

# **CRAFTING A PROGRESSIVE WORKPLACE REGULATORY POLICY: WHY ENFORCEMENT MATTERS**

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## I. INTRODUCTION

With the success of the Democratic party in retaking control of the United States Congress in 2006, and the prospects of a Democrat in the White House in 2008, policymakers will be hearing calls to address a variety of workplace problems that have been largely neglected over the past decade. There will be calls to pass legislation regarding the outsourcing of work, new policies to assist working families and low income workers, and bold initiatives to address the myriad of problems facing both temporary/contingent workers and the growing immigrant workforce.

Initiating new policies represents a signal opportunity for a new Congress or President. Capitalizing on the momentum of an election victory to push through a legislative agenda is imperative, as well as an early indicator of the long-term effectiveness of a new Congress or administration.

With that said, a progressive workplace regulatory policy should not depend solely, or even primarily, on new legislative initiatives. Instead, significant advances in achieving core public goals in the workplace can be more effectively pursued by drawing on the extensive body of established laws, regulations, and executive orders and the vast administrative apparatus that already exists to implement those policies. Rather than focusing all energy and political capital on passing legislative initiatives, which could take years to implement, a new Congress or entering administration should bring to its regulatory

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agencies a clear and coherent plan for enforcing and implementing existing laws and regulations in order to achieve a focused set of public aims.

The alphabet soup of policies under the authority of the U.S. Department of Labor (DOL) represents more than the accumulated legislative initiatives of past administrations and Congresses. It comprises the means by which an administration affects working conditions for millions of people. And those laws can impact workers as early as the day after a new President is elected—as opposed to prospective legislative initiatives that require years to craft, pass, and implement. For reasons described in this essay, a clear and focused strategy for enforcing and implementing existing workplace regulations may therefore prove more consequential than broader legislative initiatives whose political fortunes are far more uncertain.

## II. FIVE PRINCIPLES FOR A PROGRESSIVE WORKPLACE REGULATORY AGENDA

Let me start by asserting a set of broad objectives for workplace regulatory policy. This list is obviously based on a normative view about social policy, and some might disagree with particular points on this list.<sup>1</sup> The focus here is on assuring that some basic set of conditions is provided in the workplace. This relates to, but differs from, other recent discussions of workplace policy, which focus on creating labor market policies to better match emerging human resource needs of firms with labor supply and normative requirements of workers<sup>2</sup> or adapting legal structures to more adequately fit current employment realities.<sup>3</sup>

Take the following five principles as a reasonable starting point for crafting workplace policy.<sup>4</sup>

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1. The normative view can be framed as one that provides for market exchanges in most labor market activities but providing a Rawlsian floor to social policy relating to basic labor market conditions. I will discuss the underlying social welfare model in a separate essay.

2. *E.g.*, THOMAS KOCHAN, MIT INST. FOR WORK & EMP. RES., *RESTORING WORKER VOICE: A CRITICAL NATIONAL PRIORITY* (2003); PAUL OSTERMAN ET AL., *WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET* (2003); Thomas Kochan, MIT Inst. For Work and Emp. Res., *Updating American Labor Law: Taking Advantage of a Window of Opportunity* (2006).

3. *See, e.g.*, KATHERINE STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

4. As minimalist as these goals may sound, note that they overlap with and in some cases presuppose the achievement of the core labor standards adopted by the International Labor Organization: “(2) . . . (a) freedom of association and effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the

1. Assuring basic labor standards: hours of work, overtime compensation, child labor restrictions.
2. Ensuring a safe and healthy work environment.
3. Protecting against workplace discrimination in hiring, promotion, dismissal; and treatment of employees according to race, sex, age, or disability.
4. Providing mechanisms for worker representation and voice at the workplace.

Protecting against major downside risks associated with employment: loss of pensions or health care benefits, loss of job from plant closure, or major family emergencies.

We can define a basic progressive workplace regulatory agenda as one that sets out to ensure attainment of each of these five principles in the majority of covered workplaces. For example, it would assure that all workers receive at least the minimum wage; low exposure to major safety and health risks; basic human resource processes that are blind to race, sex, age, and disability; some avenue for voice at the workplace; and basic protections against the most severe downside risks associated with employment such as loss of health care benefits. This agenda is basic (i.e., focused on attaining minimum levels of each principle) in the sense that one can easily argue that these standards already set the bar far too low. For example, a truly progressive policy against workplace discrimination would transcend what Glenn Loury describes as “race blindness” and instead focus on achieving “race egalitarianism.”<sup>5</sup>

Given this definition of a progressive regulatory *agenda*, an accompanying progressive regulatory *strategy* would be one that assures that as many workers as possible experience this minimalist set of conditions at their place of employment. A regulatory strategy, in turn, is based on the idea that private actors—individuals, employers, institutions—left to their own devices will not necessarily select policies that are consonant with the public aims related to the five principles. Regulatory systems provide the government with tools to change private behavior, and those tools are usually related to enforcement activities: conducting of inspections, finding and citing violations with laws (procedural or substantive), assessing penalties, and ensuring compliance.

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effective abolition of child labor; and (d) elimination of discrimination in respect of employment and occupation.” See Declaration on Fundamental Principles and Rights at Work, ILO, 86th Sess. (June 15, 1998).

5. See GLENN LOURY, THE ANATOMY OF RACIAL INEQUALITY 109–54 (2002).

A progressive workplace regulatory strategy would begin by recognizing that the conditions faced by workers lie along a spectrum with respect to the five principles. The spectrum would extend from workplaces where employers fail to provide conditions consistent with any of these basic conditions to workplaces where conditions of work well exceed minimum standards in regard to all five principles.

### III. THE INSTALLED BASE OF WORKPLACE REGULATIONS

A workplace regulatory strategy does not start with a blank slate. The DOL is responsible for enforcing roughly 200 separate pieces of legislation. Like software accumulated on a computer's hard drive, this "installed base" of regulation has built up over time from the additions and modifications of multiple users. The installed base, therefore, reflects different political, social, and economic factors that led to passage of legislation. As a result, the compatibility of its various policies with current workplace realities varies. Additionally, the different systems used by DOL were not necessarily designed to be compatible with one another, so methods of enforcement, criteria for assessing civil penalties, and even the focus of enforcement (for example, who is defined as "employer") vary widely across statutes.

Most would agree that parts of these statutes and regulations are flawed—in some cases woefully out of date with current labor market realities, and in other cases only partly able to deal with new workplace practices. Yet for better or worse, the accumulated statutes represent what a new administration has immediately at its disposal in pursuing the broad objectives laid out above. For example:

- If the administration hopes to ensure that workers receive a basic rate of pay (principle 1), it will not only need to convince Congress to raise the minimum wage provided by the Fair Labor Standards Act,<sup>6</sup> but also ensure that covered, low-wage workers receive it.
- If the administration hopes to cushion the impact of globalization on local communities (principle 5), it must not only look to macro trade policies, but also to the Worker Adjustment and Retraining Notification Act<sup>7</sup> and the Trade Adjustment Assistance program for providing

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6. Fair Labor Standards Act, 29 U.S.C. § 201 (2000) [hereinafter FLSA].

7. Worker Adjustment and Retraining Notification Act, <http://www.doleta.gov/layoff/warn.cfm> [hereinafter WARN].

workers and communities with adequate notice of imminent plant closings.

A rough mapping of the installed base against the five principles described above is provided in Figure 1 (found in the appendix to this article). All five objectives are addressed by several pieces of major legislation.<sup>8</sup>

We can distinguish two reasons why existing legislation may not be able to achieve the five principles of workplace regulation. First, certain pieces of legislation may be deficient in their basic structure as enacted. That is, even if fully implemented as designed, the Acts would be insufficient to attain basic goals. Alternatively, they may be deficient in terms of how they are implemented, through inadequacies of funding, staff abilities, institutional structure and incentives, or because of other matters relating to how the Acts or Executive Orders are carried out in practice. The former problem is one only amenable to legislative and executive action. The latter can be addressed through the means that are the central focus of this essay. Let me briefly comment on the former problem before focusing in on the latter.

In some cases, current legislation as enacted provides a strong basis for achieving core objectives. For example, the Mine Safety and Health Act (MSHA)<sup>9</sup> provides the means for ensuring basic levels of health and safety in mining operations via its provisions for strong enforcement (for example, requiring a minimum number of four inspections per year), significant penalties, and detailed health and safety standards specific to mining. Although at different times funding limitations from Congress and/or the policies of a particular administration might have precluded full use of the features of the legislation, this reflected policy choices rather than inherent limitations of the MSHA.<sup>10</sup>

A much larger group of federal workplace statutes provide partial attainment of basic goals as enacted. The Fair Labor Standards Act (FLSA),<sup>11</sup> for example, establishes a minimum wage, but because the actual wage is set by Congress, the adequacy of that law in achieving principle 1 varies over time. The Employee Retirement Income

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8. They are also addressed by a myriad of detailed statutes, regulations promulgated by agencies, executive orders, and operational policies adopted in the field.

9. Mine Safety and Health Act, <http://www.msha.gov/REGS/ACT/ACTTC.HTM> [hereinafter MSHA].

10. In the case of MSHA, its basic architecture was significantly strengthened through major legislative changes enacted to amend the original 1969 statute by Congress in 1977.

11. FLSA, *supra* note 6.

Security Act (ERISA)<sup>12</sup> was devised to provide basic insurance against employer default on pensions, but that law was built around agreements by which employers assured a benefit level upon retirement, which has become an increasingly uncommon form of pension benefits. What is more, it is a system to *protect* pension benefits, rather than one to *require the provision* of such benefits.<sup>13</sup>

Finally, there are cases in which the installed base of regulations can lead to only marginal attainment of baseline objectives. For example, current federal policies that address job loss arising from international trade via the WARN Act<sup>14</sup> or Trade Adjustment Assistance are inherently limited in their capacity to address this issue. Similarly, it has been shown in almost two decades of analyses that the National Labor Relations Act<sup>15</sup> provides an ineffective means of providing for workplace representation in the private sector, in large part because of problems inherent in the election model on which it is based.<sup>16</sup>

I will take up elsewhere an evaluation of the adequacy of each workplace statute with respect to the regulatory principles. For purposes of this essay, I only require that existing workplace legislation as currently enacted provides *some* basis for meeting the five principles.<sup>17</sup>

#### IV. CENTRAL ELEMENTS OF A PROGRESSIVE WORKPLACE POLICY

We come now to the nub of a progressive workplace regulatory policy. Taking the installed base as a starting point, and focusing on those statutes most closely aligned with the five principles of workplace regulation, the central question becomes what is the best

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12. Employee Retirement Income Security Act, <http://www.dol.gov/dol/topic/health-plans/erisa.html> [hereinafter ERISA].

13. One might argue that OSHA represents an analogous case to minimum wage under FLSA: although the structure of the law might in principle allow one to attain basic levels of workplace health and safety, the absence of standards redressing important areas of health for certain workers (for example, ergonomics) undermines the alignment between the statute and workplace objectives. Since the process for setting new standards has become almost as cumbersome as enacting legislative changes, the OSHA Act itself might be regarded as unable to attain baseline health and safety objectives for some classes of workers.

14. WARN, *supra* note 7.

15. National Labor Relations Act, [http://www.nlr.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx) [hereinafter NLRA].

16. *E.g.*, Estlund, *supra* note 3; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); COMM'N ON FUTURE WORKER-MGMT. REL., U.S. DEP'T LAB., FACT FINDING REPORT (1994).

17. Evaluating the adequacy of the installed base as enacted for achieving underlying objectives could provide a meaningful way of identifying priorities in fashioning a legislative agenda. I take this issue up at the end of the essay.

means to ensure the implementation of those principles? Given the structure of most of the legislation listed in Figure 1, implementing federal workplace policies rests primarily on enforcement programs and secondarily on consultation and education activities. In most areas of workplace regulation, a division of the U.S. Department of Labor acts as the enforcement agent for policies.<sup>18</sup> The task of the relevant agency is to assess whether an employer's human resource policies are consistent with regulatory standards and then to change the behavior of those who are not.

A behavioral set of assumptions are embodied in the enforcement model: employers decide to comply with regulations—beyond actions based on their private interests—by responding either to the direct pressure arising from inspections and penalties (essentially being “forced” to comply), or to the deterrence effects arising from the threat of inspections and fines, and the consequent voluntary decision to comply.<sup>19</sup> Alternatively, the use of consultation and education initiatives as tools arises from a model in which non-compliance stems from a lack of information or guidance on the part of employers or workers. If we take the installed base of legislation as given, and focus on the subset of regulatory programs most closely attuned to core workplace policy objectives, the options for a progressive workplace regulatory policy then come down to how best to deploy the tools of enforcement and consultation/education.

A new administration faces a set of decisions that directly affect the way that enforcement, consultation, and educational tools are deployed. These include appointing key political positions in the Labor Department; setting the overall agenda within the Department, particularly with respect to which policies and approaches will receive greatest attention; allocating discretionary resources across those departments and regions with line responsibility for administering the installed base; affecting the incentives and disincentives within agency programs; and hiring, firing, promoting, and demoting agency staff.

The question is which of these organizational features require attention in order to implement a progressive regulatory strategy? Focusing only on the big picture by using the bully pulpit of political leadership is useful for setting initial directions, but will not result in sustainable regulatory impacts on the ground. At the same time, an

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18. Examples include the Wage and Hour Division for the Fair Labor Standards Act, or the Occupational Safety and Health Administration for the OSHA Act.

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

administration could quickly become mired in minutia by attempting wholesale change of internal management systems or personnel policies. Instead, political leaders should focus attention on those aspects of the regulatory apparatus most important to achieving core workplace objection. In order to do so, the strategy needs to challenge several entrenched features that have over time come to drive how regulatory policies are carried out.

#### A. *Overcoming Entrenched Barriers*

Regulatory systems tend to develop ruts in their enforcement protocols, leading them to increasingly focus attention on certain sectors, employers, and geographic areas. Sometimes these ruts form in sectors and workplaces that made up a significant proportion of the regulatory environment at the inception of an Act (for example, the manufacturing sector). Other times, the ruts reflect incentives created for inspectors by organizational procedures or the appropriations process. If regulatory agencies are evaluated (either by the White House or Congress) by the number of inspections completed, inspectors will tend to move toward workplaces where they can complete an inspection expeditiously. Finally, the ruts may reflect cognitive biases of regulators, political overseers, or the public, which lead them to overestimate the likelihood of risks or workplace problems in certain workplaces, and underestimate them in others.<sup>20</sup>

The upshot is that ever-scarce regulatory resources often do not flow toward the areas where they are most needed nor applied in the most effective manner. For example, a significant share of Occupational Safety and Health Administration (OSHA) resources flow toward large firms in the construction and manufacturing industries, even though studies show that they tend to be the better performers in those sectors, and do not respond much to application of regulatory pressure.<sup>21</sup>

Although agencies have tried to redress parts of this problem—OSHA targets industries with injury and illness rates above national averages, and Equal Employment Opportunity Commission (EEOC) focuses on federal contractors with poor past performance in

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20. See MALCOM SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* (2000).

21. David Weil, *Assessing OSHA Performance: New Evidence from the Construction Industry*, 20 J. POL'Y ANALYSIS & MGMT. 651 (2001); Wayne Gray & John Mendeloff, *The Changing Effects of OSHA Inspections Over Time: A Review of Three Data Sets from 1979 to 1998* (Working Paper, National Bureau of Economic Research 2001).

affirmative action policies—breaking out of these ruts often requires expenditure of political capital as a precursor to changes in management systems.

Two examples from the Clinton administration OSHA policy are indicative. Efforts to improve employer-level OSHA targeting by requiring all employers to provide their injury and illness logs to the Department of Labor electronically foundered because of a groundswell of opposition by the business community (particularly small businesses). Similarly, a fundamental restructuring of OSHA's internal management and evaluation systems was ultimately shelved in favor of a more modest set of policy initiatives on targeting. In both cases, the political leadership (and to some extent their external political allies) did not view these efforts as sufficiently important to pursue relative to other political battles.<sup>22</sup>

Another source of ruts in regulatory enforcement is the fact that agency personnel develop mental models regarding how the world works—or more specifically, how employers are organized and interact with one another. These views tend to be translated into the methods that regulators use to plan activity, and allocate inspectors and resources. Unfortunately, these mental models and management systems do not adapt quickly when enterprise and industry structures change. The world as perceived by regulators and the “objective” facts about how the world actually operates may therefore be far out of synch, leading agencies to look for lost keys near familiar light but far from the real problem.<sup>23</sup>

One example is the growing use of subcontracting in multiple sectors of the economy. The traditional model embodied in many regulatory agencies assumes a world in which distinct employers autonomously set policies for their workforce—e.g., a General Motors with vast facilities but operating under a common set of human resource policies. If employers increasingly shed parts of the production process to other, smaller subcontractors, the locus of enforcement or consultation activities becomes more ambiguous. Is it Wal-Mart who is responsible for the personnel policies of the janitorial subcontractors who work for it, or the small local companies who provide that service? The traditional model would focus on the small contractor even though—as the recent actions brought against

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22. John Mendeloff, *Overcoming Barriers to Better Regulation*, 18 L. & SOC. INQUIRY 711 (1993); Harvey Simon & Malcom Sparrow, *Regulatory Reform at OSHA (A), (B), & (C)*, in KENNEDY SCH. OF GOV'T CASE PROGRAM, Case Nos. 1371-73 (1997).

23. For the classic discussion of this problem, see EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).

Wal-Mart suggest—it is Wal-Mart that is setting the underlying conditions that may lead to these violations.

*B. Elements of a Progressive Regulatory Strategy*

The above barriers to optimal use of regulatory resources point to the central elements required for building a set of policies that will be effective in achieving the five core principles.

1. Don't Focus on Where the Light is Best—Focus on Where the Keys were Lost

Many of the enforcement protocols and information systems relied upon by regulatory agencies are no longer suited to current or prospective conditions. Major sector problems in the labor market increasingly lie in areas where the regulatory light has seldom focused. For example, many of the major problems experienced by low-wage workers occur in service and retail industries, sectors that were seldom the pressing concern of workplace policies several decades ago. Even in industries that have received ongoing attention, such as construction, segments within those sectors that receive current programmatic emphasis (for example, major commercial construction) may not be those where major problems now exist (for example, the vast home building sector).

In order to deal with this problem, a regulatory strategy must adapt or develop (1) metrics to measure problems in non-traditional sectors; (2) information and data sources with which to monitor those sectors; and (3) protocols with which to ensure that regulatory resources move toward them. This requires rebuilding some of the basic infrastructures regulatory agencies use to measure, track, and monitor critical workplace outcomes. For an agency like OSHA, this strategy may primarily involve the application of established metrics (injuries, fatalities) in work settings they historically have paid less attention. In contrast, for an agency like the Wage and Hour Division of the Employment Standards Administration, the strategy might require finding ways to measure core regulatory objectives and then arraying priorities according to those measures.

The now notorious case of McWane Corporation, a manufacturer of industrial pipes, is illustrative. A *New York Times* investigative report showed that between 1995 and 2002, nine workers were killed and at least 4,600 workers injured (hundreds of them seriously) in foundries owned by the company. The report also found that the company had been cited for more than 400 violations of OSHA

standards during that time.<sup>24</sup> One of the reasons McWane's horrific record had remained below the government radar screens arose from the complex and hidden connections the company maintained among its multi-state operations. In effect, regulators did not "see" the deeper connections between violations, injuries, and fatalities that occurred across the nine foundries controlled by McWane (a privately held company) and operating in five states.

The recent findings of extensive Fair Labor Standards Act (FLSA) and immigration law violations by contractors working for Wal-Mart also raise the importance of adapting the manner in which employment connections between networks of businesses are monitored. As will be further discussed below, employment relations have been splintered in a growing number of industries, undercutting the utility of traditional methods of tracking workplaces. A progressive enforcement policy must vastly improve the government's capacity to collect information germane to finding the sources of current and prospective problems.

## 2. Bigger is Not Always Better

Workplace regulatory programs tend to focus attention on the largest firms in an industry. The logic of this bias in enforcement is related to Willy Sutton's oft-quoted maxim regarding why he robbed banks—because that's where the money is. Although it is true that largest employers may employ most workers, it is not necessarily true that they represent the largest problems.

For example, the very large-scale construction contractors typically targeted under OSHA's construction policy tend to perform much better than other contractors.<sup>25</sup> Other studies show a similar correlation of performance and employer size.<sup>26</sup> OSHA would be better served by finding correlates other than size on which to base its efforts. The same may be true elsewhere: many of the most egregious violations of workplace policies occur in medium- or small-scale enterprises. The problem is that many established approaches (and regulatory incentives) are pitched toward inspecting larger workplaces. A progressive enforcement policy that paid greater attention to specific characteristics of workplaces more closely

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24. David Barstow & Lowell Bergman, *At A Texas Foundry an Indifference to Life*, N.Y. TIMES, Jan. 8, 2003, at A1.

25. Weil, *supra* note 21.

26. JAMES HAMILTON, CHARLES BROWN & JAMES MEDOFF, EMPLOYERS LARGE AND SMALL (1988); Gray & Mendeloff, *supra* note 21.

associated with violations of core standards would go a long way to redressing this problem.

### 3. Don't Confuse Silence With Compliance

Many pieces of federal workplace regulation depend on worker complaints as a trigger for enforcement activity. This is not particularly surprising given that an agency like the Wage and Hour Division has fewer than 1500 enforcement officers to oversee six and a half million private sector establishments. As a result, about 75% of Wage and Hour inspections arise from employee complaints. Under OSHA, about 30–40% of all inspections arise from workers' complaints.

It is clear then that regulators go where people complain. My research and that of others, however, demonstrates that workers are more likely to exercise rights where they have an agent that assists them in use of those rights.<sup>27</sup> In most cases, that means a union.<sup>28</sup> The contrary case also follows: workers who 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.

A progressive 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.

### 4. Seek Help Because Regulators Can Seldom Do It Alone

A corollary to the above complaint problem arises in a world where only 8% of the private sector workforce are members of labor unions. Absent the presence of workplace agents, workers face grave impediments to effectively exercising their rights. Two policies naturally follow. First, policies that increase the ability of workers to

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27. 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); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59 (2005).

28. See Figure 3 for a listing of studies that have demonstrated this link between worker exercise of rights and unions.

organize have the secondary effect of improving the implementation of workplace policies like OSHA. 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 debate on reform of the National Labor Relations Act, which regulates private sector worker representation).

Second, and more in keeping with the focus of this essay, a progressive workplace policy requires assisting workers to exercise their rights in nonunion settings. The likelihood that workers exercise their rights depends both on the benefits they perceive arising from use of rights, and also on the risks they face by exercising them. Perceptions of benefits relate to awareness of what those rights are in the first place. But they also relate to awareness of the fact that potential benefits “spill over” to others in the workplace. That is, if employees do not take into account that the benefits they may receive from exercise of their rights also provide benefits to fellow workers, they will not exercise those rights to the extent that is socially optimal. Costs are related to the time and effort it takes to find out either how to initiate an inspection or understand the coverage of a law, or, more importantly, the potential costs from losing one’s job for exercise of those rights. Those costs will be higher for most workers acting on an individual basis than they would be in the presence of some common workplace institution, once again leading to lower than optimal exercise of workplace rights.

There are many possible labor market institutions or intermediaries other than unions that might help solve the collective action problem inherent in many workplace-based policies such as legal service organizations, third party non-profits, alternative dispute resolution systems, or certain employee committee arrangements.<sup>29</sup> There is also significant evidence that workers would desire such agents in their workplace.<sup>30</sup> A progressive workplace policy 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.

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29. See Joni Hersch, *A Workers’ Lobby to Provide Portable Benefits*, in *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 207 (Richard Freeman et al. eds., 2005); Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of Employment Laws*, in *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 141 (Richard Freeman et al. eds., 2005).

30. See RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

### 5. Changing Behavior Is What It's All About

At the end of the day, enforcement activity is about changing behavior—if it wasn't, there would be no need to regulate in the first place. A progressive regulatory policy, therefore, should be one that results in changes in employer behavior. A successful regulatory policy must reflect an understanding of why employers make the choices they do, and what is required to alter those decisions.

Too often, enforcement policy simply boils down to the chance an employer faces of being inspected and the cost of penalties if caught in violation. Most workplace policies provide insufficient penalties and insignificant chances of inspection to make this set of tools sufficient. The costs of complying may seem too high relative to the expected cost of being found in violation of the law.

All behavior change does not arise from coercion, however, and regulators can call upon other tools to improve compliance. Sometimes employers simply need information—not the threat of penalties—to move them in the desired direction. An intervention that raises awareness and explains methods of complying will lead to desired outcomes more effectively than playing “cops and robbers.” In other cases, cooperative efforts from firms with baseline interests in complying (for example, due to the importance of a brand name) can move beyond mere compliance and toward establishing the standard of regulatory performance. Some of the effective partnership efforts between workers, employers, and government agencies illustrate these opportunities.

On the other hand, regulators can also act upon a better understanding of deterrence strategy and the internal decision-making processes of regulated actors to improve performance. The use of supply chain pressure by the Wage and Hour Division—the office within the Labor Department charged with enforcing minimum wage and other labor standards—to induce better compliance with the Fair Labor Standards Act illustrates this point and is described in detail below.

### 6. Adapt Regulatory Institutions to Fit the Times

Workplace regulations reflect the times in which they were developed. Many regulations arose in the era when the archetypical employer was General Motors (GM), with its large-scale workplace establishments, stable workforce, career employment, fixed facilities, and clear structure of employment responsibility and liability.

But GM is no longer the archetypical employer. The single largest private sector employer is now Wal-Mart. It is characterized by a very different blend of practices that challenge the traditional model of regulation. On one hand, like GM, Wal-Mart operates on a huge scale, employing hundreds of thousands in large, fixed facilities. Unlike GM, Wal-Mart's nonunion workforce receive low compensation and minimal benefits and accept far greater uncertainty regarding the length and duration of their employment. Like GM, Wal-Mart uses outside contractors for some functions, but unlike GM those functions might be to provide services that are core to business operations. Like GM, the company relies on an enormous network of suppliers to undertake its core business, all of which are dependent on the corporation for a significant percentage of their business. Unlike GM, however, those relations are at once arms-length (that is, they are suppliers of products to Wal-Mart and autonomous corporate entities as opposed to the vertically integrated or closely held firms within GM's historic supplier structure) yet operate under elaborate and stringently enforced guidelines by the retailer that dictate everything from logistic arrangements, product identification methods, packaging and marketing decisions, and method of floor display.<sup>31</sup>

In light of these features, many of the traditional presumptions underlying regulatory enforcement approaches fall into question. Who is the employer ultimately responsible for establishing workplace conditions? How much latitude does the employer of record (for example, a small janitorial contractor to a large company like Wal-Mart) have to change conditions for their workforce? Which party in a network of relationships will be most responsive to enforcement interventions? These questions revolve around a central feature of regulating in sectors where the archetypical employer is Wal-Mart and not GM: An effective regulatory system must act upon webs or networks of employers, not on single, fixed employers. As a result, the enforcement problem begins to resemble more the regulation of a construction worksite—with its many small employers and indirect forms of coordination between owners, project managers, and individual contractors—rather than a monolithic factory setting.

A progressive implementation strategy should not only recognize this fundamental difference, but use existing tools in ways that better

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31. FREDERICK ABERNATHY ET AL., *A STITCH IN TIME: LEAN RETAILING AND THE TRANSFORMATION OF MANUFACTURING* 39–70 (1999).

fit new conditions.<sup>32</sup> The emergence of highly coordinated and lean supply chains in many sectors have given rise to potentially new means to leverage private incentives created by supply chains pressures to achieve public ends. The use of supply chain pressure to regulate minimum wages in apparel is one illustration of this opportunity that will be discussed next.

#### V. PROGRESSIVE REGULATORY STRATEGY IN ACTION

Putting the pieces together to create a progressive workplace regulatory policy is illustrated by a program developed by the Wage and Hour Division (WHD) of the U.S. Department of Labor. The initiative combined many of the elements of a progressive strategy described above in order to pursue the fundamental goals of assuring basic labor standards in the U.S. apparel industry.

An analysis of the features of product and labor markets in the apparel industry would lead one to predict high rates of employer noncompliance. The industry is characterized by a splintered production system where different enterprises carry out the design, cutting and sewing, and pressing/packaging of apparel products. Contractors compete to preassemble bundles of cut garment pieces in a market where there is little ability to differentiate services (that is, sewing and associated assembly). Sewing contractors compete in a market with large numbers of small companies, low barriers to entry, limited opportunities for product differentiation, and intense price-based competition. Because labor costs represent the majority of total costs for a sewing contractor, there is significant pressure on these contractors to strike deals in the short run with jobbers and manufacturers that would not be economically sustainable if the contractor were to comply with wage and hour laws. As a result, non-compliance is predominately a problem among the large number of contractors and subcontractors that assemble apparel products. About one-half of all contractors in Los Angeles in 1998, and one-third of contractors in New York in 1999 failed to comply with minimum wage laws.

Regulatory activity historically focused at that contractor and subcontractor level of the apparel industry. The primary means of

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32. In this way, I agree with OSTERMAN ET. AL., *supra* note 2; STONE, *supra* note 3; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); and others who call for fundamental change in the structure of workplace policies at a legislative level. But once again, I would argue for equal attention paid to methods of using the existing apparatus of enforcement and regulation to adapt to these changes as well.

inducing compliance was through direct inspection and the effects of deterrence through the levying of civil penalties for those who are repeatedly found in violation.<sup>33</sup> This led historically to a seemingly endless cat and mouse game between the WHD and small contractors where the efforts to reduce sweatshop conditions in the garment industry were thwarted by companies constantly coming in and out of the business sometime because of the harsh competitive conditions in the industry as well as a means of evading penalties from past violations.

This regulatory model was altered substantially in the mid-1990s, partly in response to changes in the larger apparel industry. New forms of “lean retailing” (with Wal-Mart being the leader in developing this model) take advantage of information technology to use real time information to reduce exposure to changing consumer tastes. Lean retailing reduces the need for retailers to stockpile large inventories of a growing range of products, thereby reducing their risks of stock-outs, markdowns, and inventory carrying costs. Apparel suppliers, in turn, must operate with far greater levels of responsiveness and accept a great deal more risk than in the past. Suppliers must replenish products within a selling season, with retailers now requiring replenishment of orders in as little as three days. Any disruptions in the weekly replenishment of retail orders by apparel suppliers become a major problem—one that can lead retailers to assess penalties, cancel orders, and potentially drop “unreliable” suppliers. This increasing importance of time translates into a potential tool of regulatory enforcement.<sup>34</sup>

Through an initiative begun in 1996, the WHD, which is vested with responsibility for enforcing minimum wage and overtime, dramatically shifted the focus of enforcement efforts by exerting regulatory pressure on manufacturers in the apparel supply chain rather than on individual small contractors. Invoking a long ignored provision of the FLSA, Section 15(a) (the “hot cargo” provision),<sup>35</sup> WHD embargoed goods that were found to have been manufactured

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33. The basic remedy under FLSA is payment of back wages to compensate workers for underpayment (pay below minimum wage or overtime payments for work beyond forty hours in the work week). First-time violators are only required to pay back pay (what should have been paid all along). Employers owe civil penalties only if found in continued violation of minimum wage provisions in subsequent inspections. However, some features of enforcement make penalties for first-time offenders potentially higher than back pay alone. See John Lott & Russell Roberts, *The Expected Penalty for Committing a Crime: An Analysis of Minimum Wage Violations*, 30 J. HUM. RESOURCES 397 (1995).

34. ABERNATHY ET AL., *supra* note 31.

35. FLSA, *supra* note 6.

in violation of the Act. Although this provision had limited impact in the traditional retail-apparel supply chain, when long delays in shipments and large retail inventories were expected, invocation of the hot goods provision today potentially raises the costs to retailers and their manufacturers of lost shipments and lost contracts (given the short lead times of retailers). This provision potentially creates significant penalties arising from FLSA violations that quickly exceed those arising from back wages owed and civil penalties.

The new WHD policy uses the hot cargo provision to persuade manufacturers to augment regulatory activities by making the release of embargoed goods contingent on *the manufacturer's* agreement to create a compliance program for its subcontractors. The manufacturer must agree to sign two types of agreement: an agreement between the manufacturer and the Department of Labor, and an agreement between the manufacturer and its contractors.<sup>36</sup> The agreements stipulate basic components of a monitoring system that will be operated by the manufacturer.<sup>37</sup>

Statistical analyses of these monitoring arrangements demonstrate that they have led to very large improvements in minimum wage compliance among apparel contractors in Southern California<sup>38</sup> and New York City.<sup>39</sup> Stringent contractor monitoring is associated with reductions in the number of workers who receive minimum wage underpayments by as much as 17 violations per 100 workers and decreases the size of underpayments received per worker by an average of \$4.85 per worker per week.<sup>40</sup> These represent far higher reductions in noncompliance than through the use of traditional regulatory tools in this industry.

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36. See U.S. DEP'T LAB., WAGE & HOUR DIV., FULL "HOT GOODS" COMPLIANCE PROGRAM AGREEMENT, FORM FCPA(AB).CP1 (1998) [hereinafter DOL FORUM]; U.S. DEP'T LAB., PROTECTING AMERICA'S GARMENT WORKERS: A MONITORING GUIDE (1999), available at <http://www.dol.gov/esa/forum/monitor.htm>.

37. These agreements, however, are entered in voluntarily by the manufacturer and their terms are therefore negotiated out between the government and the manufacturer/jobber. The terms described here are taken from the Department of Labor's model agreement language specified in formal policy documents. See DOL FORUM, *supra* note 36.

38. See David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. REL. REV. 238 (2005).

39. See Carlos Mallo & David Weil, *Government Regulation of the Minimum Wage: Estimating the Effects of Intervention* (June 15, 2006) (unpublished manuscript, on file with the author). These evaluations were possible because of another innovation of the Wage and Hour Division. In order to gauge the impact of the new strategy, the WHD undertook random, inspection-based monitoring of contractors in the major garment producing markets. It did so to be able to estimate the geographic impacts of the initiatives in a way that would be impossible using administrative records, which are in part reflective of the initiatives. It also later developed new performance benchmarks from the random surveys.

40. Weil, *supra* note 38.

This initiative is notable for several reasons. The initiative was devised by longstanding labor department personnel (John Fraser, Rae Glass, Libby Hendrix in the Washington office and Jerry Hall and Bruce Sullivan in California and New York regional offices), who had considerable experience in the field and awareness that the conventional model of enforcement was not effective. At the same time, the initiative required the strong support of political leadership of the department—the Wage and Hour administrator (Michael Kerr), the Assistant Secretary of Labor for the Employment Standards Administration (Bernard Anderson), and ultimately, the Secretary of Labor (Robert Reich and later Alexis Herman)—for it to obtain the funding, political support, and institutional focus needed to launch and sustain it.

Because of the novelty of the use of FLSA in this fashion and its far-reaching impact, concern over the potential fallout from it was considerable and the program was extremely controversial inside (for example, in the Office of the Solicitor) and outside (for example, industry associations) the department. It therefore could not have persisted over the several years required to develop it without such strong support. Equally important, however, is that once it had been in place for a period of time, institutionalized in the practices of two key area offices (New York and Southern California) and demonstrating to the agency, the Office of Management and Budget (OMB), and Congress significant impact on performance outcomes, it became sustainable and potentially replicable. As a result, the program has remained in place and active during the Bush administration.

#### VI. INSTITUTIONAL CONTEXT FOR A PROGRESSIVE WORKPLACE REGULATORY STRATEGY

The larger authorizing environment created by Congress and the White House is often ignored in discussions of workplace policy. So too is the existence of a regulatory staff that transcends any one presidential administration. Yet these institutional factors create powerful boundaries within which any set of workplace policies must operate. Focusing on the implementation of existing policies rather than attempting to craft entirely new laws as the principal focus of a progressive regulatory strategy provides a method of realistically addressing these fundamental institutional realities from the offset. It is also more consistent with the constraints posed by them.

*A. Workplace Policy and Congressional Appropriations*

Given that each administration begins with a large installed base of workplace regulations, a major part of the debate between Congress and the White House over workplace regulatory policy occurs through the annual appropriations process. The overall outlays to the Department of Labor have fluctuated considerably over time. Figure 3 charts outlays for the Department over time (in constant 1982–84 dollars), and shows that outlays have gone from a high of \$38.8 billion in the early years of the Reagan administration to a low of \$18.5 billion at the close of the Clinton administration. The lower panel portray total outlays as a percent of all outlays by the federal government. It also portrays a volatile history of funding over time.

Yet, this variability is deceptive. Much of the budget provided by Congress for the Department of Labor is non-discretionary, as a large proportion of annual expenditures are committed to mandatory contributions to state training programs, unemployment compensation funds, and other obligations fixed by statute. In 2003, the Labor Department's discretionary budget was only 17% of the overall outlays for the agency. That placed the agency slightly above Health and Human Services, which had authorized discretionary expenditures of 13% relative to its outlays, but well below both Agriculture at 30% and the Defense department, whose authorized discretionary expenditures in 2003 were less than its actual outlays in that year.<sup>41</sup> As a result, the resource canvas that a new administration has to work with is smaller than overall appropriations might lead one to believe—an estimated \$11.9 billion for FY2005 for Labor in comparison to its overall projected budget of \$57 billion.

The trend in constant dollar expenditures for discretionary spending shows far less variability, particularly since the late 1970s. In particular, outlays for major enforcement programs over this time period have been surprisingly stable (perhaps better described as deadlocked) within the overall level of funding for workplace agencies. Figure 4 presents combined funding for several major regulatory enforcement programs—the Wage and Hour Division, EEOC, OSHA, and MSHA—between 1977 and 2003. The overall

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41. Figures tabulated by comparing 2003 outlays by agency versus discretionary budget authorized by agency. In 2003, the Defense Department had authorized expenditures of \$437,495,000 although it only expended \$388,870,000 by year's end for both discretionary and mandatory expenditures. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, tbl. 4.1 & 5.4 (2004). The primary reason was that it spent only a small proportion of the funds Congress had authorized for rebuilding efforts in Iraq.

level of funding has been remarkably constant over this time period,<sup>42</sup> despite changes in presidential administrations and political control of Congress, only going significantly above this level in the Carter administration, or below it during the middle of the Clinton administration.

The case of OSHA is particularly illustrative. Since its inception in 1971, OSHA has been buffeted by intense political battles, often between a Congress controlled by one party and an executive branch led by the other. OSHA has repeatedly been a lightning rod for efforts to reduce big government, most notably during the Reagan administration and during the tenure of Newt Gingrich as Speaker of the House of Representatives. Yet the agency has withstood repeated efforts to radically alter its basic structure—either by Republicans like Rep. Cass Ballenger of North Carolina, who introduced legislation that would have removed OSHA's most important enforcement teeth, or by Democrats like Senator Edward Kennedy, who introduced legislation early in the Clinton administration that would have strengthened enforcement tools and mandated workplace safety and health committees to augment the agency.

Political offensives and counter-offensives have led over time to a surprisingly steady level of funding for OSHA appropriations across administrations.<sup>43</sup> The net effect leaves OSHA extremely limited in its ability to affect the more than six million workplaces that the statute covers. Over the course of its history, the agency has averaged fewer than 2000 inspectors and has levied fines that are often trivial in relation to the costs of adopting health and safety technologies and practices consistent with OSHA standards, thereby providing employers little incentive to comply with those standards. As a result, the politics surrounding OSHA simultaneously protect it from evisceration *and* prevent it from becoming the fully effective regulatory body that the statute mandates.

A new administration will most likely face a continuation of this long-running standoff. It must therefore expect only moderate increases in overall discretionary expenditures, and instead pursue a strategy that fights for the specific resources most centrally attuned to the core workplace conditions it hopes to address and the particular programs within agencies it needs to pursue them.

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42. Fluctuating around \$300 million in 1982–83 dollars.

43. *See infra* Figure 5.

*B. Congressional and White House Regulatory Performance Expectations*

The public discourse on regulation has shifted dramatically over time. Beginning in the Carter administration and continuing to the present time, regulatory discussions have appropriated the language of the private sector and regulatory agencies are increasingly judged by measures akin to those applied to businesses. The public, or their proxies, demand that agencies demonstrate that they have achieved performance outcomes given the resources they have been granted. This has played out institutionally in many ways. For example, the Office of Management and Budget, in its role in reviewing agency proposals as it assembles the annual budget, has played an increasingly prominent role as arbiter of performance through its use of benefit/cost analysis of regulatory initiatives.<sup>44</sup>

Since the Clinton administration, executive agencies have engaged in formal annual planning cycles, mirroring strategic planning exercises in the private sector. Most departments of the government now require their agencies to set out specific performance goals for upcoming fiscal periods, and those goals are increasingly being tied to budgeting processes.

Congress also explicitly built performance into its appropriations process via the Government Performance and Results Act (GPRA) of 1993.<sup>45</sup> GPRA's legislative purpose is "to provide for the establishment of strategic planning and performance measurement in the Federal Government, and for other purposes,"<sup>46</sup> with its ultimate objective stated to be "to change agency and managerial behavior—not to create another bureaucratic system . . ."<sup>47</sup> The Act required all federal agencies to submit a five-year strategic plan in 1997 and every three years thereafter, as well as annual performance plans. Although the plans' impact on agency management and activity is widely disputed, they have become an institutionalized part of the appropriations and budgeting process.

It is clear, then, that a new administration will be required to frame its workplace policies in the language of benefit/cost analysis

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44. The importance of OMB in all regulatory matters culminated in the very powerful role played by John Graham's Office of Regulatory Policy in the Bush administration. However, the importance of this aspect of OMB review policy was already well established during the Clinton administration.

45. Government Performance and Results Act, <http://www.whitehouse.gov/omb/mgmt-gpra/gplaw2m.html> [hereinafter GPRA].

46. *Id.* at 1.

47. *Id.*

and performance evaluation as part of the established way it interacts with Congress and the public. A comprehensive enforcement strategy is therefore not only important to achieving core goals—it also is in keeping with institutional processes now guiding executive agencies and their oversight by Congress.

### *C. Staff as the Core of Regulatory Structure*

A new administration has the opportunity to appoint a number of key positions in an agency like the Labor Department. The vast majority of people that affect an administration's ability to carry out its policies, however, are the career appointees both in Washington and dispersed across the country. In 2004, there were approximately 17,500 staff members of the Department of Labor, roughly 3500 of which are devoted to enforcement.

Internal human resource policies covering these employees are set by civil service, collective bargaining, and tradition. Staff members in core regulatory programs represent a cross-section of people who were hired under different administrations and who have a variety of perspectives on the mission of their agency. Similarly, the human resource policies and management systems to which they respond have arisen from an amalgam of different administrations, management philosophies, and institutional arrangements.

Those who underestimate the importance of the large number of people who run, administer, and carry out the work of agencies have time and again learned the error of their ways. The capacity to both implement new initiatives and to use the installed base of policies depends critically upon engaging the career staff and changing those aspects of human resource policies most important to putting in place the regulatory strategies described above. The reality that political appointees change following an election but career staff do not can therefore be an asset or a liability for a new administration, depending on its willingness to commit part of its capital to working with that aspect of the installed base to further its core objectives.<sup>48</sup>

## VII. CONCLUSION

By focusing a progressive workplace regulatory agenda primarily on the implementation of existing legislation, I am not arguing for maintaining the *status quo* or simply treading water. Quite the

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48. OFFICE OF MGMT. & BUDGET, Appendices, *supra* note 41.

contrary. A progressive workplace policy requires significant changes to the basic way that government carries out regulatory activity. In that sense, it would require an administration's willingness to harness the momentum from the election and to use some of the accompanying political capital to push this agenda forward.

A new administration faces thousands of decisions, of both large and small consequence. In the maelstrom of decisions, political leaders risk being led astray by the siren calls of new legislation, which promise new frontiers but often lead to unfulfilled expectations and squandered time. At the same time, becoming captive to the myriad small crises at the agency level puts a new administration at risk of missing opportunities to focus on those decisions that might truly lead to new, bold, and sustainable directions. Somewhere in the middle, between "big idea" legislation and day-to-day minutia, reside choices of consequence—decisions in the direct control of the new leaders—that could move a larger workplace agenda forward. An administration that combines well chosen legislative agendas focused on critical new policy initiatives with an equally focused agenda on progressive enforcement policy could accomplish much and stand to leave a substantial legacy in its wake.

## APPENDIX

**Figure 1**  
**Workplace Objectives and Existing Federal Labor Statutes**

Workplace Objective	Federal Labor Statute or Executive Order
Assuring basic labor standards—Hours of work, overtime compensation, child labor restriction	<ul style="list-style-type: none"> <li>• Fair Labor Standards Act</li> <li>• Davis-Bacon Act; Service Contract Act</li> <li>• Walsh-Healy</li> <li>• Contract Work Hours and Safety Standards Act</li> <li>• Migrant and Seasonal Agricultural Workers Protection Act</li> </ul>
Ensuring a safe and healthy work environment	<ul style="list-style-type: none"> <li>• Occupational Safety and Health Act</li> <li>• Mine Safety and Health Act</li> <li>• Drug Free Workplace Act</li> </ul>
Protecting against workplace discrimination in hiring, promotion, dismissal, and treatment—Race, sex, age, sexual preference, disability.	<ul style="list-style-type: none"> <li>• Title VII Equal Pay Act</li> <li>• Executive Order 11246</li> <li>• Age Discrimination Employment Act</li> <li>• Americans with Disabilities Act</li> <li>• Rehabilitation Act</li> <li>• STAA</li> <li>• Anti-retaliatory provision-Surface Transportation Assistance Act</li> <li>• Veterans' Reemployment Rights Act</li> </ul>
Creating methods for worker representation at the workplace	<ul style="list-style-type: none"> <li>• National Labor Relations Act</li> <li>• Labor Management Reporting and Disclosure Act</li> <li>• Railway Labor Act</li> </ul>
Protecting against major downside risks associated with employment—Loss of pensions or health care benefits, loss of job, major family emergencies	<ul style="list-style-type: none"> <li>• Employee Retirement Income Security Act</li> <li>• Consolidated Omnibus Budget Reconciliation Act (COBRA)</li> <li>• Workers Adjustment &amp; Retraining and Notification Act</li> <li>• Unemployment Insurance</li> <li>• Family Medical Leave Act</li> <li>• Trade Adjustment Assistance Act</li> </ul>

**Figure 2**  
**Impact of Labor Unions on Enforcement and Compliance with Workplace Regulations**

<b>Labor Statute or Executive Order</b>	<b>Union Impact on Enforcement</b>	<b>Union Impact on Employer Compliance</b>
Fair Labor Standards Act—Overtime Provisions	Inclusion of premium pay for overtime in collective agreements	Increase the probability of compliance for unionized workers
ERISA	Raise degree of scrutiny over eligible pension plans	Require more strict adherence to eligibility and financial management standards by employers
OSHA	Higher inspection probabilities; longer inspections; shorter abatement duration; and higher penalties	Higher rates of compliance with specific OSHA standards
MSHA	Higher inspection probabilities; longer/more intense inspections; shorter abatement duration; higher penalties	N/A
EO 11246	No impact on probability of receiving a federal contract compliance review	N/A
WARN	Increase in the probability of filing suit under WARN	No impact on the probability of providing advance notice to affected workers
ADA	N/A	Raise probability that firms comply with four core practices required by ADA
FMLA	Improve information to workers regarding rights and eligibility under FMLA	Increase probability that leave was fully paid by employer as provided

2007]

## WHY ENFORCEMENT MATTERS

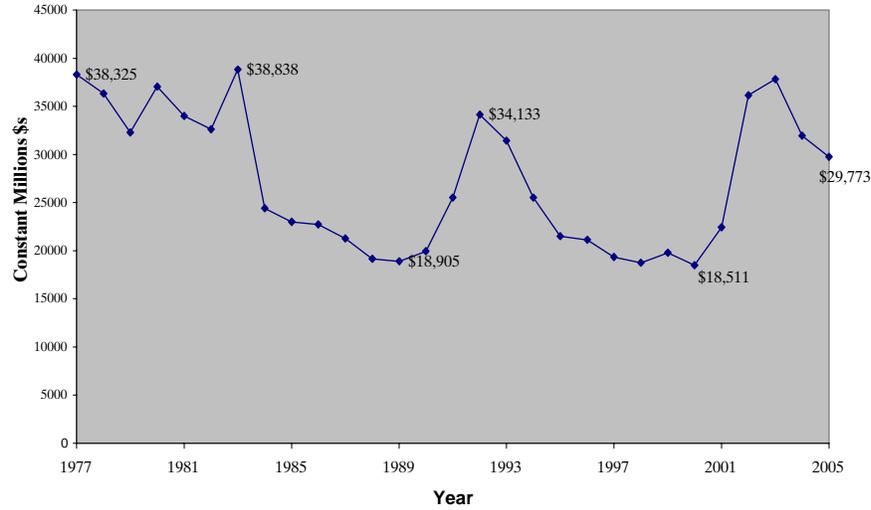
151

Unemployment Compensation	N/A	Increase probability of filing for benefits among eligible workers
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**Source:** 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).

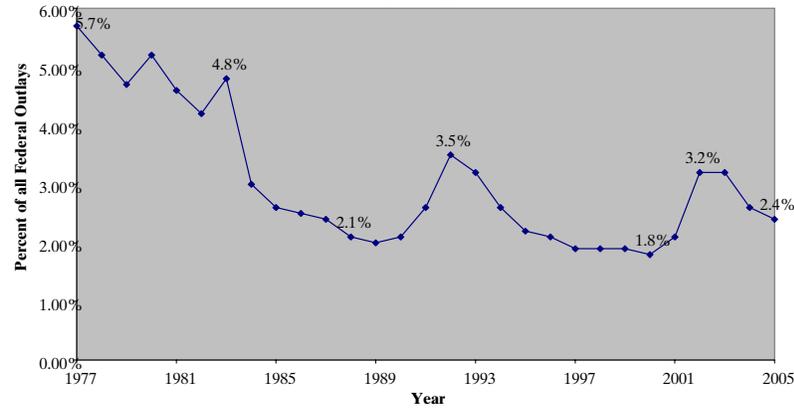
**Figure 3**  
**U.S. Department of Labor Outlays**  
**1977-2003 (Constant 1982-84 dollars)**

**Federal Outlays for U.S. Department of Labor, 1977-2005**  
 (Constant Million \$)



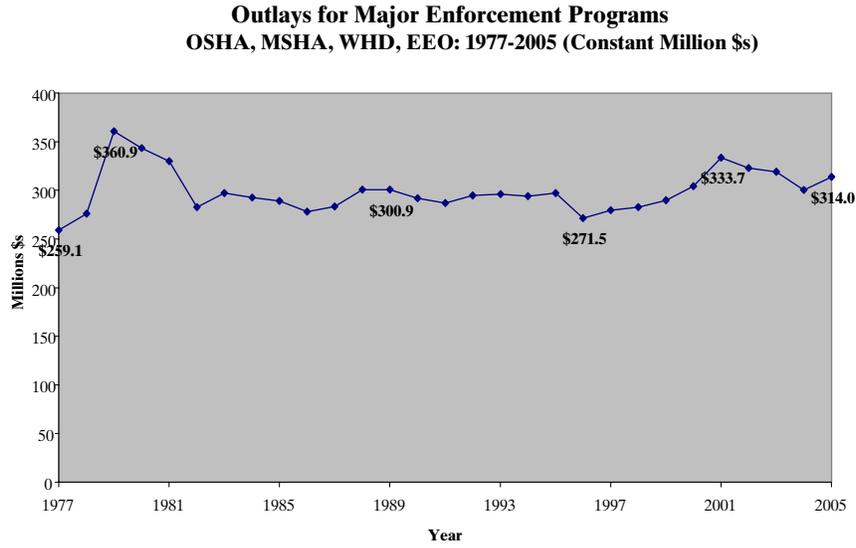
*Source: Budget of the U.S. Government, Various Years (Constant 1982-84 dollars).*

**U.S. Department of Labor - Percent of Outlays for Agency Relative to Total Federal Budget 1977-2005**



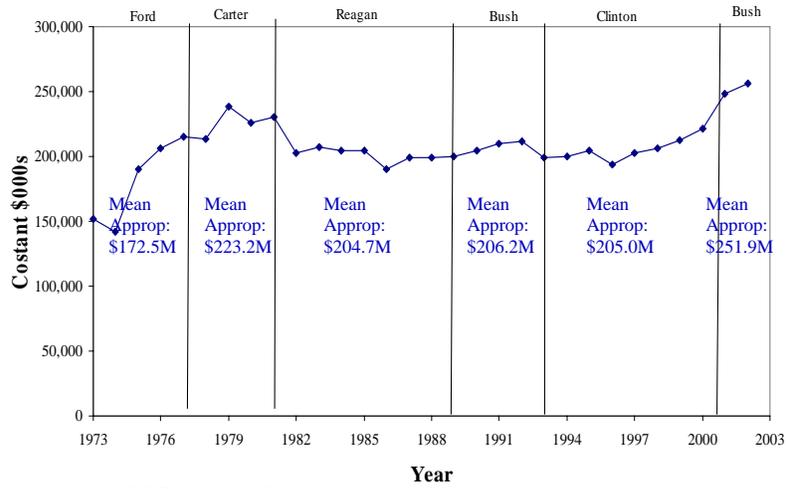
*Source: Budget of the U.S. Government, Various Years.*

**Figure 4**  
**Outlays for Major Workplace Regulatory Programs, 1977–2003**  
**(Constant 1982–84 dollars)**



*Source: Budget of the U.S. Government, Various Years (Constant 1982–84 dollars). Expenditures for enforcement activities of each agency only.*

**Figure 5**  
**OSHA Funding, 1973–2003**  
**(Constant 1982–84 dollars)**



Source: U.S. Budget, Various Years.