

“HEREINAFTER”: WORKPLACE PROTECTIONS, THE STATE ATTORNEY GENERAL’S SETTLEMENT TOOLKIT, AND INJUNCTIVE RELIEF

INTRODUCTION

The debate over workers’ rights rages on.

This is not a partisan issue. Scholars have argued that, echoing the “moment of contract supremacy” known as the *Lochner* era, coercive employment contracts are seeing widespread use for many private sector, nonunionized employees across the United States.¹ Though this is a highly critical view, it is true that regardless of these employees’ political persuasions, these contracts continue to impact workers’ ability to exit — “workers’ rights to quit or present a credible threat of quitting” — and their ability to exercise a voice, through mandatory arbitration, class/collective action waivers, and broadly chilling confidentiality and nondisparagement clauses.²

Nor is this just an adult issue. Terri Gerstein, the former Labor Bureau Chief for the New York Attorney General’s Office, questions why, in some parts of the country, we are arguing about whether children should work in meatpacking plants.³

Whether you believe these critiques or not, the discombobulation, or at least haze, of labor and employment protection efforts in the federal agencies should kindle much cause for concern. In a recent draft report for the U.S. Equal Employment Opportunity Commission (EEOC) that evaluates the EEOC’s federal hearings and appeals processes, the four primary insights were that the EEOC’s Office of Field Programs has a Handbook for Administrative Judges “with standard operating procedures for the hearings process that are *not followed by District and Field offices*,”⁴ organizational structures in some of these offices “*do not match the ideal structure defined by management*,”⁵ database development and upgrades “*do not match EEOC’s reporting and tracking needs*,”⁶ and the

¹ Jane Flanagan & Terri Gerstein, “*Sign on the Dotted Line*”: *How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It*, 54 U.S.F. L. REV. 441, 443 (2020).

² *Id.*

³ Terri Gerstein, Opinion, *Are We Actually Arguing About Whether 14-Year-Olds Should Work in Meatpacking Plants?*, N.Y. TIMES (Mar. 27, 2023), <https://www.nytimes.com/2023/03/27/opinion/child-labor-laws.html> [<https://perma.cc/Q86J-KPWN>].

⁴ THE CTR. FOR ORGANIZATIONAL EXCELLENCE, INC. & COHNREZNICK LLP ON BEHALF OF THE EQUAL EMP. OPPORTUNITY COMM’N OFF. OF INSPECTOR GEN., DRAFT REPORT: EVALUATION OF EEOC FEDERAL HEARINGS AND APPEALS PROCESSES 18 (2020) (emphasis added), <https://oig.eeoc.gov/sites/default/files/audits/Final%20report%20ofederal%20hearings%20and%20appeals%20processes.pdf> [<https://perma.cc/KN2Z-8LM9>].

⁵ *Id.* at 22 (emphasis added).

⁶ *Id.* at 25 (emphasis added).

appeals intake process “*consistently runs at a slower pace than needed* within [the Office of Federal Operations]’s Compliance and Control Division.”⁷ Cases at the National Labor Relations Board (NLRB) “take many months, and sometimes years, to resolve” — years during which workers are out of work and losing pay, “creat[ing] a huge incentive for employers to drag out proceedings, especially because, . . . if the employer is found liable for violating the law, it faces no monetary penalties, only the requirement to deliver back pay minus deductions.”⁸ And to take one striking example, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) “has been stretched increasingly thin” — WHD has only one investigator for every 135,000 workers, and the number of cases WHD investigated decreased by sixty-three percent from 1980 to 2015.⁹

The intersecting nature of the federal administrative state in this area exacerbates these inefficiencies. The NLRB, EEOC, and DOL each have different areas of enforcement within the U.S. federal labor, employment, and workers’ rights regime.¹⁰ Real-world practice has shown that these agencies can have overlapping jurisdiction, however, and the three have worked in tandem on joint initiatives, most recently to raise awareness about retaliation issues workers face when exercising

⁷ *Id.* at 28 (emphasis added).

⁸ LYNN RHINEHART & CELINE MCNICHOLAS, ECON. POL’Y INST., SHORTCHANGED — WEAK ANTI-RETALIATION PROVISIONS IN THE NATIONAL LABOR RELATIONS ACT COST WORKERS BILLIONS 2–3 (2021), <https://files.epi.org/uploads/225230.pdf> [<https://perma.cc/4693-M657>].

⁹ TERRI GERSTEIN & MARNI VON WILPERT, ECON. POL’Y INST., STATE ATTORNEYS GENERAL CAN PLAY KEY ROLES IN PROTECTING WORKERS’ RIGHTS 1–2 (2018), <https://files.epi.org/pdf/147025.pdf> [<https://perma.cc/2NE3-BB39>]. In this thirty-five-year time period, America has seen a balanced procession of six Presidents — three Democrats and three Republicans. See *List of Presidents of the United States*, BRITANNICA, <https://www.britannica.com/topic/Presidents-of-the-United-States-1846696> [<https://perma.cc/PE4U-NW9E>].

¹⁰ The NLRB is an independent federal agency tasked with carrying out responsibilities outlined in the National Labor Relations Act, 29 U.S.C. §§ 151–169. The NLRB is specifically “vested with the power to safeguard employees’ rights to organize, engage with one another to seek better working conditions, choose whether or not to have a collective bargaining representative negotiate on their behalf with their employer, or refrain from doing so.” *Who We Are*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are> [<https://perma.cc/V3RY-FWNG>]. The EEOC enforces “federal laws that make it illegal to discriminate against a job applicant or an employee.” *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/overview> [<https://perma.cc/MC69-UV4G>]. DOL is the most general agency and covers essentially everything else; its mission is “[t]o foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.” *About Us*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol> [<https://perma.cc/M796-F697>]. DOL “administers and enforces more than 180 federal laws” covering topics like wages and hours, workplace safety and health, workers’ compensation, and the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.). *Summary of the Major Laws of the Department of Labor*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/majorlaws> [<https://perma.cc/UW4K-EKV3>].

their protected labor rights.¹¹ But it is unclear if one agency's inefficiencies should be interpreted as a death knell or cause for hope. Professor Benjamin I. Sachs argues for the latter — in light of modern administrative failures at the NLRB, perhaps overcoming the traditionally strict delineations between the three agencies is a solution of overlapping jurisdiction and more rights protections.¹² The NLRB enforces the National Labor Relations Act,¹³ the DOL enforces the Fair Labor Standards Act of 1938,¹⁴ and the EEOC enforces Title VII of the Civil Rights Act of 1964.¹⁵ Yet, regardless of the *room* or *capacity* for such cooperation, purely on the face of the intersections of these statutes, in practice the intersection of each agency's inefficiencies may cause even more dysfunction. One wonders if these recent numbers are but a death knell, sounding louder than Sachs's now decades-ago hope.

If they get there, private employees might believe that the federal courts will protect them — after all, they have already won their agency adjudications. But many assert that private employees have found scant solace in those courts. One commentator criticizes the Ninth Circuit's 2019 holding that “McDonald's is not liable for labor law violations at its franchisees' restaurants due to its lack of control over the ‘day-to-day operations’ of the franchises.”¹⁶ Another posits that in 2022, the Fourth Circuit read an adverseness requirement into its ability to enforce an NLRB consent order, “refusing to exercise its statutorily granted authority to enforce the Board order . . . [and] interfer[ing] with Congress's [Article I] ability to determine the contours of the labor law regime.”¹⁷ Finally, two leading scholars contend that, with its decision in *Epic Systems Corp. v. Lewis*,¹⁸ “[t]he Supreme Court has . . . told the

¹¹ Press Release, U.S. Equal Emp. Opportunity Comm'n, U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights (Nov. 10, 2021), <https://www.eeoc.gov/newsroom/us-department-labor-national-labor-relations-board-us-equal-employment-opportunity> [https://perma.cc/9C5U-JYZV]; see also J. Clay Smith, Jr., Comm'r, Equal Emp. Opportunity Comm'n, Address Before the National Institute on Labor Relations Law: Overlapping Jurisdiction of the Equal Employment Opportunity Commission and the National Labor Relations Board (May 1, 1980), https://dh.howard.edu/cgi/viewcontent.cgi?article=1001&context=jcs_speeches [https://perma.cc/9S65-CLKE] (“[T]he most overwhelming impression I came away with after studying overlapping jurisdiction is that the Equal Employment Opportunity Commission and the National Labor Relations Board should work more closely together to eliminate invidious employment discrimination. Our two agencies must better utilize each other's resources and expertise.”).

¹² Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2744 (2008).

¹³ 29 U.S.C. §§ 151–169.

¹⁴ *Id.* §§ 201–219.

¹⁵ 42 U.S.C. §§ 2000e to 2000e-17.

¹⁶ *Recent Case: Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019), HARV. L. REV. BLOG (Oct. 18, 2019), <https://harvardlawreview.org/blog/2019/10/recent-case-salazar-v-mcdonalds-corp> [https://perma.cc/BC55-B3X8].

¹⁷ *Recent Case, NLRB v. Constellation Rolled Products Ravenswood, LLC*, 43 F.4th 395 (4th Cir. 2022), 136 HARV. L. REV. 1022, 1022 (2023).

¹⁸ 138 S. Ct. 1612 (2018).

nation’s workers: [i]f you’re underpaid at work, or if you face discrimination on the job, you’re on your own.”¹⁹

It is time to turn to public enforcement at the state level. Private remedies are hamstrung in our current environment. Whether or not you agree with the above assessments of the federal courts, existing administrative deficiencies mean that most private remedies move at a glacial pace. The most attractive and obvious option is state attorneys general, who nimbly:

enforce state laws, educate the public about important rights, propose legislation, file amicus briefs, produce reports, author op-eds, issue opinion letters, make public statements that garner media and public attention, submit comments and provide testimony on state and federal legislation, and, in recent years, have sued the federal government over matters of national importance.²⁰

State attorneys general, regardless of political party, are all “law enforcement officials. . . . [W]hen egregious violations of the law are brought to their attention, [they] are perfectly able and willing to put aside philosophical differences, roll up their sleeves and work together to enforce the law.”²¹ And, in light of recent hostility shown in federal courts and federal agencies toward worker protections, state attorneys general seem better suited than private parties to provide effective and timely relief for vulnerable workers and are already working to effect positive change. There is a need for a different solution that can bring back more dignity for American workers.²²

This Note explores the unique goals and importance of injunctive relief terms in labor enforcement settlements by state attorneys general. Part I provides a brief overview of state attorney general action to protect workers’ rights in the labor and employment space, as well as a relevant constitutional-federalism critique. Part II breaks down the anatomy of a state attorney general settlement to show that injunctive relief is a tool uniquely situated to achieve both direct righting of specific wrongs and broader effects on an industry/practice. Part III considers examples of the composition and objectives of injunctive relief in five specific labor-violation contexts: subcontracting and employee misclas-

¹⁹ Terri Gerstein & Sharon Block, Opinion, *Supreme Court Deals a Blow to Workers*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/opinion/supreme-court-arbitration-forced.html> [<https://perma.cc/5GUD-UJQF>].

²⁰ GERSTEIN & VON WILPERT, *supra* note 9, at 3.

²¹ James Tierney, *What an Expanding State AG Multi-state Lawsuit Against Drugmakers Says About Partisanship*, STATEAG.ORG: TIERNEY BLOG (May 13, 2019), <https://www.stateag.org/tierney-blog/2019/5/13/what-an-expanding-state-ag-multi-state-lawsuit-against-drugmakers-says-about-partisanship> [<https://perma.cc/F5S5-3NY7>].

²² See, e.g., *Franklin and Eleanor Roosevelt: Human Rights and the Creation of the United Nations*, GEO. WASH. UNIV.: ELEANOR ROOSEVELT PAPERS PROJECT, <https://erpapers.columbia.edu/franklin-and-eleanor-roosevelt-human-rights-and-creation-united-nations> [<https://perma.cc/89N8-268P>].

sification, unpaid wages and compensation, noncompete/no-poach agreements, discrimination, and obstruction of investigations.

Ultimately, this Note's catalog of settlement language and converging goals across various state attorney general's offices aims to (1) provide a response to the constitutional-federalism critique raised in Part I, and (2) serve as a guide or launchpad for state attorneys general to modify or start their own forays into workplace rights protection that is so critically needed.

I. STATE ATTORNEYS GENERAL AND WORKERS' RIGHTS

A. Background

State attorneys general "share a core commitment to the enforcement of state laws" but vary widely in funding and organizational structure, criminal jurisdiction, responsibility for representing state agencies, and resources.²³ However, there are dedicated labor units in the attorney general's offices of several states, including California, Massachusetts, New York, the District of Columbia, Illinois, Pennsylvania, and Washington.²⁴ State attorneys general, through varying authority to enforce state laws, "have played an affirmative role in protecting workplace rights."²⁵ Some are explicitly granted civil or criminal enforcement jurisdiction, others work through referral or varying cooperative arrangements with state labor departments and state government agencies to take on workers' rights cases and investigations, and still others without any specific charge to enforce labor laws "may utilize labor statutes as well as other bases for jurisdiction to address workplace issues."²⁶

An attorney general's office's protection of workplace rights takes many forms. In 2023, California Attorney General Rob Bonta and New York Attorney General Letitia James launched a joint investigation concerning employment discrimination and hostile work environment allegations against the National Football League (NFL), with both attorneys general noting broad concerns about companies being too big or powerful to escape accountability.²⁷ In 2022, New York

²³ GERSTEIN & VON WILPERT, *supra* note 9, at 2–3.

²⁴ *Id.* at 3.

²⁵ *Id.* at 4.

²⁶ *Id.* at 4–5 (noting, as an example, the Illinois AG's use of the state's Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. ANN. 505 (West, Westlaw through P.A. 103-585 of 2024 Reg. Sess.), to pursue independent contractor misclassification cases).

²⁷ Press Release, Off. of the N.Y. State Att'y Gen., Attorneys General James and Bonta Launch Investigation into National Football League's Workplace Practices and Culture (May 4, 2023), <https://ag.ny.gov/press-release/2023/attorneys-general-james-and-bonta-launch-investigation-national-football-leagues> [https://perma.cc/TLG3-SUMW]. New York Attorney General James stated that "[n]o person should ever have to endure harassment, discrimination, or abuse in the workplace No matter how powerful or influential, no institution is above the law, and we will

Attorney General James also announced an agreement with Marriott International, Inc. that provided “hundreds of previously terminated workers with more than \$2.9 million in undelivered severance pay.”²⁸

B. *The No-Poach Conundrum*

No-poach agreements have attracted especially significant enforcement attention by state attorneys general. No-poach agreements and provisions “artificially restrict competition for labor” by “prohibit[ing] employees from moving between locations of the same corporate chain, and prohibit[ing] employees from accepting employment at another franchise location.”²⁹ Because these provisions appear in franchise agreements between franchise owners (franchisees) and the managing corporations (franchisors), “[e]mployees are often unaware the provisions exist” and the provisions “are often invisible to those whose mobility is restricted” until the employees try to seek other employment opportunities.³⁰ However, while state attorney general efforts to eliminate no-poach agreements have been celebrated for their far-reaching solutions to restrictions on worker mobility and freer labor markets,³¹ these efforts have also teed up an important constitutional-federalism critique. This Note’s study of injunctive relief terms may offer a solution.

In 2019, then–Pennsylvania Attorney General Josh Shapiro and then–Massachusetts Attorney General Maura Healey led a fourteen-state settlement in which “four national fast food franchisors agreed to cease using ‘no-poach’ agreements that restrict the rights of fast food workers to move from one franchise to another within the same restaurant chain.”³² Following up on a multistate investigation announced in

ensure the NFL is held accountable.” *Id.* California Attorney General Bonta stated that “California will not tolerate any form of discrimination No company is too big or popular to avoid being held responsible for their actions.” *Id.*

²⁸ Press Release, Off. of the N.Y. State Att’y Gen., Attorney General James Recovers More than \$2.9 Million for Hundreds of New York City Marriott Workers Denied Full Severance Pay (May 5, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-recovers-more-29-million-hundreds-new-york-city-marriott> [https://perma.cc/7WJN-FJFG].

²⁹ WASH. STATE ATT’Y GEN.’S OFF., NO-POACH INITIATIVE: ENDING A RIGGED SYSTEM FOR HOURLY EMPLOYEES AT CORPORATE FRANCHISES 4 (2020) [hereinafter WASHINGTON NO-POACH REPORT], https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf [https://perma.cc/4GKJ-HRY8].

³⁰ *Id.*

³¹ See, e.g., Rachel Abrams, *8 Fast-Food Chains Will End “No-Poach” Policies*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html> [https://perma.cc/S7VZ-3GTF].

³² Press Release, Pa. Off. of Att’y Gen., AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 12, 2019), <https://www.attorneygeneral.gov/taking-action/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements/> [https://perma.cc/D3V7-497H]. In addition to the District of Columbia, the thirteen states that joined the settlement were California, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Vermont. *Id.*

July 2018 “over concerns that no-poach agreements hurt low-wage workers by limiting their ability to secure better paying jobs,” the states entered into settlement agreements under which Dunkin’, Arby’s, Five Guys, and Little Caesars agreed to: (1) “stop including no-poach provisions in any of their franchise agreements,” (2) “stop enforcing any franchise agreements already in place,” (3) “amend existing franchise agreements to remove no-poach provisions,” (4) “ask their franchisees to post notices in all locations to inform employees of the settlement,” and (5) “notify the attorneys general if one of their franchisees tries to restrict any employee from moving to another location under an existing no-poach provision.”³³

Washington Attorney General Bob Ferguson has taken the most significant initiative against no-poach practices. Attorney General Ferguson’s two-year investigation “eliminated no-poach clauses in franchise agreements *nationwide for every company that has three or more locations in Washington*.”³⁴ As a result of this initiative, “237 corporate franchisors, ranging from McDonald’s to Jiffy Lube, signed legally binding agreements to end no-poach practices nationwide, covering more than 4,700 Washington locations and nearly 200,000 locations across the country.”³⁵ In Attorney General Ferguson’s final report on the initiative, he particularly highlighted how no-poach practices “decrease competition for the labor of franchise employees, which can lead to reduced opportunities and stagnant wages, and can diminish competition for better benefits and working conditions.”³⁶ A recent study unaffiliated with Attorney General Ferguson’s initiative considered a total of 847,984 online job postings — 113,271 on Glassdoor from January 2008 through December 2021 and 734,713 on Burning Glass Technologies from January 2017 through December 2021 — and found that Attorney General Ferguson’s initiative materially increased annual earnings (based on what was advertised).³⁷

But should a single state attorney general be able to eliminate no-poach agreements within national businesses and franchises, jumping the geographic boundaries of their particular states? The underlying constitutional-federalism critique is this: “[S]hould an elected official in Olympia, Washington, or any other state capital, be regulating the terms

³³ *Id.*

³⁴ Press Release, Wash. State Off. of the Att’y Gen., AG Report: Ferguson’s Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (June 16, 2020) (emphasis added), <https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate> [https://perma.cc/6B55-FUQU].

³⁵ *Id.*

³⁶ WASHINGTON NO-POACH REPORT, *supra* note 29, at 4.

³⁷ Brian Callaci et al., *The Effect of Franchise No-Poaching Restrictions on Worker Earnings* 27, 40 tbl. 2 (IZA Inst. of Lab. Econ., Working Paper No. 16330, 2023), <https://ssrn.com/abstract=4521246> [https://perma.cc/F9ZN-RA7A].

of franchise agreements nationwide?”³⁸ Perhaps Attorney General Ferguson, in attempting to impose his “public policy views on purely out-of-state transactions, . . . is usurping the role of the federal government and interfering with the sovereignty of [Washington’s] sister states in violation of the dormant Commerce Clause.”³⁹ The Supreme Court’s recent decision in *National Pork Producers Council v. Ross*,⁴⁰ where eight Justices discussed the dormant commerce clause in their decision-making,⁴¹ whispers that the constitutional-federalism threat could have teeth if a state attorney general faces it in court.⁴²

This threat is disarmed, however, when a state attorney general pursues a settlement with a similar aim as Attorney General Ferguson’s in going after no-poach agreements — attaining long-lasting impact beyond just one specific case — but does not reach outside of that attorney general’s state. The argument that a sort of constitutional-federalism legal cloud looms over Attorney General Ferguson’s initiative relies on the dormant commerce clause’s restriction on an initiative that “directly regulates out-of-state transactions.”⁴³ However, what if a state attorney general wants to do more than what Attorney General Ferguson did from a *depth* point of view — say, by adding extremely stringent notice requirements (for example, making the defendant inform even past employees of the defendant’s agreement to remove all no-poach provisions) as injunctive terms in their settlement — but limit the *breadth* to just their specific state?⁴⁴ There could be no dormant commerce clause argument against that injunctive approach.

The remainder of this Note builds an initial study of injunctive relief terms in labor settlements. Such terms are a particularly appealing option for state attorneys general pursuing protection of workplace rights because, viewed in the light of the aforementioned constitutional-federalism counterargument, they are a high-depth, single-state-focused relief option. In the context of Attorney General Ferguson’s initiative, if injunctive restrictions on no-poach agreements have accomplished so many benefits for workers’ rights — and editing one dimension of that

³⁸ Michael L. Sturm, *The State of Washington’s Attempt to Ban Franchise Anti-poaching Provisions Nationwide Violates Constitutional Limitations on State Power to Regulate National Commerce*, 39 *FRANCHISE L.J.* 169, 170 (2019).

³⁹ *Id.* at 172.

⁴⁰ 143 S. Ct. 1142 (2023).

⁴¹ *See id.* at 1150; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part). *But see id.* at 1172 (Kavanaugh, J., concurring in part and dissenting in part) (grounding opinion in discussion of burden on interstate commerce, the Import-Export Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause — though, one might suggest that Justice Kavanaugh also considered the dormant commerce clause by implication given his joining in full of the opinion of Chief Justice Roberts).

⁴² “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

⁴³ Sturm, *supra* note 38, at 184.

⁴⁴ This exact hypothetical comes from an actual settlement discussed later. *See infra* notes 106–111 and accompanying text.

injunctive relief (here, national versus one-state breadth) could eliminate a core argument against the initiative's constitutionality — learning about different attorney general's offices' approaches to injunctive relief could drive even more new workers' rights protections if increasingly implemented. This understanding of injunctive relief options could also inspire further reflections on how this protective theory against the constitutional-federalism counterargument may fare if actually raised in court.

II. STATE ATTORNEY GENERAL SETTLEMENTS AND THE INCENTIVES INVOLVED

A. *The Anatomy of a Labor Settlement*

A basic settlement or consent decree with a state attorney general can be split into six general categories and objectives: case background, release, enforcement, monetary terms, injunctive terms, and miscellaneous provisions.

For the sake of simplicity, this discussion considers the anatomy of a labor settlement mostly through the lens of a recent consent decree Illinois Attorney General Kwame Raoul filed to resolve a lawsuit (*Greenridge*) from his office against Greenridge Farms Inc. (Greenridge), a meat-processing company based in Elk Grove Village, Illinois.⁴⁵ *Greenridge* was the result of a joint investigation conducted by the Illinois Attorney General's Office and the DOL, and the settlement mainly required Greenridge “to pay \$3 million in back wages and damages to resolve allegations that Greenridge failed to pay overtime wages to over 282 now-current and former employees.”⁴⁶ The investigation uncovered Greenridge's intentional denial of 283 workers' “full-earned wages for a seven-year period” in violation of overtime requirements outlined in the Illinois Minimum Wage Law⁴⁷ and the federal Fair Labor Standards Act.⁴⁸

First is the case background detailing the parties involved, definitions of relevant terms, and the litigation/investigation thus far. Most importantly, the state attorney general will begin the case background by noting their statutory and/or common law authority to bring the action. In the case of *Greenridge*, Attorney General Raoul claimed authorization under the Illinois Attorney General Act⁴⁹ “to initiate and

⁴⁵ Press Release, Off. of the Ill. Att'y Gen. Kwame Raoul, Attorney General Raoul Reaches Settlement with Meat Processing Company over Unpaid Overtime Wages (Dec. 20, 2023), <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-reaches-settlement-with-meat-processing-company-over-unpaid-overtime-wages> [https://perma.cc/LH4J-GUWH].

⁴⁶ *Id.*

⁴⁷ 820 ILL. COMP. STAT. ANN. 105 (West, Westlaw through P.A. 103-585 of 2024 Reg. Sess.).

⁴⁸ Press Release, Off. of the Ill. Att'y Gen. Kwame Raoul, *supra* note 45.

⁴⁹ 15 ILL. COMP. STAT. ANN. 205/4, 205/6.3(b) (West, Westlaw through P.A. 103-585 of 2024 Reg. Sess.).

enforce, on behalf of persons with this State, all legal proceedings on matters related to the payment of wages, including but not limited to the provisions of the Minimum Wage Law and the Wage Payment and Collection Act⁵⁰.⁵¹ At other times, a state attorney general will proclaim broader authority — former Illinois Attorney General Lisa Madigan, for example, claimed authority to pursue a 2016 consent decree with Jimmy John’s “for [its] alleged violations of the [Illinois] Consumer Fraud and Deceptive Business Practices Act⁵² and through her common law and *parens patriae* authority as Attorney General to represent the people of the State.”⁵³ *Parens patriae* (parent of the country) actions are actions by state attorneys general that seek “to vindicate states’ sovereign and quasi-sovereign interests . . . [by] recover[ing] costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state’s citizenry.”⁵⁴

Second is the release. After a brief note on the scope and duration of the settlement (for example, detailing the effective date and binding nature of the settlement on the defendant and its future directors, officers, and managers), the settlement may “release[] and discharge[] [the defendant] from all facts and claims raised in this litigation under the [relevant labor statutes] on behalf of or in relation to the [wronged] individuals.”⁵⁵

Third is the enforcement of the settlement terms, which is not precluded and kicks in if the attorney general’s office “believes that [d]efendants have not fulfilled [their] obligations under the Decree.”⁵⁶ The enforcement sections may build in a notification requirement for defendants in breach, occasionally specifically tailored to different relief terms of the settlement. For example, the *Greenridge* consent decree grants that the attorney general’s office will notify the party in writing of the violation “and give the party 15 calendar days from the receipt of the notification to remedy the noncompliance to the [attorney general’s office’s] satisfaction” before the attorney general’s office “fil[es] a motion

⁵⁰ 820 ILL. COMP. STAT. ANN. 115 (West, Westlaw through P.A. 103-585 of 2024 Reg. Sess.).

⁵¹ Consent Decree ¶ 1, *State ex rel. Raoul v. Greenridge Farm, Inc.*, No. 2023CH06790 (Ill. Cir. Ct. Dec. 19, 2023) [hereinafter *Illinois-Greenridge Settlement*].

⁵² 815 ILL. COMP. STAT. ANN. 505 (West, Westlaw through P.A. 103-585 of 2024 Reg. Sess.).

⁵³ Final Order and Consent Decree at 1, *State ex rel. Madigan v. Jimmy John’s Enters., LLC*, 2016 CH 07746 (Ill. Cir. Ct. Dec. 6, 2016) (citation omitted) [hereinafter *Illinois-Jimmy John’s Settlement*].

⁵⁴ Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, The Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863 (2000); *see also* *State v. Lead Indus. Ass’n*, 951 A.2d 428, 471 (R.I. 2008) (“[A]ttorneys general have additional special duties which, because of the nature of that ancient and powerful governmental office, differ from those of the usual advocate. Unlike other attorneys who are engaged in the practice of law, the Attorney General ‘has a common law duty to represent the public interest.’” (footnote omitted) (quoting *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005))).

⁵⁵ *Illinois-Greenridge Settlement*, *supra* note 51, ¶ 29.

⁵⁶ *Id.* ¶ 33.

for judgment to enforce Paragraph 49 of the Decree.”⁵⁷ Paragraph 49 is a monetary relief term that outlines a payment schedule of the specific monthly deadlines by which Greenridge must pay out the settlement amount.⁵⁸ For “any other provisions of the Decree,” however, the Illinois Attorney General’s Office must “give the party 45 calendar days.”⁵⁹

Fourth is monetary terms. The total settlement payout in a settlement with an attorney general’s office includes not only the typical litigation payments of compensatory damages, punitive damages, and attorneys’ fees, but also civil penalties.⁶⁰

Fifth is injunctive terms. These are nonmonetary enforcement tools that span a variety of conduct based on what is at issue, as discussed in Part III, but generally “address the conduct alleged to be discriminatory” or in violation of the law and “should be drafted with a view to effective enforcement if similar conduct recurs.”⁶¹ The *Greenridge* settlement’s injunctive terms covered future violations of the Illinois minimum wage law, timekeeping software for tracking hours, production of such hours-worked data, provision of weekly paychecks to nonexempt employees, and proof of compliance to be submitted to the Illinois Attorney General’s Office.⁶² These are necessarily forward-looking, focusing on “hereinafter.”⁶³

Sixth is miscellaneous provisions. Some have critical importance unique to settlements with state attorneys general. In the *Greenridge* settlement, sandwiched between the written consent requirement and clarification about digital signatures is an agreement that the defendants “consent to the exclusive jurisdiction of and venue in the Circuit Court of Cook County, Illinois for the purposes of adjudicating any matter arising out of or relating to this litigation or this Decree.”⁶⁴ State court

⁵⁷ *Id.* ¶ 35.

⁵⁸ *Id.* ¶ 49.

⁵⁹ *Id.* ¶ 36.

⁶⁰ Amy Pritchard Williams, Ryan Strasser & Ashley Taylor, *State Attorney General Actions: Strategies for Venue and Settlement Differ from Typical Litigation*, REUTERS (Feb. 16, 2023, 10:43 AM), <https://www.reuters.com/legal/legalindustry/state-attorney-general-actions-strategies-venue-settlement-differ-typical-2023-02-16> [https://perma.cc/9NZW-2L33].

⁶¹ *Settlement Standards and Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/regional-attorneys-manual/settlement-standards-and-procedures#section2b2> [https://perma.cc/6UGT-8CNS]. For another example of federal guidance in a different legal context, see Memorandum from Lawrence E. Starfield, Acting Assistant Adm’r, EPA, to Reg’l Couns. & Deputies on Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements (Apr. 26, 2021), <https://www.epa.gov/sites/default/files/2021-04/documents/usingallappropriateinjunctiverelieftoolsincivilenforcementsettlemento426.pdf> [https://perma.cc/CUZ2-GFKQ] (describing advanced monitoring, audits and independent third-party verification, electronic reporting, and increased public transparency of compliance data as possible environmental enforcement injunctive tools).

⁶² Illinois-Greenridge Settlement, *supra* note 51, ¶¶ 38–45.

⁶³ See, e.g., *id.* ¶ 38 (“Greenridge and KLC Global, their officers — including Michael and Sebastian — agents, and employees are enjoined from hereinafter engaging in violations of the IMWL . . .”).

⁶⁴ *Id.* ¶ 73.

venue and jurisdiction are a critical procedural disadvantage for defendants because “[s]tate courts, on balance, are typically less defendant-friendly than federal courts, and out-of-state defendants who use outside counsel are typically not familiar with local practice in state courts — especially not to the degree that [attorney general’s offices], who practice primarily in those same state courts, are.”⁶⁵

B. Settlement Incentives

The anatomy of a settlement with a state attorney general is crucial not only for that particular enforcement but also for future private litigation and industry standards. Because “defendants often face new and expensive private lawsuits for the same conduct” following the settlement of an enforcement action by a state attorney general, law firms urge their clients to strategically maximize the preclusive effect of settlements with state attorneys general.⁶⁶ One law firm emphasizes three strategies for maximizing preclusion likelihood: (1) negotiating with state attorneys general so that the underlying statutory basis for the enforcement action becomes a statute without a private right of action, (2) broadening the statement of facts in the settlement documents to decrease a private plaintiff’s likelihood of establishing claims “sufficiently distinct from the government’s case to withstand dismissal,” and (3) pushing to pay restitution rather than for injunctive relief or civil penalties.⁶⁷

This third strategy is of particular importance in the context of labor enforcement. When facing an enforcement action by a state attorney general, a defendant has incentives to negotiate “restitution that encompasses potential plaintiffs” over injunctive relief or civil penalties because doing so will “optimize the success of a future claim preclusion defense.”⁶⁸ Professor D. Theodore Rave, writing in the class action context, similarly argues: “On the conventional account, *peace* is the whole point of a . . . settlement. By settling, the defendant buys preclusion”⁶⁹

In the labor context, state attorneys general arguably have somewhat opposite settlement incentives because of “their different yet complementary powers” vis-à-vis state labor departments and other state

⁶⁵ Williams, Strasser & Taylor, *supra* note 60.

⁶⁶ See, e.g., Winston Chan, Charles Stevens & Justine Kentla, *Structuring California Attorney General Settlements to Maximize Preclusive Effect on Private Litigants*, GIBSON, DUNN & CRUTCHER LLP (Sept. 7, 2022), <https://www.gibsondunn.com/structuring-california-attorney-general-settlements-to-maximize-preclusive-effect-on-private-litigants> [<https://perma.cc/AW3V-R3FG>].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 477 (2016) (emphasis added).

officials.⁷⁰ “State labor departments are generally the primary regulator or enforcer” in most states, and they pursue a high volume of cases with primarily investigator-composed enforcement staff.⁷¹ State attorneys general, on the other hand, because of their more limited-volume operations, “generally bring cases with a strategic or impact litigation focus, aiming to have a broader effect on an industry or practice.”⁷² At the same time, at least one state high court has emphasized that, unlike state officials such as public examiners — who often possess limited statutory authority to investigate — state attorneys general often possess statutorily granted “‘broad and comprehensive authority to investigate’ potential violations of state law and ‘conduct discovery’” with wide-reaching civil investigative demands.⁷³

Thus, state attorneys general deciding to weigh in on labor issues must constantly balance limited-volume operations with broad investigative authority. Of course, this reality does not mean that all state attorneys general pursue strategic or impact litigation only when it comes to labor. However, this difficult balance does mean that state attorneys general must carefully consider what types of legal action will accomplish the largest benefit while imposing the least strain on the resources of state attorney general’s offices.

Of the available options in the state attorney general’s settlement toolkit, injunctive relief seems to strike this balance best. Injunctive relief not only directly responds to the specific wrongs at issue in each case or investigation, but also — by having a broader deterrent effect — eases caseload pressure on attorney general’s offices’ comparatively limited-volume operations. In providing such relief, state attorneys general would complement federal recognition that injunctions are particularly effective in the enforcement of labor and employment regulations.⁷⁴

III. INJUNCTIVE RELIEF AND THE MODERN LABOR ENFORCEMENT SETTLEMENT

Injunctive relief terms in recent labor enforcement settlements vary widely based on the violation involved. Many settlements begin with a

⁷⁰ TERRI GERSTEIN, ECON. POL’Y INST., WORKERS’ RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL 4 (2020).

⁷¹ *Id.* at 3.

⁷² *Id.* at 4.

⁷³ *Madison Equities, Inc. v. Off. of Att’y Gen.*, 967 N.W.2d 667, 672 (Minn. 2021) (quoting *Curtis v. Altria Grp., Inc.*, 813 N.W.2d 891, 898 (Minn. 2012)).

⁷⁴ *See, e.g.*, Memorandum GC 23-01 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Regional Directors, Officers-in-Charge & Resident Officers 1 (Oct. 20, 2022) (on file with the Harvard Law School Library) (“Section 10(j) injunctions are one of the most important tools available to effectively enforce the [National Labor Relations Act].”); News Release, U.S. Dep’t of Lab., US Department of Labor Seeks Nationwide Court Injunction to Stop Packers Sanitation Services’ “Oppressive Child Labor” Violations at Processing Facilities (Nov. 9, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221109> [<https://perma.cc/NSP3-35A5>].

broad injunction against “hereinafter engaging in violations of” the relevant labor law statutes violated.⁷⁵ Most injunctive relief terms are not generally worded bans on engaging in similar violations.

The District of Columbia Attorney General settled a case about a subcontracting managing company, and the Notice of Settlement term there required delivery of the settlement “to each of [the managing company’s] current and future principals, officers, directors, and managers who have managerial authority with respect to the subject matter of this Settlement Agreement.”⁷⁶ In a different case involving noncompetition provisions signed by all employees instead of management, one settlement between the Illinois Attorney General and the fast-food restaurant chain Jimmy John’s included notice to not only franchise managers but also notice “to the last known email addresses of *all current Store Employees* who might have signed an agreement containing a Non-Competition Provision.”⁷⁷ Thus, even Notice of Settlement terms vary by case.

Therefore, the following analysis considers specific executed labor settlement terms, organized by violation, to provide an outline of existing wording and emphasized objectives that state attorneys general around the country are currently applying.⁷⁸

A. *Subcontracting and Employee Misclassification*

On August 7, 2023, District of Columbia Attorney General Brian L. Schwalb entered into a settlement agreement with Prestige Drywall LLC, a Virginia company that completed construction projects in D.C. both “by contracting directly with dozens of workers” and “by entering into agreements with subcontractors, who in turn supplied Prestige Drywall with construction workers.”⁷⁹ Attorney General Schwalb’s allegation was that, during the subcontracting period of projects from 2018 to 2023, Prestige Drywall’s direct engagements and subcontracted workers “were often misclassified as independent contractors when they should have been classified as employees,” in violation of three D.C. laws⁸⁰ — the Workplace Fraud Amendment Act of 2012,⁸¹ the

⁷⁵ See, e.g., Illinois-Greenridge Settlement, *supra* note 51, ¶ 38.

⁷⁶ Settlement Agreement: *In re* Prestige Drywall LLC ¶ 17, D.C. Off. of the Att’y Gen. (Aug. 7, 2023) [hereinafter D.C.-Prestige Drywall Settlement], <https://oag.dc.gov/sites/default/files/2023-08/2023.08.07-Prestige-Drywall-Draft-Settlement-%28fully-executed%29-.pdf> [https://perma.cc/B3EJ-Y6TH].

⁷⁷ Illinois-Jimmy John’s Settlement, *supra* note 53, ¶ 6 (emphasis added).

⁷⁸ This Note at times considers, within one type of violation, examples from multiple different settlements to reflect convergence and divergence in the array of options used around the country.

⁷⁹ D.C.-Prestige Drywall Settlement, *supra* note 76, ¶¶ 2–3.

⁸⁰ *Id.* ¶ 4.

⁸¹ D.C. CODE §§ 32-1331.01 to .15 (West, Westlaw through Jan. 5, 2024).

Minimum Wage Act Revision Act of 1992,⁸² and the Accrued Sick and Safe Leave Act of 2008.⁸³

The D.C.-Prestige Drywall settlement contains three buckets of injunctive terms. First, under a “Certified Payroll” term, Prestige Drywall is mandated to “require all subcontractors retained for projects in the District to submit weekly certified payroll reports to Prestige Drywall that certify that the subcontractor is in compliance with the [relevant D.C. labor laws].”⁸⁴ Prestige Drywall was given specific requirements for the payroll form it is to use in making subcontractors certify various details about their workers and projects (names/classification of workers, hours worked, rate of pay, net/gross earnings, and an explicit sworn certification of statutory compliance by the subcontractor) and is required to maintain the records for at least five years.⁸⁵

Second, under the “Auditing,” “Reporting,” and “Corrective Action” terms, Prestige Drywall is required to “submit an Annual Report to the District that certifies it is in compliance with its obligations.”⁸⁶ Additionally, the settlement requires Prestige Drywall to perform random audits on each subcontractor it retains, including comparisons of the subcontractors’ certified payroll records against randomized samples of the subcontractors’ pay stub records to ensure compliance with relevant D.C. labor laws.⁸⁷ The settlement also emphasized that if “an audit or other source” gives Prestige Drywall knowledge of a subcontractor’s labor law violation, Prestige Drywall has fourteen days to take action “to ensure that the subcontractor comes into compliance and pays any applicable restitution to any affected worker to remedy the violation.”⁸⁸

Third, under the “Debarment,” “Penalties in Future Actions,” and “Use of Subcontractors” terms, Prestige Drywall is “prohibited from bidding on or providing work on any projects in the District of Columbia for a period of five (5) years” and warned of elevated civil penalties under D.C. law for any violations of the labor law statutes within two years after the settlement.⁸⁹ Prestige Drywall is also banned from “contract[ing] with any subcontractor to perform future work in the District (including any officers or owners of the subcontractor or their affiliated entities) with whom the Company contracted in the District during the relevant time period” of the investigation unless such a subcontractor (1) proves its workers were not misclassified or (2) enters into a separate

⁸² *Id.* §§ 32-1001 to -1015.

⁸³ *Id.* §§ 32-531.01 to .16.

⁸⁴ D.C.-Prestige Drywall Settlement, *supra* note 76, ¶ 11.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶¶ 12-14.

⁸⁷ *Id.* ¶ 12.

⁸⁸ *Id.* ¶ 14.

⁸⁹ *Id.* ¶¶ 15, 16, 18.

settlement with the attorney general’s office that “includes injunctive relief” concerning the misclassification.⁹⁰

In sum, the D.C.-Prestige Drywall settlement identifies three core objectives of a state attorney general’s use of injunctive terms for subcontracting and employee-misclassification violations: improving payroll monitoring for proper classification, requiring random auditing of and reporting on all current subcontractors, and restricting future contracting (short-term for the managing company and long-term for any subcontractors who previously violated the law).

Three months later, on November 6, 2023, Attorney General Schwalb entered into a settlement agreement with 20/20 Vision.⁹¹ This settlement concerned an “economic policy advocacy firm in the District of Columbia” that also allegedly misclassified its workers as independent contractors.⁹² This settlement’s injunctive terms are sparser, but they still follow two of the three core objectives. First, a “Proper Classification” term requires 20/20 Vision to “reclassify its workers as W2 employees and . . . ensure prospectively that it properly classifies employees as such.”⁹³ A “Retention of Employee Records” term requires 20/20 Vision to “maintain proper records for each employee, including without limitation name, address, position title, classification, rate of pay, amount paid, hours worked per day and week, and any other information required by Title 32 of the DC Code.”⁹⁴ Second, a “Compliance Reporting” term requires 20/20 Vision to submit an annual report certifying compliance with the settlement and provide a copy of the payroll each time.⁹⁵

The D.C.-20/20 Vision settlement, except for the third goal of restricting future contracting, thus directly embodies the D.C.-Prestige Drywall settlement’s emphasis on (1) payroll monitoring for proper classification and (2) random auditing/reporting.

B. Unpaid Wages and Compensation

The ultimate goal of injunctive relief for unpaid wages and compensation is the design of a system that will catch similar wage issues in the future. Existing settlements combating this issue, however, offer two different approaches.

The D.C.-20/20 Vision settlement in its “Sick Leave and Overtime Compliance” term requires 20/20 Vision only to “establish and maintain policies and practices sufficient to ensure that its employees accrue paid

⁹⁰ *Id.* ¶ 18.

⁹¹ Settlement Agreement: *In re* 20/20 Vision, D.C. Off. of the Att’y Gen. (Nov. 6, 2023), <https://oag.dc.gov/sites/default/files/2023-11/2020-Vision-OAG-Settlement.pdf> [<https://perma.cc/G8CJ-QWZC>].

⁹² *Id.* ¶ 2.

⁹³ *Id.* ¶ 10.

⁹⁴ *Id.* ¶ 13.

⁹⁵ *Id.* ¶ 12.

sick leave and overtime at a rate in compliance with the [relevant state labor statutes].”⁹⁶ This term then outlines a review-and-distribution scheme where (1) 20/20 Vision was to provide Attorney General Schwalb’s office with “copies of such policies for review” within thirty days of the effective date of the settlement, (2) the office would “review such policies” within thirty days of receipt and “notify [20/20 Vision] of any concerns,” (3) 20/20 Vision would make any corrections “to come into compliance” with D.C. labor laws within thirty days “of being notified” and send those corrections to the office for another review, and (4) 20/20 Vision would lastly, upon final approval by the office, “distribute the policies to all current employees within 30 days of approval, and to all future employees upon their start date.”⁹⁷

The aforementioned settlement between Illinois Attorney General Raoul and Greenridge (arising from an overtime violation) was more granular. The Illinois-Greenridge settlement requires Greenridge to “contract with a third party to provide time-keeping software . . . preserv[ing] and maintain[ing] all clock-in and clock-out entries by each individual employee.”⁹⁸ Greenridge is also required to “provide their non-exempt employees with a weekly paycheck and check stub in the form attached [to the settlement] . . . or a substantially equivalent substitute containing at least” information on seven different metrics provided by the attorney general’s office: “regular rate of pay” and what the “basis” of the rate was (for example, per hour, per piece, commission); “hours worked by [each] employee each week”; “[t]otal weekly straight-time earnings”; “[t]otal . . . earnings for overtime hours”; “[t]otal additions to or deductions from wages paid each day period”; “[t]otal . . . wages . . . each pay period”; “[d]ate(s) of [each] payment[] identified” and its “pay period”; and “[d]ate and amount of any bonus or other compensation paid.”⁹⁹ Finally, the settlement establishes compliance requirements (documentation and paystubs sent to the attorney general’s office) and extensive audit rights.¹⁰⁰

The ultimate goal of injunctive relief for unpaid wages and compensation, as seen in both these settlements, is to design a system that will catch similar wage issues in the future. These settlements, however, offer two different approaches. The D.C.-20/20 Vision approach uses a review-and-distribution scheme featuring back-and-forth communication between defendants and the attorney general’s office about optimal wage-accrual policies and practices, on the front end, over the course of

⁹⁶ *Id.* ¶ 11.

⁹⁷ *Id.*

⁹⁸ Illinois-Greenridge Settlement, *supra* note 51, ¶ 39.

⁹⁹ *Id.* ¶ 41.

¹⁰⁰ *Id.* ¶¶ 42–45. The audit term allowed the Illinois Attorney General’s office “access to Greenridge’s place of business during regular business hours on reasonable notice at any time for the purposes of interviewing employees, inspecting the premises, and reviewing time and payroll records to ensure compliance.” *Id.* ¶ 45.

around four months. The Illinois-Greenridge approach uses a combination of a third-party timekeeper/monitor and provision of clearer paycheck data to employees based on an already provided example and list of key metrics suggested by the attorney general’s office, coupled with extensive compliance requirements and audit rights maintained by the attorney general’s office to conduct random checks.

Certainly, there is a wide expanse of possible settlement approaches between that of the District of Columbia and that of Illinois. But these two approaches show how an attorney general’s office can be more proactive on the front end, engaging directly with the defendant right after settlement to design optimal policies and practices, or more active on the back end, requiring the defendant to follow a set list of requirements with the threat of extensive auditing looming large.

C. Noncompetition/No-Poach Agreements

Washington Attorney General Ferguson’s 2018 lawsuit against Jersey Mike’s “was the first lawsuit against a company for its use of no-poach clauses by a state attorney general.”¹⁰¹ On August 21, 2019, Jersey Mike’s settled with Attorney General Ferguson’s office, agreeing to pay \$150,000 and adhere to various injunctive relief terms affecting “franchise contracts nationwide.”¹⁰² The Washington-Jersey Mike’s settlement has very straightforward injunctive terms. First, Jersey Mike’s agreed to “no longer include the No-Poaching Provision in any of its franchise agreements in the United States signed after the date hereof” and “not enforce the No-Poaching Provision in the single existing franchise agreement that still contains that provision.”¹⁰³ Second, Jersey Mike’s certified that it “provided notice to the Franchisees nationwide that it will no longer include [or enforce] the No-Poaching Provision in any of its franchise agreements.”¹⁰⁴ Third, Jersey Mike’s agreed to not include any no-poaching provisions in any renewals or creations of, or amendments to, “existing franchise agreements for locations in the United States during the ordinary course of business.”¹⁰⁵ This approach, of course, is a highly significant and contentious instance of national preclusion through injunctive relief settlement terms.

¹⁰¹ WASHINGTON NO-POACH REPORT, *supra* note 29, at 10.

¹⁰² Press Release, Wash. State Off. of the Att’y Gen., Jersey Mike’s Will Pay \$150K to Resolve AG Ferguson’s First No-Poach Lawsuit (Aug. 23, 2019), <https://www.atg.wa.gov/news/news-releases/jersey-mike-s-will-pay-150k-resolve-ag-ferguson-s-first-no-poach-lawsuit> [https://perma.cc/6UQU-K5HX].

¹⁰³ Assurance of Discontinuance ¶ 3.1, State v. Jersey Mike’s Franchise Sys., Inc., No. 18-2-25822-7 (Wash. Super. Ct. Aug. 23, 2019), https://agportal-s3bucket.s3.amazonaws.com/uploaded-files/Another/News/Press_Releases/20190823_JerseyMikes_AOD_SIGNED.pdf [https://perma.cc/GAB7-Y73Z].

¹⁰⁴ *Id.* ¶ 3.2.

¹⁰⁵ *Id.* ¶ 3.3.

Attorney General Ferguson, it seems, prioritized three goals in the no-poach-injunction context: a basic agreement to not include or enforce no-poach provisions, a certified provision of notice to relevant parties, and a forward-looking promise to not pursue any new no-poach provisions.

Other pre-2018 settlements neatly track these three goals. The settlement between then-Illinois Attorney General Madigan and Jimmy John's concerned the use of noncompetition agreements for sandwich-shop employees and delivery drivers in Illinois.¹⁰⁶ This settlement began with the same core, with Jimmy John's "agree[ing] that [it] will no longer utilize non-competition provisions . . . and [will] use reasonable best efforts to ensure that any future use of non-competition agreements in the State of Illinois complies with Illinois law."¹⁰⁷ Franchisees were required to "remove all sample agreements containing Non-Competition Provisions from any Operations Manuals previously distributed in Illinois."¹⁰⁸ The Illinois-Jimmy John's settlement also required Jimmy John's to:

send a written communication, which has been shared with and approved by the [attorney general's office], within 30 days from the execution of this Consent Decree to all general managers and area managers [and franchisees] . . . explaining that the Non-Competition Provisions in the agreements have been rescinded . . . and instructing them as to how they should respond to questions from current or former Store Employees . . . about the Non-Competition Provisions.¹⁰⁹

Then-Attorney General Madigan's focus on notice (Attorney General Ferguson's second goal) in this settlement was very strong — Jimmy John's was required to give notice not only to managers and franchisees but also "to the last known email addresses of *all current Store Employees* who might have signed an agreement containing a Non-Competition provision."¹¹⁰ Some attorneys general have gone even further with notice requirements. In an August 4, 2016 settlement with a nationwide medical information services provider called Examination Management Services, Inc., then-New York Attorney General Eric T. Schneiderman required the defendant to notify not only all current employees but also "*all former employees who left within the last nine months*[]" that the non-compete agreement is no longer in effect."¹¹¹

¹⁰⁶ Illinois-Jimmy John's Settlement, *supra* note 53, at 1.

¹⁰⁷ *Id.* ¶ 1.

¹⁰⁸ *Id.* ¶ 7.

¹⁰⁹ *Id.* ¶ 4.

¹¹⁰ *Id.* ¶ 6 (emphasis added).

¹¹¹ Press Release, Off. of the N.Y. State Att'y Gen., A.G. Schneiderman Agreement Ends Non-compete Agreements for Employees of National Medical Information Services Company Emsi (Aug. 4, 2016) (emphasis added), <https://ag.ny.gov/press-release/2016/ag-schneiderman-agreement-ends-non-compete-agreements-employees-national-medical> [<https://perma.cc/7ZLV-E4R5>].

D. Discrimination

On April 1, 2021, Illinois Attorney General Raoul settled with a temporary staffing agency and three companies that utilized temporary staffing labor, resolving allegations that the companies segregated workplaces and discriminated against workers based on their sex when hiring by making some positions open to only one gender and using coded language to make thinly veiled sex-specific laborer requests through staffing agencies.¹¹² The consent decree “aimed [to] eliminat[e] discrimination” by requiring the companies to: (1) “communicate minimum requirements” that the staffing agencies would use while recruiting for open positions; (2) “conduct annual reviews of position descriptions to ensure hiring requests are tailored to the needs of each position”; (3) “train personnel on sex-based discrimination, including bias in employment and assignments”; (4) “create and distribute a discrimination and equal employment opportunity policy”; (5) “establish a complaint hotline[] and increase recordkeeping”; and (6) “provide regular reports to the Attorney General’s office to ensure compliance.”¹¹³

Illinois Attorney General Raoul’s core goals of communication of hiring requirements, review of hiring requests, antidiscrimination training and policy revision, and complaint/compliance mechanisms are seen and slightly expanded in other settlements as well. In a settlement between Washington Attorney General Ferguson and Electroimpact, an aerospace automation company that refused to hire Muslim applicants, on top of all four of Attorney General Raoul’s goals, Electroimpact was additionally required to follow novel “Outreach Goals” mandating cross-posting job advertisements with minority engineering organizations and hosting semiannual minority recruitment events.¹¹⁴ Attorney General Ferguson’s settlement against a blueberry grower whose supervisor subjected employees to “severe” and “pervasive” sexual harassment not only required revisions and distributions of nondiscrimination policies in multiple languages but also permanently enjoined and restrained the grower from rehiring the harasser “in any capacity, whether as a supervisor/manager, non-supervisory/managerial employee, independent contractor, or consultant” and/or allowing him to enter the farm or have any contact with the farm’s employees.¹¹⁵

¹¹² Zinya Salfiti, *Staffing Agency, 3 Companies Settle Sex Discrimination Claims*, CHI. SUN TIMES (Apr. 1, 2021, 6:15 PM), <https://chicago.suntimes.com/business/2021/4/1/22362171/temporary-staffing-agency-companies-settle-sex-discrimination-illinois-attorney-general> [<https://perma.cc/EY35-7ZFW>].

¹¹³ *Id.*

¹¹⁴ Consent Decree ¶¶ 1.2, 1.4, 4.1–4.3, *State v. Electroimpact, Inc.*, No. 17-2-02704-31 (Wash. Super. Ct. Mar. 23, 2017), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/3%20-%20Consent%20Decree.pdf [<https://perma.cc/YRU4-Q7X6>].

¹¹⁵ Consent Decree ¶¶ 3, 7, 11, *State v. Great Columbia Berry Farms, LLC*, No. 21-2-00086-36 (Wash. Super. Ct. Feb. 22, 2021), <https://agportal-s3bucket.s3.amazonaws.com/2021.02.24-ConsentDecree-signed.pdf> [<https://perma.cc/QP5W-GXRL>].

Overall, attorneys general take the antidiscrimination training goal extremely seriously. Another Attorney General Ferguson settlement, this one against an air-cargo carrier that discriminated on the basis of pregnancy, specifically outlined that the defendant would:

provide mandatory in-person training or online video conference training to all management and human resources employees . . . on federal, state *and* local laws of equal employment opportunity. . . . [The defendant] will have an independent, qualified third party, *approved in advance* by the Office of the Attorney General . . . conduct the training.¹¹⁶

Attorney General Ferguson also asked for “certifications of attendance executed by each employee who receives the training.”¹¹⁷

E. Obstruction of Investigations

Finally, one recent settlement sheds light on a situation uniquely suited for injunctive terms as inherently prospective, substantive (and procedural) safeguards. On October 25, 2022, Minnesota Attorney General Keith Ellison entered into a Consent Judgment with a property maintenance and construction company that interrupted Attorney General Ellison’s investigation into its wage violations by contacting and intimidating its workers into not speaking with Attorney General Ellison.¹¹⁸ Attorney General Ellison responded swiftly and decisively. His injunctive terms required the defendant to “meet in person with all current[ly contracted] workers . . . with a[n] [attorney general’s office] investigator present, and explain to workers that they are free to cooperate with [the Minnesota Department of Labor and Industry]’s investigation and that there will be no adverse consequences.”¹¹⁹ The defendant also explicitly agreed to have no direct or indirect contact “with former workers except by Defendants’ counsel as necessary to prepare for litigation or other administrative or regulatory actions.”¹²⁰ Thus, injunctive terms can also be an important tool for settlements that, though focused mainly on other actual labor violations, require a forward-facing guarantee of investigatory procedure where a defendant has attempted to obstruct said procedure.

¹¹⁶ Agreed Order ¶¶ 1.4, 4.1, *State v. Matheson Flight Extenders, Inc.*, No. C17-1925 (W.D. Wash. Mar. 31, 2021) (emphasis added), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Washington%20v.%20Matheson%20Flight%20Extenders%20Order.pdf [<https://perma.cc/Z228-KZ7A>].

¹¹⁷ *Id.* ¶ 4.2.

¹¹⁸ See Press Release, Off. of Minn. Att’y Gen. Keith Ellison, Attorney General Ellison Sues Subcontractor for Obstructing Wage Investigation, Intimidating Workers (Oct. 25, 2022), https://www.ag.state.mn.us/Office/Communications/2022/10/25_PMC.asp [<https://perma.cc/2UHX-WQLE>].

¹¹⁹ Consent Judgment ¶ 1.a, *State v. Prop. Maint. & Constr., LLC*, 27-CV-22-15772 (Minn. Dist. Ct. Oct. 3, 2023).

¹²⁰ *Id.* ¶ 1.b.

CONCLUSION

The roots of the office of the state attorney general run deep in American jurisprudence, all the way back to the thirteen colonies.¹²¹ As the chief lawyer for the state, a state attorney general today must perfectly balance law, public policy, constitutional concerns, ethical concerns, relationships with other state officials, and — in many states, of course — getting reelected. Perfection is hard, but this impossible juggling is the beauty and substance of the job. “The persnickety law official who keeps his shoes clean by stepping around the mudholes of politics and public policy neglects the most important and exciting aspect of his office.”¹²²

The states have a critical role to play when both the federal courts and federal agencies are providing less-than-ideal labor protections. In a world where more state attorneys general may take on new mantles in protecting workplace rights, and others will continue to shape current approaches, injunctive relief terms are exciting settlement tools.

To summarize the contributions of this Note: State attorneys general can pursue aggressive civil enforcement actions, without triggering the Dormant Commerce Clause, by channeling that aggression into demanding injunctive relief that is limited in breadth to a single state. Injunctive relief in the labor and employment context not only has been approvingly used by the federal agencies but also is particularly suited to state attorneys general, who must constantly balance broad investigative authority with limited-volume operations to accomplish expansive deterrent effects from redressals of specific wrongs. Though the injunctive relief options are numerous, this Note is the first study to consolidate sample language from, as well as common and divergent approaches/goals of, the past decade of civil enforcement settlements covering five areas of core workplace protections: subcontracting and employee misclassification, unpaid wages and compensation, noncompetition/no-poach agreements, discrimination, and obstruction of investigations.

When it comes to workers’ rights protections by state attorneys general, perfection must not be the enemy of progress. As evidenced by the already visible similarities of goals in the above-catalogued injunctive terms, trial and error by different state attorneys general will benefit from and converge with the trials and errors of other state attorneys general. In this way, injunctive relief is an exciting mudhole for the attorneys of the people to continue stepping in, creating long-lasting workplace protections along the way. This Note has sought to lay out some beginning tracks in that mud with a starting guide to common injunctive terms.

¹²¹ See James E. Tierney, *A Brief Introduction to the World of State Attorneys General*, STATEAG.ORG (Jan. 2024), <https://www.stateag.org/ag-101/intro> [<https://perma.cc/G8JJ-Y7PA>].

¹²² Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 158–59 (1966).