How Local Government Can Protect Workers’ Rights Even When States Do Not Want Them To: Opportunities for Local Creativity and Persistence despite Double Preemption

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HOW LOCAL GOVERNMENT CAN PROTECT WORKERS’ RIGHTS EVEN WHEN STATES DO NOT WANT THEM TO: OPPORTUNITIES FOR LOCAL CREATIVITY AND PERSISTENCE DESPITE DOUBLE PREEMPTION

Terri Gerstein & LiJia Gong*

Local governments have emerged as key players in advancing and protecting workers’ rights in a growing number of jurisdictions in the United States. They have enacted cutting-edge laws; created local labor agencies; established worker boards or councils to provide input into policy; placed standards — either high-road practices or at least mandating compliance — on government contractors as well as licensees and permit holders; improved conditions for their own local government employees; and otherwise stood up for working people. Localities have played this role despite escalating abusive state preemption in many states, which have stripped powers from local government in a manner that is undemocratic and exacerbates racial inequities. Localities are also limited by federal preemption, including notably the National Labor Relations Act. Despite these limitations, local governments can take action — and many have — to creatively leverage their proprietary, budgetary, public leadership, licensing, and convening authorities to advance workers’ rights. This Article lays out a vision for how doubly-preempted local governments can nonetheless exert a meaningful impact on behalf of working people. This Article concludes by outlining possibilities for resisting abusive state preemption.

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INTRODUCTION

Historically, protecting workers and advancing workers’ rights have not been a core function of local governments.1 Although localities have long served constituents’ needs in a wide range of ways, this expansive role has not until very recently included addressing residents’ struggles as workers

1. We use the terms “local governments,” “localities,” and “municipalities” to include cities, counties, and all other political subdivisions of states.
experiencing precarious, underpaid work with insufficient protections. In the past ten years, however, a number of local governments have begun to play a critical and growing role in relation to workers’ rights, using a range of tools and strategies.\(^2\)

Localities have passed workplace laws creating new and essential rights, and they have enforced these laws, often using innovative strategic and/or collaborative approaches. More than 20 localities have created dedicated departments, offices, or sub-agencies focused on worker issues. Several local governments have created boards or councils that provide workers with a voice or formal role to inform policymaking. Localities have also had an impact on their own municipal employees as well as the broader local labor market by raising their own workers’ wages, providing paid leave, facilitating collective bargaining, and otherwise improving conditions for local employees.

Some localities are incorporating labor compliance and/or job quality considerations in their procurement process, or in relation to the issuance of permits or licenses. Finally, local leaders have used their public leadership role, sometimes described as soft powers, to highlight worker issues in various ways, including through community education and outreach, issuance of reports, holding hearings and convenings, and publicizing available resources.

This surge of activity at the local level has resulted in part from stagnation at the federal and, sometimes, state levels.\(^3\) As such, the Fight for 15 campaign and other worker advocates and organizations have — through seeking increased local minimum wage floors — helped pave the way for more innovative policymaking by local governments to advance workers’ rights.\(^4\) Some of these protections, like statutes mandating higher minimum wages, paid sick leave, or fair scheduling, have later been adopted at the state level. In this way, local government is playing the “laboratory” role that Justice Brandeis observed states playing in \textit{New State Ice Co. v. Liebmann}.\(^5\)

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\(^3\) See Andrew Elmore, Labor’s New Localism, 95 S. Cal. L. Rev. 253, 253 (2021) (attributing the rise of labor localism to stagnation at the federal and state levels as well as the growing role of workers’ centers in advocating for this new model of localism).


Indeed, some of the most innovative labor policies in the United States have been adopted at the local level in recent years.

Localities are particularly well-positioned to set minimum labor standards because metropolitan economies account for the overwhelming majority of economic growth and employment growth.\textsuperscript{6} As such, local governments should have the authority to direct that growth and ensure that the benefits accrue to all working people.

At the same time, however, a second anti-democratic development now constrains many localities considerably. As the role of local governments in advancing worker protections has grown, conservative state legislatures have sought to quash this local organizing and policymaking via preemption.\textsuperscript{7} Over the past two decades, conservative state legislatures have enacted exceedingly broad preemption proposals, sometimes known as “the new preemption,” that would virtually end local policymaking over a wide range of subjects as well as punitive measures that do not merely preempt local action but also threaten local officials or governments with criminal or civil fines, state aid cutoffs, or liability for damages.\textsuperscript{8} Conservative state legislatures have preempted local efforts to increase the minimum wage, guarantee paid sick leave, require fair scheduling, regulate gig employers, and set prevailing wages for municipal contracts.\textsuperscript{9} For example, at least 26 states have passed preemption laws prohibiting local governments from setting minimum wages higher than the state minimum wage.\textsuperscript{10} In some cases, states have gone beyond targeted preemption of specific policies and sought to use field preemption to eliminate all local workplace regulation.\textsuperscript{11}

Indeed, this new preemption was initiated in part as backlash from corporate actors against the leadership many local governments have taken to strengthen workers’ rights and has been replicated via business lobbying groups like the American Legislative Exchange Council (ALEC) and the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{8} Id.
  \item \textsuperscript{10} See Workers’ Rights Preemption in the U.S., Econ. Pol’y Inst. (Feb. 2024), https://www.epi.org/preemption-map [https://perma.cc/L6YY-8GCK].
  \item \textsuperscript{11} See, e.g., Texas Regulatory Consistency Act, H.B. 2127, Tex. Leg. (Tex. 2023), https://capitol.texas.gov/tlodocs/88R/billtext/pdf/HB02127L.pdf [https://perma.cc/S9S6-HU3N].
\end{itemize}
\end{footnotesize}
Cicero Institute. This new preemption, however, has now grown to encompass all sorts of issues beyond workplace regulation, including reproductive health, gun safety, the regulation of plastic bags, and more. These efforts have deleterious impacts on democracy and racial equity, as gerrymandered state legislatures suppress the authority of metropolitan centers where more communities of color reside. The preemption of local policies to support workers’ rights is most common in the South and Midwest, where these laws are part of a long history of efforts to limit the rights and freedoms of Black people.

Meanwhile, even in more hospitable landscapes, all localities (as well as states) must contend with federal preemption in relation to worker protection laws they pass. Some cornerstone federal workplace statutes do not present this challenge; rather, they act as a floor above which states and localities may enact higher standards. For example, this is true of the Fair Labor Standards Act, which governs minimum wage, overtime, and child labor, 29 U.S.C. § 218(a); the Family and Medical Leave Act, which requires certain employers to provide unpaid leave to qualifying employees, 29 U.S.C. §2651; and Title VII of the Civil Rights Act, as amended, which protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin, 42 U.S.C. §2000e-7.

However, other key federal workplace laws preempt local and state action; depending on the federal statute, the scope of this preemption can be narrow or broad. The scope of the Occupational Safety and Health Act (OSH Act) is relatively limited: it only preempts state or local action when there is an Occupational Safety and Health Administration (OSHA) standard or rule, addressing a particular and specific workplace hazard; even then, states and localities may take action if the law, regulation, order, or government action protects the general public, and any protection of workers is incidental.

In contrast, the National Labor Relations Act (NLRA) has far broader preemptive scope: Under San Diego Building Trades Council v. Garmon,

states and localities are preempted from passing laws arguably protected or prohibited by the NLRA or that add to the NLRA’s remedies, while under Machinists v. Wisconsin Employment Relations Commission, state and local governments are precluded from enacting laws that regulate or overly influence the course of bargaining — what Congress intended to be controlled by “the free play of economic forces.” Even within these broad limitations, however, there are exceptions: states and localities may act as a market participant in a proprietary capacity, in other words, to protect their interests as purchasers of goods and services. They are also not preempted from action that addresses matters “deeply rooted in local feeling and responsibility,” such as violence or trespassing. Indeed, many states have taken non-preempted action in recent years that have ultimately helped strengthen worker power in various ways.

In this way, a number of localities face what we would describe as “double preemption,” constraints from both federal and state government that limit the potential scope of local activity on worker justice matters. Nonetheless, there remains considerable space for local governments — even those that are doubly-preempted — to take action to protect and advance workers’ rights.

This Article discusses the landscape of increased pro-worker developments at the local level. First, it sets forth the various ways that cities and counties have used their powers to address the needs of constituents as workers. Then, it considers, in relation to each overall area of action, how doubly-preempted localities can nonetheless find room to maneuver and have an impact. Finally, this Article examines strategies for localities to push back against preemption itself in order to be able to legislate on matters of critical importance to their constituents.

I. OPPORTUNITIES FOR IMPACT: HOW LOCALITIES — EVEN WHEN DOUBLY-PREEMPTED — CAN ADVANCE AND PROTECT WORKERS’ RIGHTS

The growth of local government action to protect and advance workers’ rights in recent years has led management law firms and other management-
aligned commentators to argue that employment laws have gone local and note that the municipalization of employment law is part of a growing trend. Local governments have also gone beyond solely using legislation and have also leveraged their other authorities to protect and advance workers’ rights. Despite the limitations they face, there is still considerable room for doubly-preempted localities to take action to advance and protect workers’ rights and to promote labor compliance and high-road practices by employers. The following discussion describes the various ways that localities have taken action to support workers’ rights and proposes and analyzes opportunities for doubly-preempted localities to nonetheless find room to maneuver and take action.

A. Enactment of Local Labor Standards Laws

1. Overview

In states where local governments have initiative authority to pass laws regulating workplace matters, many have taken up the opportunity with vigor on a range of issues.

Wages. Localities have often led the nation in policymaking to raise workers’ minimum wages in their jurisdictions. Currently, 56 cities and counties have local minimum wage laws that raise the minimum wage above the levels established by state and federal governments. Localities have also addressed minimum wages in specific industries, eliminating the tip


credit for restaurant workers as in Flagstaff and Chicago\textsuperscript{25} and setting higher wages for domestic workers\textsuperscript{26} and hotel workers.\textsuperscript{27}

\textit{Wage theft.} Localities have also used their initiative authority to address wage theft, which occurs when employees do not receive wages to which they are legally entitled for their work, including paying workers less than the minimum wage, not paying overtime premiums to workers who work more than 40 hours a week, or asking employees to work “off the clock” before or after their shifts.\textsuperscript{28} For example, Denver passed a wage theft ordinance with a civil penalty for wage theft offenses and an administrative process for enforcement through Denver Labor, a dedicated unit within the city auditor’s office.\textsuperscript{29}

\textit{Paid sick leave and fair scheduling.} At least 21 cities and counties have laws requiring employers to permit workers to take time to recover from an illness or care for a sick loved one and to be compensated for that time;\textsuperscript{30} notably, they led the way for subsequent state-level laws.\textsuperscript{31} Presently, at least 11 cities have fair scheduling or “fair workweek” laws to ensure workers have predictable schedules, more opportunities for existing employees to work, and sufficient periods of rest between shifts.\textsuperscript{32} Fair

\begin{itemize}
\item \textsuperscript{26} Seattle, Wash., Domestic Workers Ordinance, Ordinance 125627 (July 23, 2018).
\item \textsuperscript{27} L.A., Cal., Citywide Hotel Worker Minimum Wage Ordinance, Ordinance 183241 (Oct. 1, 2014).
\item \textsuperscript{28} César F. Rosado Marzán, Wage Theft as Crime: An Institutional View, 20 J.L. SOC’Y 300, 302 n.5 (2021). For a detailed discussion of wage theft, see generally id.
\item \textsuperscript{31} See id.
\end{itemize}
workweek laws are generally focused on workers in retail and the service sector.\textsuperscript{33}

\textit{Protections for workers in specific industries.} Local governments have passed laws protecting workers in certain industries to address the specific challenges and vulnerabilities faced by those workers. These include:

- \textit{Platform-based workers.} New York City and Seattle have set standards for people working for platform corporations in the so-called gig economy, in which workers are hired via apps and treated as independent contractors instead of as employees, thereby depriving them of federal and state employee rights. New York City and Seattle side-stepped questions of worker classification by simply setting minimum standards.\textsuperscript{34} New York City in 2018 established minimum pay rates for app-based drivers,\textsuperscript{35} and in 2023 set a minimum pay standard for gig delivery workers, which took effect after unsuccessful litigation challenging it.\textsuperscript{36} The delivery worker law also contained a number of other provisions, including bathroom access.\textsuperscript{37} Along

\begin{itemize}
\item \textsuperscript{33} See id.
similar lines, in May 2022, the Seattle City Council passed an ordinance establishing minimum payments for app-based delivery workers, requiring companies to be transparent about worker pay and tips, and banning companies from punishing workers for rejecting jobs.38

- **Freelancers and independent contractors.** Minneapolis,39 New York City,40 Los Angeles,41 Columbus,42 and Seattle43 have passed laws to aid freelancers and independent contractors in securing timely payment for their work. These local ordinances typically require a written contract that includes certain written terms for agreements above a certain value.44

- **Domestic workers.** Chicago,45 Philadelphia,46 Seattle,47 and Washington, D.C.48 have passed laws to provide domestic workers certain rights.

- **Hotel workers.** At least seven cities have passed laws requiring hotels to equip workers with panic buttons (GPS-enabled devices that alert security


42. See Chad Smith, Columbus, Ohio, Adds Freelance Worker Protections to Its City Code, JD SUPRA (July 28, 2023), https://www.jdsupra.com/legalnews/columbus-ohio-adds-freelance-worker-8193069/ [https://perma.cc/4W4F-DW98].

43. See SEATTLE, WASH., MUN. CODE § 14.34.055 (2021).


46. See generally PHILA., PA., CODE ch. 9-4500 (2020).

47. SEATTLE, WASH., MUN. CODE § 14.23.020 (2024).

when activated), in addition to other measures protecting workers from sexual harassment and assault.\(^49\) Several have also passed laws regulating workloads, including maximum square footage cleaned in a day.\(^50\) In addition, the City of Newark prohibits hotels in the jurisdiction from subcontracting critical hotel employees (i.e., jobs related to housekeeping, food preparation or service, front desk service, and engineering).\(^51\) Newark and New York City also have laws requiring hotel guests to be alerted to disruptions of service resulting from a number of causes, including a strike or picket; such laws also require penalty-free reservation cancellations.\(^52\)

- **Car wash workers.** New York City’s car wash accountability law requires car washes to obtain a license to operate. In addition to a license application, car washes must provide proof of workers’ compensation insurance, proof of disability benefits insurance, proof of commercial general liability insurance, and proof of unemployment insurance.\(^53\) Notably, car washes must also post a surety bond (also known as a wage bond) to cover potential wage claims as a condition of doing business.\(^54\)

- **Fast food workers.** New York City passed “just cause” legislation applicable to fast food workers, prohibiting employers from arbitrarily


\(^52\) Id. at ch. 9:1–3; N.Y.C. Admin. Code §§ 20–850 (2021).


\(^54\) Id.
terminating them for reasons unrelated to job performance. Philadelphia adopted a similar law in relation to parking lot attendants.

Enhanced protections against discrimination. Local governments have passed laws to expand upon federal and/or state employment discrimination protections, including protection from discrimination on the basis of sexual orientation or gender identity, as well as protection on the basis of marital or partnership status, family status, immigration status, status as a veteran, credit history, caregiver status, sexual and reproductive health decisions, salary history, weight and height, caste, and status as a victim of domestic violence, stalking, or sex offenses. In addition, federal employment discrimination protections only apply to employers with 15 or more workers, and local ordinances also often cover smaller workplaces. New York City in 2022 included domestic workers in the law prohibiting workplace discrimination. At least 22 local governments have passed “ban-the-box”


59. See, e.g., N.Y.C. ADMIN. CODE § 8–102 (2023) (defining an employer as anyone employing four or more persons for the previous year, or one domestic worker for any period of time).

60. See Protections for Domestic Workers Under the New York City Human Rights Law, N.Y.C. COMM’N ON HUM. RTS. (Oct. 26, 2021),
or “fair chance hiring” laws requiring employers to consider job qualifications before inquiring about a candidate’s criminal history.\footnote{61} Local governments also prohibited discrimination based on a worker’s hairstyle or hair texture; now, 24 states have passed this legislation, known as the Crown Act.\footnote{62}

In the wake of the \textit{Dobbs} decision, cities like Chicago have passed bodily autonomy anti-discrimination ordinances, which prohibit employment discrimination against individuals who receive reproductive healthcare or gender-affirming care.\footnote{63} Finally, in an effort to remedy past systemic gender and race-based pay discrimination, at least 20 local governments have passed laws prohibiting employers from inquiring about a job applicant’s salary history during the hiring process;\footnote{64} New York City also passed a pay transparency law, requiring listing of pay ranges on job postings.\footnote{65}

\textit{Worker retention laws}. Some localities have passed laws to protect workers’ employment when services are contracted out or when a contract changes hands.\footnote{66} At least seven cities (Hoboken, Newark, New York City, Los Angeles, San Francisco, Seattle, and Philadelphia) have passed laws that require successor contractors that operate in those cities to retain employees for at least 90 days, provide written offers of employment, retain employees by seniority, and maintain a preferential hiring list of employees not retained.\footnote{67} These laws differ in the categories of workers that are covered;


\footnote{63. CHI., ILL., MUN. CODE § 6-120-010 (2023).}


\footnote{66. GERSTEIN & GONG, supra note 2, at 22.}

\footnote{67. See TERI GERSTEIN & VISHAL REDDY, ECON. POL’Y INST., HARV. CTR. FOR LAB. & JUST. ECON., & LOC. PROGRESS IMPACT LAB, LOCALITIES TAKE ACTION TO PROTECT WORKERS: LABOR DAY REPORT 2023 13–15 (Sept. 4, 2023), https://localprogress.org/wp-
Philadelphia’s ordinance provides the broadest coverage, including security, janitorial, building maintenance, food and beverage, hotel service, and health care services workers.68

Addressing technological change. New York City passed an ordinance in 2021 that regulated the role of artificial intelligence in workforce decisions. That ordinance, the first in the nation of its kind, prohibits employers or employment agencies from using an automated employment decision tool to make an employment decision unless the tool is audited for bias annually, the employer publishes a public summary of the audit, and the employer provides certain notices to applicants and employees who are subject to screening by the tool.69

Protecting workers during the COVID-19 pandemic. Local governments also used their authority — at times invoking emergency powers — to protect worker safety during the early days of the COVID-19 pandemic, including issuing stay-at-home orders, as well as masking, testing, quarantine, and vaccination requirements.70 In addition, local governments clarified or enacted paid sick leave policies, prohibited employer retaliation against workers in connection with workplace safety and compliance with COVID-19 public health orders, mandated hazard or premium pay bonuses for workers in certain industries, and passed “right to recall” or “right to return” laws to protect workers in certain affected industries that were laid off during the pandemic, among other protections.71

Uninterrupted service delivery. Some localities, like Miami-Dade County, Philadelphia, and San Francisco, require certain contractors operating at their airports to enter into labor peace agreements with labor unions.72 A labor peace agreement generally requires the employer and


71. GERSTEIN & GONG, supra note 2, at 26–29.

union to waive certain rights under federal law with respect to union organizing (for example, neutrality and non-opposition to the union on the employer side; and, on the union side, a promise not to strike, picket, or disrupt the employer’s operations) to ensure uninterrupted workflow or, in the case of government, uninterrupted delivery of public services.\footnote{Robert B. Stulberg & Julie A. Dabrowski, The City and State of New York Enact Powerful New Laws to Protect the Rights of Workers and Unions, AM. BAR ASS’N (Mar. 1, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_newsletter-lel-winter2022/new-laws-city-state-new-work/} In 2021, New York City amended its law to include a requirement, currently being challenged in litigation,\footnote{See Hum. Servs. Council of N.Y. v. City of New York, No. 21 Civ. 11149, 2022 WL 4585815, at *1 (S.D.N.Y. Sept. 29, 2022).} that human services contractors and subcontractors must agree to labor peace agreements as a condition to being able to win or renew a city service contract with city agencies.\footnote{See N.Y.C. ADMIN. CODE § 6-145.} While labor peace agreements can be valuable for all parties, localities should proceed with caution with such policies to ensure that they fall within the market participant exception of the NLRA.\footnote{See, e.g., Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227, 231–33 (1993) (holding that challenged labor requirements imposed by local government were exempt from preemption because local entity was acting not as regulator, but as market participant).}

2. What Can Be Done in Doubly-Preempted Localities?

As an initial matter, because of the dynamic nature of abusive state preemption (i.e., states often preempt in response to specific local action), legislation may not be the most durable way to enact worker-friendly policies. To the extent localities can make policy changes without actually legislating through use of administrative action — by, for example, changing policies for specific departments — such approaches may be less likely to attract attention of adversarial state legislators.\footnote{Tripartite lawmaking — when government actions in areas of law unrelated to labor (but of significant interest to employers) are exchanged for private agreements through which unions and employers reorder the rules of union organizing and bargaining — is also another way of insulating local action from state preemption. See Benjamin Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 HARV. L. REV. 1153, 1221 (2011).}

There are, however, still opportunities for legislation in doubly-preempted localities. Typically, because of the constraints of home rule or other legal protections in many states, state legislatures have used express preemption to prohibit specific local worker-protection policies — i.e., local laws setting...
minimum wages, requiring paid sick leave, utilizing project labor agreements, establishing prevailing wage requirements, or creating rights for workers in the gig economy.\textsuperscript{78} As such, avenues for local policymaking that are not expressly preempted often remain. This section describes several areas with potential for such action.

With the exception of COVID-related matters, state preemption has not typically focused extensively on workplace safety and health matters. Indeed, Miami-Dade County enacted an ordinance prohibiting retaliation against non-essential employees for complying with County evacuation orders (such as during an impending hurricane) or other County Executive Orders issued during a declared state of local emergency,\textsuperscript{79} and, in 2023, an ordinance was proposed in the County to create a workplace heat standard.\textsuperscript{80} Unfortunately, the Florida legislature in 2024 may pass legislation that would preempt localities from mandating workplace heat standards.\textsuperscript{81} Action on similar issues, particularly relevant and resonant in light of climate change, may be an area of opportunity.

When states prohibit localities from enacting higher minimum wages, such laws do not necessarily prohibit localities from passing wage theft ordinances that would allow localities to enforce already-existing state-level minimum wage laws. Numerous localities in Florida have passed ordinances setting up administrative processes that make it easier for workers to file a complaint and recoup stolen wages without retaining a lawyer. In Florida, Miami-Dade County led the way, followed by Alachua County, Broward County, Hillsborough County, Osceola County, Pinellas County, and the City of St. Petersburg.\textsuperscript{82} These ordinances set out a procedure for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} See Richard Briffault, \textit{Preemption: The Continuing Challenge}, 36 J. LAND USE & ENV’T L. 251, 256, 262, 265 (2021). This contrasts with the effort of some conservative state legislatures, which have used so-called “Death Star” bills to preempt local action in an entire field — like protecting workers’ rights. See, e.g., id. at 260; see also Jennifer Sherer & Margaret Poydock, \textit{Flexible Work Without Exploitation}, ECON. POL’Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/ [https://perma.cc/8WLJ-82B6].
\item \textsuperscript{79} See MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES § 8B-11.1(2) (2022).
\item \textsuperscript{80} See Miami-Dade Cnty., Fla., Ordinance 231454 (Sept. 11, 2023), https://www.miamidade.gov/govaction/matter.asp?matter=231454&file=true&fileAnalysis=false&yearFolder=Y2023 [https://perma.cc/6HUD-Z7R8].
\end{itemize}
\end{footnotesize}
administrative resolution of wage theft claims by first allowing workers with claims of more than $60 in unpaid wages to settle claims with the city’s help.\textsuperscript{83} If those claims are not resolved, workers then may proceed to a hearing where the employer may be exposed to additional penalties.\textsuperscript{84} In addition, while Colorado currently does not preempt localities from legislating on workplace rights, it previously had state-level preemption in relation to wage-setting.\textsuperscript{85} Despite that limitation, Denver in that period enacted a local-level wage theft law — in other words, preemption in relation to wage-setting was distinct from preemption in relation to local enforcement of existing state wage laws.\textsuperscript{86}

Consumer-oriented laws that also incidentally benefit workers may also present opportunities. For example, Newark and New York City have enacted laws requiring hotel guests to be alerted to disruptions of service resulting from a number of causes, including a strike or picket; such laws also require penalty-free reservation cancellations.\textsuperscript{87} In the service sector, laws protecting consumers from fraud in relation to gratuities might be another avenue for protecting workers’ earnings; where customers intend tips to go to workers and their tips are retained in whole or part by an employer or business, this can be considered a form of consumer fraud, and indeed, the D.C. Attorney General’s Office settled cases with DoorDash and Instacart, recovering $2.5 million from each, based on this analysis.\textsuperscript{88} Laws focusing on corporations defrauding or deceiving consumers are likely to fall outside of workplace-related preemption.

\begin{itemize}
\item \textsuperscript{83} See sources cited supra note 82.
\item \textsuperscript{85} See generally TOWARDS JUST. & UNIV. OF DENVER, COMBATING WAGE THEFT IN DENVER: HOW THE CITY OF DENVER CAN PROTECT THE SAFETY & DIGNITY OF WORKERS (Mar. 2018), https://d3n8a8pro7vhmx.cloudfront.net/towardsjustice/pages/345/attachments/original/1521739712/2018.03.21_Combating_Wage_Theft_White_Paper_FINAL.pdf [https://perma.cc/5L5P-SVW8].
\item \textsuperscript{86} See id.
\end{itemize}
Laws requiring workers’ rights outreach and education by a locality are also unaffected by preemption. Both federal and state preemption concern action and regulation, but they in no way prevent local governments from educating workers about their rights and directing them to webpages, agencies, and resources that can assist them. Localities could mandate the creation of a webpage about workers’ rights, as well as outreach activities to educate workers in the jurisdiction. While such legislation may seem milquetoast in light of the country’s current stark income inequality and high levels of workplace violations, it is necessary and valuable: research shows that many workers lack knowledge about their employment rights.89

Press releases and publicity about violations help to deter violations by similarly situated employers.90 It would be useful, then, for localities to enact laws requiring creation of a database or public resource listing labor law violators within the jurisdiction. In 2020, New Jersey passed a “Workplace Accountability in Labor List” (WALL) law.91 The statute allows the state labor commissioner to post a list on its website with the name of any person, corporation, or entity found in violation of any state wage, benefit, or tax laws; factors to be considered by the commissioner include the record of previous violations, the scale of the violations, failure to cooperate with an investigation, submission of false records, and more.92

Austin, Texas, passed a wage theft ordinance in late 2022 that contained several elements of the various proposals above: the ordinance requires the creation of a wage theft coordinator position to assist workers who report violations and a publicly available database of certain employers that have a

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92. See N.J. STAT. § 34:1A-1.16(b) (2023).
record of wage theft in the city. It also bars any employer in the database from entering into any contract with the city.

In addition, licensing laws may provide opportunities for enhancing compliance with wage and other laws. As noted above, New York City’s car wash licensing scheme requires car washes to post a wage bond to cover potential wage claims as a condition of doing business. Nail salons have a similar wage bond requirement under New York State law. Enacting licensing requirements in high-violation industries will help local government to monitor employers in those industries, and requiring a wage bond as part of the licensing process can help deter violations and ensure workers who experience wage theft are ultimately paid.

Of course, the room each locality will have to maneuver depends on the constitutional or statutory structure of local government law in each state and the specific preemption statutes that may touch on a locality’s ability to take action to protect workers in each state. However, the above possibilities are intended to provide examples of the kinds of opportunities that may be present despite state efforts to preempt local lawmaking on many key labor issues.

B. Establishment of Dedicated Labor Agencies or Units Within Local Government

1. Overview

At least 20 localities have created labor-focused agencies or units in local government specifically dedicated to enforcing workers’ rights under local ordinances and/or advancing labor standards and workers’ rights in other ways. Several of these agencies are also charged with analyzing and potentially proposing local labor policies. In other instances, localities do not have a dedicated stand-alone office, but units of other municipal agencies focus specifically on workers’ rights matters. And some localities without dedicated units have tasked specific government entities with enforcing wage theft or paid sick leave laws, such as a city manager, treasurer, or


94. See Austin, TX., Code of Ordinances § 4-22-5(A) (2023); see also Austin City Council Passes Wage Theft Protection Ordinance, supra note 93.

95. See infra Section II.A.1.

attorney, office of human rights, unit of the mayor’s office, or other officials.97

The creation of a dedicated unit within local government focused on workers’ rights can be transformative. It ensures that municipal public servants will be involved in worker protection in a continuous, proactive, and in-depth manner. It allows specialized staff to develop expertise on the relevant municipal laws and policies, as well as deep knowledge of issues affecting local workers. Where there is a dedicated worker-focused office in local government, staffers can develop ongoing relationships with relevant stakeholders like worker advocacy groups, unions, immigrant rights advocates or service providers, employment lawyers, and employer associations, as well as other relevant government enforcement agencies at the local, state, and federal levels. A dedicated office can also be mobilized to address emerging needs, including those that arose in the COVID-19 pandemic. Most importantly, the establishment of a dedicated office institutionalizes and embeds the work within local government, ensuring the focus on workers and their challenges will continue beyond a particular administration.

Jurisdictions with dedicated agencies, subdivisions, or staff include Austin, Berkeley, Bloomington (MN), Boston, Chicago, Columbus, Denver, Duluth (MN), Emeryville (CA), Flagstaff, Los Angeles City, Los Angeles County, Minneapolis, New York City, Philadelphia, Pittsburgh, San Diego City, San Diego County, San Francisco, San Jose, Santa Clara County (CA), Seattle, St. Paul, Tacoma, and Tucson.98 Some of these offices were created directly by the voters: for example, Tucson voters in 2021 passed a ballot initiative99 to create a local minimum wage and also a city Department of Labor Standards, and in Philadelphia, voters overwhelmingly approved a


ballot question in the June 2020 primary election to amend the city charter to create a city Department of Labor.\footnote{100}

These agencies have conducted considerable enforcement of local worker protection laws.\footnote{101} While a detailed discussion of such enforcement is beyond the scope of this Article, it is worth noting that there have been numerous high-profile actions, from fair scheduling cases in New York City recovering $20 million from Chipotle\footnote{102} and millions also from other chains,\footnote{103} to enforcement of gig worker rights by the Seattle Office of Labor Standards that have ensured paid sick leave for such workers and also recovered millions of dollars for them.\footnote{104} Some localities have recognized the importance of adequate funding for enforcement; in 2023, the Seattle City Council approved a ten-cent fee per order with certain gig delivery companies to fund enforcement of new gig worker protections;\footnote{105} this fee-based funding will be in addition to ongoing public funding of the Seattle Office of Labor Standards. Some of these agencies also have community partnership programs, sometimes referred to as “co-enforcement,” in which they contract with worker and community organizations to provide know-your-rights education to hard-to-reach populations and help refer cases to the

\footnote{100. Philadelphia, Pennsylvania, Question 1, Department of Labor Amendment (June 2020), BALLTOPEDIA, https://ballotpedia.org/Philadelphia,_Pennsylvania,_Question_1,_Department_of_Labor_Amendment_(June_2020) [https://perma.cc/CP2V-XEJZ] (last visited Mar. 7, 2024).}

\footnote{101. GERSTEIN & REDDY, supra note 67, at 14–16.


government office. Some localities have issued reports on worker issues or on their activities supporting workers, either because they are statutorily required to do so, or as a matter of public disclosure and government transparency.

2. What Can Be Done in Doubly-Preempted Localities?

Many, but not all, city and county offices of labor standards or other local government worker protection units focus largely or primarily on enforcing local labor standards laws. As a result, it may seem curious to propose creating a dedicated worker protection agency or unit in a locality unable to enact virtually any local worker protection laws.

But government agencies do a lot more than passing and enforcing laws, and there are important initiatives that localities can undertake aside from enacting legislation, in large part because of considerable gaps in the labor enforcement and worker protection landscape. Federal and state labor enforcement agencies have been systematically starved for resources for decades and are woefully underfunded relative to the mission they are expected to perform. Many workers cannot file private lawsuits to seek redress because of forced arbitration, and workers of all income levels, including especially workers in low-wage industries, do not know about their rights. When workers overcome the various obstacles to reporting violations, often they confront a confusing government bureaucracy. When cases are resolved, the penalties for labor standards violations are often insufficient to deter violations by peer employers. Perhaps most importantly, union density has significantly decreased over the past several


107. GERSTEIN & GONG, supra note 2, at 52–53.


109. HAMAJI ET AL., supra note 108; RANKIN & LEW, supra note 89; Miller & Tankersley, supra note 89.

110. Celine McNicholas et al., Civil Monetary Penalties for Labor Violations are Woefully Insufficient to Protect Workers, ECON. POL’Y INST. (July 15, 2021, 12:56 PM), https://www.epi.org/blog/civil-monetary-penalties-for-labor-violations-are-woefully-insufficient-to-protect-workers/ [https://perma.cc/VQR8-6AY9].
decades, leaving many workers without a collectively bargained representative in the workplace, instead reliant only on advocacy groups, nonprofit organizations, and government action. In this context, a range of focused measures by (doubly-preempted) local governments can have a meaningful effect on helping both protect and empower workers. Notably, the following activities can be undertaken even without a designated, dedicated unit or agency, but however the work is organized, these initiatives will require staffing and resources to implement.

**Education and outreach.** Local government labor agencies or units can conduct extensive public education for workers about their rights. This could consist of multi-lingual outreach in person, a social media campaign or advertisements, or adding know-your-rights education to other kinds of community outreach. At the very least, a locality can create a well-designed webpage with basic labor rights information and a listing of other resources for seeking help.

**Navigator services.** A number of government agencies have used a navigator model to help constituents manage complex bureaucracies and processes. This model is being or has been used, for example, to assist people seeking unemployment benefits applying for health insurance under the Affordable Care Act, or navigating the criminal justice system. Navigators help overcome the obstacles (in addition to lack of knowledge) to people seeking government services: people may feel intimidated by an application process, feel they lack skills to complete paperwork properly, or simply need additional assistance in navigating a
process. Affordable Care Act navigators have been shown to increase enrollment in health insurance;116 for example, for elderly SNAP-eligible adults, receiving information about likely eligibility increased enrollment by 83%, but enrollment increased by 200% when the outreach information included a number to call for personalized assistance enrolling.117 The navigator model often involves grants to community organizations, but a local government office could either fund or play the navigator role.118 This function could involve educating workers about their rights, screening potential complaints, helping workers complete complaint forms, and connecting them with the relevant government enforcement agencies, public interest or contingency-fee lawyers, or general public services. In addition, unlike in some other countries,119 workplace enforcement in the United States occurs in silos: for example, one agency may deal with employment discrimination, another with wages and hours, and still another with workplace safety and health — each with their own processes. A local agency navigator could create a unified complaint form and play a “traffic cop” role of helping workers reach the right agencies.

In Denver, for example, the city’s Office of Financial Empowerment and Protection plays a navigation function in relation to wage theft cases. In addition to connecting workers with the appropriate city or state enforcement agencies, the office assists workers experiencing wage theft with accessing other needed support, such as the local human services agency that can potentially provide cash or food assistance.120

Grants program. A dedicated local labor agency could administer a grants program providing public funding to worker advocacy groups or public interest law offices to help constituents with wage theft and related concerns. Notably, such programs could also be created without a dedicated labor agency. There are currently several programs in which government funding has been used to support non-governmental organizations in such activities.

116. See Benjamin D. Sommers et al., The Impact of State Policies on ACA Applications and Enrollment Among Low-Income Adults in Arkansas, Kentucky, and Texas, 34 HEALTH AFFS. 1010, 1010–18 (2015).
118. For more on the navigator concept, see DEUTSCH & GERSTEIN, supra note 106, at 17–19.
Such funding programs exist in Iowa (with grants from several cities and the county to the Center for Worker Justice of Eastern Iowa);\textsuperscript{121} in Washington, D.C., where the Attorney General’s Office administers a grant program established by local legislation;\textsuperscript{122} and in Palm Beach County (FL), where the County issues a grant to a local legal aid office to handle wage theft complaints.\textsuperscript{123}

Convene and enlist local resources. Even without the ability to pass laws or directly enforce workers’ rights, local labor agencies or leaders can convene and enlist other resources in addressing constituents’ workplace needs. For example, the Massachusetts Attorney General’s Office for years has held a monthly free wage theft legal clinic in donated space during the late afternoon at a Boston law school, as well as occasional clinics elsewhere in the state, in order to provide help to workers whose cases the office cannot handle.\textsuperscript{124} The clinics are conducted in partnership with a range of other organizations that serve workers’ needs: legal services offices, volunteer and nonprofit lawyers, contingency fee attorneys, law school clinics, worker centers, and more.\textsuperscript{125} Routine convening of these community resources for workers needing help provides a genuine service and helps address unmet legal needs.\textsuperscript{126} Local officials or a local agency could organize a similar effort in their jurisdictions, potentially including state and federal labor enforcement agencies. In addition, local labor agencies could hold quarterly convenings of worker organizations along with relevant state and federal agencies, thereby serving as a connector or hub for disparate players in the local workers’ rights landscape who may not routinely be in contact.

Publish local enforcement data of state and/or federal labor enforcement agencies. As noted above, localities can enact laws requiring creation of a

\textsuperscript{121} DEUTSCH & GERSTEIN, supra note 106, at 19–20.
\textsuperscript{122} DEUTSCH & GERSTEIN, supra note 106, at 19–20.
\textsuperscript{125} Id.
\textsuperscript{126} Along similar lines but on a non-labor topic: when Vice President Kamala Harris was California Attorney General, her office convened a roundtable of law firms, immigrants’ rights advocates, and others about the need for resources and legal aid for unaccompanied minors then fleeing Central America. These efforts led to the legal representation of more children in immigration cases, as well as building relationships between immigrant-focused nonprofit organizations and law firms able to take on pro bono cases. See Attorney General Kamala D. Harris Convenes Immigration Advocates, Law Firms to Provide Legal Support to Children Seeking Refuge in the U.S., CAL. DEP’T OF JUST. (Dec. 16, 2015), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-convenes-immigration-advocates-law-firms [https://perma.cc/AJZ4-RGZH].
database or public resource listing labor law violators within the jurisdiction. But this can also be done without passing an ordinance, of course — San Diego County has done precisely that,\(^{127}\) although without a statute, there is no guarantee of continuation when administrations change. In addition, localities could adapt the New Jersey WALL, discussed above, and New York City’s Public Advocate’s annual “Worst Landlord Watchlist”\(^{128}\) to focus on labor and employment matters, highlighting employers with egregious violations in the jurisdiction.

**Collaborate with state and/or federal labor enforcers.** Enforcement of worker protection laws involves many steps: outreach, intakes, interviews with worker witnesses and other witnesses, review of payroll and other business records, and much more. Local labor agencies could serve as intake vehicles for complaints to state or federal labor agencies, conduct initial interviews, and help prepare or package cases for other agencies to follow up on. Such relationships can be formalized through a Memorandum of Understanding. In some jurisdictions, state-level offices may be able to cross-designate local government officials so that they may directly work on cases together; for example, the New York State Attorney General’s Office deputized lawyers from the New York City Taxi and Limousine Commission as “special Assistant Attorneys General” in relation to a case involving taxi drivers’ rights.\(^{129}\)

**Conduct or commission studies or reports on conditions of workers within the jurisdiction; hold public hearings or events in relation to such studies.** Government-issued studies can help identify and highlight work-related problems that urgently need addressing, helping shape public conversations about state policy. New York City’s Department of Consumer and Worker Protection issues an annual report on the state of the City’s workers.\(^{130}\) The D.C. Attorney General, in the midst of several cases involving misclassification of construction employees as independent contractors in the District, commissioned a report by academic economists about

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misclassification specifically in the construction industry, analyzing how much money contractors illegally save through this practice, thereby depriving workers of protections, the public of needed tax revenue, and also creating an unfair advantage in relation to law-abiding contractors bidding on the same projects.131 The New York Attorney General issued a report on the then-growing practice among employers of paying workers with payroll cards (similar to debit cards), resulting in unexpected fees and insufficient access to workers’ full pay. The report highlighted the problem nationally, and the inquiry to employers led to some of them proactively negotiating new arrangements with their payroll card providers that were less onerous on their workforce.132

In addition, a local agency or local leaders can hold a public hearing or event to raise visibility and awareness of worker issues. The New York City Department of Consumer and Worker Protection held several hearings on the state of workers’ rights in the city, along with the Mayor’s Office of Immigrant Affairs and the New York City Commission on Human Rights.133 Workers had the opportunity to publicly testify about their experiences on the job, which provided an organizing and leadership-building opportunity for worker and community organizations, as well as creating an opportunity for the media to focus on worker issues.

*Incorporate worker considerations in relation to other local government agencies and activities.* A labor-focused local agency or unit could help infuse worker protection issues into other areas of local government. For example, it could help orient district attorneys on worker exploitation prosecutions and assist in developing a case pipeline for them. It could collaborate with city small business agencies or other programs assisting small and emerging businesses in order to help them provide education to employers about their responsibilities under workplace laws, helping prevent violations. Indeed, Seattle’s Office of Labor Standards provides grants and

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operates outreach programs to help immigrant-owned, minority-owned, and small businesses understand the laws and their obligations, and a longstanding grants program by workplace Occupational Safety and Health Administration also works with employer associations.\textsuperscript{134} A dedicated worker-focused agency or official could collaborate with the locality’s procurement team to develop methods to ensure that egregious labor law violators do not receive local government contracts, and to analyze ways to promote creation of not merely compliant but rather, quality jobs through government contracting.\textsuperscript{135}

Play a leading role in incorporating labor considerations into the local licensing and permitting process. A dedicated local labor agency could play a leading role in relation to local permitting and licensing processes by assessing how to instill labor factors into those processes, either as a prerequisite to prevent violations, as in Boston’s construction safety ordinance discussed \textit{supra}, or creating licensing or permitting consequences for unresolved state labor violations, as in San Diego County and Santa Clara County’s restaurant permit programs.\textsuperscript{136}

Helping enforce state-level wage-related judgments. State labor departments often struggle to collect unpaid wages even after final agency determinations against an employer.\textsuperscript{137} San Diego County’s Office of Labor Standards recently created an innovative Workplace Justice Fund: starting with $100,000, the fund will provide $3,000 payments to victims of wage theft who have final outstanding wage orders from the state labor commissioner’s office. The County will use its resources and staff to pursue the outstanding payments from the offending employer, and will remit to workers funds recovered, less the $3,000 initially paid and a percentage to cover the County’s collection efforts.\textsuperscript{138}

Create wage theft enforcement or mediation programs. As noted above, numerous Florida localities have created wage theft enforcement or

\textsuperscript{134} DEUTSCH & GERSTEIN, \textit{supra} note 106, at 38, 44.
\textsuperscript{135} For more information about procurement policy, see \textsc{Jobs to Move Am.}, https://jobstomoveamerica.org/ [https://perma.cc/Z9JR-S9G3] (last visited Mar. 7, 2024).
\textsuperscript{136} Discussed in more detail \textit{infra} notes 146–49.
mediation programs of various kinds, and Palm Beach County created a Wage Dispute Division within the county civil court.\textsuperscript{139}

C. Workers’ Boards

Workers’ boards are bodies established by governments that include worker representation and that typically aim to provide workers with a voice and formal role in setting higher minimum standards for jobs in particular industries. These boards typically investigate challenges facing workers by conducting hearings and outreach activities, issuing reports on findings, and making recommendations regarding minimum wage rates, benefits, and workplace standards. By focusing on workers in specific industries, these boards are able to address industry-specific issues and involve workers and their organizations directly in governance decisions.

Although local governments in heavily preempted states typically do not have the authority to set minimum labor standards — whether industry-specific or not — workers’ boards may nonetheless be able to impact local government decision-making that is not preempted. For example, Harris County in Texas established an essential workers board in 2021 to advise the county on programs and policies that support essential workers.\textsuperscript{140} In addition to advising the county on its overall approach to protecting essential workers’ rights and providing a public forum, the board is also tasked with providing feedback on the county’s “purchasing and contracting policies, workforce development programs, tax abatement and incentive policies, community benefits agreements, distribution of federal COVID-19 relief and recovery funds, disaster preparedness and recovery programs, OSHA


\textsuperscript{140} See Harris Cnty. Essential Workers’ Bd., https://ewb.harriscountytx.gov/ [https://perma.cc/NX29-A6L5] (last visited Mar. 7, 2024); Harris Cnty. Essential Workers’ Bd., Bylaws 4 (2021), https://ewb.harriscountytx.gov/Portals/ewb/LiveForms/2021.11.30_HCEWB_Bylaws.pdf?v er=HkqfYkWgQAlZG7nL3GxQ%3d%3d [https://perma.cc/P7JM-RK5Y] (all members must be “low-income Essential Workers,” with at least one worker representative from each of the following essential industries: airport or transportation; construction; domestic work or home care; education or child care; grocery, convenience, or drug store; health care or public health; janitorial; food services, hospitality, or leisure services); Elizabeth Troval, Harris County Commissioners Court Votes to Create Essential Workers’ Board, HOUS. CHRON. (Dec. 1, 2021), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Commissioners-Court-votes-to-create-16664261.php.
trainings, independent monitoring of local, state, and federal public health and labor laws, and inclusive economic development planning."\textsuperscript{141} Here, the county avoided any mention of setting local minimum worker standards or other policymaking that would require local initiative authority that would be preempted by state law.\textsuperscript{142} Instead, the board’s purview relies on local governmental authority that is protected by the Texas Home Rule Amendment, like budgetary action and procurement, or protected by federal law, like the disbursement of federal funds.

Durham and Detroit have also established workers’ boards in states where local governments are significantly preempted in regulating workplace standards. In 2019, Durham formed the Workers’ Rights Commission to advise the city council on working conditions in Durham.\textsuperscript{143} The commission aims

[to provide a public forum for discussion and exploration of workers’ rights . . . conduct . . . studies . . . recommend pro-worker policies for Durham City Council’s state legislative agenda . . . craft[] a workers’ bill of rights . . . [develop a] voluntary recognition program[] [to] reward[] employer [compliance] . . . propose standards [to encourage] all employers within the City to establish a [minimum standard] . . . support workers in [union campaigns] . . . [and] provide channels of communication between organized and unorganized workers.\textsuperscript{144}

Here, the enumerated responsibilities expressly include engaging in state legislative advocacy, reflecting an implicit understanding that local governments are significantly preempted in the realm of advancing pro-worker policy.\textsuperscript{145} In November 2021, Detroit passed an ordinance creating a structure for industry standards boards.\textsuperscript{146} A standards board in a specific industry can be established under the ordinance by the city council, at the request of the mayor, or by petition of at least 150 workers in a given industry.\textsuperscript{147} The standards boards are composed of workers, employer

\begin{thebibliography}{99}
\bibitem{HARRIS_CNTY_ESSENTIAL WORKERS_Bd_supra_note_140} Harris Cnty. Essential Workers’ Bd., \textit{supra} note 140.
\bibitem{HARRIS_CNTY_ESSENTIAL WORKERS_Bd_supra_note_140} Harris Cnty. Essential Workers’ Bd., \textit{supra} note 140.
\bibitem{DURHAM_WORKERS_RTS_COMMN_supra_note_143} Durham Workers’ Rights Comm’n, \textit{supra} note 143, at 1–2.
\bibitem{DURHAM_WORKERS_RTS_COMMN_supra_note_143} Durham Workers’ Rights Comm’n, \textit{supra} note 143, at 1–2.
\bibitem{DETROIT_MICH_CODE} Detroit, Mich., Code § 12-10 (2021).
\bibitem{Id} Id.
\end{thebibliography}
representatives, and other individuals appointed by the mayor and city council. The industry boards are tasked with investigating industry conditions, conducting outreach to workers, making recommendations as to pay, benefits, training opportunities and scheduling, and forwarding complaints to relevant enforcement agencies.

Local workers’ boards have also been implemented in jurisdictions that are not subject to abusive state preemption — and these examples also serve as potential models and opportunities for localities in heavily preempted states. In 2018, Seattle passed the Domestic Workers Ordinance, which along with establishing a minimum wage and entitling workers to rest and meal breaks, also created a Domestic Workers Standards Board. The board, members of which are appointed by the mayor and city council (and one member is appointed by the board itself), requires representation from domestic workers, employers, and the community (with an emphasis on vulnerable populations like people with disabilities). The board is empowered to provide recommendations to the city council on workplace safety standards, discrimination, and sexual harassment, training for workers and employers, access to leave, wage standards, workers’ compensation, hiring agreements, and other topics, and has been granted funding to implement these recommendations. Many, but not all, of these activities would be preempted by states that preempt local standard-setting. In addition, local and state governments have significant leeway to regulate domestic work because domestic workers are excluded from many federal laws protecting workers’ rights. In response to the significant worker safety challenges presented by the COVID-19 pandemic, Los Angeles County approved a program in November 2020 establishing public health councils to help ensure that employers follow COVID safety guidelines. Implemented and overseen by the county’s Department of Public Health, the program empowers workers to form public health councils at their worksites to monitor compliance with county health orders in the following industries: food and apparel manufacturing, warehousing and storage, and restaurant.

148. Id.
149. Id.
151. Id.
152. See id.
155. Id.
The Department of Public Health will enlist the help of certified worker organizations to conduct outreach and education to workers interested in forming public health councils.156

**D. Being a Model Employer and Improving Conditions for Local Government’s Own Public Employees**

When acting as an employer, local governments typically have the authority and autonomy to advance the conditions of their own public employees. Local governments have used this authority to raise labor standards for municipal employees and to enable and support collective bargaining.157 The impact of these local efforts can be significant. Women and Black workers are more likely to be employed by local and state governments, so improving working conditions for local government workers advances important equity goals.158 Moreover, municipal employers are often the largest employers in many regions,159 and thus improved standards for municipal workers can also lead to additional benefits, like public health gains when paid sick leave prevents spread of illness, and stabilizing and stimulating the local economy in times of stagnation or recession. By exemplifying practices of a model employer, local governments also can play a leadership role for private and nonprofit employers, helping to create local norms that lift local working standards generally.

Local governments are often interested in raising labor standards and improving working conditions because high-road job offerings can help attract better-qualified workers and reduce turnover — both of which enable local governments to provide higher-quality public services.160 Collective

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157. See generally GERSTEIN & GONG, supra note 2.


bargaining, in particular can, help reduce racial and gender pay gaps, attract workers to local government, and create high-quality jobs.161

A number of local governments have increased the minimum wage paid to their own employees; recent examples include Allegheny County, Pennsylvania, “Atlanta[Georgia]; Jersey City, New Jersey; Milwaukee[, Wisconsin]; New Orleans[, Louisiana]; North Miami Beach, Florida; Tallahassee, Florida; and West New York, New Jersey.”162 Additionally, “[m]ore than 100 localities have passed paid family or parental leave policies for their municipal employees.”163 Several localities have also become early adopters of the four-day workweek for their employees.164

Localities also can enable or facilitate collective bargaining and unionization among their municipal workforces. Whether or not local government workers can form and join unions varies by state and by the type of municipal worker; heavily preempted states, however, do not necessarily prohibit municipal unionization. Many state statutes expressly authorize collective bargaining by teachers, police officers, and firefighters.165 In Louisiana, for example, local governments are permitted to collectively bargain with all municipal workers.166 In 2023, the New Orleans City Council passed a “Right to Organize” ordinance codifying city employees’ right to organize.167 The ordinance creates collective bargaining processes


and timelines, and requires the council to hire a “labor relations advisor” to mediate potential disputes. Ordinance supporters hope it will help overcome challenges with hiring and retention in city government. In states where collective bargaining for local employees is neither guaranteed nor prohibited by state law, localities can typically facilitate unionizing and collective bargaining by their own workforces by passing local ordinances permitting collective bargaining. Two states where there has been heightened attention to this issue in recent years are Virginia and Colorado. In Virginia, the General Assembly in 2020 passed a law lifting a previous ban, thereby allowing localities to recognize and collectively bargain with unions by passing an ordinance. Several Virginia localities and school districts subsequently passed collective bargaining ordinances. In 2022, Colorado’s state legislature passed a bill granting county employees the right to collectively bargain. Before then, all localities — including counties — decided individually whether to grant such rights, and only 16 out of approximately 270 localities in the state had collectively bargained contracts with any of their workers.

In addition, localities can emulate legislative measures taken by certain states to facilitate public employee union access to government workers in response to the Supreme Court’s decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31. Janus held that requiring public employees to pay union fair share agency fees to cover the costs of collective bargaining violates the First Amendment. The decision bars unions from requiring workers who benefit from union representation to pay their fair share of that representation, thereby reducing public employee union resources and potentially their stability. In the wake of the Janus decision, a number of states, including California, Maryland, New Jersey, and Washington, passed measures to reduce barriers to public-sector unionization, such as requiring public employers to allow public employee

168. See id.
170. VA. CODE ANN. § 40.1-57.2.
173. GERSTEIN & GONG, supra note 2, at 15
175. Id. at 2486.
176. Id. at 2491 (Sotomayor, J., dissenting).
unions access to new employee orientations, and to provide public employee unions with lists of new and current employees with contact information.\textsuperscript{177}

Moreover, local governments could facilitate exposure to unions during the hiring process for job applicants and onboarding process for new employees, develop guidance and labor relations materials for managers and supervisors regarding unfair labor practices and neutrality in union organizing campaigns, and increase and visibly support workers’ right to organize, including a deploying know-your-rights initiatives on the right to organize and collectively bargain.\textsuperscript{178}

\section*{E. Procurement and Contracting}

\subsection*{1. Generally}

Local and state governments spend an estimated $2 trillion in goods and services every year.\textsuperscript{179} Given the immense amount of public money transferred to the private sector through government contracting, local governments can leverage their power as purchasers to ensure that their contracting funds lead to family-supporting employment, not low-road, underpaid, precarious jobs. Moreover, even in states where abusive state preemption poses a significant hindrance to local action, local governments — especially home rule jurisdictions — typically have some authority to require or incentivize improved working conditions or drive compliance with worker protection laws.\textsuperscript{180} With that said, state laws generally require competitive bidding and otherwise dictate the process for procurement for local government contracts above a certain threshold amount.\textsuperscript{181} And in recent years, several states have also preempted local governments from requiring municipal contracts to pay workers a prevailing wage — that is, a higher hourly rate based on local pay norms for a given type of work.\textsuperscript{182}

\begin{itemize}
  \item \textsuperscript{177} See Sarah W. Cudahy et al.,\textit{ Total Eclipse of the Court: Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts}, 36 Hofstra Lab. & Emp. L.J. 55, 104–06 (2018).
  \item \textsuperscript{178} See Kamala D. Harris & Martin J. Walsh,\textit{ White House Task Force on Worker Organizing and Empowerment: Report to the President} 16–17, 23–24 (2022).
  \item \textsuperscript{179} Donald Cohen & Allen Mikaelian,\textit{ The Privatization of Everything} 290 (2021).
  \item \textsuperscript{180} See, e.g., Greater Cincinnati Plumbing Contractors’ Ass’n v. City of Blue Ash, 666 N.E.2d 654, 657 (Ohio Ct. App. 1995) (finding that a home rule municipality’s contracting process is an exercise of self-government); Am. Health Care Providers v. Cook Cnty., 638 N.E.2d 772, 778 (Ill. App. Ct. 1994) (“[T]he method by which a home rule unit procures its contracts is a matter pertaining to its government and affairs” and thus falls within the general grant of home rule power.).
  \item \textsuperscript{181} See, e.g., GA. CODE ANN. § 50-5-67 (2022); IOWA CODE § 26.3 (2024); N.Y. GEN. MUN. LAW § 103 (2023).
  \item \textsuperscript{182} See\textit{ Workers’ Rights Preemption in the U.S.}, supra note 10.
\end{itemize}
Although conservative state legislatures are increasingly targeting local procurement power, there are still opportunities for local governments in heavily preempted jurisdictions to creatively leverage opportunities to require disclosure or higher standards. For example, the City of Austin has a living wage ordinance that requires city contractors and subcontractors to pay their employees working on the contract at least $20 per hour for fiscal year 2023. The City of Houston has a contractor “Pay or Play Program,” which requires that city contractors with contracts over $100,000 and subcontractors with subcontracts over $200,000 to either contribute prescribed amounts to the Contractors Responsibility Fund (CRF) for their uninsured employees or provide their employees a minimum specified level of healthcare benefits. The CRF helps offset the costs of caring for uninsured residents and provides various health programs that are affordable to those who are uninsured.

Numerous local governments across the country — including in heavily preempted states — have passed laws requiring contractors bidding for public projects (above a certain value) to meet certain “responsible contractor[]” criteria. A responsible bidder ordinance is a policy that sets minimum requirements for all contractors bidding on publicly funded projects in a given political jurisdiction. Criteria may include, for example, previous compliance with worker protection laws (i.e., laws prohibiting wage theft, misclassification, etc.), appropriate insurance coverage (i.e., for workers’ compensation), participation in a registered apprenticeship training program, and appropriate professional licenses. While such requirements are based in commonsense and noncontroversial

186. See CITY OF HOUS., supra note 185.
188. Id.
189. Id.
approaches, they do diverge from the frequently taken approach of awarding contracts to the lowest bidder based solely on price.

The City of New Orleans recently passed a responsible contractor ordinance after the collapse of the Hard Rock Hotel which was under construction; three workers died in the accident. Many local governments in Indiana have passed responsible bidder ordinances. Toledo, Ohio, has a municipal code that requires payment of prevailing wages for contracts of $10,000 or more, and prohibits awards of such contracts to bidders who have been convicted or found liable under the city’s wage-related law in the previous five years.

For construction projects of more than $75,000, city law sets criteria, including continuity and experience of the workforce, local hiring, whether there is an apprenticeship program, and whether the employer provides benefits (health insurance and retirement or pension plan), as well as the bidder’s record of compliance with tax, wage and hour, and unemployment laws. Dozens of other cities disqualify contractors with a history of wage theft and other labor standards violations from winning city contracts, such as Cincinnati, Ohio; Columbus, Ohio; Coralville, Iowa; El Paso, Texas; and Houston, Texas.

2. Project Labor Agreements and Community Benefits Agreements

Project labor agreements (PLAs) are used primarily in the construction industry to establish the terms of employment for all workers on a project. PLAs typically specify the wages and benefits that workers must be paid; many also include provisions requiring contractors to take other measures, such as hiring workers through union hiring halls or developing procedures


194. Id.

195. GERSTEIN & GONG, supra note 2, at 45.
PLAs are expressly authorized pursuant to the National Labor Relations Act. Many states, however, have preempted local governments from requiring contractors to abide by PLAs. Although local governments may be preempted by state law from requiring contractors to abide by PLAs, they may still be able to incentivize voluntary agreement to use PLAs. Indeed, the federal government has encouraged the use of PLAs among applicants for discretionary funds pursuant to the Infrastructure Investment and Jobs Act, the CHIPS and Science Act, and the Inflation Reduction Act. Because of this federal encouragement, procurement by transit and port authorities related to those federal initiatives in states where PLA requirements are preempted have agreed to be covered by PLAs.

Community benefits agreements are typically made between developers of a construction project and representatives of community groups where the project is being developed. Communities can stipulate certain requirements for the projects, such as hiring from the local community or guaranteed financial or social benefits from the project; in return, the developer receives the community’s support for the project. Major development often occurs on city land, receives public funding or tax breaks that can accrue value to the developer, and in almost all cases require land use approvals that require the support of local government officials. Consequently, local governments are sometimes parties to community

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198. 29 U.S.C. §§ 158(e)-(f).

199. See Workers’ Rights Preemption in the U.S., supra note 10.


201. See id.


203. See id.

204. See id.
benefits agreements directly, may have a separate agreement with developers that is also part of negotiations, or may otherwise leverage their land use or funding powers as a part of these community benefits agreement negotiations. Because community benefits agreements are voluntary contractual agreements between the various parties, and because local governments are leveraging their land use or funding powers, local governments typically have the authority to act, even in states where local governments are heavily preempted.

Community benefits agreements have been used effectively to raise labor standards in jurisdictions where local governments are preempted from doing so through lawmaking. For example, in 2018, the City of Nashville supported a community coalition in winning a community benefits agreement that included requirements for local hire, a $15.50/hour minimum wage, mandatory worker safety training for construction workers and supervisors, and workforce development. A group of Nashville city councilmembers held off a necessary rezoning vote until the community benefits agreement was satisfactory to the community coalition. In 2016, a community coalition won a community benefits agreement with the Milwaukee Bucks in connection with the development of a new arena that raise minimum wages for permanent jobs like housekeeping, landscaping, and food service, hiring at least 50% of employees from neighborhoods with high unemployment; and affirming the rights of employees to unionize.

F. Licensing and Permitting

When businesses are applying for or renewing a locally-issued license or permit, there is an opportunity to promote legal compliance. Specifically, localities can require applicants or holders of locally-issued permits or licenses to comply with labor standards laws by creating pre-requisites for obtaining a permit/license or consequences for permit/license holders who violate wage theft laws.

To this end, some localities have created specific, explicit labor compliance requirements for businesses wishing to obtain or renew permits or licenses. For example, the City of Somerville, Massachusetts has a wage theft ordinance with provisions to this effect: the city may deny an

206. Id.
application for a license or permit if the applicant was found guilty or liable or responsible for wage violations under various state or federal laws within the three or five years prior to the application.208

However, some localities have taken action even without an explicit law directly on this subject. Licensing and permitting laws may contain general “catch-all” provisions requiring licensees or permit holders to comply with all applicable laws, to be financially responsible, or similar language. In California’s Santa Clara County, the Director of the Department of Environmental Health may deny, suspend, or revoke restaurant permit for a number of reasons, including: “Whenever the Director determines that the permit holder fails to meet the requirements of the permit, local ordinances, or applicable state law or regulations.”209 This language was used as the basis for establishing the Santa Clara County Office of Labor Standards Enforcement Food Permit Program, initially piloted in one zip code and more recently expanded.210 Under this program, if a retail food vendor, such as a restaurant, hasn’t paid a judgment from the state labor commissioner, the County may temporarily suspend the vendor’s food health permit, after a series of escalating warnings.211 In the fall of 2023, San Diego County’s Office of Labor Standards initiated the similar but even more expansive Good Faith Restaurant Owners Program.212 As part of this program, San Diego County’s Office of Labor Standards notified restaurants in the county with outstanding unpaid wage orders issued by the state labor commissioner, alerting them to potential indefinite suspension of food permits if they fail to pay the back wages owed or enter into a payment plan.213

The City of Boston passed an ordinance incorporating workplace safety requirements at the front end of the construction permitting process, in an

211. See id.
effort to prevent workplace injuries and fatalities. The new construction safety ordinance applies to construction projects larger than 50,000 square feet and all demolition projects for buildings of four or more stories. Among other provisions, it prohibits issuance of permits for construction, alteration, or destruction unless a Site Safety Plan Affidavit has been submitted, indicating the potential hazards on the job and how the contractor plans to keep workers safe. Each permit holder must provide safety orientations to workers, offer refresher courses, and hold pre-shift meetings to explain potential risks. An OSHA-trained site safety coordinator must be designated and present on the site. Importantly, there are enforcement measures as well, that draw on already-existing city employees: city building inspectors have the power to issue violations, impose stop work orders, and revoke permits based on violations.

This approach — using the licensing and permitting process to prevent labor standards violations and impose consequences when they occur among permit and license holders — can potentially be used in any industry that requires a license or permit issued at the local level, and one first step in implementation is ascertaining what types of businesses fall into this category. Restaurants and construction contractors, two industries with high rates of violations, both typically require locally-issued licenses or permits to operate, and offer potential as industries for an initial pilot effort. Completed buildings also require certificates of occupancy, which may represent another opportunity for addressing unsatisfied wage theft orders: localities can condition the issuance of a certificate of occupancy on paying all wages owed to workers who performed labor on the project.

In addition, there may be additional preventive tools to consider, along the lines of Boston’s ordinance, but broader. License or permit applications could require applicants to attend live or online trainings about wage and hour laws, to disclose the lowest wage they intend to pay, or to provide copies of workers’ compensation policies rather than simply attesting to coverage. Renewal applications, for example, could require submission of payroll records from the most recent pay period.

215. See id.
216. See id.
217. See id.
218. See id.
Although labor enforcement should generally be prioritized and publicly funded instead of having to rely on self-funding mechanisms, fees associated with licensing and permitting in challenging budget environments can be useful to support related labor enforcement. Minneapolis is investigating the addition of line item added fees as part of the city’s business licensing and construction permitting processes to support the Labor Standards Enforcement Division of the Civil Rights Department’s co-enforcement program.220

In all of the above examples, localities should prepare for implementation challenges. The relevant licensing or permitting agency may need additional resources or adjustment in order to incorporate a new set of issues into its operations.

G. Using Tax Credits or Other Incentives to Promote Improved Working Conditions

Local governments can use a variety of incentives to promote improved working conditions or higher-road employment practices. For example, since 2017 Austin, Texas has maintained a program in which the building plan review and permitting process for commercial construction projects may be expedited for contractors that participate in the city’s Better Builder Program, operated in partnership with the Workers Defense Project. The program requires compliance with wage and hour and workplace safety laws, payment of a living wage, safety and health training, provision of workers’ compensation insurance, on-site monitoring, and more.221

This sort of incentive could be incorporated in relation to other kinds of permitting or licensing processes. In Minnesota, for example, a 2023 collaboration between the worker organization Centro de Trabajadores Unidos En La Lucha and several construction unions resulted in a campaign called Building Dignity and Respect.223


infancy, construction developers would enter legally binding agreements to comply with the law, provide improved working conditions, and agree to monitoring of participating contractors by an independent worker-run nonprofit. These conditions would also apply to subcontractors on a project, and consequences for violations could include cancellation of a contract. Once this project is fully under way, building departments in the Twin Cities and elsewhere in the region could offer expedited permit handling and other processes as carrots to incentivize contractors to participate in the Building Dignity and Respect program.

Another example of this approach — using a carrot and not a stick — is Scranton, Pennsylvania’s Small Business Wage Boost Grant Program, which uses funds from the American Rescue Plan Act of 2021 to help small business owners “retain employees or increase their workforce by offering wages and benefits competitive with state averages.” The program allot up to $50,000 per applicant for up to two years to fund enhanced wages, with 100% of the enhanced wages funded in the first year and 50% in the second. Program materials, however, do not detail implementation measures or how the city will ensure that workers’ wages are actually increased as a result of the funding.

Doubly-preempted localities could also consider providing financial benefits, such as grants or tax credits, to employers who implement certain workplace standards, to incentivize such policies. Tennessee, for example, created a two-year program in which companies offering paid family leave may be eligible for a tax credit, based on the amount of wages reimbursed to workers. New Hampshire has a voluntary paid family and medical leave


227. See id.

228. See generally id.

insurance plan in which employers or workers can participate. In 2023, bills were introduced in Maryland and Massachusetts to provide tax credits for companies that pilot a four-day-workweek, and a bill was introduced in California to create a grant program for the same purpose.

The aforementioned programs and bills provide a model for an approach that cities and counties could potentially take in relation to a number of policies, from increased wages to paid sick leave to four-day workweeks. However, such programs should not be undertaken without a robust implementation plan to ensure that employers ultimately provide the promised conditions for workers.

H. Involvement By District Attorneys and Other Criminal Prosecutors

A growing number of District Attorneys and County Attorneys (collectively referred to herein as “DAs”) have begun to bring prosecutions related to wage theft and other worker exploitation cases. They have generally taken action in egregious cases of workplace law violations, including not only wage theft, but also workplace fatalities, labor trafficking, misclassification of employees as independent contractors, workers’ compensation insurance fraud, and more. Some district attorneys, such as in Manhattan and San Diego County, have created dedicated worker protection units.

DAs are generally independently elected officials within their localities. They are typically not constrained by NLRA preemption: one of the primary NLRA exemptions involves situations “where regulated conduct touches

interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,” a court cannot conclude that Congress “deprived the States of the power to act.”236  Similarly, although some conservative governors have tried to remove prosecutors who are part of the “progressive prosecutor” movement,237 these efforts have generally centered on criminal justice reform-oriented decisions and positions that result in less prosecution. In contrast, active prosecution of wage theft and worker exploitation cases should not present that concern: this area of work involves bringing charges, not refraining from doing so.238

Most states that preempt local legislation on workers’ rights also have inadequate enforcement of workers’ rights at the state level.239  Action by DAs, then, may represent the only opportunity for effective state or local government enforcement in these jurisdictions — the only entity within state or local government to have a footprint in meaningfully protecting workers’ rights. When there are federal administrations adverse to workers’ rights, DAs could well be the only government actors in such states that may be able and inclined to take strong and effective action for workers.

Moreover, criminal prosecution may have a strong deterrent effect on employers for several reasons. Scholars who have analyzed employer costs and benefits of noncompliance find that “employers will not comply with the law if the expected penalties are small either because it is easy to escape detection or because assessed penalties are small.”240 Worker exploitation prosecutions by DAs increase both the likelihood of detection and the severity of the consequences. As an initial matter, the likelihood of detection is increased simply because there are more government actors involved in worker protection. In addition, though, because prosecutions of employers typically receive media coverage,241 it is probable that such cases also

238. Of course, conservative legislatures or governors could seek to squelch criminal prosecution of wage theft and worker exploitation cases too, but the politics of such opposition would likely be complicated, with serious downsides for them, especially if the cases prosecuted are well-chosen and compelling.
239. Levine, supra note 108; Blair et al., supra note 13.
241. See, e.g., Jonah E. Bromwich, Twin Brothers Face Prosecution as Manhattan Cracks Down on Wage Theft, N.Y. TIMES (Feb. 24, 2023),
increase employers’ perception of the likelihood of detection, changing their risk analysis because detection seems more likely, thereby leading to greater compliance. Further, the potential consequences of a criminal prosecution are in many cases more severe than those of a civil lawsuit: even apart from the possibility of incarceration (which rarely happens in criminal worker exploitation cases), there are business consequences (such as potential debarment from public contracting) and of course reputational harm.

In states with preemption or states with worker-hostile administrations and ineffective state labor departments, action by DAs may be one of the only ways to ensure some government presence in enforcing workers’ rights and deterring violations. This is true as a general matter and especially at times when the federal government is unresponsive to worker concerns.

I. Public Leadership, Education, and Outreach

Localities as an institution, as well as individual local elected officials, can, generally without state preemption concerns, use their public visibility and leadership position to highlight worker issues, educate workers, and support organizing efforts. Local elected officials — whether individually or collectively alongside other officials and community labor groups — can use their public platforms in a range of ways.

1. Communications

Strategic communications, including use of media, is particularly important in educating workers about their rights and deterring violations. Media coverage increases employers’ knowledge about their legal obligations; it also increases their perceptions about the likelihood and cost of detection of violations. Many workers, especially low-wage workers, have limited knowledge about the laws that affect them.


243. Rankin & Lew, supra note 89; Miller & Tankersley, supra note 89.
Localities have used a range of approaches in reaching out to the public and educating workers about their rights as workers, including setting up hot lines,\textsuperscript{244} holding in-person workshops for immigrant-owned small businesses,\textsuperscript{245} including information on webpages,\textsuperscript{246} using social media advertisements, mounting ad campaigns on public transit, posting videos online,\textsuperscript{247} and more.

The Chicago Office of Labor Standards provides an example of an office that has taken considerable action to educate the public. The Department of Business Affairs and Consumer Protection, within which the Office of Labor Standards is located, has its own YouTube channel, and the Office of Labor Standards has posted numerous webinars there on a wide range of labor-related topics.\textsuperscript{248} The Office also created a “Your Home is Someone’s Workplace” campaign focused on domestic workers, and has a web page specifically focused on this workforce, including information about a new law giving domestic workers a right to a written contract.\textsuperscript{249} The office also partnered in its outreach with the nonprofit worker organization Arise Chicago, which provided trilingual (English, Spanish, and Polish) sample contracts for employers’ use.\textsuperscript{250}

Denver Labor has an extensive outreach and public education function. The office hosts “Wages Wednesday” live events on the Denver Labor
Facebook page, including programs in English and Spanish.\textsuperscript{251} The office web page contains online resources for small businesses about compliance.\textsuperscript{252} It also contains tools for workers and employers, including, among others, a regional address finder to assess whether work performed was in the relevant local boundaries and a minimum wage and tip calculator.\textsuperscript{253} In addition, the office launched an “Earned It, Deserved It” campaign to raise awareness of the city’s minimum wage ordinance, with bilingual ads at regional bus stops, and on radio, television, and social media platforms.\textsuperscript{254}

Recognizing the power of public art to raise awareness, the Seattle Office of Labor Standards in 2023 solicited proposals from artists to create large-format art panels highlighting gig worker protections for the general public, which were then displayed publicly in Seattle Center.\textsuperscript{255}

### 2. Linguistic Needs

Some local agencies have been particularly aware of the need to reach the broad range of workers within their jurisdictions and have translated materials into multiple languages. Cities and counties operate on the ground serving diverse communities and may sometimes be more attentive to language access concerns than agencies at other levels of government. The New York City Department of Consumer and Worker Protection, for example, has produced workers’ bill of rights booklets in 15 languages and audio files in five indigenous languages, as well as an animated video.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{251} Denver Labor, \textit{Facebook}, https://www.facebook.com/DenverLabor/ (last visited Mar. 8, 2024).
\item \textsuperscript{253} \textit{Id}.
\end{itemize}
The animated video and audio files also enhance access for people with varying literacy levels. Smaller cities can have an impressive range of language access; for example, Emeryville, California, with a population of less than 13,000, offers minimum wage and paid sick leave notices and posters in six languages.

3. Solidarity Actions

Local elected officials have used their public platforms to demonstrate their support for working people in many ways. Such officials have shown up at rallies, events, and actions (including strikes and walking workers back to work after days of action). They have also written op-eds and commentary in support of worker advocacy and to bring attention to labor policy issues. And while the NLRA limits certain actions as preempted, it does not prevent local officials from speaking in favor of unions; indeed, in 2022, the Seattle and Philadelphia city councils both passed resolutions supporting Starbucks workers seeking to unionize. Local (and state) officials should take care, however, to ensure that such statements do not jeopardize legislative or enforcement actions that could be subject to NLRA preemption challenges.

4. Shareholder Power via Local Pension Funds

New York City Comptroller Brad Lander has played a catalyzing role in using stockholder leverage to raise worker-related issues. For example, he led a shareholder effort to address high injury rates and turnover at Amazon.

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257. Id.
warehouses, and led a coalition of investors calling on Apple to conduct an independent assessment regarding workers’ rights. He also called on Starbucks to perform an independent audit regarding whether they have violated any labor laws and regulations. This pressure later resulted in Starbucks shareholders approving a proposal to conduct an independent assessment of management’s response to worker organizing.

II. LOCAL STRATEGIES TO PUSH BACK AGAINST ABUSIVE STATE PREEMPTION

The impacts of the rise of the new abusive preemption are various and significant — from depriving residents of material improvements through local policymaking to suppressing and undermining democratic accountability and engagement. This new wave of preemption, however, has also led local governments and community organizations to develop creative strategies, litigation, and organizing to fight back. Local challenges to the state governments imposing preemptive measures should not be taken for granted, given that states in our system of federalism have much more legal and fiscal authority than local governments and many heavily preempted states have made efforts to punish local governments that resist.

Despite oftentimes challenging legal landscapes and court composition, localities have started to challenge egregious state preemption in the courts.


In 2017, several local governments brought suit alongside advocacy and community organizations to challenge Texas’ SB 4, which sought to engage local law enforcement bodies in immigration enforcement.268 In 2021, eight cities brought suit against the state of Florida to challenge HB 1, which sought to override municipal budgeting power as it related to policing.269 And the City of Houston brought suit in 2023 to challenge Texas’ HB 2127, termed a “Death Star” preemption bill that would have used field preemption to remove local initiative authority when it came to labor, agriculture, insurance, and more.270 Metro Nashville has brought four lawsuits against the state in 2023 for violations of the state’s Home Rule Amendment.271 The results of these cases have been varied, but they provide examples of the increasing willingness to litigate and challenge preemption overreach, which not only have the potential to preserve local authority, but also to develop the law on home rule and state-local relationships.

Community and labor organizations have also used statewide ballot initiatives to achieve policy goals that have been foreclosed due to the new preemption. In Missouri, a coalition of labor, faith leaders, workers in low-wage industries, and local elected officials came together to pass a higher minimum wage in St. Louis.272 When that minimum wage was swiftly preempted by the state, the same coalition was able to pass a ballot measure that raised the minimum wage statewide.273 Gun safety advocates have recently filed ballot measures to repeal preemption on local gun safety regulation in Missouri.274

Johnson County, Iowa passed a county-wide
minimum wage increase; when that law was preempted by the state, local advocates who pressed for the county measure organized over 160 businesses to voluntarily maintain the wage as a way to circumvent and resist preemption.275

The City of St. Louis, in collaboration with the Missouri Workers’ Center and other community groups, tried a new approach: passing a set of trigger ordinances that go into effect if and when state preemption law is rescinded.276 Two of these trigger ordinances concern work-related subjects: fair scheduling and rest breaks during the workday.277 The trigger ordinance approach aims to help ordinary people understand the real-world impact of state-level preemption. Political debates about which level of government should have control over which issues may seem abstract and difficult to use as a basis for an organizing campaign. In contrast, if local ordinances have been passed on a specific topic, such as breaks during the workday, it creates an opening to talk more concretely about workers’ needs and what positive results will immediately occur if state preemption is rescinded.

When state legislative makeups have changed, advocates have prioritized repealing preemption in response to the growing recognition that this new preemption harms working people and democracy. For example, in 2019, the state of Colorado repealed its prior preemption of local labor standards.278 In Michigan, driven in large part by a coalition of labor and community organizations, the legislature is considering a repeal to the state’s “death star” preemption law.279

Notably, as many of these examples demonstrate, resistance to abusive preemption has often been waged by community and labor organizations working together hand-in-hand with local government. This approach, in

277. See Bd. Bill No. 104, supra note 276; Bd. Bill No. 114, supra note 276.
which community and labor organizations work side-by-side with local elected officials to push back against state legislative power (often risking the ire of a more legally powerful state), not only deepens relationships but also equalizes the power relation between community and government. On an individual level, we have seen organizers from such community and labor organizations go on to win elections and serve in local government.\textsuperscript{280} In heavily preempted states, the first step to community control\textsuperscript{281} is home rule and local democracy.

**Conclusion**

As localities across the country have emerged as leaders in protecting and advancing workers’ rights, conservative state legislatures have retaliated via a new and abusive preemption. Coupled with longstanding expansive federal preemption, many local governments are doubly preempted from regulating labor and employment in their jurisdictions. Nevertheless, local governments have continued to take action on behalf of working people, oftentimes by carefully avoiding preemption and relying on core local powers that are more likely to be protected by even thin home rule regimes. There is considerable untapped potential for even the most preempted localities to stand up for workers in a meaningful and impactful way.

At the same time, local advocates and governments are increasingly resisting state preemption via litigation, ballot measures, repeal efforts, and more. The question remains whether these resistance efforts will lead to transformation — a needed rebalancing of state and local authority\textsuperscript{282} that allows local governments to continue to innovate and lead to protect and advance the rights of working people.

