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**ARTICLE:** Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws

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**BIO:**

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**SUMMARY:**

... With a stagnant and inadequate federal minimum wage rate of \$ 5.15 per hour, twenty states have enacted state minimum wage rates that exceed the federal rate in an effort to lift millions of low-wage workers out of poverty. ... The three structures can be characterized as: (1) sole authority in the attorney general, where the attorney general is solely responsible for investigating violations, initiating lawsuits, and issuing citations against employers who violate wage and hour laws; (2) concurrent authority, where a state labor agency and state attorney general each have some level of joint or independent authority to investigate and initiate legal action to remedy violations; and (3) sole authority in the state labor department, where a state labor agency does all of the investigation and litigation. ... Under California's Labor Code, the state labor department is designated as the primary agency responsible for enforcing wage and hour laws, and has the power to collect unpaid wages for minimum wage and overtime violations on behalf of employees, through administrative proceedings and state court actions. ... In 2004, Florida voters approved a minimum wage initiative that gave the Attorney General standing to enforce the minimum wage, and in November 2006, Arizona and Ohio's citizens will vote on minimum wage initiatives that grant their state Attorneys General standing to enforce the minimum wage. ...

**HIGHLIGHT:** With a stagnant and inadequate federal minimum wage rate of \$ 5.15 per hour, twenty states have enacted state minimum wage rates that exceed the federal rate in an effort to lift millions of low-wage workers out of poverty. Accepting the efficacy of a state-based strategy for improving the rights of workers, this Note argues that rigorous enforcement of state wage and hour laws is necessary for workers to fully realize the gains of these laws. The Note explores the varying roles that state governments have assigned to state attorneys general and labor departments to enforce state wage and hour laws, presenting three models of how states enforce wage statutes. After describing how New York Attorney General Eliot Spitzer has transformed enforcement in his state by strategically asserting and using his office's independent legal authority to enforce state wage laws, the Note concludes that the ideal wage enforcement structure is one that grants both a state attorney general and a state labor department concurrent authority to enforce such laws. At a time when Washington is hostile to the concerns of workers, this Note offers a blueprint for how state attorneys general and other state reformers can protect the rights of the most exploited and vulnerable workers.

People say, "The Wall Street cases must be your favorite cases," because they generate great interest, given there are 100 million investors who feel touched by the mutual fund piece of what you're doing. But the greatest need, I thought, was to help low-wage workers who are least able to protect themselves.

-- New York Attorney General Eliot Spitzer n1

**TEXT:**

[\*496]

## I. INTRODUCTION

In the aftermath of Hurricane Katrina, the national political discourse grappled with the questions of why widespread poverty still exists in the United States and how government policies might improve the economic prospects for America's most vulnerable working families. With cautious optimism, some advocates for workers and the poor had newfound hope that the Republican-controlled federal government would address poverty issues, including the woefully inadequate federal minimum wage rate, with the same zeal that had propelled the passage of regressive income tax cuts in 2001 and 2003. n2 Yet, despite explicit promises from President George W. Bush and Republican leaders in Congress that they would attack poverty, n3 in the months following Hurricane Katrina these leaders actually promoted policies that reduce workers' wages, such as Bush's temporary suspension of prevailing wage laws for federal construction projects in four Gulf Coast states. n4 In addition, in October 2005, on a party-line vote, [\*497] Senate Republicans rejected a modest proposal by Senator Edward Kennedy to raise the federal minimum wage rate for the first time since 1997, from \$ 5.15 to \$ 6.25 per hour, n5 and Republicans blocked a bipartisan plan to provide temporary Medicaid coverage to low-income hurricane victims. n6 In possibly the most disturbing development, unknown numbers of immigrant workers hired to clean up the Gulf Coast did not receive any wages for several weeks, and federal labor officials did not respond sufficiently to remedy such abuses. n7

Robert Greenstein of the Center on Budget and Policy Priorities described the Republicans' renegeing on their anti-poverty promises as a "stunning reversal," and observed, "We've gone from a situation in which we might have a long-overdue debate on deep poverty to the possibility, perhaps even the likelihood, that low-income people will be asked to bear the costs." n8 This about-face perfectly illustrates and reinforces a view of many progressives in the United States that given the complete Republican domination of the federal government, advocates for workers and the poor should not look to the federal government to enact and enforce progressive economic policies. Instead, these advocates should primarily work with state legislators, governors and, in particular, state attorneys general to enact and enforce laws that reduce poverty and promote economic justice, such as state minimum wage laws. [\*498]

In a growing effort that reflects the view that workers and the poor currently face a dead-end in Washington, former Senator John Edwards is leading a campaign to place several initiatives to raise state minimum wage rates on state ballots in 2006. n9 Although Edwards is one of the most prominent political leaders currently endorsing this strategy, for many years worker advocates have turned to sympathetic voters and state officials to enact and enforce state laws that exceed federal standards, such as minimum wages, municipal living wage ordinances, and family leave laws. n10 In a sign that a state-based anti-poverty strategy can be successful despite national Republican domination, voters in two states that reelected President Bush in 2004 by narrow margins n11 simultaneously voted to raise state minimum wages by overwhelming margins of 72 percent in Florida and 68 percent in Nevada. n12 Thus, even if Washington is uninterested in [\*499] addressing workers' rights, workers may gain greater rights via these state-based initiatives. n13

While state-based initiatives like Edwards' minimum wage campaign are absolutely necessary to improve the lives of working families, without strong enforcement by state officials these initiatives will never achieve their goals. When states enact employment laws that exceed federal standards, states have a heightened interest -- as well as a greater responsibility -- to enforce these laws so that higher wage rates are not merely empty promises. This heightened interest, in turn, increases the importance of the state attorneys general and labor departments who enforce state employment laws and raises the question of how state governments can most effectively enforce state employment laws.

In answering this question, this Note contributes to a discussion over how state governments should structure their executive institutions to effectively enforce wage and hour laws, and specifically, what role state attorneys general should play in state enforcement regimes. Part II outlines the federal and state workplace standards that protect low-wage workers, the principal ways in which federal and state laws are different, and the reasons underlying the need for stronger state enforcement. Part III describes the duties and powers of state attorneys general, and presents three models of how state governments structure state wage and hour law enforcement, examining three states whose enforcement systems represent these models of enforcement and whose state minimum wages exceed the federal rate. Part IV explains how New York Attorney General Eliot Spitzer has expanded his office's authority and functional capacity to enforce state wage and hour laws, and how Spitzer's approach represents an effective model of wage and hour enforcement. Part V describes how state attorneys general have worked together and independently to defend the substantive state law rights of undocumented immigrant workers. Part VI analyzes the relative merits of the various ways in which states structure wage and hour enforcement, argues that concurrent authority between an [\*500] attorney general and a

labor department is the ideal structure, and recommends strategies for attorneys general to expand their authority and capacity to enforce wage and hour laws.

## II. DIFFERENCES BETWEEN FEDERAL AND STATE WAGE AND HOUR LAWS AND THE NEED FOR RIGOROUS STATE ENFORCEMENT

This Part identifies the most important federal and state wage and hour laws, highlights several areas in which state laws exceed federal standards, and discusses the principal reasons why states today have a heightened interest in enforcing state employment laws. Before entering this discussion, however, it is important to identify how this inquiry is situated within the fields of labor and employment law. This Note and this Part specifically address the enforcement of wage and hour statutes associated with the field of employment law, as opposed to labor law, n14 because most state-based innovations occur exclusively in employment law. n15 Because state employment laws are not preempted to the same degree as state labor laws, states have far greater authority to enact and enforce state employment laws. n16 [\*501]

### A. FEDERAL WAGE AND HOUR LAWS

The Fair Labor Standards Act ("FLSA") of 1938 is the most important federal wage and hour law for all workers, and particularly for low-wage workers. To receive FLSA protections, an employee must work for an employer "engaged in interstate commerce or in the production of goods for interstate commerce." n17 The FLSA sets forth a federal minimum wage rate of \$ 5.15 perhour, n18 but provides exceptions for several groups of workers. n19 In addition, the FLSA requires employers to pay an overtime rate of one and one-half times an employee's regular wage rate once the worker has worked forty hours in a work week. n20 The FLSA, however, does not prohibit an employer from mandating overtime work for employees over fifteen years old. n21 Furthermore, the FLSA exempts millions of workers from overtime coverage for a variety of reasons, with the most expansive exemptions for "executive, administrative, or professional" workers. n22 [\*502]

Workers have several ways to vindicate their FLSA wage and hour rights. Either an employee or the Secretary of Labor can bring an action in state or federal court for violations of the federal minimum wage or overtime provisions of the FLSA, for which the standard remedy is the payment of unpaid wages to the employee plus an equal amount in liquidated damages. n23 Moreover, if an employer discharges a worker for filing a complaint or bringing an action under the FLSA, a worker can receive a remedy of reinstatement plus "payment of wages lost" and equal liquidated damages. n24 When a worker or the Secretary of Labor brings an action, a two-year statute of limitations period applies, unless the employer committed a "willful violation," which triggers a three-year period. n25

Other federal wage and hour laws impose additional restrictions or requirements. First, the FLSA and federal regulations restrict the number of hours that children under sixteen years old can work, and prohibit children who are sixteen and seventeen years old from working in certain hazardous jobs. n26 Second, the FLSA's so-called "hot goods" provision allows the Secretary of Labor to both recover unpaid wages and enjoin the shipment of goods where minimum wage or overtime violations occurred in the production of the goods. n27 Other federal laws, such as the [\*503] Davis-Bacon Act n28 and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), n29 regulate wages in specific industries.

### B. STATE EMPLOYMENT LAWS THAT EXCEED FEDERAL STANDARDS

Virtually all state governments provide greater employment law rights and remedies than the federal government in at least some areas. n30 There are four main circumstances where a worker is substantively better off under state law than under federal law, including when (1) the state law provides an affirmative right, but the federal government has no equivalent right; n31 (2) the federal law exempts a worker from protection, but the state law has no exemption; (3) the state law standard is more rigorous than the equivalent federal standard, and the federal law does not [\*504] preempt state law; n32 and (4) the state law provides a greater remedy or time period to recover than federal law. Moreover, workers have procedural advantages under state law, because most states allow workers or agencies to bring claims in administrative proceedings or permit agencies to issue civil citations, while FLSA claims must be brought in state or federal court. n33

Because the FLSA has an express "savings" clause or non-preemption clause, state and local governments can pass laws that exceed federal standards in areas such as minimum wages, overtime, and child labor. n34 The state minimum wage is the most crucial law that can exceed the standard set by federal law, because it directly results in higher wages for a state's poorest workers. Since 1997, as the federal minimum wage remained at \$ 5.15 per hour, twenty states and the District of Columbia have adopted state minimum wages that exceed \$ 5.15, with seven states' minimum wage rates

reaching over \$ 7 per hour in 2006. n35 [\*505] As a result, more than 50 percent of the American people live in states in which the state minimum wage exceeds the federal minimum wage. n36 In addition to earning significantly higher wages, when workers in these twenty-one jurisdictions bring minimum wage actions, they receive greater compensation under state law than under federal law. Also, if a worker is not paid for some of the hours she worked in a week, the employee may have a remedy under state law, but not under federal law, in those cases in which her total pay divided by total hours is below the state minimum wage, but still exceeds \$ 5.15 per hour. n37

In the area of overtime rights, three states -- California, Nevada, and Alaska -- require time and one-half overtime pay for employees who have worked more than eight hours in a day, while the FLSA does not require overtime until an employee works forty hours per week. n38 In terms of remedies, many states have statutes of limitations that exceed the FLSA's two-year statute of limitations, n39 and some states provide treble damages, as opposed to the FLSA's remedy of double the unpaid wages (which can be reduced upon a showing of "good faith" by the employer). n40 In the area of child labor, the laws of about half of the states are more stringent than federal laws on the maximum number of hours and workdays per week for employees under sixteen years old. n41 Also, in contrast to federal law, about half of [\*506] the states regulate the maximum hours and workdays per week for sixteen and seventeen-year-old workers. n42 Finally, several states have passed "hot goods" laws that are stronger than the FLSA, holding apparel retailers and manufacturers responsible for suppliers' wage violations. n43

### C. AN HISTORIC NEED FOR STATE-BASED ENFORCEMENT OF STATE EMPLOYMENT LAWS

Several trends underscore why state-based enforcement of state wage and hour laws is more important today than it has been in decades. First, because twenty states and the District of Columbia have adopted minimum wage rates that exceed the federal rate, n44 these states have a greater obligation to ensure that their laws are enforced, given that they cannot rely primarily on federal officials to enforce state laws. When workers are protected by state law, but not by federal law, they must use state institutions -- state courts or agencies -- to recover unpaid wages, making it critical that states have effective wage and hour enforcement agencies.

Second, the U.S. Department of Labor's Wage and Hour Division ("WHD") has not had sufficient resources or successful strategies for wage and hour enforcement. From the 1950s to the late-1990s, the ratio of WHD investigators to American workers declined from one investigator for every 46,000 workers to one investigator for every 150,000 workers. n45 Also, in a troubling report, the General Accounting Office has identified major problems with the WHD's enforcement, such as visiting fewer worksites, giving employers advance notice of visits, conducting investigations over the phone, and "focusing on a single worker, a single [\*507] minor violation, or a particular timeframe." n46 For example, in 2005, the DOL's Inspector General severely criticized the WHD for entering into a compliance agreement with Wal-Mart, giving Wal-Mart fifteen days of advanced notice for inspections. n47 Another concern is that the WHD is often uninterested in litigating small, individual wage claims, while state agencies are more willing to litigate such claims. n48

Third, the major decline in private sector union density in America n49 increases the importance of state government enforcement. Because unions resolve wage and hour violations through private grievances and arbitration, declining unionization reduces the number of violations that are privately resolved and thus requires more active involvement by state officials. Finally, although undocumented workers are often afraid to report wage violations to federal officials because of fears of deportation, n50 they are more willing to contact state officials who promise workers that immigration status will play no role or a small role in enforcement actions. [\*508]

## III. THE ROLE OF STATE ATTORNEYS GENERAL IN ENFORCING WAGE AND HOUR LAWS

This Part provides an overview of the powers of state attorneys general and presents three models of how state governments structure their enforcement of state wage and hour laws, including the role of state attorneys general in each structure. To illustrate each of the three models of enforcement, this Part examines the enforcement regimes of three states -- California, Maine, and Massachusetts. State governments throughout the nation vary significantly in how they structure wage and hour enforcement, although almost all states involve, in some fashion, both an executive agency, such as a labor department, and the state attorney general. While the role of the state labor department is usually codified specifically in state statutes, the role of the state attorney general is often not clearly defined, due to the broad powers and duties that many state attorneys general have under state constitutions, state statutes, and the common law.

### A. THE DUTIES AND POWERS OF STATE ATTORNEYS GENERAL IN WAGE AND HOUR ENFORCEMENT

The state attorney general is a position rooted in the common law and endowed with broad powers to initiate litigation on behalf of the people of the state to promote the public interest. n51 In forty-four states, the attorney general's position and responsibilities are established by the state constitution, and in six states the position is established by a state statute. n52 In addition to receiving constitutional and statutory authority, many attorneys general receive duties and powers from the common law. Although several states limit the attorney general's powers to those [\*509] granted by statute, n53 in most states the attorney general retains its common-law powers unless the state legislature has abridged those powers. n54 According to the National Association of Attorneys General, modern American courts have recognized that state attorneys general possess common-law powers such as the "the duty to appear for and to defend the state and state agencies," "the right to control over all litigation and appeals" and "the right to intervene in legal proceedings on behalf of the public interest." n55 Thus, as the U.S. Court of Appeals for the Fifth Circuit concluded, when a state attorney general retains common-law powers, she has "wide discretion in making the determination as to the public interest," and can bring actions on behalf of the people, including suits to enforce state laws, without authorization of a governor or an agency. n56

In addition to the core functions of representing the state and initiating actions on behalf of the public, state attorneys general have other potent tools at their disposal to affect how state agencies, private parties, and the courts interpret substantive state laws. For example, attorneys general can issue non-binding advisory [\*510] opinions, n57 intervene in litigation, n58 and file amicus curiae briefs. n59

In the specific context of state wage and hour enforcement, a state attorney general can use all of these powers to ensure effective enforcement. First, and most importantly, an attorney general might initiate civil or criminal actions in state court, or issue civil citations, against employers for violating state wage and hour laws. The attorney general might take such action independently or as the representative of a state labor department. This type of action is the most crucial for wage and hour enforcement, [\*511] because the attorney general is directly remedying violations. Second, an attorney general might represent a state agency in an action brought by a private party challenging the validity of a state law or the validity of a state agency's action. Third, a state attorney general might issue advisory opinions, intervene as a party in litigation between private parties, or file an amicus brief to influence how a court will interpret wage and hour laws.

## B. THREE MODELS OF STATE WAGE AND HOUR LAW ENFORCEMENT AND THE ROLE OF THE STATE ATTORNEY GENERAL

There are three basic structures for the enforcement of state wage and hour laws. The three structures can be characterized as: (1) sole authority in the attorney general, where the attorney general is solely responsible for investigating violations, initiating lawsuits, and issuing citations against employers who violate wage and hour laws; (2) concurrent authority, where a state labor agency and state attorney general each have some level of joint or independent authority to investigate and initiate legal action to remedy violations; and (3) sole authority in the state labor department, where a state labor agency does all of the investigation and litigation. To a certain extent these three structures represent the boundaries of a continuum, from the greatest to least involvement by a state attorney general, as opposed to three fixed categories. n60

In the three states examined in this Part -- California, Maine, and Massachusetts -- the constitutions, statutes, common law, and case law of each state have assigned very different roles to the state attorneys general in wage and hour enforcement. Despite these disparate structures for enforcement, all three states have state minimum wage rates that significantly exceed the federal [\*512] rate, n61 which means they are united in their heightened interest in effective state enforcement.

### 1. Massachusetts -- Sole Authority in the State Attorney General

The Massachusetts system of wage and hour enforcement places sole authority in the attorney general -- the Massachusetts Attorney General has complete responsibility for enforcing the state's wage and hour laws. The Massachusetts Attorney General's affirmative authority to enforce wage and hour laws derives from a 1993 statutory amendment, which transferred enforcement of the state's labor laws from the state labor department to the Attorney General. n62 As amended, Massachusetts's labor law states, "The Attorney General shall, except as otherwise specifically provided, enforce the provisions of this chapter, and shall have all necessary powers therefor." n63 The labor law also specifically outlines the Attorney General's duty and authority to regularly inspect and investigate "all places of employment," n64 "receive all complaints . . . concerning alleged violations of any laws enforced under his direction," n65 issue civil citations against employers who violate the labor laws, such as the minimum wage and overtime laws, and bring criminal prosecutions in state court for willful violations. n66 In addition to having specific [\*513] statutory authority for en-

forcement, the Attorney General has a "common law duty to represent the public interest." n67 To carry out its enforcement role, the Attorney General employs attorneys and investigators who issue civil citations and bring criminal actions. n68 Despite the dominant enforcement role of the Attorney General, the state Department of Labor and Workforce Development ("DLWD") serves a limited but important role of promulgating detailed regulations on state minimum wage and overtime laws. n69

As mentioned earlier, Massachusetts's current enforcement structure is fairly new. n70 The impetus for the transfer in authority to the Attorney General was based on both policy and politics. Democratic legislators and labor advocates believed that then-Governor William Weld, a Republican, was not adequately enforcing [\*514] state labor laws. n71 According to Assistant Attorney General of Massachusetts Richard Grundy, who directs the office's wage and hour enforcement, the transfer of enforcement to the Attorney General created a major advantage of combining the roles of investigation, civil citations, and criminal prosecutions "under the same roof." n72 This structure fosters smoother investigations and more effective prosecution.

## 2. Maine -- Concurrent Authority

Maine places concurrent authority in the attorney general and the state labor department, because the Maine Attorney General works directly with the state Department of Labor to enforce state wage and hour laws, and possesses common-law authority to independently enforce the same laws. The Maine Attorney General plays a significant role in enforcing state wage and hour laws because the state Department of Labor is not authorized to use legal services other than from the Attorney General, and it [\*515] cannot hire private counsel "except upon written approval of the Attorney General." n73 Although the Bureau of Labor Standards ("BLS") in the Department of Labor has statutory authority to enforce laws on wages, hours, and workplace safety, n74 the Attorney General is responsible for providing legal services to the BLS when the BLS brings enforcement actions in state court. n75 Unlike Massachusetts' fairly new structure, Maine's structure was created in 1975, when former Attorney General and then-state Representative James E. Tierney successfully sought passage of legislation that established the current enforcement regime, giving workers a private right of action and providing for treble damages. n76

Although state statutory law creates a direct enforcement relationship between the Attorney General and the labor department, the common law gives the Attorney General authority to bring independent actions as the state's chief legal officer. n77 In [\*516] *Superintendent of Insurance v. Attorney General*, Maine's highest court held that in the absence of legislation depriving the Attorney General of a right, "he typically may exercise all such authority as the public interest requires," including the power to institute "all such actions and proceedings as he deems necessary for the enforcement of the laws of the State." n78 Applying the holding of *Superintendent of Insurance*, the Attorney General should be able to bring independent wage and hour actions, because state law does not restrict the Attorney General from initiating such actions whatsoever.

## 3. California -- Sole Authority in the State Department of Labor

Unlike Massachusetts or Maine, California places sole authority for enforcement in the state labor department, which means the California Attorney General currently has almost no concrete role in wage and hour enforcement. Although California's constitution grants the Attorney General significant general powers to enforce state law, n79 the combination of statutory authorization for labor department enforcement and a statutory exemption that permits the labor department to employ its own attorneys has effectively limited the Attorney General's role in enforcement. n80

Regarding the use of counsel, sections 11042 and 11043 of the California Government Code state that "no state agency, commissioner or officer shall employ any legal counsel other than the Attorney General," n81 and "whenever any law authorizes any State agency to employ legal counsel other than the Attorney General, [\*517] it shall be construed to refer to the Attorney General." n82 Section 11041, however, provides an express exemption to this general rule -- stating that "sections 11042 and 11043 do not apply to the . . . Division of Labor Standards Enforcement of the Department of Industrial Relations" n83 ("DLSE") -- which allows the DLSE to enforce wage and hour laws without using attorneys from the office of the Attorney General. n84 The exemption, however, does not necessarily preclude the Attorney General from remedying wage and hour violations using his independent authority. Under California's Labor Code, the state labor department is designated as the primary agency responsible for enforcing wage and hour laws, n85 and has the power to collect unpaid wages for minimum wage and overtime violations on behalf of employees, n86 [\*518] through administrative proceedings and state court actions. n87 This entire process currently proceeds without any involvement from the California Attorney General -- including in court actions -- because the labor department's DLSE uses its own lawyers. n88

Despite the lack of an enforcement role, the California Attorney General still impacts the interpretation of wage and hour laws -- and thus indirectly affects enforcement -- by issuing advisory opinions, filing amicus briefs, n89 and representing state agencies when a party challenges a state law. n90 The California Attorney General can decline to represent a state agency and even take a conflicting position in litigation, which demonstrates the independence of the position. n91 Moreover, when submitting an amicus curiae brief to a court, the Attorney General is not required to follow the Governor's opinion when the Attorney General does not represent an agency or the Governor. n92 [\*519]

#### IV. ELIOT SPITZER'S INNOVATIVE WAGE AND HOUR ENFORCEMENT: EXPANDING THE ATTORNEY GENERAL'S AUTHORITY AND CREATING A MODEL FOR EFFECTIVE ENFORCEMENT

This Part discusses how New York Attorney General Eliot Spitzer has transformed his office into one of the most effective wage and hour enforcement agencies in the nation, creating a replicable model of how an attorney general can assert the legal authority to enforce state employment laws and providing an example of why an office should adopt a strategic enforcement approach. This Part first examines how Spitzer has successfully advocated for increased legal authority to enforce wage and hour laws, and then describes the main features of Spitzer's enforcement approach.

##### A. AUTHORITY OF THE NEW YORK ATTORNEY GENERAL TO ENFORCE WAGE & HOUR LAWS

###### 1. The Basic Structure -- the State Department of Labor and Attorney General's Roles in Enforcement

New York's enforcement scheme fits squarely into the concurrent authority category of state structures for wage and hour enforcement. For many years the Attorney General has represented the state Department of Labor ("DOL") in state court enforcement actions. Under the leadership of Spitzer, however, the Attorney General's office has discovered and successfully used the legal authority to bring independent actions in state court.

The state DOL has historically served a far greater role than the Attorney General in wage and hour enforcement. This historical division of labor largely resulted from a statutory scheme that provides far greater express authority to the DOL than to the Attorney General to enforce wage and hour laws in a civil administrative system. Specifically, New York's Labor Law [\*520] grants express authority to the Commissioner of Labor -- the highest-ranking DOL official -- to investigate wage and hour violations, issue administrative orders, and enforce administrative orders in the New York Supreme Court n93 on behalf of employees, including the recovery of wages, civil penalties, and criminal penalties. n94 This role is executed by the DOL's Division of Labor Standards. n95 Employers can appeal the Labor Commissioner's administrative orders to the New York State Board of Industrial Appeals ("NYSBIA"), and the DOL and employers may appeal adverse NYSBIA decisions to the New York Supreme Court. n96

Despite the DOL's primary enforcement role, the Attorney General plays a significant role as the state's legal officer, who must represent the DOL in all actions before state and federal courts. n97 The state's Executive Law states that the Attorney General has a general duty to

prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all [\*521]

the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state. n98

Thus, when an employer or the DOL appeals a wage and hour order from the NYSBIA, the Attorney General serves as the legal counsel for the DOL in state court. n99

Although the Attorney General does not receive express statutory authority to enforce the minimum wage, overtime, agricultural labor, or child labor laws, there are several areas where the state labor law gives the Attorney General express enforcement authority without giving the DOL the equivalent power. Most importantly, only the Attorney General may prosecute criminal violations of the Labor Law, which means that the DOL must work with the Attorney General in any cases where a criminal prosecution in state court is sought. n100

###### 2. Asserting Expanded Authority

During Spitzer's two terms as Attorney General, his office has successfully asserted that the Attorney General has independent authority to enforce state wage and hour laws in state court. Spitzer's assumption of independent enforcement authority constitutes a significant legal expansion in the role of the Attorney General in New York's law enforcement regime.

Despite the dearth of statutory authorization to enforce certain specific wage and hour laws, Spitzer has successfully invoked the Attorney General's general authority under section 63(12) of the Executive Law to bring actions in state court against repeated illegal acts. n101 Section 63(12) provides that the Attorney [\*522] General "may apply, in the name of the people of the state of New York, to the supreme court of New York" to enjoin any person who "engages in repeated fraudulent or illegal acts" in the "conducting or transaction of business," and have the court "direct[] restitution and damages." n102 The Attorney General's Labor Bureau, led by Bureau Chief Patricia Smith, asserts that repeated violations of any of the state's labor laws, including wage and hour violations, constitute "repeated . . . illegal acts," under section 63(12), giving the Attorney General standing to petition the state's trial courts to remedy such labor violations. n103 Thus, section 63(12) gives the Attorney General standing to bring a lawsuit based on causes of action or rights found in other laws such as the Labor Law.

Today, most wage and hour actions brought by the Labor Bureau directly invoke section 63(12) for repeated violations of the labor laws. n104 Additionally, section 63(12) gives the Attorney General the authority to investigate repeated illegal acts. n105 [\*523]

### 3. Validity of the Attorney General's Authority Under Section 63(12) to Remedy Wage and Hour Violations

Thus far, New York state courts have affirmed the Attorney General's standing to bring actions under section 63(12) of the Executive Law for labor law violations. n106 State courts have also rejected employers' arguments that trial courts should apply the "primary jurisdiction" doctrine to abstain from hearing cases brought by the Attorney General under section 63(12). n107

In the most direct challenge to the Attorney General's authority to sue for an injunction, damages, and restitution of employees' unpaid wages, a state appellate court in *Spitzer v. Frink America, Inc.*, n108 upheld not only the Attorney General's standing to sue under section 63(12) for violations of the labor laws, but also the Attorney General's ability to obtain greater remedies for workers than the remedies provided for in the underlying labor laws. n109 In *Frink*, Spitzer brought an action under section 63(12) alleging that a company failed "to pay vacation pay, commissions, and expenses still owed to 41 employees" when it closed its snowplow manufacturing factory. n110 While the trial court recognized that the Attorney General "has the authority to redress violations of the Labor Law by a proceeding pursuant to Executive Law 63(12)," it also concluded that the Attorney General could not use section "63(12) to expand the remedies contained in the Labor Law," and thus, Spitzer could not "seek injunctive relief or seek to impose individual liability" on the company's president, because "those remedies are not available under the Labor Law." n111

The Appellate Division, however, rejected the trial court's narrow view that remedies under the Labor Law "are exclusive" and bar the Attorney General from seeking "additional remedies" under [\*524] section 63(12). n112 Instead, the Appellate Division read section 63(12) broadly:

Section 63(12) does not create any new causes of action, but does provide the Attorney General with standing "to seek redress and additional remedies for recognized wrongs" based on the violation of other statutes. In other words, section 63(12) "creates no new claims but provides particular remedies and standing in a public officer to seek redress on behalf of the State and others." Thus, where a proceeding is commenced pursuant to Executive Law § 63(12), the Attorney General is entitled to seek the "additional remedy" of injunctive relief. . . . Similarly, the Attorney General may seek restitution pursuant to Executive Law § 63 (12) for a violation . . . even though that underlying statute does not provide for restitution . . . n113

Thus, the court held that the Attorney General could seek payment from the firm's president, because he is "empowered by Section 63(12) to prosecute and seek redress beyond the remedies available to the DOL and individual employees in cases of repeated or persistent fraud or illegality." n114

Even when the Attorney General has express statutory authority to bring an action under a specific labor law, employers have argued that the state DOL should carry out in its administrative role before the Attorney General can bring a lawsuit in the state trial court. In *State v. Consolidated Edison*, n115 a party challenged the Attorney General's authority to sue an employer for violating section 882 of the Labor Law, the "Right to Know Law," which requires employers to inform workers about toxic substances. The court rejected the employer's argument that the [\*525] statute required the DOL to investigate violations before the Attorney General could bring an action, because the statute's wording was unambiguous in that the statute "grants the Attorney General authority to sue without restraint." n116

The *Consolidated Edison* court also rejected an argument that the primary jurisdiction doctrine required the DOL to take administrative action before the court could sustain jurisdiction over the Attorney General's lawsuit. As the U.S. Supreme Court has explained, under the primary jurisdiction doctrine a court with original jurisdiction over a claim de-

fers its power to hear the case because "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." n117 The Consolidated Edison court found the primary jurisdiction doctrine to be inappropriate, because there was "no issue of 'protection of the integrity of a regulatory scheme,'" when the DOL had not initiated enforcement proceedings or issued agency regulations, and when abstention "would leave in limbo the very employees the Legislature clearly intended to be informed and trained." n118 The Frink court, in a similar fashion, rejected a primary jurisdiction challenge. n119 Because these courts rejected primary jurisdiction arguments, the New York Attorney General today has a far greater ability to independently defend workers. [\*526]

#### 4. An Historic Shift Toward Wage and Hour Enforcement by the Office of the Attorney General

Over the past eight years, with Eliot Spitzer as Attorney General, New York's wage and hour enforcement regime has undergone an historic shift toward more proactive and effective enforcement, spearheaded by Spitzer's Labor Bureau. Under Spitzer's predecessor, Dennis Vacco, the Attorney General's office did not often proactively use its authority under section 63(12) of the Executive Law to bring wage and hour actions. n120 As Bureau Chief Smith recalls, when Spitzer became Attorney General, he told the Labor Bureau "to think about what can be done to help working people and to try to do it." n121 It was "the first time that [the Labor Bureau] actually had a mandate to do labor cases on our own." n122 Thereafter, the Bureau increased the extent to which it brings wage and hour cases. Seven years ago, the Bureau brought a single wage and hour action, but today about 50 percent of the eight-lawyer Bureau's cases are wage and hour actions. n123 Impressively, though its statutory authority remained unchanged, the Labor Bureau's capacity to bring these actions increased exponentially.

In a major institutional development, the New York Attorney General's expanding role in wage and hour enforcement coincided with a marked decline in the effectiveness of the DOL's enforcement under New York Governor George E. Pataki. n124 Since Pataki took office in 1994, the DOL has "levied far lighter penalties," obtained less wages for workers, and created long delays for workers to recover wages. n125 As a result, worker advocates "increasingly turn to the Attorney General's office" for assistance in remedying wage violations, because they view the Attorney General's [\*527] office under Spitzer's leadership as more effective, aggressive, and competent than the DOL. n126

#### B. A SYSTEMATIC AND STRATEGIC APPROACH TO WAGE AND HOUR ENFORCEMENT

This section discusses the main features of the New York Attorney General's Office's approach to enforcing employment laws in low-wage industries, an area in which the federal and state labor departments have had difficulty vindicating workers' rights. The Office's systematic approach to wage and hour enforcement in low-wage industries under Spitzer involves the following key features: (1) proactive investigation of industries, often in conjunction with labor advocates; (2) a combination of civil and criminal actions; (3) litigation against each level of the supply chain that employs low-wage workers; and (4) the creation of innovative settlements that foster future stability for workers.

##### 1. Proactive Investigation of Industries, Often With the Aid of Worker Advocates

To enforce state employment laws, Spitzer's Labor Bureau initiates proactive investigations of entire employers and industries -- often with the significant aid of worker advocates -- rather than merely investigating individual workers' complaints in isolation. n127 Labor Bureau Chief Smith contrasts the state DOL's "traditional collection agency" mentality with the Labor Bureau's proactive investigatory approach. Smith says that the way in [\*528] which her staff investigates employers and industries resembles attorneys assembling large class action lawsuits that pressure employers to settle without litigation. n128 When the Bureau receives a complaint from a worker about a specific employer, it investigates every possible violation by that employer, and prioritizes complaints in which similar employers are committing violations. n129 Unlike the DOL, which largely investigates complaints of individual workers, the Labor Bureau almost never brings an action on behalf of a single worker. n130 Before bringing a lawsuit or contacting an employer to settle a case, the Bureau documents as many violations as possible within a single workplace or industry, thereby reducing the likelihood of employer retaliation. n131

Four major investigations illustrate how the Labor Bureau has transformed individual complaints into industry-wide investigations, and then into large-scale settlements. In all four cases -- greengrocer workers, supermarket delivery workers, restroom attendant workers, and pretzel vendor workers -- the industries mostly employ the most vulnerable, low-wage immigrant workers.

##### i. Greengrocer Workers

In 1999, the Labor Bureau began an investigation of small "greengrocer" stores n132 in New York City, where many Korean store owners were paying Mexican workers \$ 3 to \$ 4 per hour, and requiring 72-hour weeks without overtime. n133 After initially receiving complaints from workers and labor advocates, the Labor [\*529] Bureau investigated claims at various work sites and settled ten to twenty cases for \$ 30,000 to \$ 105,000 in unpaid wages per store. n134 The Bureau then determined that violations were occurring throughout the 2,000-store greengrocer industry, and it expanded its investigation and ultimately reached an industry-wide "code of conduct" agreement with store owners to obey federal and state labor and employment laws in exchange for the Attorney General's promise not to sue for past violations. n135

#### ii. Supermarket Delivery Workers

In another industry-wide investigation, the Labor Bureau received complaints from workers who delivered groceries for large supermarkets in New York City, but were being illegally employed as independent contractors, rather than as supermarket employees. The Labor Bureau launched an investigation of several supermarkets, and by 2003, it negotiated settlement agreements for more than \$ 2.6 million in unpaid wages for workers at Gristedes, \$ 3.3 million for workers at Food Emporium/A&P, and \$ 300,000 for workers at Duane Reade drug stores. n136

#### iii. Bathroom Attendant Workers

Similarly, in 2004, the Labor Bureau responded to individual complaints of bathroom attendants who were employed via an independent contractor at about thirty restaurants. n137 Through its investigation, the Labor Bureau uncovered a multi-employer practice in which immigrant attendants "worked for tips only and [\*530] were forced to pay a fee to a private staffing service for the opportunity to work in restaurant bathrooms." n138 The main contractor, Royal Flush, took about 25 to 30 percent of the attendants' tips, with some workers earning as little as \$ 15 per 7-hour shift and \$ 300 per week for 70 to 80 hours of work. n139 Ultimately, the Bureau obtained a money judgment in a suit against Royal Flush, and reached settlements with the restaurants, all of which agreed to directly hire the attendants who had worked for Royal Flush. n140

#### iv. Pretzel Vendor Workers

In 2004, the Labor Bureau announced its investigation of M&T Pretzel, a company that operates hundreds of pretzel-vendor carts under New York City contracts. The investigation began in 2002, when a legal non-profit organization contacted the Bureau. Investigators then interviewed dozens of Bangladeshi immigrant workers, who testified that they were paid fixed rates of \$ 60 per day, though they often worked twelve to fourteen hour days in the summer without lunch breaks, and nearly eighty-hour weeks. n141 Despite such widespread exploitation, M&T Pretzel was earning as much as \$ 400,000 annually per vendor cart, and bidding hundreds of thousands of dollars to station individual carts in locations in Central Park. n142 In 2004, the Labor Bureau settled with M&T for \$ 450,000 and an agreement to follow state and federal labor laws in the future. n143

As two of these investigations demonstrate, an invaluable part of the Bureau's proactive investigatory approach involves work [\*531] ing with labor advocates who are organizing or representing workers. For example, the greengrocer workers were referred to the Labor Bureau by a local union, UNITE! Local 169, and a community labor coalition, n144 and in the M&T Pretzel case, the Bureau received information directly from the Street Vendor Project of the Urban Justice Center, a legal advocacy group. n145

### 2. The Combination of Civil and Criminal Actions

An important feature of the Labor Bureau's enforcement approach is the combination of civil and criminal actions to punish and deter employers who violate the law. The Attorney General can initiate criminal prosecutions in two situations: first, when the DOL investigates a violation and refers the case to the Attorney General for criminal prosecution; and, second, when the Attorney General independently investigates a civil violation and brings criminal and civil charges at the same time. n146 When the Attorney General brings a criminal action against an employer for labor law violations, both the Labor Bureau and the Criminal Investigations Bureau of the Attorney General work together on the prosecution. n147 Although the Labor Bureau can bring criminal actions for a variety of labor violations, the Bureau most commonly initiates criminal actions when contractors employ workers in violation of state prevailing wage laws. n148 [\*532]

### 3. Attacking Every Part of the Supply and Production Chain

One of the most creative and effective features of the Labor Bureau's enforcement approach is its use of a variety of state laws to protect workers at every point along the labor supply and production chains. As the Bureau has documented through its investigations, employers often use independent contractors and employment agencies to supply labor under terms that violate state law. Moreover, manufacturers often purchase goods from suppliers who violate state labor laws in the production of those goods. To combat these trends, the Bureau has initiated actions against the corporate entities that facilitate and benefit from these practices.

#### i. Independent Contractors and Employment Referral Agencies

In recent investigations and litigation, the Labor Bureau has helped to curb the use of exploitative independent contractors and employment agencies in several ways. First, the Labor Bureau has brought many actions against independent contractors and the companies that hire abusive contractors, as exemplified by the supermarket delivery and bathroom attendant cases discussed above. n149 Second, in June 2004, the Bureau successfully brought civil actions against nine employment agencies that had consistently and illegally referred workers to jobs that paid subminimum wages, n150 and in February 2006, the Bureau announced [\*533] a \$ 495,000 settlement with a construction contractor that had used a staffing agency to avoid providing overtime pay to hundreds of laborers. n151 New York law bans referrals to employers who violate minimum wage and overtime laws, and limits the compensation that employment agencies can receive. n152 By suing these agencies, Spitzer has eliminated a tool used by many industries to recruit subminimum wage labor.

#### ii. Enforcing the Hot Goods Law in the Apparel Industry

By enforcing the "hot goods" law, the Labor Bureau has pressured retailers, manufacturers, and subcontractors to improve working conditions in New York's apparel industry. In 1996, New York enacted a "hot goods" law, making it illegal to ship, deliver or sell apparel goods that are produced in violation of the state's wage laws. n153 In 1999, working with the state DOL's Apparel [\*534] Industry Task Force ("AITF"), Spitzer became the first New York Attorney General to use the "hot goods" law to obtain an injunction against the sale of goods manufactured with subminimum wage labor. n154 Importantly, in its first action under the new law, the Labor Bureau convinced the court that manufacturers should be held strictly liable. n155

### 4. Innovative Settlements That Foster Future Stability for Workers

#### i. Requiring the Real Employer to Hire the Aggrieved Worker

A crucial part of the Labor Bureau's approach is its ability to settle disputes with employers in innovative ways that foster greater stability for aggrieved workers. In several cases, the Bureau has reached settlements that require companies to directly hire employees who had worked for independent contractors that provided services to the settling companies. For example, in the settlement of the bathroom attendant cases, Tavern on the Green agreed to directly hire fourteen attendants, and three other restaurants agreed to hire twenty-one valets who staffed their bathrooms. n156 In the settlement of the supermarket delivery cases, Gristedes "agreed to hire the delivery workers in-house and provide benefits, including health insurance, pension, and vacation [\*535] pay." n157 These agreements create greater stability and job security for the workers, because they will work for more financially stable employers, instead of fly-by-night independent contractors. The agreements also make it easier for workers to join existing unions or to form new ones, by making them in-house employees instead of independent contractors. As Smith notes, a goal in "service staffing cases" is to "take jobs out of the underground economy as much as possible," which these agreements accomplish. n158

#### ii. Creating an Industry-Wide Code of Conduct

The Labor Bureau's most innovative settlement occurred in the greengrocer cases, in which the Bureau obtained an agreement with hundreds of greengrocer stores to follow a Greengrocer Code of Conduct ("Code"). n159 While many of the Code's provisions merely require employers to follow federal and state laws, the Code provides for additional rights, such as two to three sick days and one week of paid vacation per year. n160 Also, the Code provides for monitoring by the Attorney General, creates a hotline for workers to report violations, and gives information to consumers about which greengrocer stores comply with the Code. Finally, under the Code, employers must affirm the rights of workers to join unions without retaliation. n161 A few years after the Code was adopted, a monitoring report concluded that 144 of 145 monitored stores had followed minimum wage and overtime laws, [\*536] demonstrating substantial compliance in the greengrocer industry. n162

## V. STATE ATTORNEYS GENERAL DEFENDING THE SUBSTANTIVE EMPLOYMENT RIGHTS OF UNDOCUMENTED IMMIGRANT WORKERS

This Part addresses how state attorneys general have worked both collectively and individually to defend the substantive state employment rights of undocumented immigrant workers, demonstrating the types of tools -- advisory opinions, amicus briefs, intervention, and representation of state agencies -- that all attorneys general can strategically use to influence the interpretation of state employment laws. This Part also highlights a potential issue for multi-state coordination among attorneys general, n163 the defense of undocumented workers' rights.

Because there are six million undocumented workers in the United States, and two million of them earn less than \$ 5.15 per hour, n164 many attorneys general recognize that state wage enforcement cannot be effective unless state officials can uphold the rights of undocumented workers. The ability of states to protect undocumented workers' rights has been threatened by the U.S. Supreme Court's 2002 decision that undocumented workers cannot receive "back pay" under the NLRA, prompting employers to launch an attack on the state employment rights of undocumented [\*537] workers. n165 Nevertheless, both before and after *Hoffman Plastic Compounds, Inc. v. NLRB*, n166 attorneys general have defended the nation's most vulnerable workers against employers' arguments that federal immigration law preempts state employment law remedies.

#### A. HOFFMAN AND THE AMICUS CURIAE BRIEF OF THE STATE ATTORNEYS GENERAL

In 2002, the U.S. Supreme Court held in *Hoffman* that undocumented workers cannot receive back pay awards under the NLRA for work that was not actually performed and could not have been legally performed. n167 Specifically, the court held that Jose Castro could not receive the back pay award that the National Labor Relations Board ("NLRB") had ruled he was entitled to because of a discriminatory discharge. n168 Although the Supreme Court had previously suggested that undocumented workers can receive back pay under the NLRA, n169 the *Hoffman* court found that "awarding back pay to illegal aliens runs counter to the policies underlying" the Immigration Reform and Control Act of 1986 ("IRCA"), which prohibits employers from knowingly hiring undocumented workers. n170

Fearing that a broad ruling in *Hoffman* might adversely impact state employment laws, the Attorneys General of New York, Arizona, California, Hawaii, Massachusetts, West Virginia, and Puerto Rico submitted an amicus curiae brief to the Supreme Court, arguing that back pay should be allowed for undocumented [\*538] workers under the NLRA, but that even if back pay is not allowed under the NLRA, IRCA "should not prevent states, under their own laws, from granting back pay or other appropriate remedies to undocumented workers." n171 Raising the point that many state laws grant back wages or lost wages to workers -- including workers' compensation, tort, contract, employment discrimination, and wage and hour laws -- the brief argued that without the ability to award back pay to undocumented workers "state laws that protect both documented and undocumented employees could not be enforced." n172 The brief also argued that federal immigration law cannot preempt state employment laws, because there is no conflict between federal and state law and no congressional intent to displace state law. n173 Although the Attorneys General hoped that the Court would expressly limit its holding to back pay under the NLRA, the majority opinion did not address whether its holding impacts state law in any way, leaving the issue open for state and federal judges to decide on the basis of federal preemption analysis. [\*539]

#### B. ADVISORY OPINIONS AND INTERVENTION IN LITIGATION TO AVOID THE FEDERAL PREEMPTION OF STATE EMPLOYMENT LAWS

Since the *Hoffman* decision, state attorneys general have issued advisory opinions, intervened in litigation, and filed amicus curiae briefs with courts to argue against preemption of state employment laws by federal immigration law. These activities illustrate the diverse legal tools that state attorneys general can use to impact the interpretation and application of state law. Indeed, action by state attorneys general on the IRCA preemption issue has been key, because state courts have been more willing than the federal courts to find that IRCA bars otherwise available remedies. n174

As in the area of enforcement, New York Attorney General Spitzer has been at the forefront of the post-*Hoffman* debate over whether state employment laws are preempted. In New York, where a survey shows that half of the state's undocumented immigrants are paid below the minimum wage, n175 Spitzer's response serves as a model for how an attorney general can use the office's full range of powers to influence the way that courts and state agencies interpret substantive issues of law.

In 2003, in response to an inquiry from the state DOL about the effect of *Hoffman* on the enforcement of state wage and hour laws, Spitzer issued a formal opinion, n176 advising the DOL that "*Hoffman* does not preclude enforcement of State wage payment laws on behalf of undocumented immigrants." n177 In the two years since Spitzer issued the opinion, four state courts and one federal court have cited the opinion as positive authority for the proposition that federal law does not preempt state law remedies for un [\*540] documented workers. n178 In the opinion, Spitzer ar-

gues that because state wage and hour laws mandate payments to workers for wages already earned, and not for back pay, Hoffman is irrelevant to the state's enforcement of these laws, because Hoffman only barred back pay. n179 The opinion also suggests that, under state tort law, undocumented workers can recover "lost wages" for work not actually performed. n180

In 2005, Spitzer successfully intervened n181 in three cases in which state trial and appellate courts had held that federal immigration law preempts undocumented workers from receiving lost earning recoveries based on wages earned domestically in common-law tort and state statutory worker-safety actions. n182 By [\*541] intervening and litigating these cases, Spitzer helped to precipitate a split among the state appellate courts on the issue of lost earnings tort recoveries, and on February 21, 2006, the New York Court of Appeals, the state's highest court, decided that "IRCA does not bar maintenance of a claim for lost wages by an undocumented alien" and reaffirmed that the state's "labor law . . . applies to all workers in qualifying employment -- regardless of immigration status." n183 Instead of passively waiting for workers or employers to appeal adverse decisions to the state's highest court, Spitzer's Labor Bureau shaped the outcome of this litigation by participating in briefing and oral arguments before the Appellate Division and the Court of Appeals. n184 [\*542]

Finally, consistent with Spitzer's opinion that immigration status is irrelevant to wage and hour enforcement, like many other attorneys general in the nation, n185 Spitzer's Labor Bureau has adopted a policy of not inquiring into the immigration status of workers when conducting enforcement investigations and litigation. n186 As reports from investigations confirm, this policy is crucial for undocumented workers to feel comfortable reporting violations. n187

## VI. ANALYSIS OF WAGE AND HOUR ENFORCEMENT BY STATE ATTORNEYS GENERAL

This Part argues that the concurrent authority approach is the ideal enforcement structure, recommends how state attorneys general can expand their legal authority to enforce wage and hour laws, discusses why states should adopt Spitzer's proactive investigatory model, and urges attorneys general to take action to protect the state employment rights of undocumented workers. [\*543]

### A. STATE ATTORNEYS GENERAL: A POWERFUL AND GROWING FORCE IN WORKER PROTECTION

In this era of conservative federal governance, decreasing union density, and a stagnant federal minimum wage, state attorneys general have an historic opportunity and obligation to provide leadership in protecting America's workers. Although state attorneys general across the nation serve significantly different roles in wage and hour enforcement, they all have expansive authority and significant capacity to impact the legal rights and remedies that workers can obtain under state law. Attorneys general have already demonstrated the importance of their leadership in enforcement by using legal and extralegal tools, such as industry-wide investigations, civil and criminal actions, amicus briefs, advisory opinions, intervention, representation of state agencies, community and media outreach, and public education.

In addition, through inter-office discussion, communication, and collaboration, state attorneys general are now sharing and adopting successful strategies for assuming enhanced legal authority and enforcing state laws. n188 As a result of increased cooperation, the attorneys general may be emerging as major players in state wage and hour enforcement, just as the attorneys general did in the areas of consumer protection in the 1980s and public health in the 1990s. n189 In a promising development, some state attorneys general who historically have not been involved in wage enforcement recently started to bring actions against exploitative employers. n190 [\*544]

### B. CONCURRENT AUTHORITY: THE IDEAL STRUCTURE FOR STATE WAGE AND HOUR ENFORCEMENT

As stated earlier, a main purpose of this Note is to ascertain the ideal role for an attorney general in a state's overall wage and hour enforcement structure. Based on the prior examination of several states' enforcement structures and the emergence of a successful concurrent enforcement scheme in New York, it appears that the concurrent authority structure is far superior to the systems which have sole enforcement in the attorney general or sole enforcement in the state labor department. The concurrent authority structure is superior for several reasons: (1) it reduces the risk that a single election could result in weak enforcement; (2) it creates an additional check and balance in state government, allowing the state attorney general to fill in the gaps left by a poorly performing labor department, and encourages experimentation and competition between the attorney general and the labor department; and (3) it combines investigations with civil and criminal prosecutions.

#### 1. The Political Problem with Sole Enforcement in Either the Attorney General or the Department of Labor

A major reason to support concurrent authority lies in the primary weakness of a system that gives sole or exclusive authority to either the attorney general or the state labor department to enforce state wage and hour laws. The primary problem with each sole authority model is that a single election can jeopardize the viability of an enforcement system. If a governor or an attorney general has exclusive authority over enforcement, then when a candidate who favors lax enforcement is elected to the office that controls enforcement, enforcement will likely suffer. Given how important workplace issues are, state officials often solicit support during elections from labor and business groups by suggesting varying levels of vigilance in enforcement. Thus, the sole authority structures place too much responsibility exclusively in the hands of one official, without a check of another agency or official. The lack of a check would be particularly unfortunate in the sixteen states where the governor and attorney general's offices are controlled by opposite political parties that often place different emphases on wage enforcement, especially because nine of these states have minimum wages that exceed the federal minimum wage rate.<sup>192</sup>

The political dilemma of the sole authority structures is illustrated by the experience of California. In California, where the labor department has the lion's share of enforcement authority, voters in 2003 recalled a labor-friendly Democrat, Gray Davis, and elected a business-friendly Republican, Arnold Schwarzenegger, who subsequently promoted several anti-worker initiatives.<sup>193</sup> Although California's labor department officials assert that the state has not changed its enforcement practices since Schwarzenegger replaced Davis,<sup>194</sup> a recent report shows that the state's Division of Labor Standards Enforcement has cut 8.4 percent of its staff since Schwarzenegger took office and that the DLSE has systematically failed to enforce the state's hot goods law.<sup>195</sup> [546]

## 2. Concurrent Authority Provides a Necessary Check and Balance

The concurrent structure is the most efficacious because it creates an additional check and balance in state government to ensure that wage and hour laws are adequately enforced -- a balance that the office of the state attorney general was intended to provide. As forty-four attorneys general recently stated in an amicus curiae brief, "the independence of the Attorney General reflects a conscious decision by the framers of their state constitutions to interpose an additional check and balance in the traditional American tripartite scheme of government."<sup>196</sup> In the forty-three states where voters elect their attorneys general, this "divided executive branch" form of government was created so that the people would have a legal representative to bring actions to protect the people, the state, and the public interest.<sup>197</sup> Thus, when state attorneys general take action to remedy the private and public wrongs of wage violations -- when the state labor department will not -- they are fulfilling their most fundamental constitutional, statutory and common law duties, or as the amicus brief put it, their duties as "guardians, parens patriae of the public interest" to enforce the law and to protect residents from harm.<sup>198</sup>

Most importantly, however, concurrent authority will likely result in the greatest level of enforcement because it allows an attorney general to supplement -- though not necessarily replace -- the enforcement work of the state labor department in circumstances where the labor department is not doing a sufficient job. There are many reasons why a state labor department might be [547] doing a poor job enforcing state laws, such as inept agency management, insufficient agency funding, or a lack of political interest in enforcement. Whatever the cause of the decline, the attorney general's supplemental role will very likely improve enforcement. As Part IV showed, with Spitzer's Labor Bureau as an additional enforcement agency, New York's aggrieved workers are now much more likely to report violations and recover unpaid wages than they were when they could only rely on the state DOL. When the state labor department and attorney general develop different approaches to enforcement, aggrieved workers can choose which style will best enforce their rights. As reports suggest, low-wage workers and advocates increasingly turn to Spitzer's office, because they find it more aggressive and capable of recovering for large groups of workers.<sup>199</sup>

Another beneficial feature of the concurrent structure is that an attorney general who asserts independent jurisdiction can highlight areas where the state labor department is not effectively doing its job, and can showcase more effective enforcement strategies that the state labor department might adopt. Thus, the infusion of an attorney general's proactive, strategic approach might have a ripple effect on a state labor department, potentially improving the capacity of both agencies to skillfully enforce the law.

## 3. Concurrent Authority Unites the Roles of Investigation, Civil Litigation, and Criminal Prosecution

Concurrent authority gives an attorney general the ability to carry out three key functions in remedying wage and hour violations -- investigation, civil litigation, and criminal prosecution. When a state attorney general has all three of these powers, he or she can seamlessly oversee the entire case, from investigating a violation, to determining whether to bring civil or criminal charges, to deciding when to settle.<sup>200</sup> Having all three powers reduces the red tape of relying on another agency's investigators, [548] and makes it more likely that a state will seek criminal charges, because no

referral from the labor department is necessary. n201 Moreover, employers who exploit low-wage workers may only be persuaded to follow the law by the threat of criminal penalties.

#### 4. Responses to Possible Criticisms of a Concurrent Authority

Despite the success of Spitzer's use of concurrent authority, there are several arguments that critics could raise against the use of concurrent authority to enforce wage and hour statutes. First, critics might argue that allowing two state agencies to enforce the same laws will result in "over-enforcement" -- i.e. placing too much regulation on employers -- and that the benefits of additional enforcement are outweighed by the costs of enforcement. n202 This argument ignores evidence that millions of workers are paid below the federal or state minimum wages, including thousands in New York where Spitzer has used concurrent authority, n203 which shows that current enforcement levels are nowhere close to solving the problem of wage and hour violations. Moreover, having an additional agency increase the overall level of enforcement does nothing more than ensure greater compliance with current laws, and places no new substantive requirements on employers. Thus, any argument about over-enforcement must be premised on the notion that some level of law-breaking is desirable. This notion is highly dubious in the minimum wage context, where both low-wage workers and responsible firms suffer significant adverse effects from violations. Furthermore, additional enforcement is a highly efficient use of government resources. Because state attorneys general need not hire large staffs to bring new wage actions n204 and enforcement [\*549] staffing often pays for itself in employer penalties, n205 there is no risk that the costs of additional enforcement will outweigh the benefits to workers, the state, and law-abiding employers.

Critics might also argue that concurrent authority will cause unnecessary conflict and redundancy between the state labor department and the attorney general. Given that the federal and state labor departments, as well as individual workers, already have concurrent authority to bring legal actions for the same violations, it is doubtful that adding a state attorney general into the mix will cause significant conflict or redundancy. Nor will there inevitably be intra-state conflict over whether the state labor department or the attorney general will represent a particular aggrieved worker. In New York, these two agencies sort out these cases amicably, especially because they already work together on some cases. n206 Moreover, if an attorney general steps up enforcement because a labor department is enforcing state laws poorly, it seems unlikely that a labor department would want to keep these cases for itself.

#### C. STRATEGIES FOR EXPANDING LEGAL AUTHORITY TO ENFORCE WAGE AND HOUR LAWS

In light of the benefits of having state attorneys general initiate independent wage and hour actions, state attorneys general should consider developing such independent authority through existing statutes or legal reforms. First, attorneys general should consider invoking legal standing and jurisdiction in a state court on the basis of current state law, including common law, state constitutions and state statutes that define the general and specific powers and duties of the state attorney general. For example, an attorney general might find such authority in broadly worded state consumer fraud statutes or other statutes that give the attorney general standing to bring actions against repeated [\*550] violations of law or unfair competition, such as section 63(12) of New York's Executive Law. n207

Second, attorneys general should promote or support statutory and constitutional amendments that expressly grant the attorney general standing to bring actions in state courts for wage and hour violations. Attorneys general can work with legislators to amend state labor laws, and they also can partner with the proponents of minimum wage ballot initiatives, to ensure that those initiatives not only raise the minimum wage, but also give attorneys general the standing to enforce the higher minimum wage rates. In 2004, Florida voters approved a minimum wage initiative that gave the Attorney General standing to enforce the minimum wage, n208 and in November 2006, Arizona and Ohio's citizens will vote on minimum wage initiatives that grant their state Attorneys General standing to enforce the minimum wage. n209 As advocates in other states draft initiatives, they [\*551] should use language making it clear that the attorney general has standing to bring an action, whether or not the legislature empowers another agency to do so. Finally, as an attorney general acquires or asserts the preexisting authority to enforce state laws, he or she should advocate for the appropriation of state funds for independent litigation. n210

#### D. STATE ATTORNEYS GENERAL SHOULD ADOPT SPITZER'S PROACTIVE INDUSTRY-WIDE INVESTIGATION MODEL OF ENFORCEMENT

In considering how to approach the task of investigating and prosecuting employers that violate employment laws, state attorneys general should look to Spitzer's method of enforcement as a model approach of supplementing a state labor department. As Spitzer's Labor Bureau has demonstrated through seven years of massive investigations, litigation, and settlements, the class action or proactive industry-wide investigation model n211 is the ideal way for attorneys general to maximize the protection of workers. In this model of enforcement, investigators and attorneys document viola-

tions from as many workers as possible before seeking settlement or suing employers, independent contractors, or employment agencies. The most beneficial aspect of the model is the maximization of compensation that workers collectively recover from their employers, and the minimization of risk that each individual worker faces in reporting a violation or participating in an investigation. Crucially, the class action approach solves two collective action problems that often complicate efforts to enforce wage and hour laws in low-wage, immigrant-dominated industries.

The first problem is that, for the average individual worker who is considering making a complaint to the government, the [\*552] cost of acting alone -- the likelihood of retaliation by the employer, including discharge and deportation -- may outweigh the potential benefit of action. When workers know that the attorney general will seek relief for all aggrieved workers and conceal the names of the complainants to the greatest extent possible, the likelihood of retaliation by the employer falls dramatically and the probability of a full recovery increases significantly. n212 The second collective action problem is that employers of low-wage workers have no incentive to follow wage and hour laws if their competitors violate the laws with impunity. By seeking settlements with all employers that violate laws in the same market, and by monitoring future violations, the attorney general reduces the benefit of non-compliance and increases the cost of noncompliance for firms. n213

#### E. STOPPING THE ADVERSE RAMIFICATIONS OF HOFFMAN

Whether or not state attorneys general engage in enforcement, they all should resist the growing threats to undocumented workers' rights since Hoffman. Although in some states no courts or very few courts have addressed whether federal immigration law preempts state employment law remedies for undocumented workers, the body of post-Hoffman state case law grows every month, and several decisions have significantly diminished undocumented workers' rights. n214 While all attorneys general have considerable powers to influence the post-Hoffman case law -- through amicus curiae briefs, advisory opinions, and interventions -- too few of them have taken such actions in the four years since Hoffman. Many more attorneys general should use these tools at the state level and also attempt to seek Supreme Court [\*553] review of a case involving preemption of state law to give the Court an opportunity to limit Hoffman to back pay under the NLRA. n215

#### VII. CONCLUSION

This Note has examined the important and varying roles that state attorneys general play in enforcing wage and hour laws. As certain resourceful attorneys general have demonstrated, attorneys general have a tremendous ability to protect workers under state laws, and more attorneys general should consider putting greater resources into wage and hour enforcement in the future. The experience of Eliot Spitzer in New York in particular shows that state attorneys general often may have existing statutory or common law authority to enforce wage and hour laws through direct litigation, and the benefits of attorney general participation in this key legal area far outweigh the costs. Instead of mourning the laissez-faire attitude of federal leaders on workers' rights, attorneys general who believe in economic justice and fair competition should expand their legal and functional capacity to uphold the rights of all workers.

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Statutes of Limitations  
Time Limitations  
Transportation Law  
Water Transportation  
Rates & Tariffs

#### FOOTNOTES:

n1 Stephen Greenhouse, *Waging War, From Wall Street to Corner Grocery: Beyond the High-Profile Cases, Spitzer Helps Low-Wage Workers*, N.Y. TIMES, Jan. 21, 2004, at B1 (quoting New York Attorney General Eliot Spitzer).

n2 Elizabeth Bumiller & Anne E. Kornblut, *Black Leaders Say Storm Forced Bush to Confront Issues of Race and Poverty*, N.Y. TIMES, Sept. 18, 2005, at A21 ("Hurricane Katrina has forced President Bush to confront the issues of race and poverty in a way that has shaken his presidency and altered his priorities . . . . Many black leaders, who have newfound political leverage at the White House in the wake of the storm, cautiously applauded.").

n3 The White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html> ("As all of us saw on television, there's also some deep, persistent poverty in this region, as well. That poverty has roots in a history of racial discrimination . . . . We have a duty to confront this poverty with bold action.").

n4 The White House, Proclamation by the President: To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina (Sept. 8, 2005), <http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html> (suspending the application of the federal Davis-Bacon Act in counties in Alabama, Florida, Louisiana, and Mississippi).

n5 Marilyn Geewax, Minimum Wage: Senate Rejects Increase to \$ 6.25, ATLANTA JOURNAL-CONST., Oct. 20, 2005, at 1F ("The Senate on Wednesday defeated an effort by Sen. Edward Kennedy (D-Mass.) to raise the federal minimum wage for the first time since 1997. Kennedy proposed boosting the government-mandated wage from \$ 5.15 an hour to \$ 6.25 in two steps over 18 months. . . . Kennedy's amendment picked up only 47 votes . . .").

n6 Jason DeParle, Liberal Hopes Ebb in Post-Storm Poverty Debate, N.Y. TIMES, Oct. 11, 2005, at A1 (stating that Bush opposed a plan of Senate Finance Committee Chairman Charles E. Grassley and Ranking Democrat Max Baucus "to expand Medicaid to cover all the poor who survived Hurricane Katrina, including many adults who did not previously qualify").

n7 Immigrant Workers Stiffed for Katrina Work, ASSOCIATED PRESS, Nov. 5, 2005 ("A pattern is emerging as the cleanup of Mississippi's Gulf Coast morphs into its multibillion-dollar reconstruction: Come payday, untold numbers of Hispanic immigrant laborers are being stiffed."); National Employment Law Project, Hurricane Katrina and Low-Wage Workers, <http://www.nelp.org/workers/workplacerrights/hurricanekefactsheets.cfm> (last visited Apr. 1, 2006); NATIONAL IMMIGRATION LAW CENTER, IMMIGRANT RIGHTS UPDATE 34 (Oct. 21, 2005), available at <http://www.nilc.org/disasterassistance/IRU6-05.pdf>.

n8 DeParle, *supra* note 6.

n9 John Edwards, Take Action: Raise the Minimum Wage, <http://www.oneamericacommittee.com/minimumwage/> (last visited Apr. 1, 2006) ("Since the Bush Administration and the Republican-led Congress have continued to block attempts to increase the minimum wage at the federal level, we are working with grassroots coalitions to organize and pass minimum wage ballot initiatives in targeted states in 2006."). See also John M. Broder, States Take Lead in Push to Raise Minimum Wages, N.Y. TIMES, Jan. 2, 2006, at A1 ("The 2006 battle over the minimum wage is expected to be particularly intense in Ohio, one of only two states that have a minimum wage below the federal level (the other is Kansas)."); Rick Klein, Democrats to Woo Voters on Wage Issue: Frozen Minimum Pay Seen as Spur, BOSTON GLOBE, Dec. 25, 2005, at A1 ("Labor, religious, and community groups have launched efforts to place minimum-wage initiatives on ballots in Ohio, Michigan, Arizona, Colorado, Nevada, Arkansas, and Montana next fall.").

n10 See *infra* Part II.B (discussing state laws that exceed federal standards); Jon Gertner, What is a Living Wage?, N.Y. TIMES MAG., Jan. 15, 2006, at 38; Darin Dalmat, Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule, 39 COLUM. J.L. & SOC. PROBS. 93, 99-100 (2005) (discussing local employment law ordinances); Living Wage Resource Center, Living Wage Suc-

cesses, <http://www.livingwagecampaign.org/index.php?id=1959> (last visited Apr. 1, 2006); William Quigley, Full Time Workers Should Not Be Poor: The Living Wage Movement, *70 MISS. L.J.* 889 (2001). For example, San Francisco has adopted a city-wide minimum wage rate of \$ 8.82 per hour, which applies to adults and minors who work two or more hours each week. San Francisco, Office of Labor Standards Enforcement, Minimum Wage Ordinance, <http://www.livingwagecampaign.org/index.php?id=1959> (last visited Apr. 1, 2006).

n11 George W. Bush received 52 percent of the vote in Florida and 51 percent of the vote in Nevada in the 2004 election. CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/scorecard/> (last visited Apr. 1, 2006).

n12 Edwards, *supra* note 9. In Nevada, because the initiative was for a proposed amendment to the state constitution, voters must approve the initiative again, during the 2006 election, to ratify the amendment. Broder, *supra* note 9.

n13 See Thomas Geoghegan, Take It to the Blue States: Maybe Labor Should Give Up on Washington in Favor of Friendlier Terrain, *THE NATION*, Nov. 29, 2004, at 14 (arguing that Democrats and unions should promote a populist agenda at the state level to demonstrate the benefit of such policies to the entire nation).

n14 Academics make a basic distinction between the fields of employment law -- the regulation of individual workers' rights -- and labor law -- the regulation of unions and collective bargaining. Matthew T. Bodie, The Potential for State Labor Law: The New York Greengrocer Code of Conduct, *21 HOFSTRA LAB. & EMP. L.J.* 183, 187 (2003).

n15 This is mostly because the Supreme Court has interpreted the National Labor Relations Act ("NLRA") to preempt many types of state and local labor laws. See Cynthia Estlund, The Ossification of American Labor Law, *102 COLUM.L.REV.* 1527, 1571-72 (2002) (explaining that two types of court-developed preemption, Garmon and Machinists preemption, "together virtually banish states and localities from the field of labor relations").

n16 This Note's focus on employment law is not intended to diminish the importance of labor laws that states have passed and enforced, particularly in the regulation of collective bargaining for public employees and agricultural workers, two groups that have no rights under the federal NLRA. See *29 U.S.C. § 152(3)* (2000) (defining the term "employee"); *id.* § 152(2) (defining the term "employer"). For example, nine states have passed laws that provide some level of collective bargaining rights for farm workers, covering about half of the 680,000 farm workers nationwide. U.S. GENERAL ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 13 (2002), available at <http://www.gao.gov/new.items/d02835.pdf>. Also, in a major victory for workers' rights, in 2002 California enacted a law providing for binding mediation between farm worker unions and growers. See *CAL.LAB. CODE § 1164-1164.13* (West 2005).

n17 *29 U.S.C. § 206(a)* (2000).

n18 *Id.* § 206(a)(1) ("Every employer shall pay to each of his employees . . . not less than \$ 5.15 an hour beginning September 1, 1997.").

n19 Exempted employees include workers with disabilities, tipped employees, student-learners, and youths under twenty years old in the first ninety consecutive calendar days of work. See *id.* § 214(c) (handicapped workers); *id.* §§ 213(t), 213(m) (tipped employees); *id.* § 206(g) (workers under twenty in first ninety consecutive calendar days of work); *id.* § 214(a) (student learners). Tipped employees must receive \$ 5.15 if the sum of the required minimum wage of \$ 2.13 per hour and their tips is less than \$ 5.15 per hour. U.S. Dep't of Labor, *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, <http://www.dol.gov/esa/regs/compliance/whd/whdfs15.htm> (last visited Apr. 1, 2006).

n20 29 U.S.C. § 207(a) ("No employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.").

n21 See U.S. Dep't of Labor, *Fact Sheet #23: Overtime Pay Requirements of the FLSA*, <http://www.dol.gov/esa/regs/compliance/whd/whdfs23.htm> (last visited Apr. 1, 2006).

n22 29U.S.C. § 213(a)(1). These workers are also exempted from the minimum wage rate requirements. *Id.* In addition, many other specific categories of workers are exempted from either minimum wage or overtime coverage, or both. See *id.* §§ 213, 214. In April 2004, the Bush Administration issued final regulations on the "executive, administrative, or professional" exemptions, which eliminated overtime coverage for six million workers. Craig Becker, A Good Job for Everyone, Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy, LEGAL TIMES, Sept. 6, 2004, at 54 (stating that the AFL-CIO and the Economic Policy Institute believe the Bush Administration's final rule will "remove nearly 6 million workers from the overtime protection of the FLSA"). Nevertheless, almost all low-wage workers qualify for overtime, because the regulations specify that any employee who earns less than \$ 455 per week (or \$ 23,660 per year) is not exempt. U.S. Dep't of Labor, Wage and Hour Division, 29 C.F.R. Part 541, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22126 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541) (stating that the final rule "guarantees protection for all employees earning less than \$ 455 per week (\$ 23,660 annually)").

n23 29 U.S.C. § 216(b). An employee, however, cannot maintain an action if the Secretary of Labor has already brought an action on behalf of the employee. *Id.*

n24 *Id.* § 215(a)(3); *id.* § 216(b). The "payment of wages lost" is provided to the employee for work that he or she would have performed but for the retaliation.

n25 *Id.* § 255(a).

n26 See *id.* § 212; 29 C.F.R. Part 570 (2005); U.S. Dep't of Labor, Youth and Labor, <http://www.dol.gov/dol/topic/youthlabor/hazardousjobs.htm> (last visited Apr. 1, 2006) ("The Fair Labor Standards Act (FLSA) prohibits minors under age 18 years old to work in any occupation that it deems to be hazardous. Among these occupations are excavation, manufacturing explosives, mining, and operating many types of power-driven equipment.").

n27 29 U.S.C. § 217; *id.* § 215(a)(1). While the hot goods law has tremendous potential to protect low-wage workers, the law's potency has been diminished due to a lack of enforcement and a requirement that a party needs knowledge of violations to be liable. See Andrew Elmore, State Joint Employer Liability Law and

Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to a National Crisis, *49 UCLA L. REV.* 395, 410-12 (2001).

n28 The Davis-Bacon and Related Acts mandate a "prevailing wage" -- which significantly exceeds federal and state minimum wage rates -- for federal construction contracts. *40 U.S.C. § 276a* (2000); 29 C.F.R. Parts 1, 3, 5, and 6 (2005). These laws apply to contractors or subcontractors working on federal contracts of more than \$ 2,000 for the "construction, alteration, or repair (including painting and decorating) of public buildings or public works." U.S. Dep't of Labor, *Prevailing Wages in Construction Contracts*, <http://www.dol.gov/asp/programs/guide/dbra.htm> (last visited Apr. 1, 2006). When Davis-Bacon violations occur, the law requires employers to pay workers their unpaid wages, and employers can lose federal contracts. Prevailing wage laws are enforced by the U.S. Department of Labor. Id.

n29 The MSPA regulates the terms of employment for migrant and seasonal farm workers, and is enforced by the U.S. Department of Labor. *29 U.S.C. § § 1801-1872.*; U.S. Dep't of Labor, *Employment Law Guide, Migrant and Seasonal Agricultural Worker Protection*, <http://www.dol.gov/compliance/guide/mspa.htm> (last visited Apr. 1, 2006).

n30 For a comprehensive review of state labor and employment laws passed in recent years, see U.S. DEPT OF LABOR, *STATE LABOR LEGISLATION ENACTED IN 2005* (2006), available at <http://www.bls.gov/opub/mlr/2006/01/art1full.pdf>; U.S. DEPT OF LABOR, *STATE LABOR LEGISLATION ENACTED IN 2004* (2005), available at <http://www.bls.gov/opub/mlr/2005/01/art1full.pdf>; U.S. DEPT OF LABOR, *STATE LABOR LEGISLATION ENACTED IN 2003* (2004), available at <http://www.bls.gov/opub/mlr/2004/01/art1full.pdf>.

n31 State "wage collection" statutes fall into this category. See EVE H. CERVANTEZ, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, *WHEN SHOULD YOU BRING STATE LAW WAGE AND HOUR CLAIMS IN ADDITION TO, OR INSTEAD OF FLSA CLAIMS? 2*, available at <http://www.lieffcabraser.com/pdf/20040330ehcflsaarticle.pdf> (last visited Apr. 1, 2006) ("In contrast to federal law, most states have wage collection statutes, which mandate that employers pay employees all wages earned and due, generally within a certain time frame (e.g. within two weeks of the work being performed).") (citing *CAL.LAB.CODE § § 204, 216* (West 2005)).

n32 A state minimum wage rate that exceeds \$ 5.15 per hour is an example of this category. See *infra* note 35 (listing the minimum wage rates of twenty states and the District of Columbia).

n33 See *infra* Part III.B (discussing how certain states use administrative proceedings and civil citations to remedy violations).

n34 *29 U.S.C. § 218(a)*. Millions of workers benefit from the state wage and hour standards that exceed the FLSA's standards, and many workers who are FLSA-exempt receive wage and overtime protection under state laws.

n35 Twenty states and the District of Columbia currently have enacted minimum wage rates that exceed the federal minimum wage rate of \$ 5.15, including Alaska (\$ 7.15), Arkansas (\$ 6.25), California (\$ 6.75), Connecticut (\$ 7.40), Delaware (\$ 6.15), District of Columbia (\$ 7.00), Florida (\$ 6.15), Hawaii (\$ 6.75), Illinois (\$ 6.50), Maine (\$ 6.50), Maryland (\$ 6.15), Massachusetts (\$ 6.75), Michigan (\$ 6.95), Minnesota (\$ 6.15), New Jersey (\$ 6.15), New York (\$ 6.75); Oregon (\$ 7.50), Rhode Island (\$ 7.10), Vermont (\$ 7.25), Washington (\$

7.63), and Wisconsin (\$ 6.50). The state minimum wage rates for Arkansas and Michigan will not take effect until October 1, 2006. AFL-CIO, *Living and Minimum Wage: State Minimum Wage Rates*, <http://www.aflcio.org/issues/jobseconomy/livingwages/staterates/index.cfm#11> (last visited Apr. 15); Nat'l Conference of State Legislatures, *State Minimum Wage Rates* (Jan. 1, 2006), <http://www.ncsl.org/programs/employ/stateminimumwages2006.htm>; U.S. Dep't of Labor, *Minimum Wage Laws in the States* (Mar. 1, 2006), <http://www.dol.gov/esa/minwage/america.htm>. In November 2004, Nevada voters approved a constitutional amendment providing for an inflation-indexed minimum wage rate of \$ 6.15 per hour -- or alternatively \$ 5.15 per hour plus health care benefits -- but to ratify the amendment voters must approve the initiative again in 2006. Nevada Secretary of State, *Ballot Question #6: Raising the Minimum Wage for Working Nevadans*, <http://sos.state.nv.us/nvelection/2004bq/bq6.htm> (last visited Apr. 1, 2006); Broder, *supra* note 9. Furthermore, West Virginia recently enacted a state minimum wage rate that takes effect on July 1, 2006, but does not apply to workers who are covered by the FLSA, and will therefore only apply to about 2,000 workers. Juliet A. Terry, *Minimum Wage Set to Increase, But Not for All State's Workers*, *STATE JOURNAL*, Mar. 16, 2006, available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=9424>.

n36 See U.S. Census Bureau, *Table 1: Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2005*, <http://www.census.gov/popest/states/tables/NST-EST2005-01.xls> (last visited Apr. 1, 2006).

n37 See CERVANTEZ, *supra* note 31, at 2 ("Many states have a minimum wage that is higher than the federal minimum wage. This may make an off the clock case that is not viable under the FLSA viable under state law. . . . A worker making \$ 7 per hour who is paid for 30 hours of work but works 35 hours, would not have an FLSA minimum wage claim, because she would still be earning \$ 6 per hour, which exceeds the FLSA minimum wage of \$ 5.15 per hour . . . she would have a valid minimum wage claim in states which have a minimum wage that exceeds \$ 6 per hour.").

n38 *U.S. Dep't of Labor, supra* note 35. Puerto Rico and the Virgin Islands also require overtime after eight hours in a workday. Additionally, Colorado requires overtime pay of time and one-half for work over twelve hours per day, and California requires double time pay for work over twelve hours per day. *Id.*

n39 CERVANTEZ, *supra* note 31, at 4 (stating that the statute of limitations is six years in New York and three years in Illinois, Washington, and Michigan).

n40 See *MASS.GEN.LAWS ANN. ch. 151, § 20* (West 2005) (treble damages); *ME.REV. STAT. tit. 26, § 626-A* (2005) (treble damages); *29 U.S.C. § § 216(b)*, 260 (2000).

n41 U.S. Dep't of Labor, *Selected State Child Labor Standards Affecting Minors Under 18 in Non-farm Employment as of January 1, 2005*, <http://www.dol.gov/esa/programs/whd/state/nonfarm.htm> (last visited Apr. 1, 2006).

n42 *Id.*; U.S. Dep't of Labor, *Fair Labor Standards Act Adviser, How Many Hours Per Day or Per Week Can an Employee Work?*, <http://www.dol.gov/elaws/faq/esa/flsa/013.htm> (last visited Apr. 1, 2006) ("The Fair Labor Standards Act (FLSA) does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work.").

n43 See Elmore, *supra* note 27, at 410-26.

n44 See *U.S. Dep't of Labor, supra* note 35.

n45 Becker, *supra* note 22; HUMAN RIGHTS WATCH, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS* 61 (2000), available at <http://www.hrw.org/reports/pdfs/c/crd/frmwrk006.pdf>.

n46 GENERAL ACCOUNTING OFFICE, *WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE* 18-19 (2002), available at <http://www.gao.gov/new.items/d02925.pdf> ("All of these are activities that reduce WHD's and OSHA's ability to uncover potential violations affecting day laborers."). Accord Becker, *supra* note 22 ("In 2001, the Wage and Hour Division conducted 55 percent of its investigations solely by fax and telephone, hardly an effective means of detecting most forms of cheating.").

n47 INSPECTOR GENERAL OFFICE OF AUDIT, U.S. DEP'T OF LABOR, *AGREEMENT WITH WAL-MART INDICATES NEED FOR STRONGER GUIDANCE AND PROCEDURES REGARDING SETTLEMENT AGREEMENTS* (Oct. 31, 2005), available at <http://www.democraticleader.house.gov/GM/DOLESA.pdf> (stating that it found "serious breakdowns in WHD's process for negotiating, developing and approving settlement agreements. Specifically, the agreement provided for advance notification by WHD of Wal-Mart investigations, and gave Wal-Mart the ability to avoid civil money penalties . . . under certain conditions. In exchange the agreement primarily committed Wal-Mart to continue measures that were already in place or required by law.").

n48 Telephone Interview with Gwendolyn Thomas, Assistant Attorney General of Maine, in Augusta, Me. (Jan. 5, 2005). Assistant Attorney General of Massachusetts Richard Grundy reports that about half of the Massachusetts Attorney General's wage and hour cases involve claims of less than \$ 500. Telephone Interview with Richard Grundy, Assistant Attorney General of Massachusetts, in Boston, Mass. (Dec. 23, 2005).

n49 See Steven Greenhouse, *Labor Leaders to Convene, Faced With Uphill Battles*, N.Y. TIMES, Feb. 27, 2006, at A10 ("Only 12.5 percent of the nation's workers belong to unions, and just 7.8 percent in the private sector, down from 35 percent in the 1950's."); Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members Summary: Union Members in 2005* (Jan. 20, 2006) <http://www.bls.gov/news.release/union2.nr0.htm>.

n50 HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS* 113 (2004), available at <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf>.

n51 *Brief of Thurbert E. Baker, Attorney General of Georgia, and Lawrence E. Long, Attorney General of South Dakota et al. at 4, People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (No. 03SA133) [hereinafter "Salazar Amicus Brief"] ("The authority of the Attorney General to bring litigation in the public interest has its roots in English common law. The King's Attorney was first appointed as Attorney General of England in 1461. By the sixteenth century, legal powers were consolidated in a single attorney who could be called the chief representative of the crown in the courts.") (quoting *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 n.4 (5th Cir. 1976)).

n52 STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 40 (Lynne M. Ross ed., Bureau of National Affairs, 1990) [hereinafter "POWERS AND RESPONSIBILITIES"].

n53 See Justin G. Davids, State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers, 38 *COLUM. J.L. & SOC. PROBS.* 365, 372 (2005) (stating that it appears that Arizona, Connecticut, Indiana, Iowa, New Mexico, New York, Oregon, Texas, Washington, and Wisconsin have "abandoned attorney general common-law powers").

n54 Jason Lynch, Note, Federalism, Separation of Powers and the Role of the State Attorneys General in Multistate Litigation, 101 *COLUM. L.REV.* 1998, 2002 (2001) (citing POWERS AND RESPONSIBILITIES, supra note 52, at 15); *Shevin*, 526 F.2d at 268 ("Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law.")).

n55 POWERS AND RESPONSIBILITIES, supra note 52, at 37-38 (stating that courts also have recognized that attorneys general have "power to determine the state's legal policy" and "authority to prosecute criminal activity in the absence of express legislative restriction").

n56 *Shevin*, 526 F.2d at 268, 271 ("There is and has been no doubt that the legislature may deprive the Attorney General of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the Attorney General has wide discretion in making the determination as to the public interest."). See also *Davids*, supra note 53, at 374 ("In her representation of the people, the attorney general has the ability to initiate or intervene in almost any action as long as a real public interest is involved."). As the chief law enforcement official, an Attorney General with common-law powers can take all necessary actions to enforce state law, regardless of whether the legislature authorized such enforcement. 7 *AM. JUR. 2D ATTORNEY GENERAL* § 7 (2004) ("An Attorney General may, in the absence of some express legislative or constitutional restriction to the contrary, exercise all such power and authority as public interests may occasionally require, and may institute, conduct, and maintain all such suits and proceedings as deemed necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.").

n57 Every attorney general "renders advisory opinions on questions of law," which address actual questions of law posed by governors, heads of state agencies, and legislators. POWERS AND RESPONSIBILITIES, supra note 52, at 61 (stating that the function of rendering advisory opinions "inheres in their roles as the states' chief legal officers and is mandatory by statute or constitution in most jurisdictions. It was one of the office's original functions and continues to be one of its most important."); James E. Tierney, Opinions, Pass It On -- the Newsletter of the Public Lawyer Section of the A.B.A. (Oct./Nov. 1995), available at <http://tierney.blogware.com/blog/archives/2004> ("State statutes and often constitutions have from the time of statehood codified the common law responsibility of the state Attorney General to, in the words of the Arizona law, 'render a written opinion upon any question of law relating to their offices' when asked to do so by 'the Legislature or either house thereof, any public officer of the state or a county attorney.'"). Although advisory opinions are "neither conclusive nor binding" on state agencies, private parties, or the courts, they are treated as significant persuasive authority. 7 *AM. JUR. 2D ATTORNEY GENERAL* § 11; see also Tierney, supra note 57 (stating that opinions are "determinative of the position of the Office of Attorney General . . . a state official who fails to get the opinion it 'wants' must then live with the fact that their own Attorney General will be opposing them if litigation ensues.").

n58 In many states, attorneys general have the right to intervene in civil cases between private parties where a dispute involves the interest of the state or the constitutionality of a state law. Thus, in certain states an attorney general

has the right to intervene in civil suits of a private nature involving the interests of the state, under statutes making it his or her duty to prosecute or defend cases pertaining to the public interest of the state. Also, the Attorney General may intervene in civil suits of a private nature involving the constitutionality of a statute, where the result to be reached in the suit may affect not only the immediate parties to the litigation but also the interests of the public generally.

7AM.JUR.2D ATTORNEY GENERAL § 30 (citations omitted). See, e.g., N.Y. EXEC.LAW § 71(1) (McKinney 2005).

n59 Attorneys general can assert their views in the federal and state courts by filing amicus curiae briefs in cases in which attorneys general are not parties, but have an interest in the litigation. See, e.g., *Salazar Amicus Brief*, *supra* note 51 (arguing on behalf of forty-four state attorneys general that the Colorado Attorney General can sue to enjoin the Secretary of State from enforcing a statute the Attorney General believes is unconstitutional). In addition to filing amicus curiae briefs on behalf of individual offices, attorneys general often file joint amicus curiae briefs on issues of national importance. See *id.*; Brief of the Amici Curiae States of New York, Arizona, California, Hawaii, Massachusetts and West Virginia and Commonwealth of Puerto Rico in *Support of Respondent, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595).

n60 The National Employment Law Project has compiled a survey of the authority of state attorneys general to enforce labor, employment and other laws in the fifty states, territories, and the District of Columbia. See National Employment Law Project, <http://www.nelp.org/docUploads/State%20Jurisdiction%20Chart%2Epdf> (last visited Apr. 1, 2006).

n61 See *ME.REV.STAT.ANN. tit. 26, § 664* (2005) (stating that the minimum wage rate in Maine is \$ 6.50 per hour); *MASS.GEN.LAWS ANN. ch. 151, § 1* (West 2005) (stating that the minimum wage rate in Massachusetts is \$ 6.75 per hour); California Industrial Welfare Commission, California Minimum Wage, <http://www.dir.ca.gov/Iwc/Minwage2001.pdf> (last visited Apr. 1, 2006) (stating that California's Industrial Welfare Commission has adopted a minimum wage of \$ 6.75 effective January 1, 2002, pursuant to the IWC's statutory authority to increase the state minimum wage rate).

n62 JEFFREY L. HIRSCH, 1-2 LABOR AND EMPLOYMENT IN MASSACHUSETTS § 2-8 (Matthew Bender 2005) ("In 1993, the Massachusetts Legislature enacted legislation that reassigned the jurisdiction for wage, hour and safety enforcement from the Department of Labor and Industries (DLI) to the Office of the Attorney General."); Pia Sarkar, New Office To Handle Wage and Hour Issues; The Fall River Location is One of Three Sites Statewide in Charge of Labor Law Enforcement, *PROVIDENCE JOURNAL-BULLETIN*, July 26, 1996, at 3C ("The state Department of Labor and Industries transferred its powers of labor law enforcement to the Attorney General's office in late 1993, as required by a bill passed by the state legislature.").

n63 *MASS.GEN.LAWS ANN. ch. 149, § 2*.

n64 *Id.* § 3.

n65 *Id.* § 5.

n66 *Id.* § 27C (authorizing criminal prosecutions by the Attorney General for willful violations of various sections of the Labor Law, and authorizing the Attorney General to "issue a written warning or a civil citation upon the inspection of a public works or other workplace"); *Kessler v. Cambridge Health Alliance*, 818 N.E.2d

582, 587 (*Mass. App. Ct. 2004*) ("The Attorney General is given general enforcement powers over the whole of chapter 149, including the power to conduct inspections and investigations of workplace conditions, to impose civil fines, and to seek criminal sanctions.") (citations omitted). When the Attorney General issues a civil citation against an employer on behalf of an aggrieved employee, the employer can appeal the citation within ten days to the state's Division of Administrative Law Appeals ("DALA"), an administrative agency that adjudicates such disputes. *MASS.GEN.LAWS ANN. ch. 149, § 27C(b)(4)*; Office of the Mass. Attorney General, Enforcement: Civil Citations, <http://www.ago.state.ma.us/sp.cfm?pageid=1123> (last visited Apr. 1, 2006). Any person who is "aggrieved by a decision" of a DALA hearing officer can appeal the decision in the Massachusetts Superior Court. *MASS.GEN.LAWS ANN. ch. 149, § 27C(b)(4)*; Division of Administrative Law Appeals, Frequently Asked Questions, <http://www.mass.gov/dala/doihearighttoappeal.htm> (last visited Apr. 1, 2006).

n67 *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (*Mass. 1977*). The Attorney General also receives broad civil responsibilities from a state statute to represent the Commonwealth in "all suits and other civil proceedings in which the commonwealth is a party or interested," and render "all legal services required" for state officers and departments. *MASS.GEN.LAWS ANN. ch. 12, § 3*.

n68 Office of the Mass. Attorney General, Business and Labor Protection Bureau, <http://www.ago.state.ma.us/sp.cfm?pageid=982> (last visited Apr. 1, 2006). The office's Fair Labor and Business Practices Division

enforces Massachusetts' workplace laws, including the wage and hour laws, the prevailing wage, minimum wage, nonpayment of wage and overtime laws. The division is also charged with enforcing the child labor and public construction contracting laws. It has authority to seek criminal, civil, and administrative remedies for violations of the laws it enforces.

Id.

n69 See Mass. Dep't of Labor and Workforce Development, <http://www.mass.gov/dos/mw/index.htm> (last visited Apr. 1, 2006) (stating that it issues regulations on payments of the minimum wage, overtime -- including for learners, apprentices and tipped employees -- on-duty call time, lodging, meals and uniforms, travel time and expenses, and employers' records).

n70 See *supra* note 62.

n71 Meg Vaillancourt, Will Dismantling of State Agency Hurt Massachusetts Workers?, *BOSTON GLOBE*, Sept. 28, 1993, at 41 (stating that Senate Ways and Means Chairman Thomas Birmingham, who sponsored the bill, claimed that "the wage laws on the books were being flouted with impunity"). Unions and legislators who supported the transfer believed that then-Attorney General Scott Harshbarger, a Democrat, would be more friendly to workers, and that he would diligently enforce the labor laws. Peter J. Howe, Labor Agency Cuts Assailed; Chelsea Senator Urges Shifting Most Powers to Harshbarger, *BOSTON GLOBE*, June 17, 1993, at 49:

Contending Gov. Weld's administration has emasculated the agency for political reasons, the state Senate's chief budget writer yesterday proposed terminating all of the Department of Labor and Industries' top officials and transferring most of its enforcement powers to Democratic Attorney General Scott Harshbarger Sen. Thomas F. Birmingham (D-Chelsea), the Ways and Means Committee chairman who is also a veteran union-side labor attorney, used his fiscal 1994 budget plan unveiled yesterday to blast the department for dragging its feet on enforcing minimum-wage and prevailing-wage laws for what he called 'ideological' reasons; Telephone Interview with Richard Grundy, *supra* note 48. Because of the transfer of authority in 1993, the Attorney General's relationship to workers has emerged as a more important election issue. See Robert A. Jordan, Defeating Lois Pines May Be Thomas Reilly's Toughest Case, *BOSTON GLOBE*, May 10, 1998, at C4.

n72 Telephone Interview with Richard Grundy, *supra* note 48. Whereas prior to the transfer, labor department investigators would work on their own civil cases and ask the Attorney General staff to lead criminal prosecutions in selected cases, now the Attorney General supervises all activity on every case and can more appropriately decide when to use a civil citation, a criminal indictment, or both. *Id.* Thus, by using criminal sanctions in eight to ten percent of all enforcement actions -- usually the larger, intentional violations -- the Attorney General has created a stronger deterrent effect against employer violations than the labor department had. *Id.*

n73 *ME.REV.STAT.ANN.*, *tit. 5, § 191(3)(B)* (2005) ("All legal services required by those officers, boards and commissions in matters relating to their official duties must be rendered by the Attorney General or under the Attorney General's direction. The officers or agencies of the State may not act at the expense of the State as counsel, nor employ private counsel except upon written approval of the Attorney General.").

n74 *ME.REV.STAT.ANN.*, *tit. 26, § 42* (2005) ("The director shall cause to be enforced all laws regulating the employment of minors; all laws established for the protection of health, lives and limbs of operators in workshops and factories, on railroads and in other places; all laws regulating the payment of wages; and all laws enacted for the protection of the working classes.").

n75 Although the BLS can bring an action in the Superior Court for unpaid wages, investigate workplaces by examining employers' records on wages, *id.* § 665, and issue citations to employers for violations, including treble damages, *id.* § 626-A, only the Maine Attorney General "may institute injunction proceedings in the Superior Court to enjoin further violation" of the minimum wage law. *Id.* § 671; Telephone Interview with Gwendolyn Thomas, *supra* note 48. Thus, if the BLS wants to bring an action against an employer for violating a wage or hour law, the BLS must work with the Attorney General's staff to bring an action for damages and an injunction in the Superior Court. *Id.* Although the BLS has the authority to issue civil citations to employers for wage and hour violations, the BLS staff rarely does so in practice. Instead, the BLS attempts to settle with employers who have committed violations, and then refers cases that do not settle to Assistant Attorney General Gwendolyn Thomas, who continues the investigations, seeks settlements, and brings necessary actions in the Maine Superior Court. *Id.*

n76 Telephone Interview with James E. Tierney, in Lisbon Falls, Me. (Jan. 28, 2006). In 1975, Tierney was Chairman of the Joint Standing Committee on Labor and a student at the University of Maine School of Law. *Id.*

n77 See *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1199 (Me. 1989) ("The Attorney General, in this State, is a constitutional officer endowed with common law powers.") (citation omitted). Thom Harnett, Assistant Attorney General of Maine, believes that the Attorney General's normal working relationship with the Department of Labor "would not preclude [the Attorney General] as the ultimate law enforcement agency from bringing a lawsuit independently." Telephone Interview with Thom Harnett, Assistant Attorney General of Maine, in Augusta, Me. (Dec. 10, 2004). James E. Tierney, who drafted the state labor law, notes that the legislature believed in 1975 that the Attorney General had common-law power to bring such actions. Telephone Interview with James E. Tierney, *supra* note 76.

n78 558 A.2d at 1199 (Me. 1989).

n79 See CAL.CONST., art . V, § 13 ("Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the state are uniformly and adequately enforced. . . . Whenever in the opinion of the Attorney General any law of

the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.").

n80 Telephone Interview with Ralph Lightstone, Counsel in the Office of the Cal. Attorney General, in Sacramento, Cal. (Jan. 6, 2005).

n81 *CAL. GOVT. CODE* § 11042 (West 2005).

n82 *Id.* § 11043. In addition, section 11040 provides that other than the exempted agencies in section 11041, "written consent of the Attorney General is required prior to employment of counsel for representation of any state agency or employee in any judicial proceeding." *Id.* § 11040.

n83 *Id.* § 11041.

n84 As the California Attorney General has described in an advisory opinion, "section 11041 exempts from the mandatory requirements of sections 11042 and 11043 that state agencies employ the Attorney General as their legal counsel." *63 Op. Att'y Gen. Cal. 132, 14 (1980)*. Accord Office of the Cal. Attorney General, <http://caag.state.ca.us/ag/index.htm> ("The Attorney General represents the people of California in civil and criminal matters before trial, appellate and the supreme courts of California and the United States. The Attorney General also serves as legal counsel to state officers and, with few exceptions, to state agencies, boards and commissions. Exceptions to the centralized legal work done on behalf of the state are listed in Section 11041 of the Government Code."). The section 11041 exemption was originally enacted in 1933. Telephone Interview with Ralph Lightstone, *supra* note 80. The exemption works in a similar fashion for other exempted agencies such as the State Insurance Fund and the state Workers' Compensation Appeals Board. See, e.g., *State Compensation Insurance Fund v. Riley*, 69 P.2d 985, 987 (Cal. 1937) (holding that due to the exemption in state law the state insurance fund could hire counsel other than the Attorney General and receive payment from the state, and stating that "it seems clear that the fund has the power to employ special counsel to protect its rights in pending litigation").

n85 *CAL LAB.CODE* § 90.5 (West 2005).

n86 Section 1193.6 of the Labor Code states

The department or division may, with or without the consent of the employee or employees affected, commence and prosecute a civil action to recover unpaid minimum wages or unpaid overtime compensation, including interest thereon, owing to any employee under this chapter or the orders of the commission, and, in addition to these wages, compensation, and interest, shall be awarded reasonable attorney's fees, and costs of suit. The consent of any employee to the bringing of this action shall constitute a waiver on the part of the employee of his or her cause of action under Section 1194 unless the action is dismissed without prejudice by the department or the division.

*Id.* § 1193.6.

n87 The state labor law gives the state Labor Commissioner authority to inspect workplaces, issue subpoenas, take depositions and affidavits, and even make arrests, *id.* § § 90, 95, and after receiving a complaint from an employee, the Commissioner can order a hearing to determine whether the employer has violated state law. *Id.* § 98. Either an employer or an employee can appeal the Labor Commissioner's administrative determination

to the Superior Court, where a de novo hearing occurs, and the Labor Commissioner can represent the employee when the employee cannot afford counsel. *Id.* § 98.2-98.4; Telephone Interview with Ralph Lightstone *supra*, note 80.

n88 *CAL.GOV'T.CODE* § 11041; Telephone Interview with Ralph Lightstone *supra*, note 80.

n89 The California Attorney General has filed amicus curiae briefs in cases between private litigants, including in an important case in which the California Supreme Court held that workers can sue for unpaid wages under the state's unfair competition law. See *Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 708 (Cal. 2000).

n90 Although the DLSE has an exemption to use its own counsel, the overall state labor department, the Department of Industrial Relations ("DIR"), lacks such an exemption and periodically utilizes counsel from the office of the Attorney General. Telephone Interview with Ralph Lightstone, *supra* note 80.

n91 *California Air Resources Bd. v. Hart*, 26 Cal. Rptr. 2d 153, 159 (Cal. Ct. App. 1993); *People ex rel Deukmejian v. Brown*, 624 P.2d 1206, 1207 (Cal. 1981) ("There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel."). The Attorney General, however, cannot first represent a state agency and then withdraw representation to participate in the same litigation with an adverse position to the agency. *Id.*

n92 For example, in a recent case raising the issue of whether the state's prevailing wage law should apply to charter cities, California Attorney General Bill Lockyer filed an amicus brief with the California Supreme Court, taking a different position than the newly elected Governor, Arnold Schwarzenegger. *City of Long Beach v. Dep't of Indus. Relations*, 102 P.3d 904, 905 (Cal. 2004). When the lawsuit was filed, then-Governor Gray Davis and Attorney General Lockyer had the same position -- that the prevailing wage laws should apply to charter cities. During the appeal, however, California voters recalled Governor Davis and elected Governor Schwarzenegger, who then declined to take the position that the prevailing wage law should apply to charter cities. Telephone Interview with Ralph Lightstone, *supra* note 80. Because of the independence of the California Attorney General, Lockyer was able to assert his view in favor of what he believed was in the public interest of the state. *Id.*

n93 The New York Supreme Court is the state's trial court.

n94 *N.Y. LAB.LAW* § 196 (McKinney 2005); *id.* § 660; *id.* § 663.2:

On behalf of any employee paid less than the wage to which he is entitled under the provisions of this article, the commissioner may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and if such underpayment was willful, an additional amount as liquidated damages equal to twenty-five percent of the total of such underpayments found to be due him;

New York Dep't of Labor, Minimum Wages,  
<http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/minwage.shtm#MINWAGELAWS> (last visited Apr. 1, 2006):

The DOL helps collect underpayments for workers who have not received the minimum wage. Generally, the Department recovers the funds without resorting to court action. A violator of the Minimum Wage Law is

subject to criminal prosecution and penalties. Action may also be taken in civil court. The Commissioner of Labor may require an employer to pay interest and civil penalties in addition to minimum wage underpayments.

The Labor Commissioner has similar powers for enforcing New York's laws on wages for agricultural laborers, *N.Y. LAB.LAW* § 681, and for child labor. *Id.* § 141.

n95 New York State Dep't of Labor, Wage and Hour Law, <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm> (last visited Apr. 1, 2006).

n96 See New York State Bd. of Industrial Appeals, Frequently Asked Questions, <http://www.labor.state.ny.us/iba/faq.htm#A1> (last visited Apr. 1, 2006) (stating that the NYSBIA's "major review activities include . . . hearing and adjudicating petitions for review of compliance, penalty and interest orders issued by the Commissioner of Labor under the various wage provisions of the Labor Law").

n97 See *N.Y. EXEC.LAW* § 63(1) (McKinney 2005); *People v. Reisner*, 295 *N.Y.S.* 813, 817 (1936) ("The Attorney-General is the prosecutor in all matters brought by or on behalf of the Department of Labor."); Telephone Interview with Patricia Smith, New York Attorney General Labor Bureau Chief, in New York City (Jan. 4, 2005).

n98 *N.Y. EXEC.LAW* § 63(1).

n99 Telephone Interview with Patricia Smith, *supra* note 97.

n100 *N.Y. LAB.LAW* § 214 ("The attorney-general may prosecute every person charged with the commission of a criminal offense in violation of this chapter, or of any rule, regulation or order made thereunder . . ."); Telephone Interview with Patricia Smith, *supra* note 97. In addition, only the Attorney General has express statutory authority to bring actions for injunctive relief regarding violations of the state's "hot goods" law, which regulates wages and sales in the garment industry, *N.Y. LAB.LAW* § 345(10)(C), and to bring actions for violations of the "Right to Know" law, which requires employers to disclose toxic substances to their workers. *Id.* § 882(1).

n101 E.g. *Spitzer v. Frink America, Inc.*, 770 *N.Y.S.2d* 225, 226-27 (4th Dept. 2003).

n102 *N.Y. EXEC.LAW* § 63(12):

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the Attorney General may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, canceling any certificate filed under and by virtue of the provisions of section [440] of the former penal law or section [130] of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper.

n103 Telephone Interview with Patricia Smith, *supra* note 97. The Labor Bureau has interpreted "repeated" violations in the context of the Labor Law to mean (1) violations of more than one section of the Labor Law,

such as a minimum wage violation and an overtime violation, with respect to a single worker, or (2) the same type of violation occurring among more than one worker. *Id.*; *N.Y. EXEC.LAW § 63(12)* ("The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.").

n104 Telephone Interview with Patricia Smith, *supra* note 97.

n105 *N.Y. EXEC.LAW § 63(12)* ("In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section."); *Pavillion Agency, Inc., v. Spitzer*, 802 *N.Y.S.2d* 879, 883 (*N.Y. Sup. Ct.* 2005) ("The Attorney General is given broad investigatory powers under § 63(12) of the Executive Law which it may freely use whenever an individual or entity appears to have engaged in illegal and/or fraudulent business activities and/or practices under New York law."); *Fernando v. Vasquez*, No-1815, 2001 *N.Y. Misc. LEXIS* 432, at \*8 (*N.Y. Civ. Ct. Apr.* 30, 2001).

n106 While this specific issue has only been addressed in a few cases, the Attorney General's authority to bring actions under section 63(12) in other areas of state law has been extensively litigated and reaffirmed by New York's highest courts. See, e.g., *State v. Princess Prestige Co.*, 42 *N.Y.2d* 104, 107 (1977); *People v. American Motor Club*, 582 *N.Y.S.2d* 688, 693 (1st Dept. 1992). Smith notes that several employers have sent legal briefs to the Labor Bureau arguing that the Attorney General cannot sue before the state DOL has initiated an action. Telephone Interview with Patricia Smith, *supra* note 97.

n107 See *infra* note 117.

n108 770 *N.Y.S.2d* 225 (4th Dept. 2003).

n109 *Id.* at 227.

n110 *Id.* at 226.

n111 *Id.*

n112 *Id.*

n113 *Id.* at 226-27 (citations omitted).

n114 *Id.* at 227 (citations omitted). Specifically, the court concluded that Spitzer could seek payment from the company's president -- although the Labor Law did not provide a remedy against the individual corporate officer -- because the Attorney General can seek relief under section 63(12) against "any person." *Id.* Although the Frink court ultimately denied the Attorney General's request for an injunction because the employer had closed its business, making future violations unlikely, the court affirmed the proposition that under section 63(12) the Attorney General can obtain both restitution for unpaid wages of employees, and an injunction against ongoing violations. *Id.*

n115 506 N.Y.S.2d 819 (1984).

n116 *Id. at 821* (stating that section 822(1) provides that "the attorney general may bring an action in the supreme court against any person or persons alleged to have violated the provisions of this article.") (emphasis in original).

n117 *Id.* (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956) ("In such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.")). Accord JACOB A. STEIN ET AL., 5-47 ADMINISTRATIVE LAW § 47.01 (Matthew Bender 2005) (stating that under the primary jurisdiction doctrine, a court "defers its powers to hear a case, pending administrative determination of issues particularly within agency competence").

n118 *Consolidated Edison*, 506 N.Y.S.2d at 821-22 (citation omitted).

n119 *Frink*, 770 N.Y.S.2d at 227 (rejecting the argument that "allowing the Attorney General to seek additional remedies under section 63(12) in wage disputes undercuts the Legislative intent behind the statutory scheme of Labor Law article 6" relating to payment of wages). Thus, the Frink court found that it was unnecessary for the workers to seek an administrative order through the DOL, and instead found that the Attorney General could file an action on behalf of the workers in court. *Id.*

n120 Telephone Interview with Patricia Smith, *supra* note 97.

n121 Greenhouse, *supra* note 1.

n122 *Id.*

n123 Telephone Interview with Patricia Smith, *supra* note 97. In addition to eight lawyers who represent the DOL and bring independent wage and hour actions, the Labor Bureau has lawyers who represent the state in unemployment and workers' compensation cases. *Id.*

n124 Jordan Rau, NY Labor Law Enforcement: A Fight For Fair Pay; State Labor Agency's Reinforcement of Rules Requiring Proper Wage For Workers Has Waned During Pataki's Tenure, N.Y. NEWSDAY, Apr. 11, 2004, at A6.

n125 *Id.*

n126 *Id.* As the director of a low-wage and immigrant worker advocacy group in Brooklyn observed, "the state DOL is completely overwhelmed and doesn't seem to have enough commitment or resources to do the job properly." Steven Greenhouse, On a Discount Shopping Strip in Brooklyn, Immigrants Report Illegal Wages, N.Y. TIMES, June 6, 2005, at A1 (quoting Andrew Friedman, who noted that workers "are very scared to stand up and complain because they worry about losing their jobs and because they have a perception that the State Labor Department isn't interested in protecting the rights of immigrants"). Another reason why advocates may

be skeptical of Pataki's commitment to workers' rights is that the Republican State Senate had to override Pataki's veto to increase the state minimum wage rate in 2004. Heidi Evans & Joe Mahoney, *Minimum Wage Hike Approved*, N.Y. DAILY NEWS, Dec. 7, 2004, at 2 ("Nearly a million of New York's lowest-paid workers will get a pay hike after the GOP-led state Senate trumped Gov. Pataki yesterday, overriding his veto of an increase to the \$ 5.15-an-hour minimum wage.").

n127 Telephone Interview with Patricia Smith, *supra* note 97.

n128 *Id.*

n129 *Id.* The Labor Bureau always has a complaint from a worker when it investigates a specific employer. *Id.*

n130 *Id.*

n131 *Id.* Smith notes that in almost all situations where a single worker complains of a wage and hour violation, the employer is likely committing similar violations with respect to other workers. *Id.*

n132 Professor Bodie describes greengrocers as "small grocery stores that sell basic food and home supplies. They have a smaller selection than supermarkets, but are open later and are more numerous. Unlike convenience stores, they offer fresh produce. . . . Greengrocers are primarily owned by Korean immigrants, and usually employ between five and fifteen workers, who are generally Mexican immigrants." Bodie, *supra* note 14, at 185.

n133 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, *Landmark Code of Conduct to Improve Working Conditions in the Greengrocer Industry* (Sept. 17, 2002), <http://www.oag.state.ny.us/press/2002/sep/sep17a02.html>.

n134 Bodie, *supra* note 14, at 192 ("As its investigation grew, the Labor Bureau learned that these violations were not confined to one or two stores; instead, sublegal wages appeared endemic to the industry. Other workers slowly began to come forward. The Attorney General's Office first pursued these cases through the traditional investigate-and-settle method.").

n135 Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 133. In announcing the industry-wide code of conduct, the Labor Bureau noted that the greengrocer campaign is explicitly about protecting immigrant workers. *Id.* ("The Code represents a milestone in the defense of the rights of all undocumented immigrants, in particular Mexicans who make up the largest percentage of workers in the green grocery industry.") (quoting Salvador Beltran del Rio, Consul General of Mexico in New York).

n136 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, *Gristedes to Pay \$ 3.25 Million in Back Wages and Fees in Deliverymen Case* (Dec. 17, 2003), <http://www.oag.state.ny.us/press/2003/dec/dec17a03.html>.

n137 Telephone Interview with Patricia Smith, *supra* note 97.

n138 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Investigation Reveals Deplorable Plight of Restaurant Bathroom Attendants (Oct. 7, 2004), <http://www.oag.state.ny.us/press/2004/oct/oct7a04.html>.

n139 Steven Greenhouse, Restroom Attendants Gain Ally in Bid for Back Pay and Tips, N.Y. TIMES, Oct. 8, 2004, at B1.

n140 Telephone Interview with Patricia Smith, *supra* note 97; Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 138 (stating that Tavern on the Green agreed to pay \$ 170,000 for five years of minimum wage underpayments, and directly hire fourteen workers).

n141 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Central Park Pretzel Vendors to Receive Overtime Pay, Back Wages (Nov. 23, 2004), <http://www.oag.state.ny.us/press/2004/nov/nov23a04.html>; Steven Greenhouse, Pushcart Vendors Gain Victory in a Labor Deal, N.Y. TIMES, Nov. 23, 2004, at A1.

n142 Greenhouse, *supra* note 141.

n143 Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 141.

n144 Bodie, *supra* note 14, at 192.

n145 Lisa Fleischer, Park Vendors Win 450G, N.Y. DAILY NEWS, Nov. 24, 2004, at 16.

n146 Telephone Interview with Patricia Smith, *supra* note 97 (noting that in some -- but not all -- cases the Attorney General brings a criminal action in addition to a civil action). The DOL lacks authority to bring actions for criminal sanctions in state court, requiring the Attorney General to prosecute labor-related criminal offenses. *Id.*; *N.Y. LAB. LAW* § 214 (McKinney 2005); *N.Y. EXEC. LAW* § 63(1) (McKinney 2005). The second situation in which the Attorney General brings an independent action is the more efficient and powerful use of criminal actions, because the Attorney General leads the investigation and litigation, in the same way that the Massachusetts Attorney General prosecutes criminal and civil violations together. Telephone Interview with Richard Grundy, *supra* note 48.

n147 Telephone Interview with Patricia Smith, *supra* note 97.

n148 *Id.* (stating that in prevailing wage enforcement cases, an employer has not only violated the rights of its workers, but also has committed a fraud on the government). In recent joint criminal and civil actions, Spitzer has recovered hundreds of thousands of dollars for workers employed under state construction contracts, and obtained guilty pleas by the contractors, resulting in the barring of contractors from receiving future public contracts. See, e.g., Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Contractor Sentenced to a Year in Jail for Failure to Pay Wages (Apr. 2, 2003), <http://www.oag.state.ny.us/press/2003/apr/apr02b03.html>. For other cases in which Spitzer sought criminal penalties for violations of state prevailing wage and other labor laws, see Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Three Contractors Arrested for Underpaying Employees and Falsifying Business Records in Connection with New York City Housing Authority

Construction Projects (Sept. 30, 2003), <http://www.oag.state.ny.us/press/2003/sep/sep30a03.html>; Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Owners of Chinatown Garment Shop Charged with Withholding \$ 80,000 In Employee Wages: Defendant Allegedly Filed False Payroll Records to Cover Up Crimes (Dec. 1, 2000), <http://www.oag.state.ny.us/press/2000/dec/dec01a00.html>.

n149 Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 138 (workers hired by an independent contractor to work in restaurants as bathroom attendants); Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 136 (workers hired by an independent contractor to deliver groceries for supermarkets).

n150 Steven Greenhouse, Agencies Sued Over Low-Paying Jobs, N.Y. TIMES, June 16, 2004, at B4. After filing the actions, the Bureau settled five cases and continued actions against four agencies, seeking civil penalties ranging from \$ 54,000 to \$ 310,000 and injunctions against future operation. Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Spitzer Takes Action Against Employment Agencies Making Referrals to Jobs Paying Below Minimum Wage (June 15, 2004), <http://www.oag.state.ny.us/press/2004/jun/jun15a04.html> (stating that three agencies agreed to follow the law and two agencies agreed to leave the industry).

n151 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Demolition Workers Receive \$ 495,000 in Overtime Settlement (Feb. 9, 2006), <http://www.oag.state.ny.us/press/2006/feb/feb09b06.html>:

The Attorney General's investigation revealed that the staffing agencies were set up to supply low wage demolition workers, and that Advanced was their only client. In addition, the investigation revealed that Advanced did not pay the agencies sufficient monies for them to pay the workers the overtime wages to which they were entitled. The investigation revealed that hundreds of individuals worked for Advanced under this arrangement.

n152 *N.Y. LAB.LAW* § 664 (McKinney 2005) ("No employment agency shall place or attempt to place any employee in an occupation at less than the wage applicable to such occupation under this article. The term 'employment agency' as used in this section shall mean an employment agency as defined in section [171] of the general business law."); *N.Y. GEN.BUS.LAW* § 192 (McKinney 2005) ("An employer fee paid employment agency shall not . . . send or cause to be sent any person to any employer where the agency knows, or reasonably should have known, that the prospective employment is or would be in violation of state or federal laws governing minimum wages or child labor."); *id.* § 185 (stating the maximum fees that can be charged by employment agencies). See also OFFICE OF THE N.Y. ATTORNEY GENERAL ELIOT SPITZER, EMPLOYMENT AGENCY LAW FACT SHEET FOR DOMESTICS, HOUSEHOLD EMPLOYEES, <http://www.oag.state.ny.us/press/2004/jun/jun15a04attach1.pdf> (last visited Apr. 1, 2006).

n153 *N.Y. LAB.LAW* § 345(10)(a) ("Any manufacturer or contractor in the apparel industry who ships, delivers or sells any apparel or sections of apparel; who knew or should have known such goods were produced in violation of article six or nineteen of this chapter, shall be deemed to have violated this article."); *id.* § 345(10)(c) (authorizing the Attorney General to petition a state court to "restrain the shipping, delivery, sale or purchase by any manufacturer, contractor or retailer of apparel" that was produced in violation of the wage laws within the past 180 days).

n154 *Spitzer v. 14 West Garment Factory Corp.*, 697 N.Y.S.2d 458, 459 (N.Y. Sup. Ct. 1999) (granting the Attorney General a preliminary injunction enjoining the defendant companies from "shipping, delivering, selling or purchasing 'hot goods' produced unlawfully"). After receiving complaints that a subcontractor of 14 West called Ding & Mag had been paying twenty-three Chinese immigrant workers sub-minimum wages, the AITF investigated both companies. *Id.*; Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Garment

Manufacturers Cited Under "Hot Goods" Law: Judge Bars Sale of Apparel Produced by Exploited Immigrant Workers (July 19, 1999), <http://www.oag.state.ny.us/press/1999/jul/jul19a99.html>. Soon after, Spitzer brought an action in the New York Supreme Court and won a temporary restraining order by asserting that the workers had not been paid for \$ 18,500 worth of work in violation of the state's wage laws. *14 West*, 697 N.Y.S.2d at 459.

n155 *14 West*, 697 N.Y.S.2d at 461 ("The respondent is strictly liable under section 345(10)(c) because, based on the evidence submitted by petitioner and not disputed by respondent, the goods were produced illegally.").

n156 *Greenhouse*, supra note 139.

n157 Office of the N.Y. Attorney General Eliot Spitzer, supra note 138.

n158 Telephone Interview with Patricia Smith, supra note 97. Smith recalls that "in the *Gristedes* cases, it was much clearer to us that the job of a delivery worker in New York City was not going away, whereas with the job of bathroom attendants it was much more questionable whether that job would stay. Keeping that in mind we had a much higher goal in the bathroom attendant cases to keep the jobs. In a lot of the cases where we had the Royal Flush staffing service, we were going after Royal Flush for back wages, but for the restaurants we agreed to settle with the restaurants only if they agreed to take [the workers] in-house." *Id.*

n159 See OFFICE OF THE N.Y. ATTORNEY GENERAL ELIOT SPITZER, SUMMARY OF GREENGROCER CODE OF CONDUCT, <http://www.oag.state.ny.us/labor/finalggcodeenglishshort.pdf> (last visited Apr. 1, 2006).

n160 *Id.*

n161 *Id.*

n162 Press Release, Office of the N.Y. Attorney General Eliot Spitzer, Effort Launched to Ensure Compliance in Green Grocer Industry (Nov. 18, 2004), <http://www.oag.state.ny.us/press/2004/nov/nov19b04.html> (stating that an "independent monitor has examined 145 of the more than 200 stores that embraced the code of conduct. The monitor found that 144 were paying minimum wage and overtime after two monitoring visits. In addition, the vast majority of those stores were also providing vacation and sick days to employees, as well as uninterrupted meal breaks.").

n163 For a description and an analysis of multi-state litigation by state attorneys general, see Lynch, supra note 54.

n164 Becker, supra note 22. In a more specific example of the prevalence of undocumented workers and wage and hour violations, a January 2005 study of New York City's restaurant industry "found that at least 36 percent of [165,000 restaurant] workers are illegal immigrants, that 59 percent of restaurant workers surveyed reported overtime violations, and that 73 percent said they had no health insurance." Steven Greenhouse, In \$ 8 Billion Restaurant Industry, a Study Finds Mostly 'Bad Jobs', N.Y. TIMES, Jan. 25, 2005, at B7.

n165 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); Developments in the Law -- Jobs and Borders: IV. Legal Protections for Illegal Workers, 118 *HARV.L.REV.* 2224, 2229 (2005).

n166 535 U.S. 137 (2002).

n167 *Id.* at 149.

n168 *Id.* (stating that a backpay "award lies beyond the bounds of the NLRB's remedial discretion").

n169 See *Sure-Tan v. NLRB*, 467 U.S. 883, 892-93 (1984) (approving of six months of backpay to workers who were already deported and were ineligible to return to their jobs, and finding "no reason to conclude that the application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA").

n170 *Hoffman*, 535 U.S. at 150 (stating that "awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations"); 8 U.S.C. § 1324a (2000). Specifically, the *Hoffman* court reasoned that a discharged undocumented worker could only qualify for backpay by "remaining inside the United States illegally," and could only mitigate damages by violating IRCA through working illegally. *Hoffman*, 535 U.S. at 150.

n171 Brief of the Amici Curiae States of New York, Arizona, California, Hawaii, Massachusetts and West Virginia and Commonwealth of Puerto Rico in *Support of Respondent at 2*, *Hoffman*, 535 U.S. 137 (2002) (No. 00-1595). The attorneys general explained that while the Supreme Court

can properly correct the NLRB if it wrongly balances competing public policies under federal law, the states' balancing of competing policies should not be over ridden even if it differs from the federal balance unless federal law so requires, as it does not. Even if this Court were to reverse under the NLRA, it should not prevent states, under their own laws, from granting back pay or other appropriate remedies to undocumented workers.

*Id.*

n172 *Id.* at 3.

In many industries, state employment statutes would be rendered meaningless if no back pay remedy for violations were available to undocumented workers. Enforcement of these laws depends on cooperation from employees, which is difficult enough to obtain from workers subject to deportation. If undocumented workers were foreclosed from monetary remedies it would be impossible to obtain their assistance in law enforcement investigations, and state laws that protect both documented and undocumented employees could not be enforced.

*Id.*

n173 *Id.* at 15 (stating that the "state power to regulate employment extends to undocumented workers unless there is a 'specific indication . . . that Congress intended' otherwise. . . . Federal immigration law provides no such indication.") (quoting *De Canas v. Bica*, 424 U.S. 351, 358 (1976)).

n174 See *Developments in the Law*, supra note 165, at 2229 ("Courts in Kansas, Florida, and New York have inflicted the most severe damage to worker protections by interpreting Hoffman to dictate that the IRCA preempts the recovery of lost wages by illegal workers under state law.").

n175 *Greenhouse*, supra note 126 (stating that surveys conducted by Baruch College Professor Robert C. Smith show that "half of New York's illegal immigrants were paid less than the minimum wage, partly because many are too scared to speak out").

n176 *2003 N.Y. AG LEXIS 20* (Oct. 21, 2003). Although seven attorneys general filed an amicus curiae brief in Hoffman, Spitzer is the only attorney general in the nation who has issued an advisory opinion on Hoffman's application to state law.

n177 *Id.* at \*1.

n178 See *Ordonez v. Brooklyn Tabernacle*, No. 01-49702, 2005 N.Y. Misc. LEXIS 1854, at \*28-29 (N.Y. Sup. Ct. Aug. 31, 2005) (finding immigration status relevant to calculating future lost wages in a tort action); *Echeverria v. Estate of Lindner*, No. 02-018666, 2005 N.Y. Misc. LEXIS 894, at \*33 (N.Y. Sup. Ct. Mar. 2, 2005) (same); *Llerena v. 302 W. 12th St. Condo.*, No. 03-102490, 2004 N.Y. Misc. LEXIS 2487, at \*4 (N.Y. Sup. Ct. Oct. 7, 2004) (finding immigration status irrelevant to calculating future lost wages in a tort action); *Asgar-Ali v. Hilton Hotels Corp.*, No. 02-114451, 2004 N.Y. Misc. LEXIS 1547, at \*4 (N.Y. Sup. Ct. Aug. 6, 2004) (same); *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (allowing a jury to calculate lost future wages due to injuries based on earnings the worker would have earned in the United States, if the jury believed the worker would have remained in the country).

n179 *2003 N.Y. AG LEXIS 20*, at \*12 ("Hoffman is inapposite to the wage law enforcement actions that are the subject of your inquiry primarily because a backpay award to an undocumented worker for work that was not actually performed is fundamentally different from an award mandating payment of wages for work that the undocumented worker has already performed for the employer. The State's wage payment laws protect the latter. Hoffman's holding relates only to the former."). Also, Spitzer asserts that the policies of IRCA are furthered "by payment of wages earned but not paid to undocumented immigrants," because condoning non-payment of wages would encourage employers to hire undocumented workers. *Id.* at \*16.

n180 *Id.* at \*19 ("We believe that Hoffman does not prevent the Department from enforcing the State's wage payment laws on behalf of illegal immigrants where 'no federal statute is at issue, nor is there any federal Constitutional issue in dispute.'") (citing *Balbuena v. IDR Realty, LLC*, N.Y.L.J., May 28, 2003, at 18 (Sup. Ct. N.Y. County May 16, 2003); *Cano v. Mallory Mgmt.*, 195 Misc. 2d 666 (Sup. Ct. Richmond County 2003)).

n181 Under New York law, the Attorney General is entitled to receive notice and may intervene in cases that bring into question "the constitutionality of a statute, or a rule or regulation." *N.Y. EXEC.LAW § 71(1)* (McKinney 2005).

n182 In *Majlinger v. Cassino Contr. Corp.*, 802 N.Y.S.2d 56, 57 (2d Dept. 2005), Spitzer intervened after the trial court had issued its opinion, and in *Balbuena v. IDR Realty, LLC*, No. M410, 2005 N.Y. App. Div. LEXIS 5734, at \*1 (1st Dept. May 24, 2005), and *Sanango v. 200 E. 16th St. Hous. Corp.*, No. M466, 2005 N.Y. App. Div. LEXIS 5735, at \*1 (1st Dept. May 25, 2005), Spitzer intervened after the Second and First Appellate Divisions had issued opinions. *Balbuena v. IDR Realty LLC*, No-19, 2006 N.Y. LEXIS 200, at \*5, \*7 (Feb. 21, 2006); *Sanango*, 2005 N.Y. App. Div. LEXIS 5735, at \*1 ("Leave to the Attorney General of the State of New York to

intervene granted, as indicated." In *Majlinger*, the injured worker plaintiff alleged "common-law negligence and violations of Labor Law § § 200, 240, and 241(6)," the latter of which are state worker safety provisions, in *Sanango* the plaintiff won a jury verdict under section 240, and in *Balbuena*, the plaintiff alleged violations of sections 240 and 241. In *Majlinger*, the Second Department rejected preemption, while in *Balbuena* and *Sanango* the First Department held that state law was preempted by IRCA. See *Majlinger*, 802 N.Y.S.2d at 57 (rejecting the trial court's conclusion that "sanctioning the recovery of lost wages by an undocumented alien for work not performed would run contrary to both the letter and spirit of IRCA"); *Balbuena v. IDR Reality LLC*, 787 N.Y.S.2d 35, 35 (1st Dept. 2005) (limiting the worker's "recovery for lost earnings to the wages he would have been able to earn in his home country"); *Sanango v. 200 E. 16th St. Hous. Corp.*, 788 N.Y.S.2d 314, 321 (1st Dept. 2004) ("We conclude that state tort law, to the extent it permits an undocumented alien to recover compensation for lost illegal wages as an element of damages, is preempted by IRCA pursuant to the Supremacy Clause.").

n183 *Balbuena*, 2006 N.Y. LEXIS 200, at \*25, \*34 ("We therefore hold, on the records before us in these Labor Law § § 200, 240 (1) and 241 (6) cases, and in the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, that IRCA does not bar maintenance of a claim for lost wages by an undocumented alien.").

n184 Through its participation in the *Majlinger* case before the Second Department, Spitzer's office convinced the Appellate Division to issue a strong warning on why federal preemption should be rejected. The Appellate Division stated that:

once Hoffman is construed broadly enough to apply to awards of lost wages in state-court personal injury actions, there may be nothing to prevent it from reaching so far to eliminate all rights and protections to which undocumented aliens would otherwise be entitled . . . including the right to receive any compensation at all for their work . . . and it may even implicate the constitutional prohibition of involuntary servitude.

*Majlinger*, 802 N.Y.S.2d at 58. Spitzer also successfully advanced an argument before the Second Department that barring lost earnings claims would undermine federal immigration law, because employers would have an incentive to hire more undocumented workers due to the lack of liability for these workers' accidents. In its opinion, the New York Court of Appeals specifically referenced the Second Department's observation that barring such claims

would not only diminish the protections afforded by the Labor Law, it would also improvidently reward employers who knowingly disregard the employment verification system in defiance of the primary purposes of federal immigration laws. . . . This, coupled with the fact that illegal aliens are willing to work in jobs that are more dangerous and undesirable -- and for less money -- than their legal immigrant and citizen counterparts, would actually increase employment levels of undocumented aliens, not decrease it as Congress sought by its passage of IRCA.

*Balbuena*, 2006 N.Y. LEXIS 200, at \*27-\*28 (citations omitted).

n185 See, e.g., Joao Ferreira, AG Moves to Aid Abused Immigrants, SOUTH COAST TODAY, Apr. 21, 2001, available at <http://www.s-t.com/daily/04-01/04-20-01/a011o005.htm> (quoting a Massachusetts Attorney General staffperson, who stated that the office "doesn't ask nor does it need to know the immigration status of a person"); Telephone Interview with Thom Harnett, supra note 77 (stating that the Maine Attorney General's office follows an executive order issued by the Governor in 2004, which generally bars state employees from inquiring into individuals' immigration status); Governor of the State of Maine, An Order Concerning Access to State Services (Apr. 9, 2004), <http://www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=2172&v=Article>.

n186 Telephone Interview with Patricia Smith, supra note 97.

n187 Daniela Gerson, *Grocer To Pay \$ 28,852 in Back Wages*, N.Y. SUN, Mar. 25, 2005, at 2. In a recent investigation by Spitzer of a grocery store in Brooklyn, the following story was reported:

Ismael Castro, 20, said he was reluctant to come forward until a lawyer from the attorney general's office announced on a Mexican radio station they would help violation cases regardless of immigration status. "She told us not to be afraid," said Mr. Castro, who testified with his 16-year-old brother. "She asked me how much I make, what I do, but never asked about migratory status." Mr. Spitzer's office does not ask for workers' immigration status, which is irrelevant under state law.

Id.

n188 During a conference on wage and hour enforcement in February 2005, hosted by the National State Attorneys General Program at Columbia Law School, attorneys general and assistant attorneys general shared strategies on how to create labor enforcement programs like that developed by Spitzer's Labor Bureau, and how to protect low-wage and immigrant workers. Additionally, the participants created a working group of state attorneys general to share information, and to collaborate on multi-state enforcement actions in the future. Telephone Interview with James E. Tierney, *supra* note 76.

n189 See Lynch, *supra* note 54, at 2005-06.

n190 For example, within a year of attending the conference at Columbia Law School, the Arizona Attorney General "settled a case against a day labor company that charged workers to cash their daily paychecks and prohibited them from taking full time jobs with a client company." *Arizona Settles with Firm that Charged Workers to Cash Checks*, ASSOCIATED PRESS, Nov. 20, 2005 ("Under the settlement agreement, the company is prohibited from charging check cashing fees, preventing workers from taking permanent jobs or paying less than minimum wages.").

n191 The following states have Governors and Attorneys General with different party affiliations: (1) Arkansas; (2) California; (3) Connecticut; (4) Georgia; (5) Kansas (6) Kentucky; (7) Maryland; (8) Massachusetts; (9) Minnesota; (10) Mississippi; (11) Missouri; (12) New York; (13) Pennsylvania; (14) Rhode Island; (15) Vermont; and (16) Virginia. See National Association of Attorneys General, *The Attorneys General*, <http://www.naag.org/ag/fullagtable.php> (last visited Apr. 1, 2006); Republican Governors Association, *Governors*, <http://www.rga.org/Governors/Default.aspx> (last visited Apr. 1, 2006); Democratic Governors Association, *Democratic Governors*, <http://www.democraticgovernors.org/governors> (last visited Apr. 1, 2006).

n192 See *supra* note 35 (stating that Arkansas, California, Connecticut, Maryland, Massachusetts, Minnesota, New York, Rhode Island, and Vermont have enacted state minimum wage rates that exceed the federal minimum wage rate).

n193 Press Release, Cal. Labor Federation, *Gov. Schwarzenegger Proposes Cuts to Payments for Disabled Workers Over Christmas* (Dec. 23, 2004), <http://www.calaborfed.org/pressroom/Permanent%20Disability%20Regs.pdf> ("Schwarzenegger launched another attack on workers today, right on the heels of an attempt to do away with their right to a lunch break. Just in time for Christmas, the Governor proposed new emergency regulations that would cut compensation for disabled workers."); Peter Nicholas & Jordan Rau, *The Special Election; Results Unsettle Gov.'s Supporters; As Rumors of Turmoil Fly, Sources Say They Expect Some Top Advisors to Leave. Democrats and Labor Are Weighing How to Proceed*, L.A. TIMES, Nov. 10, 2005, at A1 (stating that voters rejected the Governor's initiative to bar unions from spending political money without approval from members).

n194 Telephone Interview with Miles Locker, Staff Counsel for the Cal. Labor Commissioner, in Sacramento, Cal. (Dec. 9, 2004).

n195 See ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW, AN EVALUATION OF ASSEMBLY BILL 633 SIX YEARS LATER 31 (2005), available at <http://www.sweatshopwatch.org/media/pdf/AB633Report.pdf?PHPSESSID=db99612b80eb06fd14b75b6771eccd61>. Unlike California voters, Massachusetts voters have not altered the combination of a Republican governor and a labor-friendly Democratic attorney general ever since the legislature transferred wage and hour enforcement authority from the state labor department to the Attorney General in 1993. Telephone Interview with Richard Grundy, *supra* note 48.

n196 *Salazar Amicus Brief*, *supra* note 51, at 10-11 (citing *State v. Gattavara*, 47 P.2d 18, 21 (Wash. 1935); *State ex rel. Foster v. Kansas City*, 350 P.2d 37, 42 (Kan. 1960) (holding that separation of powers concerns precluded the Governor from directing the Attorney General to dismiss a quo warranto proceeding, as the Attorney General was both an executive officer and an officer of the judiciary)).

n197 See *Dauids*, *supra* note 53, at 370-73.

n198 *Salazar Amicus Brief*, *supra* note 51, at 3-4 ("At common law, the Attorney General was not just the chief legal representative of the crown. He was also the guardian, *parens patriae*, of the public interest . . . His duty was not solely or even primarily to represent and protect the rights of the king. Rather, it was to represent and protect the rights of the people.") (citations omitted).

n199 Rau, *supra* note 124; Greenhouse, *supra* note 126.

n200 Telephone Interview with Richard Grundy, *supra* note 48. Although these same three functions are also available to an attorney general when there is sole enforcement authority in the attorney general, such as in Massachusetts, they are equally crucial for an attorney general's independent actions even when the state labor department has similar jurisdiction

n201 *Id.*

n202 In a debate against former Maine Attorney General James Tierney in September 2005 asking, "Is Eliot Spitzer Good for America?," Professor Richard Epstein argued that in several instances Spitzer may have caused "over-enforcement" by initiating actions in legal areas where federal enforcement was already sufficient. See National State Attorneys General Program at Columbia Law School, <http://www.law.columbia.edu/centerprogram/ag>.

n203 Becker, *supra* note 22; Greenhouse, *supra* note 1.

n204 Telephone Interview with Patricia Smith, *supra* note 97.

n205 Telephone Interview with Richard Grundy, *supra* note 48 (stating that his office recovers more money in penalties from employers annually than the office spends on enforcement).

n206 Telephone Interview with Patricia Smith, *supra* note 97. Labor Bureau Chief Smith notes that when her office and the state DOL receive complaints from the same worker, the DOL is often willing to have the Attorney General investigate and bring the action. *Id.*

n207 See *N.Y. EXEC.LAW* § 63(12) (McKinney 2005). New York's Labor Bureau asserts its jurisdiction to enforce repeated violations of the labor laws under the same statute, *N.Y. EXEC.LAW* § 63(12), that the Attorney General uses to bring actions against companies for committing consumer fraud and other illegal acts that deceive the public. Telephone Interview with Patricia Smith, *supra* note 97. As the New York Attorney General's experience demonstrates, some attorneys general may not necessarily need explicit statutory authorization from state legislatures or ballot initiatives to increase the roles that they play in enforcing state wage and hour laws. In many states, the major obstacle for attorneys general to assert a greater, independent role in wage and hour enforcement may not be a legal barrier, but rather a lack of interest in such action. *Id.*

n208 FLA.CONST. art. X, § 24 (2005) ("The state attorney general or other official designated by the state legislature may also bring a civil action to enforce this amendment."). The Florida Attorney General has interpreted the amendment to give it authority to bring actions in state court to enforce the minimum wage. See Fla. AGO 2005-64 (2005) ("The Florida constitutional amendment contains provisions relating to its enforcement. It authorizes any affected individual or the Attorney General (or other official designated by statute) to bring a civil action within four years . . . against an employer violating its terms."). Nevertheless, the language of the constitutional amendment that states "or other official designated by the state legislature," FLA.CONST. art. X, § 24, could create an opportunity for an employer to argue that if the legislature designates the state labor department as the enforcement agency, it would deprive the Attorney General of such authority.

n209 Arizona Minimum Wage Coalition, Raise the Minimum Wage for Working Arizonans Act, <http://azminimumwage.com/content/view/30/57/> (last visited Apr. 10, 2006) (stating that "'Law Enforcement Officer' Means the Attorney General" and that "A Civil Action to Enforce This Article May Be Maintained in a Court By a Law Enforcement Officer Or By Any Private Party Injured By a Violation of This Article."); Ohioans for a Fair Minimum Wage, The Ohio Fair Minimum Wage Amendment, <http://raisethewage.org/pdf/MinimumWageAmendmentFull.pdf> (last visited Apr. 10, 2006) ("An action for equitable and monetary relief may be brought against an employer by the attorney general and/or an employee or person acting on behalf of an employee or all similarly situated employees in any court of competent jurisdiction . . .").

n210 This year, at the request of the California Attorney General, the Governor's budget includes a start-up proposal for two attorneys in an "Underground Economy Statewide Investigation and Prosecution Unit" within the Attorney General's office. E-mail from Ralph Lightstone, Counsel in the Office of the Cal. Attorney General (Apr. 7, 2006, 19:07 EST) (on file with author); see also Legislative Analyst's Office, Analysis of the 200607 Budget Bill (Feb. 2006), [http://www.lao.ca.gov/analysis2006/crimjustice/cj03\\_0820anl06.html](http://www.lao.ca.gov/analysis2006/crimjustice/cj03_0820anl06.html).

n211 Recall how Labor Bureau Chief Smith contrasted the New York DOL's "traditional collection agency" mentality to the New York Attorney General's "class action" approach. Telephone Interview with Patricia Smith, *supra* note 97.

n212 Particularly in situations where a state agency already serves the traditional collection agency function for workers who are not afraid to file individual complaints, an attorney general using the class action approach may make it possible for entirely new groups of workers to receive rigorous protection from the state government.

n213 Spitzer solved this employer-related collective action problem in the greengrocer cases by convincing hundreds of greengrocer employers to accept minimum standards and monitoring to ensure compliance. Office of the N.Y. Attorney General Eliot Spitzer, *supra* note 133.

n214 See Developments in the Law, *supra* note 165, at 2229; REBECCA SMITH ET AL., NAT'L EMPLOYMENT LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER HOFFMAN PLASTIC COMPOUNDS V.NLRB (Feb. 2003), available at <http://www.nelp.org/docUploads/wlghoff040303%2Epdf>.

n215 The Balbuena case, decided by the New York Court of Appeals on February 21, 2006, appears to be a strong case to present to the U.S. Supreme Court, because it raises the possibility of the preemption of state laws that protect the health and safety of all workers. Because these are legal areas traditionally regulated by the states, the Supreme Court may be less likely to hold these laws preempted without a clear indication from the Congress that it intended to do so. See *Balbuena v. IDR Realty LLC*, No-19, 2006 N.Y. LEXIS 200, at \*19 (Feb. 21, 2006) ("The presumption against preemption is especially strong with regard to laws that affect the states' historic police powers over occupational health and safety issues . . . and is overcome only if it was the clear and manifest purpose of Congress to supplant state law.") (quotation marks omitted) (quoting *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))

