2024

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Louis Cholden-Brown

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Recommended Citation
Louis Cholden-Brown, Protecting Workers as Consumers and Consumers from Workers in New York City, 51 Fordham Urb. L.J. 1095 (2024).
Available at: https://ir.lawnet.fordham.edu/ulj/vol51/iss4/4

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PROTECTING WORKERS AS CONSUMERS AND CONSUMERS FROM WORKERS IN NEW YORK CITY

Louis Cholden-Brown*

I. The Intertwined Birth of Consumer and Worker Protection

II. Employment As a Public Good

III. Permitting Workplace Practices

IV. Clash of Morality and Wage Earning

V. Embracing the Vision

An extensive period of unsuccessful attempts at federal labor law reform has contributed to the explosive growth of municipal and state worker rights legislation.1 When looking for an entity to enforce these local ordinances, multiple localities have settled upon their consumer protection agencies to house dedicated offices of labor standards or labor equity.2 While these

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agencies now contribute to a whole-of-government approach to protecting workers, their roles as licensing entities and regulators of consumer standards, historically and into the present, have often imbued them with the “power of economic life or death” and placed them in the position of inhibiting forms of, and earnings from, non-traditional employment. In contrast, the unemployed and jobseekers were generally perceived as groups needing protection by consumer and human rights laws. This dichotomy runs deep — while recent ordinances continue to expand longstanding protections and rights for temporary workers or jobseekers against unscrupulous firms, licensing regimes for itinerant peddlers and street vendors have, for just as long, collided with their need to earn. In addition to recognizing workers as the subjects of unfair practices, employment agency consumers, and debtors of their hiring parties, we also need to contend with the impact of consumer-oriented regulations upon workers. Occupational permitting and price-setting seek to protect consumers from exploitative individuals and practices but hinder the ability to work and limit the capacity to earn for many workers, especially the purportedly self-employed. Requiring a license and accompanying fees increases the cost of entry, with those costs being infinite for persons barred from employment in the given field due to criminal record. While cities innovate compensation standards for on-demand workers, they cap the earnings of self-employed horse carriage drivers, tour guides, and newsstand vendors.

contract with the workers is under the jurisdiction of the Office of Consumer Protection, the Office of Human Rights enforces the County’s Earned Sick and Safe Leave and Minimum Work Week Laws; the State enforces the county-established minimum wage. MONTGOMERY CNTY., MD. CODE §§ 11-6, 27-70, 27-82, 27-85. In 2018, Chicago formally established the Office of Labor Standards within the Department of Business Affairs and Consumer Protection. CHI., ILL. BD. OF ALDERMEN SO2018-3286 (adding Municipal Code Section 2-25-035). Los Angeles County established the Office of Labor Equity within the Department of Consumer and Business Affairs (DCBA) in 2021. L.A. CNTY., CAL. BD. OF SUPERVISORS MOT. 21-4607 (2021). Since 2010, Miami-Dade’s Consumer Mediation Center has handled wage underpayment and non-payment disputes; despite its name, unresolved cases are subject to an administrative hearing and final orders for remuneration can be recorded with the court.

3. See MILTON M. CARROW, THE LICENSING POWER IN NEW YORK CITY 23 (1967); see also infra Part IV.
4. See infra Part II.
5. See infra notes 131–34, 169–72 and accompanying text.
6. See CONSUMER FIN. PROT. BUREAU, OFF. FOR CONSUMER POPULATIONS, ISSUE SPOTLIGHT: CONSUMER RISKS POSED BY EMPLOYER-DRIVEN DEBT (2023) (highlighting the risks employer-driven debt poses to workers because “employer-driven debts are inextricably linked to a worker’s employment,” so the “worker’s ability to repay the debt is controlled by the issuer of the debt itself”).
7. See infra Part IV.
8. See infra Part IV.
9. RICHARD P. BRIEF, LICENSURE AND EMPLOYMENT IN NEW YORK CITY 31 (1968).
operators. Yet elsewhere, licensing requirements protect employees from the elimination of their jobs amid technological change.

Workers face deceptive practices regarding monthly or annual income and benefits, financing terms for equipment or training, or privacy and data security measures; indeed, “employer speech on workers’ rights and other working conditions can also be characterized as key to commercial transactions, with workers akin to consumers.” Platforms and employers also engage in deceptive acts when they withhold information on projected compensation from a specific job or gig, drop-off locations, end-user pricing, and the platform’s take rate, or even engage in wage theft. Incentive pay rates that disappear before they can be completed or misleading hiring party claims about independence tied to classification could also find consumer law remedies. Misrepresentations or obfuscations about the independence and financial proposition of gig work, especially where businesses tightly prescribe and control their workers’ tasks in ways that run counter to promises or fail to disclose material information, may lead to misclassification, search frictions or increased costs in seeking alternative employment, and diminished bargaining power. This phenomenon is exacerbated by the lack of clarity about when work will be

10. See infra notes 90, 178–87 and accompanying text. For instance, outside of New York City, app-based workers in Seattle are entitled to minimum compensation amounts. SEATTLE, WA, MUNI. CODE § 8.37.

11. See infra notes 102–03 and accompanying text.


14. See Christopher L. Peterson & Marshall Steinbaum, Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy, 90 U. CHI. L. REV. 623, 655 (2023) (“[I]f drivers are truly independent consumer contractors who are purchasing access to the software platform’s services by paying a service fee, then the failure to disclose the compensation drivers will receive has the capacity to mislead reasonable drivers about a material aspect of the offered contract — namely whether it is worth the drivers’ time and effort.”).


17. See FED. TRADE COMM’N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 4–6 (Sept. 15, 2022).
available, where workers will have to perform it, or how workers will be evaluated, as well as the unilateral modification of such terms and conditions.\textsuperscript{18} Through these relationships, independent contractors and employees alike become consumers of the hiring parties, “stacked on top of their identities as workers.”\textsuperscript{19} When the same company purports to its customers that tips go to the workers when actually they are directed to the base wage,\textsuperscript{20} they have engaged in deceptive practices toward a different set of consumers who are also deceived by misleading employee handbook commitments to labor and human rights law compliance or public commitments to abide by international labor principles.\textsuperscript{21} While hiring parties immunize themselves from liability for unfair, deceptive, or abusive acts or practices (UDAAPs)\textsuperscript{22} by structuring such deeds as contractual terms of work, this same stacked identity invites the use of consumer law to balance informational and structural bargaining power asymmetries between hiring parties and individual workers without excluding labor and employment law.

\textsuperscript{18} See id. at 6.

\textsuperscript{19} Jonathan Harris, \textit{Consumer Law as Work Law}, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 5 & n.9) (on file with author) (noting also how courts have described the worker/consumer identifies).

\textsuperscript{20} See Press Release, Off. of the Att’y Gen. for D.C., AG Racine Reaches $2.5 Million Agreement with DoorDash for Misrepresenting That Consumer Tips Would Go to Food Delivery Drivers (Nov. 24, 2020).


\textsuperscript{22} While I use UDAAP here because many of these acts fall within the enforcement authority of the CFPB whose jurisdiction includes abusive practices, the language in section 5(a)(1) of the Federal Trade Commission Act and most sub-federal statutes prohibits “unfair or deceptive acts or practices” (UDAAPs). CAROLYN CARTER, NAT’L CONSUMER L. CTR., \textit{CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS} (2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [https://perma.cc/8ET7-L6UM].
itself developed to regulate competition based on workplace abuses, as continuing protective regimes for workers.

Treating workers as captive consumers of hiring parties is not a new phenomenon but rather represents a return to a paternalistic relationship, typified by the payment of wages in scrip only redeemable at company stores and through the truck system. Employment laws, including the Fair Labor Standards Act (though state laws predated it by over four decades), separated compensation from consumer relationships, banning payment in scrip and requiring frequent payment designed to “strike down the oppressions attendant upon the company store system.” Contemporaneous scholars characterized wage statutes as guarantees to workers as creditors, otherwise available in the ordinary enforcement of contracts. While these pay frequency laws now protect those within traditional employment relationships (though the exact frequency required for a specific role is often fraught), gig workers generally lack recourse in the absence of specific

23. In the Fair Labor Standards Act, Congress relied upon antitrust words of art in declaring that “the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . constitutes an unfair method of competition in commerce.” 29 U.S.C. § 202; see also Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1091 (N.D. Cal. 2019) (“[W]orker misclassification can violate the policy or spirit of antitrust laws because it significantly threatens or harms competition.”); Gurrobat v. HTH Corp., 323 P.3d 792, 813 (Haw. 2014) (holding violation of tipping law “negatively affects fair competition”).

24. See Harris, supra note 19, at *3–4; see also Helen Norton, Truth and Lies in the Workplace: Employer Speech and the First Amendment, 101 MINN. L. REV. 31, 38 (2016) (“[E]mployers know considerably more than workers about the terms and conditions of employment, about current and future industry and economic projections, and . . . about available legal protections . . . . [W]orkers also experience significant power disadvantage, as employers’ control over workers’ economic livelihood also permits them to control workers’ expression and sometimes even their physical liberty . . . .”).

25. See Harris, supra note 19, at *33 (documenting “lengthy history of government agencies and workers using consumer law to curtail UDAPs among employers and job training providers”).


27. See 29 C.F.R. § 531.35 (2023) (requiring wages to be paid “free and clear”).


29. Commons and Andrews’s Principles of Labor Legislation 49 (rev. ed. 1927) (“When the laborer works for an employer, he invests his labor in the employer’s business and becomes a creditor, his investment not being liquidated until his wages are paid. Laws regulating time, place, and medium of payment, are intended to guarantee to the laborer as creditor, regardless of contract, that certainty of payment which the capitalist as creditor secures in the ordinary enforcement of contracts.”). This conception is echoed by Yonathan A. Arbel, Payday, 98 WASH. U. L. REV. 1, 1 (2020) (“[W]orkers still must wait two weeks to a month to receive payments from their employers. In the modern economy, workers are effectively lending money to their employers, as they wait for earned wages to be paid.”).

legislation, such as New York City Local Law 116 of 2021, which prohibits food delivery apps and couriers from charging delivery workers for payment of their wages and requires at least weekly payment.31

This piece draws out the primarily quiet and sporadic story of how one locality, New York City, has protected, and in turn imperiled, vulnerable subsets of workers for over a century through mandatory consumer disclosures, imposition of license regimes, and enforcement actions targeting unfair trade practices. Building on that history and ongoing initiatives within New York City, this Essay charts a path for using latent licensing and consumer protection powers to reverse the erosion of legal regimes governing the employer-employee relationship and fill gaps left by anti-discrimination law32 and ossified labor, contract, and employment law.33

This Essay is not interested in retreading the theoretical trails already laid out by others or the current policies and initiatives of federal regulators, but rather in illuminating the very real way one locality can, and indeed long has, contributed to this embrace of consumer law as protective of (some) workers. Consumer law, which really is the “set of consumer protection, antitrust, and entry-barrier laws”34 covering a wide variety of topics that share a “desire to protect someone whom we call the consumer,”35 and which in New York City extends to safety, labor, health, morals, housing access, and the


32. While employment discrimination law emphasizes whether discrete acts or policies of discrete employers result in the differential treatment of similarly situated employees, it founders in combatting systems designed to place people at a disadvantage due to color, sex, or another characteristic. See Joshua P. Davis et al., Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic “Isms”), 66 ANTITRUST BULL. 359, 360 (2021).


is often treated simply as generalized prohibitions on UDAAPs and, occasionally, regulations under authority delegated to enforce against them; but this is underinclusive. While, by some measures, all of consumer law is designed to protect against UDAAPs, the breadth of its power is found in the form of disclosure, licensure, and conduct regulation. Indeed, any conduct regulation is a declaration that the prohibited practice is unfair, deceptive, or abusive; in such a paradigm, UDAAP statutes are a delegation of authority to identify additional instances of such conduct. These powers can both uplift workers and constrain them. Though increasing numbers of scholars have noted the potential for antitrust and UDAAP laws to combat monopsony and certain business practices, in not focusing on municipal-level consumer protection, they have largely not acknowledged the role that disclosure and licensure tools can play in combating workplace informational and power asymmetries, enhancing worker voice and exit. Any such account, however, must be tempered by a reflection on how those same municipal agencies and regimes impose barriers, including to entry, for members of the informal economy and those sold on American exceptionalism through entrepreneurship. Through historic and proposed New York City legislation and regulations, we can chart the promises and pitfalls of consumer protection, in its varied forms, for differently situated workers.

Parts I–III of this Essay chart the development of consumer protection and licensing authorities in New York City, and the historical linkages between these methods and the pursuit of worker justice. Part I chronicles the history of consumer protection and licensure in New York City that preceded the 2020 creation of the Department of Consumer and Worker Protection (DCWP), while Part II elucidates how since its earliest days, moral motives have subsumed some disadvantaged workers within the ambit of such protections. Part III documents ensuing regimes that conditioned the issuance of business licenses on the adoption of certain workplace practices.

36. See, e.g., N.Y.C. ADMIN. CODE §§ 20-910 (air conditioning prohibitions), 20-297.6(a) (minimum standards of cleanliness and hygiene), 17-1902 (banning the sale or provision of certain force-fed poultry products), 20-808 (tenant screening reports).
37. See, e.g., Van Loo, supra note 34, at 2041.
39. See id. at 3–4.
41. See infra Part IV.
Part IV identifies the inherent countervailing outcomes that ensue when the moralizing pursuit of licensure comes into conflict with locals’ need to earn. Finally, Part V cautions cities to be mindful of the inherent conflict documented in the prior section while calling for municipalities to draw upon the rich and previously unexplored record documented in the first three parts to combat marketplace harms.

I. THE INTERTWINED BIRTH OF CONSUMER AND WORKER PROTECTION

In New York City, the vast majority of this double-edged regulation is conducted under the auspices of DCWP, though some single industry agencies oversee activities severed from the Department’s predecessor entities.42 It has been less than a decade since DCWP first accepted its responsibility to police unfair, rather than merely deceptive, labor practices and even fewer years since it expanded the agency mission to “pioneer the way that city government can protect and enhance the lives of all of players in the marketplace, including consumers, business and workers, and how that work ultimately fosters stronger, more sustainable, and thriving communities.”43 Yet, stretching back to the earliest days of the consolidated City,44 the Department, in earlier iterations, constantly grappled with the tension between the interests of end users of goods and services and the licensure of other marketplace actors, including workers.45

DCWP, then known as the Department of Consumer Affairs (DCA), was created in 1968 as the country’s first municipal consumer protection agency from the merger of the Departments of Markets and Licenses.46 The agency,

42. The Taxi and Limousine Commission licenses and regulates medallion taxi cabs, for-hire vehicles, commuter vans, and paratransit vehicles, while the Business Integrity Commission regulates the private trade waste carting industry and public wholesale markets. See N.Y.C., N.Y. CHARTER §§ 2101, 2300.
44. The City was created on January 1, 1898, from the consolidation of the existing Cities of New York, comprised of the present boroughs of Manhattan, the Bronx, and Brooklyn with Richmond County, and portions of Queens County, which then included the towns that would be split off to constitute Nassau County in 1899. DAVID HAMMACK, POWER AND SOCIETY: GREATER NEW YORK AT THE TURN OF THE CENTURY 202–09 (1982).
45. See Luke Herrine, What Is Consumer Protection For?, 34 LOY. CONSUMER L. REV. 240, 300 (2023) (arguing the design of consumer protection institutions requires balancing consumers’/end users’ interests with others, including fair work conditions, macroeconomic stability, and free speech).
46. Originally the Department of Public Markets, then formally Public Markets, Weights and Measures from 1933–1938, and Markets thereafter. HOUSTON G. ELAM, CONSUMER
which emerged from a City Council investigation in 1966 and 1967 and subsequent legislation “designed to smash the milk industry monopoly,” was trumpeted as giving the consumer “the weapon which he needs in the daily struggle against powerful, self-interest groups that fix food prices and otherwise take advantage of housewives and other consumers.”

Five decades earlier, in 1918, the Department of Markets was established to supervise the city’s wholesale markets, whose day-to-day maintenance and construction previously rested with the borough presidents, while the city Comptroller oversaw financial and rate control. In 1925, Markets assumed licensure of peddlers from the Department of Licenses, which had regulated the industry since its own creation in 1914. A consumer services bureau was created within Markets in 1934, though Mayor LaGuardia often referred to the Bureau of Weights and Measures, which antedated the creation of the Department of Markets, as the “real consumers bureau,” and in 1938, the Department began enforcement of laws prohibiting misleading advertising by retailers. A Bureau of Licenses in the Mayor’s Office predated the consolidation of the City in 1898 and, in that year, was responsible for over 20 industries. However, in the wake of investigations that exposed businesses posing as domestic servant employment agencies steering immigrant women to prostitution, a separate Commissioner of

47. Report of the Committee on Codification in Favor of Adopting as Amended a Local Law to Amend The New York City Charter, in Relation to the Consolidation of Certain Agencies into a Department of Consumer Affairs, Prescribing the Functions, Powers and Duties of Such Department, G. O. No. 126-Nos. 689–816 (1968).


50. See CARROW, supra note 3, at 22.


52. Press Release, Off. of Mayor Fiorello H. LaGuardia, Commending Department of Markets for Its Campaign Against Misleading Advertising, LA GUARDIA-WAGNER ARCHIVES, Box #3254, Folder 5 (Sept. 1, 1940) (quotations omitted).


54. See CARROW, supra note 3, at 60, 201 (documenting annual reports describing the “padrone” system of contract labor, “swindling negro girls,” “peonage in southern states,” and “fleecing cattle tenders” (quotations omitted)).
Licenses was created by the state legislature in 1904 and quickly assumed oversight over nearly the 450 domestic, theatrical, commercial, stenographic, shipping, and labor agencies, as well as the nurses’ registries. The state legislature merged these functions when it established the Department of Licenses in 1914, expecting that “ultimately all the licensing functions of the city would center in the department” — a centralization that never occurred over its 50 years in existence. The Department’s jurisdiction ranges from highly concentrated industries with a small number of established businesses, to those comprised of a large number of marginal sole-proprietor operations. Various agencies were responsible for business licensure in the early consolidated city, with enforcement obligations for multiple industries shuffling between the Department of Licenses and the Police Department on multiple occasions. Mayors and Commissioners alike adopted a paternalistic approach to licensure, conceiving the Department’s function as “the protector of the poor, the transient, and those susceptible to . . . purveyors of immorality and deception.” The Department pursued these goals through censorship of periodicals, theatres, and films, supervision of cabarets and public dancing, a bureau of public employment, and proof of good moral character.

Having established the country’s first municipal consumer protection agency, New York City enacted one of the nation’s first municipal consumer protection laws in 1969 that set the standard, and limitations, for many subsequent jurisdictions.
introduced at the request of the Mayor and drafted by his Consumer Council, and the other by members of the City Council, formed the context for the creation of the Consumer Protection Law (CPL).\textsuperscript{62} As introduced, each bill applied to transactions for all “goods and services,” but at the recommendation of the Association of the Bar of the City of New York and other stakeholders, the scope was rewritten to cover only those “consumers” engaged in purchases for personal, family, or household use, a delimiter subsequently copied nationwide.\textsuperscript{63} The Bar and City representatives repeatedly explained the intent of the narrowing as excluding “merchants dealing with each other or with suppliers” and benefiting “the small purchaser.”\textsuperscript{64} In excluding business-to-business transactions, those workers who sell their services or wares through corporate entities, such as street vendors or for-hire drivers, lose protection, despite the same issues of size and asymmetry applying to their own purchases.\textsuperscript{65} The CPL prohibits deceptive or unconscionable trade practices, including any false or misleading statements, representations, or omissions that unfairly take advantage of the lack of knowledge, ability, experience, or capacity of a consumer or which result in a gross disparity between the value received by a consumer and the price paid, to the consumer’s detriment.\textsuperscript{66} However, only those acts and practices declared unconscionable and described with reasonable particularity in a local law or departmental regulation are deemed prohibited, a key and deleterious departure from the Federal Trade Commission’s jurisdiction over “unfair practices that have not yet been contemplated by more specific laws.”\textsuperscript{67} Notwithstanding this procedural


\textsuperscript{63. The Bar testified that “[t]he scope of the bill should be limited to consumer purchases (i.e. for household, family or personal (non-business) use) since the Bureau of Consumer Affairs was established for the benefit of the small purchaser,” while the Metropolitan New York Retail Merchants Association submitted a statement that “the proposed definition of ‘consumer’ would include purchasers who resell, rather than use, goods or services. Accordingly, the definition should be rewritten so that it is clear that it covers only those purchasing goods or services for personal, family or household use.” New York City Council Archives, LAGUARDIA-WAGNER ARCHIVES, Box #052541, Introductions 838; see also Truth in Lending Act and Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601 et seq.; Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et seq.

\textsuperscript{64. New York City Council Archives, supra note 63.


\textsuperscript{66. N.Y.C. ADMIN. CODE §§ 20-700, 20-701.

\textsuperscript{67. FTC v. Accusearch, Inc., 570 F.3d 1187, 1194 (10th Cir. 2009); cf. N.Y.C. ADMIN. CODE § 20-701(b).}
hurdle, the definition is sufficiently broad to permit the department to promulgate rules deeming certain hiring party practices as unfairly taking advantage of workers’ lack of knowledge. The Council conveyed its intent in the accompanying report “to write into the laws of New York City a comprehensive substantive ban on all forms of consumer fraud” and included a statutory requirement that the provisions of the Consumer Protection Law “shall be construed so as to supplement the rules, regulations, and decisions of the federal trade commission and the courts interpreting 15 U.S.C. § 45(a)(1),” ensuring that all practices where businesses do not stand on both sides that federal law deems impermissible are also actionable under city law, which arguably includes unfair methods of competition through the mistreatment of consumers, workers and small businesses within a distribution chain. Though the language of the CPL was commonly perceived to exempt individuals as sellers of wares, or their own time and services from statutory protection, long-standing regulation of some purchasers — such as pawnshop, junk, and second-hand dealers’ transactions with sellers and hockers — provided a counterpoint to this conception. Likewise, workers who purchase access to platform services, or whose hiring parties offer training services financed through deceptive instruments, misleading marketing and operations management services to franchisors, or unfair and deceptive job matching services, are already protected by the CPL without the need for new statutory protections. The ambit of these protections can be further expanded by recognizing employment contracts as “a site for distribution of goods,” including


72. See Harris, supra note 19, at 38.
healthcare, “beyond the ‘ordinary’ terms of remuneration for labor.”

However, the narrowness of the categories of consumers conceived of by the CPL allows many hiring parties to take advantage of the combination of information and structural bargaining power asymmetries without sanction.

Nearly a half-century later, at the turn of the millennium, the question of where to house enforcement of substantive labor standards persistently befuddled the Council (with the mayoralty largely, and unequivocally, opposed to any such proposals). A municipal Department of Labor operated from 1954 to 1967 and was briefly responsible for the enforcement of a minimum wage law that was never implemented. The Economic Development Administration, to which its private sector labor obligations had been transferred, had itself been dismantled, leaving no entity responsible for such matters. Each legislative proposal suggested a different


74. The week after her departure from the agency, a former DCWP Commissioner co-authored a piece arguing that “consumer agencies would be neglecting an important part of their work if they take a rigid and overly narrow understanding of who their agencies exist to protect. Consumer protection agencies should take action to address a range of complex practices at the intersection of the consumer and labor markets.” Terri Gerstein et al., When Corporations Deceive and Cheat Workers, Consumer Laws Should be Used to Protect Workers, WORKING ECON. BLOG (May 5, 2021), https://www.epi.org/blog/when-corporations-deceive-and-cheat-workers-consumer-laws-should-be-used-to-protect-workers/

75. N.Y.C., N.Y. LOCAL LAW NO. 1 (1954); N.Y.C., N.Y. LOCAL LAW NO. 59 (1962). After his proposed creation of a Department of Commerce and Labor in 1936 was unsuccessful, the mayor created an Industrial Relations Board that operated from April 1937 until July when the newly-formed State Mediation Board assumed its duties over labor disputes. Mayor Offers Charter Amendment to Set Up City Labor Department, N.Y. TIMES, Mar. 28, 1936; La Guardia Sets Up Impartial Labor Board; Names Three to Aid in Settling Disputes, N.Y. TIMES (Mar. 31, 1937), https://timesmachine.nytimes.com/timesmachine/1936/03/28/88647217.html?pageNumber=1 [https://perma.cc/N7GY-R429]; La Guardia Thanks City Labor Board, N.Y. TIMES (July 17, 1937), https://timesmachine.nytimes.com/timesmachine/1937/07/17/94401637.html?pageNumber=18 [https://perma.cc/Q5A-E84X]. In 1946, a Division of Labor Relations newly focused on industrial disputes within the City was created within the Mayor’s Office and operated until 1954. Labor Chronology, 63 MONTHLY LAB. REV. 830, 837 (1946).

76. As part of a major reorganization of 49 agencies into 10 administrations, Mayor Lindsay had proposed the combination of duties related to the preservation of harmonious and productive labor relations between private employers and their employees with jurisdiction over public wharves and the Departments of Licenses and Markets. Ultimately, while the Council elected to instead create DCA out of the latter two agencies, it did approve the consolidation of the other functions. Public Sector functions of DOL were divided among the new Offices of Labor Relations and Collective Bargaining. See New York City Council Archives, Series: Introduction of Bills, LA GUARDIA-WAGNER ARCHIVES, Box #052525, Introductions 261.
agency at introduction, whether the Department of Citywide Administrative Services or Department of Health and Mental Hygiene,77 but upon enactment universally would assign the mayor authority to select an administering agency.78  Alternatively, a few proposals forwent administrative enforcement altogether, simply providing a private right of action for the aggrieved.79  Though the May 2013 enactment of the Earned Sick Time Act (ESTA)80 began to vest enforcement for these laws in DCA, it was not slated to go into effect until April 1, 2014, and, in a bill requested by a new and supportive mayor to expand employer coverage, the authority to transfer enforcement away from DCA at any future date was secured.81  Despite this flexibility, within a year, qualified transit benefits, initially proposed for enforcement by the Department of Finance, were enacted and placed under DCA’s purview,82 which was hard at work enforcing ESTA. By the end of 2015, enforcement authority for both laws had shifted again to a brand-new Office of Labor Standards that the mayor was authorized to place within any agency or mayoral office deemed appropriate.83 The Office of Labor Policy and Standards, as it came to be known, was left within DCA, but it was not until 2020 that it irrevocably became part of the Department contemporaneously with its own renaming to DCWP.84

The sheer number and diversity of substantive worker rights statutes that New York City has enacted in the past decade is staggering, yet it represents only a portion of the steps taken to support employees and independent contractors. It includes universal paid safe and sick leave,85 (almost)

78. See, e.g., N.Y.C., N.Y. LOCAL LAW NO. 89 (2005); see also N.Y.C., N.Y. INT. NO. 805-2008 (2008) (requiring a designated mayoral entity to enforce proposed paid family leave regime). Notably, each of these bills that ultimately passed garnered a mayoral veto so no administration position on who or how enforcement would be handled preceded adoption and only those initially effective subsequent to a mayoral transition were ever actually implemented.
80. N.Y.C., N.Y. LOCAL LAW No. 46 (2013). The law was subsequently expanded to be the Earned Sick and Safe Time Act (ESSTA). N.Y.C., N.Y. LOCAL LAW No. 199 (2017).
81. N.Y.C., N.Y. LOCAL LAW No. 7 (2014).
82. N.Y.C., N.Y. LOCAL LAW No. 53 (2014) (N.Y.C., N.Y. INT. No. 295A-2014 (2014)). A proposal introduced throughout the 1990s to require each employer in the city that offered free or subsidized parking to any employee to offer a transit subsidy of $15-60, depending on the version, to each of its employees for their use in commuting to and from the employer’s worksite would have been enforced by the Department of Transportation. See, e.g., N.Y.C., N.Y. INT. No. 178-1998 (1998).
84. N.Y.C., N.Y. LOCAL LAW No. 80 (2020).
85. N.Y.C. ADMIN. CODE tit. 20, ch. 8.
universal temporary schedule change protections, sectoral severance pay, access to hours, wrongful termination, predictable scheduling requirements, freelancer protections, minimum compensation standards for for-hire vehicle drivers and delivery workers, and displaced worker retention laws for four separate industries. A legislatively mandated paid care division maintains an alternative dispute resolution program to combat wage theft faced by domestic workers. Proprietary policies requiring prevailing wages and labor peace agreements by contractors and financial assistance recipients have expanded. Also massively revised is the New York City Human Rights Law, which now protects current and prospective employees, including domestic workers as of 2021 and independent contractors since 2019, from hiring, promotion, and licensure

86. N.Y.C. ADMIN. CODE tit. 20, ch. 12, subch. 6. Excluded from coverage are those who have been employed for fewer than 120 days or who work in “the development, creation or distribution of theatrical motion pictures, televised motion pictures, television programs or live entertainment presentations.” Id. at § 20-1263.

87. N.Y.C., N.Y. LOCAL LAW NO. 104 (2021). This hotel-industry COVID-19 legislation required up to 30 weeks of severance pay for workers of hotels that had not reopened at least 25% of their rooms by October 2021.

88. N.Y.C. ADMIN. CODE tit. 20, ch. 12, subch. 4 (exclusive to fast food workers).

89. Id. at subch. 7 (exclusive to fast food workers).

90. Id. at subch. 2 (providing fast food workers with advance scheduling and schedule change premiums); id. at subch. 5 (prohibiting on-call scheduling for retail and underground utility workers).

91. N.Y.C. ADMIN. CODE tit. 20, ch. 10 (requiring written contracts for all contracts valued over $800 and establishing unlawful payment practices).


93. Of the four regimes, only Local Law 99 of 2020 establishing protections for displaced hotel service workers, ensures that the offer of retention is not illusory by requiring that the wages paid by the former employer be maintained, and only Local Law 11 of 2016 the Grocery Worker Retention Act, vests enforcement authority in DCWP (an evolution from its first iteration Int. 406-2006, which relied solely on a private right of action), who has filed a single case in 2020 that the agency successfully settled in 2021. N.Y.C., N.Y. LOCAL LAW NO. 99 (2020); N.Y.C., N.Y. LOCAL LAW NO. 11 (2016); Jason Cohen, Bronx Grocery Workers Return to Work after Filing Complaints with DWCP, BRONXTIMES (Jan. 12, 2021), https://www.bxtimes.com/grocery-store-workers-return-to-work-after-filing-complaint-with-dcwp/ [https://perma.cc/JE4A-KJ83].


95. See N.Y.C. ADMIN. CODE §§ 6-145 (labor peace agreements for human services contracts), 6-146 (labor peace agreements for certain city economic development projects), 6-109.1 (prevailing wage for security guards and fire guards at city-contracted shelters); N.Y.C., N.Y. LOCAL LAW NO. 212 (2019) (expanding the prevailing wage law for building service employees at city development projects).

discrimination based on criminal record\textsuperscript{97} or marijuana use.\textsuperscript{98} The Council also mandated a “good faith” salary range for any position located within New York City,\textsuperscript{99} and banned the use of consumer credit history for employment decisions.\textsuperscript{100}

Within New York City, licensure of industries,\textsuperscript{101} consumer disclosures about gratuity policies and hotel service disruptions due to protected activity,\textsuperscript{102} and analogous disclosures employers must provide to their employees\textsuperscript{103} are all used to ensure compliance with local labor standards or norms, or over time come to protect a skilled workforce, like movie projectionists\textsuperscript{104} or sightseeing guides.\textsuperscript{105} Yet licensing implicates “not only permission and regulation, but also exclusion,”\textsuperscript{106} and over the decades, the City licensed and regulated out of existence occupations, such as hotel runners and organ grinders, often the last source of income for the destitute

\begin{itemize}
\item \textsuperscript{97} N.Y.C., N.Y. LOCAL LAW No. 4 (2021).
\item \textsuperscript{98} N.Y.C., N.Y. LOCAL LAW No. 91 (2019).
\item \textsuperscript{99} N.Y.C., N.Y. LOCAL LAW No. 32 (2022) as amended by N.Y.C., N.Y. LOCAL LAW No. 59 (2022).
\item \textsuperscript{101} These include car washes, industrial laundries, construction labor providers, third-party delivery services, and employment agencies.
\item \textsuperscript{102} See N.Y.C. ADMIN. CODE tit. 20 ch. 5, subch. 23; id. § 20-563.2.
\item \textsuperscript{103} See, e.g., N.Y.C. ADMIN. CODE §§ 20-564.2, 20-771.
\item \textsuperscript{104} The City of New York regulated motion picture projectionists from at least 1908, when projectionists began being licensed by the now defunct Department of Water Supply, Gas and Electricity, until 2016 when just 200 remained. The repeal took place over the opposition of IATSE Local 306, who had beat back prior repeal attempts and contended that while the old-fashioned techniques which prompted the original licensure scheme were indeed largely not applied, the new methods still placed operators, other employees and attendees at the risk of harm and the industry wanted to eliminate the licenses to eliminate jobs and reduce wages and that it would invite lockouts. See N.Y.C., N.Y. LOCAL LAW No. 66 (2016) and related materials, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2523143&GUID=F6F7BDF4-951E-4DB1-8F3B-BE456CD38058 [https://perma.cc/E59K-Z3N2].
\item \textsuperscript{105} A recent proposal to require double decker sight-seeing buses to have at least one employee present on the upper level at all times when passengers are present was presented as a safety measure but drew support from the guide’s association for its employment implications as more and more companies replace guides with GPS tours. See N.Y.C., N.Y. INT. No. 271-2004 (2004) (requiring sight-seeing buses that offer tour narration to provide such narration from a live sight-seeing guide).
\item \textsuperscript{106} Carrow, supra note 3, at 2.
\end{itemize}
and communities of color, under varied public order rationales.\textsuperscript{107} Regulations denoted a preference for merchants with fixed places of business and permanence, and a belief that undesirable and deceptive practices were most likely associated with marginal operators.\textsuperscript{108} Notably, many of the industries falling outside this category were geared toward out-of-towners, allowing the government to reduce employment opportunities and lower wages for excluded workers through a thousand cuts without considering them as sources of middle-class employment.\textsuperscript{109} As one example, while costume characters — an overwhelmingly immigrant workforce — were never formally deemed general vendors or licensed despite attempts in both directions, they were ultimately confined to smaller and smaller areas to conduct their business.\textsuperscript{110}

\section*{II. EMPLOYMENT AS A PUBLIC GOOD}

Since the establishment of the Commissioner of Licenses to combat exploitation by employment agencies, training and employment providers, or deceptive purveyors of business opportunities have been a consistent focus of the Department throughout its varied incarnations. Throughout the first half-century of the Department, as domestic worker shortages, strikes, and economic depressions each brought new forms of exploitation, the “Protection of the Unemployed” from devices and schemes of employment brokers” formed a recurring theme in the Department’s regulations and inspections and led to the creation of a small claims tribunal for “poor individuals claiming to be entitled to refunds from such agencies.”\textsuperscript{111} “False lures” in newspapers, overcharging for transportation to the City or failing to supply return transportation, exerting duress by holding luggage as security, and failing to provide required meals or housing were the recurrent causes of fines and license suspension.\textsuperscript{112} The state law under which the City

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\textsuperscript{107} N.Y.C., N.Y. LOCAL LAW NO. 8 (1964) (prohibiting issuance of hotel runner licenses to all but current license holders); \textit{infra} notes 180-84. \\
\textsuperscript{108} \textit{Maney, supra} note 57, at 50, 54. \\
\textsuperscript{109} See \textit{Jessica Bird, Do the Hustle: Municipal Regulation of New York City’s Underground Economy, 1965 to the Present} 187 (2018) (“[A]s the goals of protecting those slipping through the cracks due to federal policies and the promotion of the city as a safe and orderly tourist destination came into conflict, the suggestion to purge the city of ‘negative associations’ took precedence.”). \\
\textsuperscript{111} \textit{Carrow, supra} note 3, at 61. \\
\textsuperscript{112} DEP’T OF LICENSES, 1963 ANNUAL REPORT: NEW YORK CITY’S CONSUMER PROTECTOR 2 (1963); \textit{Wagner Papers, Laguardia-Wagner Archives, Box #72, Folder 905

was authorized to license such agencies permitted revocation or suspension for “any immoral, fraudulent, or illegal conduct in connection with the operation of such agency.”113 The Department of Licenses utilized this grant in the 1950s to penalize discriminatory hiring and advertisements,114 though a provision permitting racially discriminatory advertising if insisted upon by the employer survived until 1979.115 Among the earliest willful deceptions documented by the Commissioner of Licenses was the false information provided to workers by employment agents regarding strikebreaking activities,116 and agencies that failed to disclose a worker’s use in strikebreaking saw their licenses suspended.117 Employment agency applicants were required to sign a statement agreeing to not advertise for help in out-of-town newspapers, nor in any manner, directly or indirectly, induce or encourage the unemployed to come to New York City.118 Agencies were required to credit workers who disappointed an engaged employer and refund the worker in full if the agency refilled the position.119 Regulations treated workers as creditors of the employment agencies and governed the frequency of payment of fees or wages to applicants120 while also “deprecat[ing]” employment agencies bringing suit against applicants for employment for services rendered.121 Modeling agencies were prohibited from collecting any fee until a position was secured, with the overall amount capped at one week’s salary; they were also not permitted to collect any fees for photographs.122 Employment agency fees for skilled temporary
employment shorter than ten weeks were capped at 10% of the salary paid.\textsuperscript{123} Repeated efforts were made to expand coverage further to job advisory services, alleged to be employment agencies disguising themselves as consultants to avoid licensure,\textsuperscript{124} and to require temporary help agencies to disclose salaries, fees, and other terms of contracts.\textsuperscript{125} Though many modeling agencies attempted to evade departmental oversight in the 1970s by reclassifying themselves as management companies,\textsuperscript{126} misleading offers of services remained actionable under the CPL and promises of jobs if consumers bought a “portfolio” of photographs — only giving negatives once they were purchased, and then requiring additional fees for actual photos to secure employment — continued to draw departmental ire and fines.\textsuperscript{127} Misrepresentations by employment agencies concerning the wages paid,\textsuperscript{128} the nature of the work (e.g., sending those assured restaurant jobs to strip clubs or other unsavory environments),\textsuperscript{129} or placements in jobs that failed to pay at least minimum wage were consistent areas of enforcement for over a hundred years.\textsuperscript{130}

In 2003, the City Council passed legislation establishing standards of conduct for employment agencies and employers of domestic employees placed by employment agencies.\textsuperscript{131} All such employment agencies must

\begin{footnotesize}
\textsuperscript{126} Michael Gross, Model: The Ugly Business of Beautiful Women 311 (2011).
\textsuperscript{129} Javier C. Hernández, Despite City Crackdown, Immigrants Still Are Often Cheated by Job Agencies, N.Y. TIMES, May 15, 2011.
\textsuperscript{130} See Press Release, Off. of Mayor Bill De Blasio, De Blasio Administration Announces Multifaceted Effort to Address Labor Abuses and Health Risks at City’s Nail Salons (May 15, 2015).
\textsuperscript{131} N.Y.C., N.Y. LOCAL LAW NO. 33 (2003). In the legislative intent, the Council wrote

[the] placement of domestic or household employees into the homes of employers creates special problems, including the risk of abuse and exploitation. The majority of domestic or household employees in New York City are immigrant women of color who, because of race and sex discrimination, language barriers and immigration status, are particularly vulnerable to unfair labor practices. Encouraging responsible practices with
provide each applicant for domestic employment with a written statement indicating the rights of such employees and an employer’s obligations under state and federal law before job placement is arranged. The employer is required to sign and acknowledge the same written statement. Each job applicant must also receive a written statement of the job conditions of each potential employment position the agency recommended. DCA could not ensure that employers followed the code of conduct (as they insisted at a Council hearing on the proposed legislation, actual labor violations were the purview of the state), only that employment agencies have on file the statements that employers had signed. The law ultimately penalized employment agencies’ failure to inform two sets of consumers about their rights and responsibilities under federal and state laws, “conflating the conflital interests of employers and employees.”

In 2021, a new law licensed “body shops,” labor brokers in the construction industry that supply unskilled workers, often immigrants or the formerly justice-involved, for manual labor. The brokers were previously exempted from employment agency regulations because they do not charge fees to employees to find them work with other entities, but instead generate profit by being paid for providing the labor of their own employees. Licensees must submit data on the wages and supplements paid, demonstrate maintenance of workers’ compensation coverage, unemployment insurance, and disability insurance, and supply their workers with a series of notices — in their primary language — on their rights as workers covered by the bill, training and certifications the employees would need to perform their work duties, and information on the employees’ work assignments. The respect to the placement of domestic or household employees is in the interests of employees, employment agencies, employers and the public.

Id.
132. Id.
133. Id.
134. Id.
139. N.Y.C. ADMIN. CODE §§ 20-564.1, 20-564.2.
businesses’ clients would also receive some of these notices and could be subject to civil penalties if they use the services of an unlicensed business.\textsuperscript{140}

DCA readily deemed supposed vocational training and services providing customer leads or business opportunities as consumer services for personal use, and these schemes featured prominently throughout CPL enforcement.\textsuperscript{141} Despite their intent to generate income, these services were unhesitatingly deemed consumer-oriented, as their principal aim was the extraction of money from purchasers.\textsuperscript{142} In 1971, the Department promulgated the nation’s first local provision to prohibit unconscionable tuition refund practices by computer training schools and home study schools.\textsuperscript{143} A subsequent regulation provided that it was a “deceptive practice” in connection with the offering of services at any private vocational or trade school to: “represent orally or in printed advertising that it uses an aptitude test to determine eligibility for entry into the school or course unless: (a) the percentage of applicants who pass the aptitude test on an annual basis is stated at least as prominently as the existence of the test; and (b) the aptitude test has been independently validated using professionally sanctioned standards.”\textsuperscript{144} Lawsuits followed against tractor-trailer, paralegal, and court reporter training schools that rapidly dismissed students from their program while retaining full tuition\textsuperscript{145} or misstated job prospects and pay.\textsuperscript{146} Current DCA regulations, based on provisions first promulgated in 1970, govern vocational, home study, and correspondence schools’ advertising regarding salary, whether their services have approval from educational regulators, and the provision of job placement services.\textsuperscript{147} Other predatory schemes directed at jobseekers that drew DCA enforcement included phone lines promising job leads but failing to disclose the up to $20 in fees for calling the number or career counselors who falsely indicated that

\textsuperscript{140} Id. at § 20-564.4.

\textsuperscript{141} See infra notes 142–48.

\textsuperscript{142} See, e.g., Maldonado v. Collectibles Int’l, 969 F. Supp. 7 (S.D.N.Y. 1997).

\textsuperscript{143} See Developing Protection for the Consumer of Future Services, 72 COLUM. L. REV. 926, 939 (1972).

\textsuperscript{144} See Dep’t of Consumer Affs., Regulation 19, effective January 14, 1972, reprinted in IRVING SCHER & CARL D. LOBELL, CONSUMER PROTECTION 319 (1972).

\textsuperscript{145} See Frances Cerra, Vocational Schools and Job Promises Drawing Protests, N.Y. TIMES, Nov. 30, 1974.

\textsuperscript{146} See generally Gerald Gold, City, Charging Deceit, Asks End Of Driver School’s Accreditation, N.Y. TIMES, May 22, 1974; Frances Cerra, School Agrees to Drop Its Ads on Court Reporters, N.Y. TIMES, Sept. 14, 1977; Gerald Gold, State and City Suing a Legal School, Charging Deception on Jobs as Aides, N.Y. TIMES, June 8, 1973.

\textsuperscript{147} 6 RCNY § 5-64; DEP’T OF CONSUMER AFFS., LAWS AND REGULATIONS ENFORCED BY THE DEPARTMENT OF CONSUMER AFFAIRS 69 (1988) (providing the regulatory history of Consumer Protection Law Regulation 519 and predecessor Consumer Protection Law Regulation 5).
they would find jobs for the clients.\textsuperscript{148} Another of DCA’s regulatory actions, Regulation 22, specifically forbid the operation of pyramid and other sales schemes that required participants to pay for the chance to be compensated for introducing additional people into the scheme.\textsuperscript{149}

\section*{III. PERMITTING WORKPLACE PRACTICES}

From its inception, the Department of Licenses made the provision of workers’ compensation insurance a condition of licensure.\textsuperscript{150} As the minimum wage was made applicable to different industries starting in 1938, it required a demonstration of labor law compliance.\textsuperscript{151} Industry-specific regulations sought to regulate the amount and timeliness of wages or the create employer-employee relationships. One regulation for cabarets provided that “no financial indebtedness to employees or entertainers shall remain unpaid beyond the period when such indebtedness becomes due.”\textsuperscript{152} Public dance halls were subject to heightened regulation and a prohibition on mingling with clients if the hostesses employed therein earned less than $25 per week,\textsuperscript{153} well over the $10 a Department report had indicated some such women earned just years earlier.\textsuperscript{154} As a condition of licensure, and occasionally as a component of an evaluation of “good moral character” or “fit and proper person[hood],”\textsuperscript{155} the Department considered hiring parties’ “egregious or repeated nonpayment or underpayment of wages.”\textsuperscript{156} When the “good moral character” requirement was applied to individual licensees

\begin{thebibliography}{100}
\bibitem{Licenses1934} \textsc{Dept of Licenses}, 1934 \textit{Annual Report} 10 (1935).
\bibitem{Id} Id.
\bibitem{Regulations} Regulations Governing Cabarets filed with city clerk April 19, 1945 in \textit{Cumulative Compilation I, supra note 71, at 568.}
\bibitem{Licenses1928} See \textsc{Dept of Licenses}, 1928 \textit{Annual Report} 10, 23 (1929).
\bibitem{NYCAdmin} See N.Y.C. \textsc{Admin. Code} § B32-304.0 (Cabaret and Public Dance Hall Employees) \textit{reproduced} in CARROW, supra note 3, at 44.
\end{thebibliography}
or employees, especially the justice-involved, it often served as a barrier to entry and wage-earning.\textsuperscript{157} The 2015 Car Wash Accountability Law required that car wash operators maintain a surety bond to provide a source of funds from which to satisfy judgments for wage theft, consumer claims, and obligations to the City.\textsuperscript{158} The required bond amount was reduced from $150,000 to $30,000 if the car wash applying for issuance or renewal of a license “is a party to a current and bona fide collective bargaining agreement . . . that expressly provides for the timely payment of wages and an expeditious process to resolve disputes concerning nonpayment or underpayment of wages.”\textsuperscript{159}

New York City deceptive practices enforcement already extends to misleading consumers about workplace conditions or standards, including fines for a garage’s $30 “NYC Living Wage Assessment” fee\textsuperscript{160} and a law that requires hotels to inform visitors of any strike, lockout, or picketing activity and waive any fee or penalty for cancellations made because of a resulting service disruption.\textsuperscript{161} In addition to wage bonding requirements, mandated disclosures,\textsuperscript{162} and provisions granting broad authority to deny, suspend, or revoke licenses for workplace violations,\textsuperscript{163} these regimes also contain substantive provisions designed to help workers, such as mandatory

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\textsuperscript{157} See N.Y. CORRECT. LAW § 752.
\textsuperscript{159} N.Y.C. ADMIN. CODE § 20-542(b)(1). A lawsuit alleging that the law forced businesses to unionize in violation of federal labor law was withdrawn after the U.S. Court of Appeals for the Second Circuit remanded the matter to the district court where the owners were to be required to substantiate their claims of unreasonable costs associated with maintaining the surety bond as “[t]o suggest a car wash owner would have to choose between obtaining a $150,000 bond with its attendant costs, whatever they may be, or supporting unionization, at no cost, ignores economic reality.” Ass’n of Car Wash Owners Inc. v. City of New York, 911 F.3d 74, 83 (2d Cir. 2018).
\textsuperscript{160} Press Release, Dep’t of Consumer Affs., Department of Consumer Affairs Settles Charges with Icon Quik Park for Charging Customers “NYC Living Wage Assessment” Fee (June 28, 2017). Except for a brief interlude from 2020–2021, Local Law 100 of 2020, NYC has prohibited administrative surcharges on restaurant tabs since 1976. 6 RCNY § 5-59. Despite this ban, there have been short-lived attempts by food service establishments to impose just such fees, including a 2015 single-day attempt by a Brooklyn restaurant to levy a 3\% Affordable Care Act surcharge. Ryan Sutton, Franny’s Retracts Its Obamacare Surcharge, EATER (Dec. 2, 2015), https://ny.eater.com/2015/12/2/9835508/frannys-has-retracted-its-obamacare-surchage [https://perma.cc/SCPZ-YASQ].
\textsuperscript{161} N.Y.C., N.Y. LOCAL LAW NO. 99 (2020).
\textsuperscript{162} See also N.Y.C. ADMIN. CODE § 16-528.
\textsuperscript{163} See N.Y.C., N.Y. LOCAL LAW NO. 91 (2021).
training, proper classification or direct employment of workers, or labor peace.

**IV. CLASH OF MORALITY AND WAGE EARNING**

The moralizing role by which governmental permitting permits rights to be realized, however, also poses statutory and administrative entry restrictions that keep constituencies, like undocumented immigrants, out of the workplace and expose them to exploitation. For example, licensing regimes previously prohibited places of public amusement from employing waitresses, barred the employment of homosexuals in cabarets or as cab drivers, and prohibited non-citizens and disabled persons from obtaining itinerant peddler licenses. Over 40,000 workers employed in approximately 4,000 cabarets, catering establishments, dance halls, and coffee houses were required to maintain identification cards, including performers like Thelonious Monk, who three times had his cabaret card revoked through the 1940s and 50s. This requirement was repeatedly attacked by the NAACP, who alleged that the additional requirements amounted to discrimination against communities of color. They questioned why cabaret waiters needed to be photographed and fingerprinted

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164. See, e.g., N.Y.C. ADMIN. CODE § 16-1008.
165. See, e.g., N.Y.C., N.Y. INT. NO. 1054-2023 (2023). One use of licensure that is not permissible is the refusal to renew a license pending the resolution of a labor dispute. See generally Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).
168. See LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE 224 (2016) (describing how NYC TLC required LGBT applicants to submit psychiatric evaluations for hack licenses). Liquor and cabaret licenses were withheld to constrain the associational rights of the queer and colored. See Nick Sibilla, How Liquor Licenses Sparked the Stonewall Riots, REASON, June 28, 2015 (“Gay bars were crucial in the fight for equal rights, which is why they kept getting shut down by the government.”); N.Y.C., N.Y. LOCAL LAW NO. 124 (2017) and related material, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3086319&GUID=6FDA3305-06B3-47B3-9DF6-21B605C5A8EE [https://perma.cc/77BC-ABEQ] (repealing NYC Cabaret Law which required a license for dancing and was used to shutter Harlem clubs with interracial dancing and later LGBTQ+ establishments).
169. Rules and Regulations Governing Itinerant Peddlers, filed with City Clerk September 28, 1939 in CUMULATIVE COMPILATION I, supra note 71, at 460.
171. See generally Ben Houtman, A Brief History of New York City’s Cabaret Laws, ALLEGRO, May 2016. Frank Sinatra famously refused to perform in New York during at least part of this period in protest. Id.
to possess “work permits” when those in restaurants without entertainment did not.\footnote{173}

Many regulated professions, but for the license, would impose low barriers to entry in terms of capital and education, making them an accessible and flexible alternative to exploitative low-wage employment in the domestic work, restaurant, or construction sectors of the informal economy for low-income caregivers or the aging.\footnote{174} Yet licensure and accompanying requirements dictate the earning potential for self-employed workers operating newsstands, horse-drawn carriages, pedicabs, and guided tours, which since 1937 have been limited to $1 per person per hour.\footnote{175} Since the turn of the 20th century, when New York City first licensed 6,000 peddlers,\footnote{176} New York City’s vending laws have driven thousands into an underground world defined by rented licenses and agency sweeps that upend immigrants’ carts — and livelihoods.\footnote{177} Since 1979, the city has made just 853 licenses available for vendors who are not military veterans seeking to sell merchandise, and only 2,900 permits for food vendors are allocated.\footnote{178} Over 20,000 people vend with and without permits, as the lack of work

\footnote{173. See \textit{id}.}
\footnote{174. See \textit{St. Vendor Project, Vulnerable In Itself} (2019).}
\footnote{175. See \textit{Consumer Tips for NYC Tourists}, N.Y.C. \textit{Consumer & Worker Protection} (2023).}
\footnote{176. See \textit{N.Y.C. Task Force on General Vendors, Balancing Safety and Sales on the City Streets: A Report on Street Vending to Mayor David N. Dinkins} (1991).}
authorization forecloses other opportunities for undocumented immigrants.\textsuperscript{179} Horse carriage drivers have been licensed for 150 years but the number of carriages is now capped at 68 and only 200 horses are licensed.\textsuperscript{180} Since 1989, hours and locations permitted for horse-drawn carriage rides, the permissible temperatures in which a horse could work, the rate operators could charge passengers, and other industry standards have all been subject to increasing regulation by five different agencies.\textsuperscript{181}

When first licensed in the 1890s, there were over 1500 organ grinders, a popular variety of itinerant musician popular in the 19th century, though their numbers had dwindled to 300 by the 1920s.\textsuperscript{182} Only a few dozen still plied their trade until December 31, 1935, when Mayor La Guardia summarily revoked all street musician licenses and forbade the issuance of new ones, saying he would not allow “licensed begging.”\textsuperscript{183} “As far as music is concerned,” he said in response to a petition to reinstate the licensing system, “the organ grinder no longer fills a needed want.”\textsuperscript{184} The street music ban, which “favored clear streets and an aesthetic of economic modernity by seeking to channel itinerant performers into other occupations or the relief system,”\textsuperscript{185} stayed in effect until 1970.\textsuperscript{186}

When the Department of Licenses assumed jurisdiction over newsstand licenses, previously distributed by political patronage, procedures for allocating up to two stands to handicapped veterans were codified into ordinance.\textsuperscript{187} Newsstands symbolized entrepreneurship for immigrants and

\begin{footnotesize}
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\item[184] See id.
\item[187] See CARROW, supra note 3, at 64. N.Y.C. ADMIN. CODE § B32-59.0 (1939). Disabled veterans were given Grade A licenses and only after all Grade A licenses were acted upon
\end{enumerate}
\end{footnotesize}
veterans returning from World War II and the Korean War who struggled to find full-time salaried work. Since 2013, newsstands have been permitted to sell items priced up to $10 in addition to newspapers and periodicals; these amounts, and permitted and excluded items, had only been amended twice since 1968 when the closure of five newspapers and prompted the Department of Licenses to “ease the economic plight” of newsdealers and “aid [the largely disabled licensees] . . . to remain self-supporting” by permitting the sale of designated items up to $1.

While these examples are just a few and date across the century-plus history of New York City consumer regulation, they demonstrate how in each generation evolving mores imperil the livelihood of immigrants who often lack other avenues of earning beyond the exploitative bounds of the informal economy.

V. EMBRACING THE VISION

The present state and consolidation of the marketplace, with harmful impacts for local industry, workers, and industry, calls for a renewed vision of consumer law. A marriage of antitrust — by its nature a tool for allocating and reallocating power where labor has long had a place since the Clayton Act — and consumer protection will create countervailing power, contribute to economic and democratic recapture that protects workers, small businesses, and all “bound by terms authored exclusively by commercial parties with whom they engage,” as well as combat the agglomeration of


The continued direct regulation of labor and supplier contracts and the creation of statutory frameworks for collective actions and collective bargaining by independent contractors, debtors, tenants, small businesses, consumers, and data cooperatives are critical to nimbly and comprehensively responding to new instances and forms of exploitative behaviors. Also essential are the overhaul of the CPL’s protections, which currently exclude many circumstances where information and structural bargaining power asymmetries exist, and the adoption of a bright-line rule against abuse of dominant market power or position, including anti-competitive harm from a firm’s conduct in a labor or product market.

A richer appreciation of the historical use of the CPL to pursue justice for workers presents opportunities to expand enforcement under its pioneering terms and DCWP’s anti-monopolistic roots to complement ambitious new endeavors as part of its enhanced role, including on neighborhood financial health and community wealth building. Moreover, these protections established precedent for incorporating broader sets of transactions, and increased prohibitions on unfair competition, into local consumer enforcement to better protect all marketplace participants — not merely the interests of end users of goods and services — and provide enhanced

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197. Though beyond the scope of this Essay, it is clear that consumer law, properly equipped, can play an important role in curbing private market exploitation of scope, process, and substance gaps in the expansion of our social safety net and public infrastructure. See
remedies and additional fora against various workplace violations, including in forms labor law has been interpreted to permit. The potential uses extend from penalizing wage-fixing and horizontal no-poaching agreements, wage theft, unsafe work conditions, failures to pay overtime, and union busting to tackling misclassification and other ill effects of the fissured workplace. In addition to tackling discrimination in wages, dress code, amenities, and other conditions that treat categories of workers differently and place a cohort at a competitive disadvantage to colleagues, consumer law can tackle systemic racism manifested as poor treatment of all workers by hiring parties that, regardless of animus towards those with a common

Vijay Raghavan, *Consumer Law’s Equity Gap*, 2022 UTAH L. REV. 511, 520 (2022). Only through a multipronged approach that embraces distribution, and the use of a broad set of distributional levers to attack market inequality as an explicit goal of consumer law, rather than merely a tool to correct market imperfections caused by cognitive bias or imperfect information, can the City effectively combat private infrastructural power over the transmission of and gateways to goods, services, and information, as well as the rating systems, indices and ranking databases that dictate our access, while reproducing existing patterns of bias. See id. at 513; see also K. Sabeel Rahman, President, Demos, Written Testimony Before the United States House of Representatives Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (Oct. 1, 2020). New York City also has an arsenal of nonregulatory tools to “thicken” labor markets, including tax incentives and other mechanisms that ensure market entry and more efficient matching. See Hiba Hafiz, *How Antitrust Can Better Regulate Thin Labor Markets*, PROMARKET (Mar. 29, 2022), https://www.promarket.org/2022/03/29/how-antitrust-can-better-regulate-thin-labor-markets/ [https://perma.cc/NNM9-ZYRB].


199. See Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1194 (2011) (holding that Unfair Competition Law applies to a failure to pay overtime for work performed in California by nonresidents).

200. See *Antitrust Remedies for Union Busting*, supra note 198, at 6 (describing ‘union busting’ as encompassing not just conduct employers undertake while workers are deciding whether to elect a union but also conduct whereby employers weaken extant unions’ power); see also Brian Callaci & Sandeep Vaheesan, *How Antitrust Can Help Tame Capital and Empower Labor*, 32 NEW LAB. F. 50, 55 (2023) (“Retailers such as Walmart have thwarted unionizing by their workers and thereby obtained a significant — and unfair — competitive advantage over highroad rivals that comply with labor and employment laws.”).


characteristic,\textsuperscript{204} has disproportionate effects on such workers, even though it does not operate by treating other disempowered workers better than their peers.

While local jurisdictions are often preempted from enacting specific, or any, higher labor standards\textsuperscript{205} — New York City itself is arguably preempted from implementing a higher minimum wage\textsuperscript{206} — or legislating on employee safety,\textsuperscript{207} UDAPs can be used in certain circumstances to enforce statewide, or federal, legislation.\textsuperscript{208} An embrace of the history and language of the CPL presents DCWP with unrealized opportunities to assume the full scope of FTC jurisprudence within its enforcement and vastly expand the capacity to tackle unfair practices by, and among, more market participants and protect workers who lack rights against the firms that really pulls the strings controlling their working conditions, due to outsourcing, subcontracting, and franchising.\textsuperscript{209}

Contrary to the narratives of the supposedly (re)new(ed) linkages between consumer protection and worker justice,\textsuperscript{210} the true story is that on the ground, industrial licensing and regulation have consistently combatted deceptive and unconscionable practices targeted at workers.\textsuperscript{211} While the

\textsuperscript{204}. That is not to disregard how monopsony can also emerge from racism and sexism that motivates employers to make fewer job offers or offer worse terms or conditions to members of those groups. Workers facing endemic discrimination of this type are met with an effectively smaller labor market that empowers all employers, not merely those engaged in these overtly discriminatory practices, to pay them less. See Testimony of Heidi Shierholz, President of the Econ. Pol’y Inst., before the House Committee on Economic Disparity and Fairness in Growth for a Hearing on the Impact of Corporate Power on Workers and Consumers (Apr. 6, 2022).


\textsuperscript{206}. See Wholesale Laundry Bd. v. City of New York, 12 N.Y.2d 998 (1963). \textit{But see} McMillen v. Brown, 14 N.Y.2d 326, 332 (1964) (upholding a minimum wage of $1.50 for workers employed by the City); N.Y.C. ADMIN. CODE § 22-506 (establishing a minimum amount to be paid by a grocery employer to its employees for the purpose of providing health care services or reimbursing the cost of such services for its employees); N.Y.C., N.Y. INT. No. 1054-2023 (2023) (proposing a minimum combined compensation standard for distribution center workers).


\textsuperscript{209}. See supra note 67 and accompanying text.

\textsuperscript{210}. See, e.g., Harris, supra note 19, at 8–9; Peterson & Steinbaum, supra note 14, at 642–57; David Kaplan, \textit{Consumer Rights are Gig Workers’ Rights? Regulating the Gig Economy at the Intersection of Consumer Protection Law and Employment Law}, 53 Seton Hall L. Rev. 281, 301–06 (2022); When Corporations Deceive, supra note 74.

\textsuperscript{211}. Likewise, the FTC has its own history of using UDAP tools against deceptive work claims. \textit{In re} Amway Corp., 93 F.T.C. 618, 618 (1979) (final order).
challenges presented by platform technology,\textsuperscript{212} the opportunities presented by gig companies’ embrace of “consumer” labels for service providers on their software,\textsuperscript{213} and the rise of “shadow student debt traps”\textsuperscript{214} have all sparked new interest in how consumer law can combat them, the use of such methods to ameliorate corporate fraud and misconduct, including towards workers, has a lengthy history. However, this same proximity engenders an impulse from local leaders to regulate and license their way out of every local use conflict that can, in turn, constrain the economic health of the most marginal members of the community. Recognition of the tension between minimum standards for hiring parties and individual operators must remain at the forefront of future solutions, lest barriers to entry continue to subject those excluded to exploitative business practices by hiring parties who seek to evade regulation and enforcement with potentially more damaging impacts on consumer welfare and safety.

New York City is among the once and present innovators in consumer and worker protections, especially for those left behind by federal regimes in both areas, but has yet to fully seize the opportunity presented by its history and underutilized conceptions of its foundational law to innovate in the ever-growing spaces of overlap. In this time of transitions for the department, scholarly insight, and labor and contract law, a new consumer-work law federalism must emerge.

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{212}.] Orly Lobel, \textit{The Law of the Platform}, 101 Minn. L. Rev. 87, 117 (2016).
\item[	extsuperscript{214}.] \textsc{Student Borrower Prot. Ctr.}, \textit{Trapped at Work} 29 (2022).
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