

Testimony to the House Civil Law Subcommittee of the Judiciary Committee
HB 2205: The Just Enforcement Act
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Good Morning Chair Power, Vice Chair Wallan and members of the Committee. Thank you for the opportunity to testify today on the importance of taking new approaches to boost enforcement of workplace laws, including proposals like the Just Enforcement Act.

My name is Terri Gerstein. I am providing this testimony in my personal capacity. I am the director of the state and local enforcement project at the Harvard Labor and Worklife Program, and a senior fellow at the Economic Policy Institute (EPI). The [Harvard Labor & Worklife Program](#), based at Harvard Law School, is Harvard University's center for research, teaching and creative problem solving related to the world of work and its implications for society. The [Economic Policy Institute](#) is a nonprofit, nonpartisan think tank that conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-wage workers, and assesses policies with respect to how well they further those goals.

Previously, I worked as a lawyer for New York State from 1999 through early 2017, enforcing minimum wage, overtime, and other worker protection laws. Among other state positions, I was Deputy Commissioner in the New York State Department of Labor (NYSDOL) from 2007 through 2011. As such, I was responsible for, among other things, overseeing the Labor Standards Division, which enforces the state's wage and hour and other labor standards laws. From 2011 through early 2017, I was the Labor Bureau Chief in the New York State Attorney General's Office, where we brought civil and criminal cases related to workplace laws, and also represented NYSDOL in court.

In my current role, I work with state and local enforcement agencies to help them build their capacity to enforce workplace laws, including convening of a working groups of various types of enforcers, including state attorney general offices and others. I am regularly in contact with lawyers and enforcement staff at various state and local agencies, of varying size and resource levels. One common thread I hear from virtually everyone doing this work on the government side, whether at the state or local level, is that there are not nearly enough resources to address the scope of the problem.

This anecdotal information that I hear from enforcement officials is borne out by statistics. As the economy has grown and the number of businesses has grown, enforcement resources – both federally and at the state level in most places – have not increased to meet the needs. For example, the U.S. Labor Department's Wage and Hour Division had one investigator per approximately 69,000 workers in 1978; the figure for 2018 was one investigator per 175,000 workers. Meanwhile, violations are widespread. A 2017 [EPI study](#) found that in the ten most

populous states, each year 2.4 million workers covered by state or federal minimum wage laws report being paid less than the applicable minimum wage in their state—approximately 17 percent of the eligible low-wage workforce. Workers’ losses averaged around \$3,300 per year.

Several broad workplace trends exacerbate this problem. One is the growth of what has been called the “[fissured workplace](#),” in which companies avoid the responsibility of being an employer through use of business models like subcontracting, using independent contractors, temporary agencies, or franchising. These fissured business models can often lead to higher rates of violations. Also, the [increase in forced arbitration](#) has made it impossible for a growing number of workers to bring cases in court on their own, leading to a much greater need for public enforcement. Moreover, [research](#) has shown that stronger immigration enforcement (such as that of the last four years) results in immigrant workers being less likely to report workplace violations.

The pandemic has made this situation worse. High unemployment makes it even harder for workers to complain about violations. A [recent study](#) showed a significant uptick in wage theft and workplace violations during the last recession, suggesting the need for more resources for enforcement. In short, there is a systemic crisis in which enforcement resources are insufficient to address widespread violations of workplace rights.

The goal of a labor enforcement agency is to bring employers into compliance. This requires myriad approaches, given the scope of the problem. Addressing and deterring serious violations is critical. To promote compliance, we need multiple enforcement tools that will provide workers with redress and deter wrongdoing. Currently, too many employers know they are unlikely to face serious consequences even for ongoing, serious, and harmful violations.

One important solution is, of course, adding more resources to currently-existing government agencies, such as the Bureau of Labor and Industries. This is essential. But this alone will not be enough for several reasons. First, there are tremendous burdens and demands on public budgets right now, so new positions are unlikely to be sufficient. The extent of violations, as described above, are of a scope that new approaches are also needed. Also, many workers, especially immigrant workers, are hesitant to seek help from government offices, and will be more likely to seek help from community or public interest organizations. Finally, even reasonably well-funded government agencies still often must triage and are unable to bring valid cases.

The Just Enforcement Act is a promising way of confronting the crisis in enforcement. It’s very similar to false claims acts, which have been around for decades (and in the case of the federal False Claims Act, since the Civil War era). The model is pretty simple: the Just Enforcement Act would allow whistleblowers to bring cases on behalf of the state and retain a portion of the penalties recovered.

Just as in New York and many other states, there is a *qui tam* bar of lawyers who bring false claims act cases – they root out fraud, deter violations, and bring in money for the government – this proposal would enable similar goals to be met: it would root out employer violations of important workplace laws, deter violations, and bring in money for the public coffers.

Laws like the Just Enforcement Act can be value added for state agencies seeking to protect workers' rights. This kind of proposal can help reach low wage workers, particularly in industries like agriculture, manufacturing, retail where workers have very little recourse or access to resources when workplace violations take place.

Several of the law's opponents who provided oral testimony expressed concerns that demonstrate a lack of understanding of this proposal in particular, and also in the general structure of enforcement schemes that incorporate different kinds of vehicles. I'd like to address two of the opponents' concerns in particular.

The Just Enforcement Act is not California's PAGA.

Numerous opponents pointed to what they perceived as negative consequences or shortcomings California's Private Attorneys General Act (PAGA) as a reason not to pass the Just Enforcement Act. Without opining on PAGA itself, it is important to recognize and to emphasize that this bill is not PAGA. There are a number of key differences. Among them: the JEA allows the responsible state official to move to dismiss the public enforcement action. It also allows the responsible state official to intervene in a public enforcement action and proceed with any and all claims in the action. The responsible state official may also request to be served with copies of all pleadings. And minor paystub violations would not be actionable under the Just Enforcement Act. As someone who served in state government in New York for over 17 years, serving all of the people of New York, I fully understand the importance of ensuring a strong business environment where companies of all kinds can thrive, and I also understand that not every claim brought by a worker is valid. The structure of this proposal has safeguards allowing ongoing control and involvement by the government agency, which would serve to protect against potential misuse.

Second, the Just Enforcement Act would not interfere with government enforcement.

Several opponents argued that this proposal would interfere with or somehow supplant government enforcement. These arguments were perplexing to me. Again, using false claims acts as an example: the existence of these laws and the *qui tam* bar only help the government to root out fraud. False claims act laws are additive and complementary with government enforcement, returning [millions of dollars](#) to the government annually. I have not heard of state medicaid fraud enforcers complaining that they are impeded by Medicaid-related false claims act lawsuits. In many areas of the law, there is potential for both private and public lawsuits: litigants who are not bound by forced arbitration provisions can file their own discrimination or wage and hour lawsuits, and yet there are also local, state, and federal agencies charged with and devoted to enforcing these laws. Multiple options for workers to vindicate their rights do not eviscerate government agency powers or create confusion; they are part of our overall system.

In my many years of enforcing laws, the impediments that most concerned us were limited resources, entrenched violations, inadequate legal tools, or repeat violators demonstrating impunity. Public interest or private sector lawyers bringing lawsuits under the same laws we enforced were simply not a problem. To the contrary, they often handled cases we could not. We found it frustrating and dispiriting when we were unable to handle all of the people who sought

our help with valid complaints; I hear this frustration also from other enforcers. Proposals like the Just Enforcement Act expand capacity, which benefits workers as well as strapped government agencies, public coffers, and honest employers who struggle to compete with companies that violate the law.

As someone who has spent my career working in government agencies enforcing labor laws, and now working with agencies nationwide enforcing workplace laws, my strong belief is that we need new approaches to address extensive violations occurring throughout our economy. Proposals like the Just Enforcement Act have the potential to meaningfully improve employer compliance and lead to more lawful conditions.