.0172** (0.0038)
Adjusted R-squared	0.0046	0.0207	0.0023	0.0263	0.0091	0.0233
N	165	161	165	161	165	161

Estimated standard errors in parentheses. ¹Workers paid in violation of overtime per 100 workers ²Using 2001 data for control variables. *: 0.05 confidence level; **:0.01 confidence level.

The results in Table 6 indicate that at the industry level, OSHA violations are positively and significantly associated with OSHA complaints—that is, higher complaint rates for an industry are associated statistically with higher workplace injury rates in that industry. The control for WHD complaints is also positively (and in

one case significantly) related to OSHA complaint rates, implying that industries with higher rates of FLSA complaints also have higher rates of OSHA complaints, holding constant underlying injury rates. These results suggest that in addition to underlying violations, there are other factors related to either the workplace with workers themselves that might be driving complaints, a topic taken up in the next section.

Although OSHA complaint rates are significantly related to underlying workplace conditions, those conditions account for relatively little of the variability in observed worker complaints. In Table 6, the adjusted R-squared when OSHA complaint rate is the dependent variable indicates that underlying violations (workplace injuries and illnesses) account for between 25–29% of the variability in OSHA complaint rates. Controlling for wage and hour complaints in the OSHA complaint rate model does little to increase explanatory power.

Underlying levels of FLSA overtime noncompliance are positively related to WHD complaint rates. However, the magnitude of the estimated relation is small relative to that found under OSHA and the relation is not statistically significant in any of the regressions. Interestingly, the only variable that does show a significant and positive relation is the level of OSHA complaints for that industry. A very small percentage of overall variance in the complaint rate is explained by underlying compliance with overtime provisions (well below 10%). Adjusted R-squared changes little with the inclusion of complaint rates under OSHA or by the use of a lagged structure for the regression.

Taken as a whole, the regressions suggest some relationship between OSHA complaints and underlying violations, but little such relation for FLSA. Even for OSHA, however, only a limited proportion of overall variation in complaint rates is explained by the regression. Finally, the regressions show some evidence that the complaint activity under one workplace statute is associated with complaint activity for the other statute. These findings suggest that other factors—in addition to underlying levels of violations—must be driving the varied complaint rates found above.

V. EXPLAINING THE DIVERGENCE BETWEEN COMPLAINTS AND COMPLIANCE

A. *Benefits and Costs of Complaining*

The framework regarding the exercise of rights that is discussed in Section II and depicted in Figure 1 suggests that the likelihood of complaining will be driven by: (1) factors related to the underlying problems that workplace policies seek to redress (X_j); (2) characteristics of workers and workplaces that lead employees to be more or less aware of the degree of violations they face (MB_j); and (3) characteristics of workers and workplaces that affect the cost of exercising rights (MC_j). Section IV shows clearly that complaint activity and underlying conditions diverge considerably under both FLSA and OSHA. As a result, one must look to the factors that shape worker perceptions of the benefits and costs of exercising rights in order to understand the drivers of complaint behaviors.

There are many different reasons to believe that the “objective” state of workplace conditions may not be fully perceived by an individual worker, particularly in the area of health and safety. The well-known literature on cognitive errors provides ample evidence of the myriad difficulties people have in accurately assessing risks.¹⁵ For example, individuals tend to dramatically overestimate the probability of risks when they feel little control over bad outcomes (e.g., risks associated with flying) and dramatically underestimate risks when they perceive themselves able to exercise control (e.g., risks associated with driving cars). The individual’s *perceived* marginal benefit function, therefore, may seriously diverge from the benefit function judged from a social perspective, driving part of the divergence observed in the prior section.

Second, in choosing to exercise rights workers may face costs significant enough to preclude them from complaining. The presence of a significant cost of instigating a complaint has been used to explain the underreporting of crime to the police.¹⁶ Significant costs arising in

15. For overview of this large literature, see generally BARUCH FISCHHOFF ET AL., *ACCEPTABLE RISK* (1981); Daniel Kahnemann & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, in CHOICES, VALUES, AND FRAMES 17 (Daniel Kahnemann & Amos Tversky eds., 2000); CASS SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

16. E.g., Samuel L. Myers, *Why Are Crimes Underreported? What is the True Crime Rate? Does it Really Matter?*, 61 SOC. SCI. Q. 23 (1980).

the workplace context include: (a) obtaining information regarding the existence of basic worker rights as well as the standards to which employers are held accountable¹⁷; (b) gathering information on the current state of workplace conditions—especially problematic when the risks are as complex as in the case of safety and health failures¹⁸; and (c) learning specific details of how the law is administered (e.g., the procedures for initiating a complaint inspection).

In addition to information-related costs, workers face significant costs associated with retaliatory reassignments, schedule changes, or in the extreme, the possibility of being fired.¹⁹ Studies suggest that, despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights.²⁰ Public law groups and other organizations representing low-wage workers note that many employee complaints related to minimum wage and/or overtime under the FLSA are filed

17. This is a recurring problem under workplace regulation. For example, a survey of OSHA compliance officers by the GAO concluded that “many OSHA inspectors believe workers’ participation [in OSHA] is limited by their lack of knowledge about their rights and lack of protection from employer reprisal.” *How Well Does OSHA Protect Workers from Reprisals: Inspector Opinions: Testimony Before the H. Subcomm. on Labor-Management Relations, H. Comm. on Education and Labor*, 101st Cong. (1989) (statements of William J. Gainer, Director of Education and Employment Issues, Human Resources Division, U.S. General Accounting Office), available at <http://archive.gao.gov/t2pbat12/140036.pdf>. The decline in the “take up” rate for unemployment insurance has been partly ascribed to the lack of information to workers about their access to unemployment benefits. Stephen A. Wandner & Andrew Stettner, *Why are Many Jobless Workers Not Applying for Benefits?*, 123 MONTHLY LAB. REV. 21 (2000). Richard Freeman and Joel Rogers present survey evidence that shows pervasive worker misunderstandings of basic rights under employment and labor laws. See RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999). Even the most basic information about workplace rights is sometimes not understood. A survey conducted by researchers at the Brennan Center for Justice based at the New York University Law School found that only 18% of workers surveyed in low-income neighborhoods were aware of the correct level of the minimum wage in New York in 2006. BRENNAN CTR. FOR JUST., *ECONOMIC POLICY BRIEF NO. 3, DO NEW YORKERS KNOW THE MINIMUM WAGE? RESULTS FROM A SPOT SURVEY OF EMPLOYERS AND WORKERS IN NEW YORK CITY* (2006).

18. See W. KIP VISCUSI, *FATAL TRADE-OFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* (1992); W. Kip Viscusi & Charles J. O’Connor, *Adaptive Responses to Chemical Labeling: Are Workers Bayesian Decision Makers?*, 74 AM. ECON. REV. 942 (1984). This has been a particular problem with respect to OSHA standards regarding workplace hazard exposure, in particular the hazard communication standards. See Elena Fagotto & Archon Fung, *Improving Workplace Hazard Communication*, 19 ISSUES SCI. & TECH. 63 (2003).

19. For undocumented workers, the costs of retaliation may also relate to a threat of exposure and deportation because of immigration status. See, e.g., Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States Under International Human Rights Standards* (2005); JANICE FINE, *WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 180 (2006).

20. See FREEMAN & ROGERS, *supra* note 17; AFL-CIO Issue Brief, *The Silent War: The Assault on Workers’ Freedom to Choose a Union and Bargain Collectively in the United States* (Washington D.C., Sept. 2005).

after a worker has been fired by an employer, often for other causes (thereby lowering the cost of complaining at that point).²¹

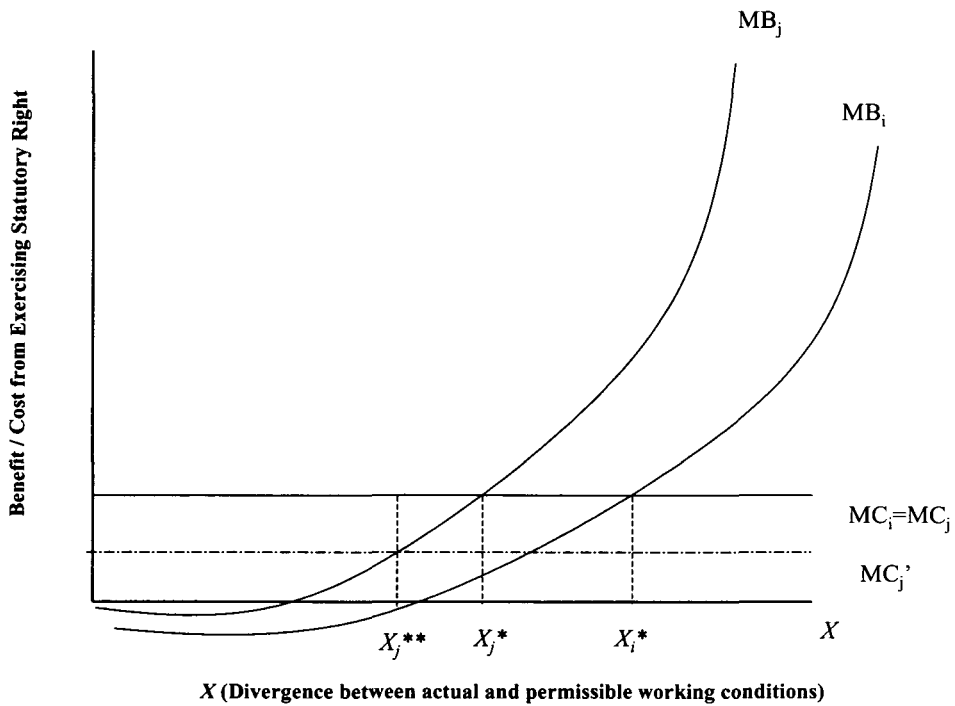
B. Public Goods Aspects of Complaints

A violation of one workplace standard typically affects many workers and is often associated with violations of other standards, which may or may not directly affect the worker who triggered the inspection. An employee's exercise of workplace rights, therefore, conveys positive benefits to others who have not chosen to complain themselves. If this is the case, an enforcement system focused on individuals exercising rights may lead to far fewer benefits than would be socially desirable.

We can illustrate this using the same framework described in Section II. Figure 3 builds on that framework, but now depicts how the exercise of rights by one worker may "spillover" and benefit others similarly affected. As a result, the marginal benefit for the workplace as a whole is always higher than that for the marginal worker, for any X_j (where, once again, X refers to the degree of noncompliance at the workplace). While the lower marginal benefit curve (MB_j) still represents the benefits received by an individual worker deciding whether or not to complain, the upper marginal benefit function (MB_j) represents the workplace as a whole, and reflects the vertical aggregation of benefits for all affected workers for any given state X_j .

21. The contact between workers and legal organizations in these cases often arise because the worker, seeking some recourse after being fired, finds that he or she has no legal recourse to allow reinstatement. However, in the course of those discussions, other regulatory violations (minimum wage; overtime) are discovered. The National Employment Law Project based in New York City and the D.C. Employment Justice Center based in Washington, D.C. are leading examples of non-profit and legal service clinics that file minimum wage and overtime claims for workers, often after they have been dismissed from their jobs. For a compendium of initiatives in this area, see National Employment Law Project, *Enforcing the Minimum Wage for Working Families: New Strategies for Communities and Government*, CONFERENCE PROCEEDINGS, BRENNAN CENTER FOR JUSTICE, New York City, Mar. 18–19, 2005.

Figure 3
Model of Employee Exercise of Rights: Impact of Spillover Benefits



Assume first a simple case in which the costs of exercising a right are constant across different levels of X_j and the same for an individual worker as they are for the workplace as a whole (the upper line in Figure 3, where $MC_i = MC_j$). Given the public good nature of the benefits ensuing from the exercise of rights, X_i^* is not optimal for the workplace as a whole, because the marginal worker decides to voice a complaint only on the basis of his or her individual preference. Accounting for all workers in the workplace, the optimal threshold in Figure 3 is X_j^* , where $X_i^* > X_j^*$. That is, the exercise of rights by the individual requires a “higher” threshold (i.e., current conditions being more out of compliance with standards) than the threshold that would prevail if the preferences of all workers were considered. Workplace rights, therefore, will be underutilized because the collective benefits that arise from exercising them are not factored into the individual decision.

If the cost of exercising a right exhibits increasing returns to scale, such as efficiencies gained from collecting information at the workplace or multi-workplace level, the divergence between thresholds for an individual versus collective group of workers grows even further. Another reason that the marginal cost of exercise may be far lower for a group of workers than for an individual are the protections against possible retaliation and discrimination afforded by a method of collectively exercising rights. In either case, this situation is depicted in Figure 3 as MC_i' , the lower, dotted horizontal line, which is below the marginal cost function faced by an individual. The collective threshold for exercise of rights now occurs at X_i^{**} , arising in an even larger gap from the individual threshold for exercising the right, X_i^* .

Thus, an intrinsic problem arising from the statutory structure of workplace rights is that if left to the decision of an individual worker, the threshold for exercise of rights lies above the threshold optimal from the workplace—and societal—level. In order to close this gap, one must address the problems of: (1) aggregating preferences across workers; and (2) reducing the marginal cost of exercising those rights.

C. Effects of Workplace Agents

A collective workplace agent can potentially solve the problems described above. As a representative of all workers in the unit, it can internalize the positive externality to workers arising from a claim. A workplace agent can also gather and disseminate information thereby lowering the cost of information acquisition faced by individuals. The specific elements required of such an agent are straightforward:

- (1) Interests that are allied with workers—specifically, an interest in representing the collective preferences of workers with regard to working conditions;
- (2) A means of efficiently gathering and disseminating information on rights, administrative procedures, and the nature of workplace risks; and,
- (3) A method of providing protection against employer discrimination related to individual workers' exercising rights.

The need for an agent to play these roles points to a conundrum embedded in many workplace regulations. Many U.S. workplace policies, including FLSA and OSHA, create rights narrowly focused on the individual worker, even though social efficiency is enhanced

where *individually-based* rights are exercised via an agent operating in the *collective interest*.

The above discussion also raises a related issue often overlooked in examining workplace regulation. One cannot detach the role of “command and control” regulatory systems from the operation of labor market institutions, even where those intermediaries are not explicitly set out in the legislation as agents for implementation. It is often assumed that under traditional regulatory structures, the government alone acts as the agent of enforcement. Yet as the above analysis of complaint behavior demonstrates, the implementation of workplace policies includes a role for workers and in that way, for labor market intermediaries. The fact that an important avenue for enforcement of those laws is the exercise of individual rights belies a more complex interaction built into the structure of regulatory systems.

While a number of different arrangements can potentially satisfy the conditions for a workplace agent, labor unions fulfill many of them through their basic agency functions. Specifically, unions act as purveyors of workplace-based public goods regarding labor policies both by internalizing the benefits relating to worker exercise of rights across workers in the unit and by lowering the costs of information acquisition. This suggests that unions can address the major factors leading to a divergence between individual and collective exercise of rights under many different regulatory policies, albeit with potential principal/agent problems that might, under certain circumstances, diminish social welfare. As a result, the role of unions as agents provides a useful benchmark for comparing other parties that might play this role in non-union workplaces.²² Most workplaces are indeed without union presence. Labor unions currently represent less than 8% of all private-sector workers, and have particularly low density in many of the industries with both low complaint rates and significant regulatory problems.

22. Divergences in behavior between workers and unions might arise from a number of sources. Median voter models of union behavior would predict that union leadership would tend to pursue policies reflective of more senior members of the unit, which might not be synonymous with the public goods solution to benefit valuation. Alternatively, principal/agent divergences in interest may also lead away from optimal behaviors from the perspective of collective worker interests.

Examination of alternative institutions that might play this role requires separate attention.²³ However, it is instructive to examine a number of current institutions outside of labor unions that seem to serve at least some of these functions. We can describe other representatives in terms of the ways and degrees to which they contribute to: (1) reducing information-gathering costs; and/or (2) protecting workers from discrimination and assisting the complaint process.

To what extent are these institutions' interests aligned with workers' interests? Workers are not permitted to bring private action against employers under the OSH Act, however that is not the case for the FLSA. Wage and hour class actions can be very attractive to law firms and workers alike, in that the FLSA allows them to request both double damages and attorneys' fees (and in fact, "double damages are the norm, singles damages the exception."²⁴) As a result, private and public law firms are becoming increasingly important workplace intermediaries.

23. For a detailed analysis of a spectrum of these institutions, see David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13 (Richard Freeman et al. eds., 2005).

24. Eric Joss & Peter Rukin, *Awakening a Sleeping Giant: The Resurgence of Wage and Hour Litigation*, HR ADVISOR: LEGAL AND PRACTICAL GUIDELINES (Mar./Apr. 2001).

Table 7
Alternative institutions that facilitate the exercising of workers' rights

<i>Institution</i>	<i>Impact on cost/benefit analysis</i>	<i>Method</i>	<i>Incentives</i>
Unions	Reduce costs associated with complaining	Lobby legislators for worker-friendly changes to code and more resources for enforcement Assist in bringing suits against employers Provide protection from discrimination	Organization mission; duty of fair representation; political motivations
	Deal with "spillover" of complaints via representation role	Voice role in the unionized workplace	
Private law firms	Reduce costs associated with complaining	Provide protection from discrimination	Profit (contingency basis for pursuing claims)
	Increase benefits associated with complaining	Able to sue for double damages under FLSA	
Public interest lawyers	Reduce costs associated with complaining	Provide protection from discrimination	Organization mission; revenues for institutional support
	Increase benefits associated with complaining	Able to sue for double damages under FLSA	
Nonprofits	Reduce costs associated with complaining	Education, community outreach	Organization mission

Indeed, the number of federal FLSA suits has almost doubled in the last three years.²⁵

[F]ederal and state class and collective actions over wage and hour issues have increased dramatically and now outpace discrimination class action lawsuits. For the last few years, issues involving employee claims under the Fair Labor Standards Act (FLSA), mostly related to the exempt/nonexempt status of employees and

25. Increase from 1960 suits in 2002 to 3617 in 2004. Source: Administrative Office of the U.S. Courts. Based on data in Table 4.4, *U.S. District Courts, Civil Cases Filed by Nature of Suit*, in OFFICE OF PUBLIC AFFAIRS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORTS 2001, 2004 (Washington, D.C. United States District Courts).

their possible entitlement to overtime pay, have been the leading employment-related civil action in federal courts.²⁶

The surge in recent wage and hour suits, including large judgments against high-profile employers, may raise awareness among workers in general, however it remains to be seen whether or not this trend will continue.

The complaint/compliance matrix introduced in Section IV provides one framework for analyzing the potential impact of various workplace intermediaries on increasing worker complaints. Workers in Quadrant 3 industries—high levels of complaints and relatively low levels of underlying violations—are those we might describe as likely to be “vocal” even in the absence of very serious employer violations. Quadrant 1 is seemingly most attractive to law firms, who are interested in finding people who have both been underpaid (or, with respect to OSHA, faced safety hazards) and are willing to talk about it. It is the set of workers in industries in Quadrant 2—high levels of underlying violations and relatively low levels of complaints—that we should be most concerned with, as attention from both regulatory agencies (by nature of their mandate to be responsive to worker complaints) and most legal advocates (as they can only represent those who are not afraid to identify themselves) might be limited and disproportionately directed to industries in Quadrants 1 and 3. For example, workers in Quadrant 2 industries are estimated to be owed significant back wages amounts under the FLSA, but because they are relatively less likely to voice complaints, for-profit firms are not likely to be trolling those industries for plaintiffs.

VI. COMPLAINTS AND COMPLIANCE: IMPLICATIONS FOR WORKPLACE ENFORCEMENT

A large number of federal and state workplace policies depend on worker complaints as a trigger for enforcement activity. This article makes clear the substantial problems arising from a regulatory policy so dependent on complaints to identify problems. The nature of the benefits and costs preclude many workers from exercising their rights in the first place, resulting in a modest level of complaint

26. MICHAEL W. CASEY III & RAYMOND T. MAK, INT'L RISK MGMT. INST., EMPLOYMENT PRACTICES LIABILITY CONSULTANT, EMPLOYMENT LAW TRENDS FOR 2005: DANGER ZONES WIDEN FOR UNWARY EMPLOYERS 6–7 (2005), available at http://www.ebglaw.com/article_1103.pdf.

activity. Many different factors related to perceptions of benefits and costs of complaints (and in particular the high costs associated with lodging complaints) may undermine the connection between bad conditions and complaining about them. As a result, silence should not be confused with compliance.

A large number of empirical studies demonstrate that workers are more likely to exercise rights where they have an agent that assists them in use of those rights.²⁷ In most cases, that has meant a union. The contrary case also follows: workers that feel vulnerable to exploitation are less likely to use their rights—these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements.

Workplace regulatory policy must focus on workplaces where big problems exist but also where workers are unlikely to complain because of barriers they face. Enforcement policies that take both the underlying likelihood of problems and the capacity of workers to trigger enforcement into account have the potential of appreciably increasing the regulatory bang for the enforcement buck.

A corollary to the above complaint problem arises in the largely non-unionized private-sector workplace. Absent the presence of third-party representatives, workers face substantial impediments to effectively exercising their rights. Two implications naturally follow. First, public policies that increase the ability of workers to organize have the secondary effect of improving the implementation of workplace policies like the OSH Act. The implication is that legislative initiatives that would make it easier for workers to choose unions would also positively affect the implementation of broader workplace policy (an argument often overlooked in the ongoing debate on reform of the National Labor Relations Act).²⁸

Second, improving the effectiveness of workplace regulation requires getting more workers in non-union settings to exercise their rights. The likelihood that workers exercise their rights depends on both the benefits and the risks of doing so. Perceptions of benefits

27. For a summary of this body of empirical literature, see Weil, *supra* note 23.

28. See, for example, arguments made by American Rights at Work, a non-profit organization affiliated with the AFL-CIO that is seeking major reform of federal labor law policies regarding union representation. See AFL-CIO Issue Brief, *supra* note 20; Lance Compa, *Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice*, in *WORKERS' RIGHTS AS HUMAN RIGHTS* 23 (James A. Gross ed., 2003).

relate to awareness of what those rights are in the first place. However, they also relate to awareness of the fact that potential benefits “spillover” to others in the workplace. That is, if employees do not take into account the fact that the benefits they may receive after lodging a complaint may extend to fellow (and future) workers as well, they will not exercise those rights to the extent that is socially optimal. Costs include the time and effort it takes to learn how to initiate an inspection or to understand the coverage of a law, and—more importantly—the potential costs from losing one’s job for exercise of those rights. For the most part, those costs will be higher for workers acting on an individual basis than they might be in the presence of some common workplace institution, once again leading to lower than optimal exercise of workplace rights when left only to the individual choices of workers. We have briefly described some of the possible labor market institutions or intermediaries—other than unions—that might help solve the collective action problem inherent in many workplace-based policies.²⁹ Future regulatory policies should evaluate different methods of affecting the benefits and costs of exercising rights through governmental or third-party organizations as a fundamental element of improving implementation of core principles.

Nonetheless, complaint-driven inspection activity will characterize the problem faced by the U.S. Department of Labor for the foreseeable future. As such, a final implication of these findings is the need to create internal policies that try to adjust for the divergences between complaints and compliance highlighted in Section IV. Government regulators, concerned about the need to allocate scarce resources to achieving core objectives, can adopt policies that allow them to adjust both the nature of their responses to complaints and also the way they use other “directed” inspections to more strategically supplement and complement complaint-driven inspections. Such an effort begins with greater scrutiny of the fundamental problem of “who complains.”³⁰

29. There is significant evidence that workers would desire such agents in their workplace. *E.g.*, FREEMAN & ROGERS, *supra* note 17.

30. The authors are currently engaged in a larger initiative on developing tools and interventions for strategic enforcement that would respond to some of these challenges.