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OVERCOMING COLLECTIVE ACTION PROBLEMS:
ENFORCEMENT OF WORKER RIGHTS

Louise Sadowsky Brock*

In a period of new employment laws, it is important to determine how those laws are enforced, why enforcement of those laws is sometimes limited and how enforcement can be improved. This Note discusses the ways in which the theory of collective action limits enforcement of three employee rights statutes: the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Worker Adjustment and Retraining Notification Act. Enforcement mechanisms such as class action lawsuits, administrative agencies, employee participation groups, and labor unions represent potential methods of overcoming collective action problems. Each method has its benefits, and the three statutes must be reformed to increase the availability of all four methods. Ultimately, however, employee participation groups represent the best means for improving enforcement.

Since the enactment of the National Labor Relations Act1 in 1935, Congress has passed a wide variety of legislation protecting workers, including a health and safety statute,2 a statute requiring notification of plant closings and mass layoffs,3 and a minimum wage and maximum hour statute.4 Despite the growing pool of federal legislation, many of the ills addressed by these laws persist. One major reason for continuing violations is the absence of effective enforcement. Pinpointing the sources of such enforcement problems is difficult because the nature of these problems varies depending on the type of protection offered by the statute and the nature of the statute itself. Nevertheless, by focusing on a few worker protection statutes and one common source of inadequate

enforcement of those statutes, several statutory reforms emerge as possible means of improving enforcement of these laws.

This Note focuses on the enforcement of the three statutes mentioned above: the Occupational Safety and Health Act of 1970⁵ (OSHA), the Worker Adjustment and Retraining Notification Act⁶ (WARNAct), and the Fair Labor Standards Act of 1938⁷ (FLSA). As compared to the private rights created by collective bargaining agreements, the rights created and protected by these laws—a safe working environment, advance notification of layoffs and plant closings, access to certain types of information, and compensation guarantees—are public rights.⁸ Public rights are those that, when provided to one employee, are available to all employees, or at least to all employees within statutorily defined categories.⁹ Because an individual lacks sufficient incentive to obtain something that someone else could obtain for her, it is difficult to mobilize workers to seek assistance from government agencies or to take legal action to ensure that employers comply with the laws.

This lack of incentive leads to ineffective enforcement absent collective action. Collective action involves “the choice by all or most individuals of the course of action that, when chosen by all or most individuals, leads to the collectively best outcome.”¹⁰ Difficulties organizing collective action emerge, however, when an individual perceives her costs of participation as outweighing her benefits. When the goal of collective action is a public right, the self-interested, rational person will choose not to participate in collective action if she knows that she will benefit whether she participates or not. This “logic of collective action”¹¹ prevents workers from taking effective

⁵. 29 U.S.C. § 651. Throughout this Note, “OSHA” will serve as an abbreviation for the Occupational Safety and Health Act. References to the Occupational Safety and Health Administration will be made in full or shortened to “the Administration.”
⁹. See infra notes 15-22 and accompanying text.
¹¹. See RUSSELL HARDIN, COLLECTIVE ACTION 9 (1982) (explaining that the logic of collective action is based on the assumption that individual actions are motivated
individual action toward enforcement of these laws because any benefit they gain will be shared by all employees, whether the other employees assisted in the efforts or not. Consequently, mobilization problems are one likely reason for inadequate enforcement of OSHA, WARN, and FLSA.

This Note begins, in Part I, by briefly explaining collective action and the factors affecting the likelihood of its occurrence. Part II describes certain substantive statutory provisions of OSHA, WARN, and FLSA, especially the enforcement mechanisms that Congress has provided in each statute. These mechanisms are then analyzed in light of collective action problems that arise in attempting to take advantage of each statutory provision. Part III examines four alternative enforcement mechanisms—class actions, agency action, employee participation groups, and unions—and the efficiency of each alternative in overcoming collective action problems. The Note concludes with suggestions for reform.

The effectiveness of the first two alternative enforcement mechanisms, class action lawsuits and agency action, is limited by individual workers' lack of incentive to bring lawsuits on behalf of similarly situated employees or to notify agencies of employer violations. Also, the Department of Labor lacks the resources necessary to ensure complete compliance with the laws, whether through litigation or through administrative procedures. Therefore, this Note first proposes amending WARN to include agency involvement that combines the roles filled by the agencies under OSHA and FLSA.

This Note also proposes a new definition of the term "representative" in both OSHA and WARN to specifically include employee representatives who have been selected by the employees but who are not necessarily labor union representatives. Such a reform should increase the effectiveness of both class actions and agency involvement as enforcement mechanisms. FLSA should also be amended along these lines to allow representatives to bring lawsuits on behalf of employees, as allowed by WARN. As with OSHA and WARN, this change should improve the effectiveness of class actions.

by self-interest). See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971) (arguing that rational, self-interested individuals will not act to further group interests without coercion or other incentives).
The last two alternatives for improving enforcement mechanisms, employee participation groups and unions, function to increase the likelihood of individual employee involvement. Both methods employ an internal representative who can enforce statutes through administrative channels or through litigation, on behalf of all employees. While this Note recognizes the limitations of these two mechanisms, it argues that they have the greatest potential for improving enforcement of OSHA, WARN, and FLSA. Employee participation groups and unions create opportunities for employees to develop commitments to collective action, and they serve as bridges connecting the work site to the relevant agency. Because union coverage accounts for a decreasing segment of the workforce, employee participation groups may be the most effective enforcement mechanism for the majority of employees.

I. INDIVIDUAL ACTION VERSUS COLLECTIVE ACTION

Two distinct categories of rights are available to employees. One group of rights is individual in nature and relates to how a particular employee is treated by her employer and the effects of such treatment on that employee. In these cases the need for an organization to enforce rights diminishes because the individual has enough incentive to advance her personal interests. Mancur Olson argues that “personal or individual interests can be advanced, and usually advanced most efficiently, by individual, unorganized action. There is obviously no purpose in having an organization when individual, unorganized action can serve the interests of the individual as well as or better than an organization . . . .” For example, if a worker has a contract with her employer and the employer breaches the contract, the worker has an incentive to seek a remedy for herself. Similarly, anti-discrimination laws protect individual interests by providing individual remedies for

13. OLSON, supra note 11, at 7.
employees whom an employer treats unfairly as compared to similarly situated employees.\textsuperscript{14}

The second category of rights, public rights, accrue to groups\textsuperscript{15} of employees by providing benefits to all employees in a particular company or industry. OSHA, WARN, and FLSA provide such benefits. These benefits—a safe working environment,\textsuperscript{16} notification of plant closings and mass layoffs,\textsuperscript{17} minimum wages,\textsuperscript{18} and overtime pay\textsuperscript{19}—are "public goods" because they have two characteristics, namely jointness of supply and impossibility of exclusion.\textsuperscript{20} Jointness of supply means that one person's use does not reduce the amount available for everyone else; impossibility of exclusion refers to the fact that an individual cannot prevent the group from consuming the good once it is made available.\textsuperscript{21} More simply, "public goods" are those that cannot be provided to one person unless provided to all.\textsuperscript{22}

The statutes discussed in this Note deal with public rights. While these rights could be protected by either individual or collective action, individual enforcement is unlikely because employees lack the incentive to seek protection of these rights on their own.\textsuperscript{23} The rational individual recognizes that if she puts forth the time, effort, money, and risk to protect a collective good, the benefit she gains for herself will be shared by all employees affected by that law, while she bears the full cost of her effort. Consequently, she may choose not to exert the effort, hoping instead to enjoy the benefits when another individual acts. This phenomenon is commonly known as free-riding.\textsuperscript{24}


\textsuperscript{15} The term "group" refers to "individuals with common interests." OLSON, supra note 11, at 1.


\textsuperscript{19} See FLSA § 207.

\textsuperscript{20} See HARDIN, supra note 11, at 17.

\textsuperscript{21} See id.

\textsuperscript{22} See Heidi Li Feldman, Note, Divided We Fall: Associational Standing and Collective Interest, 87 Mich. L. Rev. 733, 748 n.71 (1988).

\textsuperscript{23} See OLSON, supra note 11, at 12 (explaining that a rational person in a large organization does not think withholding his support will affect how others behave). Lack of incentive for the individual to invest time or money is another reason collective bargaining is necessary. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 9 (1984). Another factor inhibiting individual action is fear of retaliation. Id.

\textsuperscript{24} See FREEMAN & MEDOFF, supra note 23, at 243 (explaining that "a free-rider is a worker who enjoys all the benefits of unionism but does not pay dues for those
Collective action will likely protect the public rights created by OSHA, WARN, and FLSA more effectively than individual action, but it presents its own difficulties. What incentives will propel individuals into collective action? More specifically, how much will an individual “pay” to obtain a collective good that will be shared by others who choose to free-ride on the gains? These “investments,” or costs to the individual, may take the form of money, time, and risk of employer retaliation. Workers will not make these investments if their probable benefits are not greater than their costs, and the costs will often outweigh the benefits because of the public, or collective, nature of the rights. “[A] catalyst is usually needed for a group of individuals to shake the habits of a lifetime and to assert themselves by taking advantage of the opportunities provided by collective action; that is especially true when those individuals are subject to economic reprisal.” When such a risk of retaliation looms large, and investment by other employees is minimal, an individual worker has little incentive to seek enforcement of the law. This lack of incentive to spend time and money and to take risks also prevents workers from obtaining crucial information about their working conditions and their rights. The combination of inadequate information and disincentive to take individual action prevents adequate enforcement of OSHA, WARN, and FLSA.

One solution involves forming some type of organization or designating a representative. An agent could further those shared interests which provide little or no incentive for individual pursuit. This solution, however, has limits of its own.

benefits”). This Note uses the term “free rider” more broadly than Freeman and Medoff by applying it outside the union setting. Free riders include workers who enjoy any benefits that flow from collective action without contributing to the procurement of those benefits.

25. See infra Parts II.A.2, B.2, and C.2 (discussing the collective action problems associated with OSHA, WARN, and FLSA).

26. See supra note 23.

27. See OLSON, supra note 11, at 35 (concluding that a group member will have less incentive to help the collective effort if she gets a smaller benefit).


29. See infra text accompanying notes 76–87, 106–09, 124 (discussing the types of information employees need to enforce OSHA, WARN, and FLSA).

30. See OLSON, supra note 11, at 46 (comparing groups in which one member gets enough personal benefit that it is worth paying the full cost himself with groups in which “no collective good can be obtained without some group agreement, coordination, or organization”).
Several factors affect the likelihood that an individual will either serve as a representative or cooperate with organizational efforts. The first factor involves short-term versus long-term cost-benefit analysis. The logic of collective action is based on the assumption that individuals are motivated by self-interest.\footnote{See Hardin, supra note 11, at 9.} Therefore, an individual faced with a choice between action or inaction will analyze the costs and benefits associated with each possible option. As a result, those who stand to gain the most from a collective good will contribute more to attaining that good.\footnote{See Olson, supra note 11, at 22 (concluding that if one individual can obtain enough of the benefit at a low enough cost, that individual will provide the collective good single-handedly).} Furthermore, if an individual anticipates additional future choices, where the future choices are contingent upon a decision to participate now, she may conclude that cooperation now will lead to additional benefits later.\footnote{See Hardin, supra note 11, at 13; Elster, supra note 10, at 146.} Such cooperation serves as the catalyst for forming a group, and from that point forward individual members may demonstrate commitment to the group's collective aims beyond self-interested personal gains.\footnote{See Feldman, supra note 22, at 753.}

A second factor affecting the likelihood of collective action is the nature of benefits the group seeks to obtain. Russell Hardin, a behavior researcher, distinguishes between "collective goods," which the group seeks to obtain, and "collective goods," which the group seeks to eliminate.\footnote{See Hardin, supra note 11, at 50–66.} He concludes that individuals are more motivated to rid themselves of a collective bad than to obtain a collective good.\footnote{See id. at 92–93.} Similarly, observers of human behavior expect more cooperation to oppose a loss than to fight for a gain.\footnote{See id. at 62–64.} The rights protected by OSHA, WARN, and FLSA fit loosely into both of these categories. For example, OSHA provides means for employees to rid themselves of dangerous working conditions, thereby eliminating a collective bad.\footnote{See infra Part II.A.1 (discussing the procedure for filing a complaint with the Occupational Safety and Health Administration).} In addition, administrative enforcement under OSHA creates safe and healthy working environments,\footnote{See Basil J. Whiting, OSHA's Enforcement Policy, 31 Lab. L.J. 259, 259–60 (1980) (explaining that the statute is structured to provide deterrents to noncompliance).}
thereby obtaining a collective good for all workers. Under WARN, employees seek to procure the collective good of advance notice,\textsuperscript{40} and under FLSA, they seek wages and overtime pay.\textsuperscript{41}

In summary, individual efforts are both unlikely and inadequate to enforce the rights protected by OSHA, WARN, and FLSA. Consequently, individuals must form a collective force or seek the assistance of a representative willing to make the necessary commitment. Once the group is formed or the representative identified, its success will depend on continued cooperation of individual group members, or principals of the representative, as well as the nature of the collective benefit sought.

II. ENFORCEMENT OF OSHA, WARN, AND FLSA

OSHA, WARN, and FLSA anticipate the need for group enforcement, but various collective action problems interfere with the initial formation of these groups. While the laws anticipate enforcement by group representatives, these representatives may lack incentives or resources to obtain the public rights protected by the statutes.

A. OSHA

The stated purpose of the Occupational Safety and Health Act of 1970\textsuperscript{42} (OSHA) is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”\textsuperscript{43} Two of the thirteen means for achieving this purpose are “providing an effective enforcement program”\textsuperscript{44} and “providing for appropriate reporting procedures. . . which procedures will help . . . accurately describe the nature of the occupational

\textsuperscript{43} Id. § 651(b).
\textsuperscript{44} Id. § 651(b)(10).
safety and health problem. Enforcement mechanisms and information thereby emerge as important tools for achieving OSHA's goals.

Despite more than twenty-five years of existence, OSHA has not adequately achieved its goals. The media has reported several recent examples of persistent violations, some resulting in major casualties. One particularly egregious event occurred in 1992 when a poultry plant fire in North Carolina killed twenty-five workers and injured fifty-six others. The Company posted warning signs long before the deadly event transpired, but hazards such as locked doors, frequent fires, grease and water on the floor, and overflowing toilets went unreported for eleven years. Employees did not report the conditions and injuries because of employer intimidation. In addition to this one anecdote, an empirical study portrays a dismal picture of OSHA's effectiveness in preventing work-related injuries and diseases. Clearly, the entire workforce must pursue more effective methods of enforcement and reporting.

This Part discusses the OSHA enforcement mechanisms and the collective action problems associated with those mechanisms. It then argues that the most apparent weakness in enforcement is the lack of cooperation between the Occupational Safety and Health Administration (the Administration) and individual employee representatives.

1. The Statutory Scheme—Collective action problems hamper efficient functioning of several OSHA provisions. These provisions require filing a complaint with the agency, requesting an inspection, participating in the physical inspection or "walk-around," and appealing the Occupational Safety and Health Review Commission's award.

45. Id. § 651(b)(12).
48. See id.
49. See id. The main source of intimidation was fear of losing their jobs. See id. One worker told reporters that employees were afraid to unionize because the company threatened to fire anyone who signed a petition supporting a union. See id.
50. See Freeman & Rogers, supra note 12, at 22 (presenting statistics demonstrating that from OSHA's enactment in 1970 until 1993, 200,000 workers were killed on the job, 1.4 million were permanently disabled, and 2 million died from occupation-related diseases).
The statute provides three opportunities for an employee to make complaints and request safety inspections. First, "[a]ny employees or representative of employees who believe that a violation of a safety or health standard exists . . . may request an inspection by giving notice to the Secretary [of Labor] . . . ." The second and third opportunities occur before and during the physical inspection, when an employee or representative can notify the Administration of violations she believes exist in the workplace.

The "walk-around" provision establishes that "a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary of Labor or his authorized representative during the physical inspection of [a] workplace." After the inspection, the Secretary of Labor determines whether to issue a citation for a violation. Once issued, "any employee or representative of employees [has fifteen working days to file] a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable."

Several provisions in the statute require agency action, and employees are dependent on those agencies to fulfill their statutory obligations. For example, the Secretary of Labor promulgates occupational safety and health standards, has authority to conduct investigations of workplace sites, and issues citations for violations of the Act. Without inspection and citation by the Secretary, employers go unpenalized for violations of the Act. Because most agency inspections result from employee complaints, without a complaint there

52. See OSHA § 657(f)(2).
53. See id. § 657(e). The Act does not define "representative authorized by his employees."
54. See id. § 658.
55. Id. § 659(c).
56. See Summers, supra note 51, at 504.
57. See OSHA § 655.
58. See id. § 657.
59. See id. § 658.
60. See MICHAEL YATES, POWER ON THE JOB: THE LEGAL RIGHTS OF WORKING PEOPLE 246 (1994) (explaining that although the Administration targets certain industries and conducts random investigations, employee complaints lead to the majority of inspections).
probably would not be an investigation. Lack of adequate resources also results in an inadequate number of inspections.61

Judicial review of orders issued by the Occupational Safety and Health Review Commission (the Commission) can involve both private parties and the Secretary of Labor. For example, the statute contemplates the need for further evidence in the event that the reviewing court sends a case back to the Commission,62 and employees are the best source of such evidence because they witness the day-to-day operations. In addition, the Secretary "may . . . obtain review or enforcement of any final order of the Commission."63 Finally, the Secretary has responsibility for investigating charges filed by employees alleging retaliation by the employer for filing complaints with the Administration.64

2. Collective Action Problems—Collective action problems among workers limit the effectiveness of OSHA enforcement. In the case of a plant in which unsafe conditions exist, the logic of collective action says that the rational employee probably will not file a complaint with the Secretary of Labor because she expects someone else to do so.65 As previously noted, a safe workplace is a public good that benefits all workers. Therefore, an individual has little incentive to address a safety or health concern for the benefit of everyone else.66 The question is how much money and time the individual is willing to spend, and how much risk she is willing to take to achieve this type of "qualitative" change in her working environment.67

Individuals seeking enforcement of OSHA may face daunting time commitments. Enforcement requires time to contact the agency, to walk around the plant with an inspector, to provide the inspector with information, and to negotiate resolution of the situation after the complaint is filed.68 Later appeals may

61. See Summers, supra note 51, at 510.
62. See OSHA § 660(a)-(b).
63. Id. § 660(b).
64. See id. § 660(c).
65. See supra notes 23–27 and accompanying text.
66. See supra notes 8–11 and accompanying text.
67. See HARDIN, supra note 11, at 72. Another author suggests that today's workforce may in fact be quite motivated to obtain a higher quality of life at work, including job satisfaction and job security. See Michael Ballott, New Directions in Union Organizing, 45 LAB. L.J. 779, 781 (1994).
68. See YATES, supra note 60, at 248–49 (discussing the enforcement process).
require employee testimony. Additionally, if the inspection is complex, the closing conference could be several weeks after the physical inspection.

Depending on the time commitment involved, a worker may conclude that it is too difficult and costly to remain devoted to the issue. In fact, the time involved may actually cause the employee to forego wages she could have earned if she had been working instead of participating in the investigation. A few cases have addressed the issue of wages lost for participating in a walk-around. The United States Court of Appeals for the District of Columbia Circuit has held that OSHA does not require an employer to pay wages for time spent by employees accompanying Administration inspectors on the walk-around. In *Leone v. Mobil Oil Corp.*, four employees who were union members argued that not entitling employees to their wages during a walk-around would discourage employee participation and frustrate the purposes of OSHA. In response, the court asserted that employees can bargain for such payments in the union's collective bargaining agreement with the employer. While unionized employees may be able to bargain for these wages, the court disregarded the fact that this opportunity would not be available to nonunionized employees.

The *Leone* case was distinguished by the United States Court of Appeals for the Ninth Circuit in *Magma Copper Co. v. Secretary of Labor*. In *Magma Copper* the court held that the Federal Mine Safety and Health Act of 1977 requires employers to pay each representative of the miners for time spent accompanying health inspectors on their inspection. Unlike OSHA, the Mine Safety statute specifically requires payment. The court broadly interpreted the statute to say that a representative of miners may accompany each inspector

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69. See OSHA § 660(a).
72. Id.
73. See id. at 1161.
74. See id.
75. See id.; see also, e.g., FREEMAN & MEDOFF, supra note 23, at 8–9 (discussing the benefits of collective bargaining by unions).
76. 645 F.2d 694, 699 (9th Cir. 1981).
78. See Magma Copper, 645 F.2d at 695.
79. See 30 U.S.C. § 813(f); Magma Copper, 645 F.2d at 699.
and not suffer loss of wages. In explaining why this interpretation was proper (as opposed to a more limited reading that would not have required payment to representatives accompanying a second inspector) the court highlighted two pieces of legislative history. First, the court referred to one senator's argument "that miner participation in inspections is essential to increased miner awareness of safety problems and that such participation could not be expected unless the miners were paid for their time." Second, the court specifically found that the purpose of the walk-around pay provision is "to assure that miners will exercise their right to participate in inspections."

The analysis used in Magma Copper applies by analogy to OSHA. Despite the statute's silence on the payment of wages, legislative history shows that Congress recognized the importance of employee participation. One Senate report noted that an authorized employee representative could aid the inspection process and introduce "an appropriate degree of involvement of employees themselves."

In addition to participation time, employees also need time to gather information before the inspection. In order to adequately enforce their rights under OSHA, employees need both on-the-job, risk-awareness education and greater knowledge of their legal rights. Most employees do not know what rights OSHA affords them or how to file a complaint. Without this information, employees may not appreciate the importance of taking action. "[A] sense of powerlessness to control hazards can lead to an indifference regarding health and safety."

In addition to the hurdles mentioned above, the risk of employer retaliation is a disincentive for an employee to independently seek a collective benefit. The chance of losing one's job increases the costs an individual faces in seeking a safe and healthy working environment. Despite the statute's

80. See Magma Copper, 645 F.2d at 697.
81. See id. at 697–98.
82. Id. at 697 (summarizing Senator Javits' argument).
83. Id. at 698.
85. Id. at 11.
86. See YATES, supra note 60, at 245; Jefferson, supra note 46, at 51 (quoting Deborah Berkowitz, health and safety director for the United Food and Commercial Workers International).
87. LOFGREN, supra note 70, at 204.
guarantee of confidentiality, the reality is that employees filing OSHA complaints are often fired illegally. The risk of being detected as the complainant is higher in smaller work environments and nonunion shops because an employee does not have the anonymity that flows from large numbers and the protective barrier created by a union. Technically, employees are protected from losing their jobs by the Act's anti-retaliation provision. In reality, however, an employee has only thirty days in which to file a complaint alleging that she has been discriminated against for instituting proceedings under the Act. Such a short statute of limitations may cut off legitimate claims if the employee is not well-informed of her rights and the procedure for instituting administrative action.

B. WARNA

The Worker Adjustment and Retraining Notification Act (WARNA), passed in 1988, represents a recent attempt by Congress to provide some minimum standards to protect workers faced with mass layoffs and plant closings. As suggested by its name, the statute requires notice of a layoff or plant closing, thereby enabling employees to obtain training to qualify them for new jobs.

This Part argues that the statute's effectiveness will be limited if employers do not fear the consequences of failing to provide adequate, timely notice. The absence of agency involvement and the limitation of the term "representative" to labor unions emerge as the two major weaknesses in the statute.

89. See YATES, supra note 60, at 237; see also Summers, supra note 51, at 512 (explaining that employee self-help is limited because there is little assurance of retaliation protection).
90. See LOFGREN, supra note 70, at 204–05.
91. See OSHA § 660(c).
92. See OSHA § 660(c)(1)–(2).
95. See WARN § 2102.
1. The Statutory Scheme—WARNA provides the following:

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee . . . .

WARNA, unlike OSHA, specifically defines "the term 'representative.'" Essentially, the statute requires employers to send notification of plant closing or layoffs to the union representing the affected employees. Where no majority union exists, notice must be sent to each employee.

The liability provision of the statute provides three enforcement options. These options are single employee suits (one employee suing for herself), class action suits (employee suing for herself and other similarly situated employees), or suits filed by a union on behalf of one employee or a group of employees (suit brought by a "representative of the employees"). The only role envisioned for the Secretary of Labor is to prescribe regulations to carry out the statute.

It is important to note that WARNA only protects employees working for companies with one hundred or more employees, and that the notice requirement is triggered only when a threshold number of employees are laid off. In cases of plant closings or mass layoffs, a large group of employees undergoes a shared experience. Consequently, the overall rights protected under the statute are in fact "fundamentally collective in nature."

96. WARNA § 2102(a)(1).
97. Id. § 2101(a)(4) (defining a "representative" as "an exclusive representative of employees within the meaning of section 159(a) . . . of this title").
98. See 29 U.S.C. §§ 159(a), 2101(a)(4), 2102(a). Unions are entitled to exclusive representation of employees in a bargaining unit. See id. § 159(a).
99. See WARNA § 2102(a)(1).
100. Id. § 2104(a)(5).
101. See id. § 2107(a).
102. See id. § 2101(a)(1).
103. See id. § 2101(a)(1)(3).
2. Collective Action Problems—One commentator laments the lack of enforcement under WARNA and the very few cases that have been brought under WARNA. He emphasizes several reasons why employees experience difficulty bringing cases effectively under WARNA. First, “starting a WARNA case can involve determining the proper parties to sue, the exact numbers of employees at a site, and other complex issues.” Obtaining this type of information requires a dedication of time on the part of individual workers, time that an individual may be unwilling to sacrifice given that the benefit to herself may be relatively insubstantial. She may suspect that others have undergone the same injury, and that they will gather the necessary information.

The information needed to institute an effective lawsuit represents a public good. Once one laid off employee makes the effort to compile the information, all other employees may benefit from this knowledge without investing any time to gather it. For example, if one employee uses the information in a successful court case, other employees may do the same. Thus, the information has both necessary qualities of public goods, namely jointness of supply and impossibility of exclusion.

In addition, workers often lack adequate knowledge of their rights under WARNA and adequate resources to pursue litigation. In order to obtain this public good, an employee must invest the time and money required to gather the necessary information. The absence of administrative enforcement exacerbates the classic collective action problems associated with litigation, and the statute recognizes this in part by authorizing unions to sue as representatives for employees. Unions, therefore, fill the role otherwise occupied by an agency.

106. Id. at 54.
107. See WARNA § 2104(a) (describing available benefits in the form of damages for aggrieved employees).
108. See supra notes 20–22 and accompanying text.
109. See McHugh, supra note 105, at 61 (concluding that “lack of knowledge about WARNA and a lack of resources to pursue litigation is a reason for the low number of WARNA cases”).
The collective action issues associated with OSHA and WARNA enforcement are also present in FLSA enforcement. This Part demonstrates that a central weakness of the statute is the limited ability of employee representatives or labor unions to act on behalf of employees.

1. The Statutory Scheme—The central enforcement provision of FLSA involves enforcement through the United States Department of Labor (Department). In particular, the statute provides for complete investigation by the Department’s Wage and Hour Division, and the filing of actions by the Secretary of Labor. In addition, section 216 of the statute creates a private cause of action to recover unpaid minimum wages, unpaid overtime compensation, liquidated damages, and/or reinstatement which “may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” The statute prescribes three enforcement options: suits by the Secretary of Labor, single employee suits, and opt-in class action suits.

The original version of section 216 looked more like WARNA, stating that actions could be maintained “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.” The highlighted language anticipates representational lawsuits in which a representative, such as a union, could file on behalf of a single employee or a group of employees. One reviewer of the original statute concluded that “[l]abor unions play an important part in policing the Act and


111. See FLSA § 211(a); see also YATES, supra note 60, at 242–43 (discussing how FLSA functions).

112. FLSA § 216(b).

are destined to play an even greater part." 114 The role of unions was altered by congressional changes to the representation provision made when section 216 was revised by the Portal-to-Portal Act of 1947. 115 Most reviewers of the legislative history of this statute conclude that the change was intended to lessen the number of frivolous lawsuits. 116 Others emphasize legislative history that implies a strong anti-union sentiment. 117

2. Collective Action Problems—As a result of the enforcement mechanisms in FLSA, it suffers from similar problems faced under OSHA and WARN. 118 Just as individuals are unlikely to have the incentive to file OSHA complaints, the lack of direct suits by individual workers against employers for FLSA violations may be the result of a similar incentive structure. 119 Two limitations on employee incentives to file suit under FLSA are the limited benefits of pursuing one's own claim (individual claims are often small) 120 and the high risks the employee faces due to employer retaliation. 121 Additional limitations include ignorance of the law and the difficulty of gathering information. 122 Individual employees also have limited resources, as recognized in the legislative history. 123

115. Ch. 52, § 5, 61 Stat. 84, 87 (codified at 29 U.S.C. § 216(b) (1994 & Supp. I 1995)). This section of the Portal-to-Portal Act was entitled "Representative Actions Banned." Id. The amendment was directed primarily at lawsuits filed by union officials, attorneys, and other agents and representatives of employees suing for back pay. See BUREAU OF NATIONAL AFFAIRS, PORTAL-TO-PORTAL ACT OF 1947 47 (1947) (presenting an overview of the legislative history of the act).
116. See BUREAU OF NATIONAL AFFAIRS, supra note 115, at 1-2. Congress aimed to address the concern over the flood of lawsuits following a Supreme Court case which broadened the scope of overtime compensation. The effect of the change was to outlaw representative actions only, not collective action such as class actions, and to prevent suits by "an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all." Id. at F-8 (statement of Sen. Donnell in a reprint of the Senate Judiciary Committee Report on H.R. 2157).
117. See Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 BUFF. L. REV. 53, 167 (1991). Linder believes that Congress' purpose was aimed much more at stopping unions from filing suits on behalf of large numbers of employees than at so-called "excessive litigation." Id. at 172 n.685.
118. See discussion supra Parts II.A.2, B.2.
119. See Summers, supra note 51, at 496.
120. See id. at 497 ("The average minimum pay claim is less than $200 and the average overtime claim is less than $400.").
121. See id. at 496.
122. See id.
123. See 93 CONG. REC. 2098 (1947).
Senator Aiken hypothesized about the difficulties faced by "the man who does not belong to a union at all, and is not financially able to go to the expense" of proving the existence of a contractual promise or customary practice in the industry. 124

Marc Linder argues that both changes made to section 216 in the Portal-to-Portal Act—the ban on representational suits and the opt-in procedure—have interfered with FLSA enforcement. 125 First, he notes that virtually all Portal suits are brought by unionized employees as representative actions naming a union official as the representative. 126 Second, even in cases where nonunion employees bring suits, the statute deprives them of the opt-out class action, such that they "are remitted to a very ineffectual means of pressuring employers to comply with the FLSA." 127 "T]he restrictive individualistic framework imposed by the consent requirement" 128 adds additional legal barriers to already difficult attempts at collective action.

Finally, employees face fear of retaliation by their employer for exercising their rights under FLSA. One court recognized this concern in holding that class suits are available under section 216. 129 The Third Circuit in Pentland v. Dravo Corp., acknowledged that "employees, if they wish, can join in their litigation so that no one of them need stand alone in doing something likely to incur the displeasure of an employer. It brings something of the strength of collective bargaining to a collective lawsuit." 130

III. ALTERNATIVE ENFORCERS

Because of the range of collective action problems discussed above in Part II, many of the procedures and remedies for enforcing worker rights are ineffective or unsatisfactory. Clyde Summers formulates three general conclusions regarding the shortcomings of available remedies and enforcement

124. Id.
125. See Linder, supra note 117, at 167–76.
126. See id. at 172.
127. Id. at 167.
128. Id. at 175.
130. Id.
mechanisms. First, he argues that employees cannot rely on government agencies to enforce their rights. Second, litigation is too cumbersome and expensive. Third, individuals lack the information, resources, and psychological support to enforce their rights. He suggests that by grouping their resources and selecting a representative, employees can overcome the limitations they face through collective action.

The enforcement methods described in this Part address some collective action problems better than others. Although class actions and agencies play important roles, employee participation groups and labor unions emerge as the most important enforcement mechanisms because a representative can aid employees in enforcing their rights.

A. Class Action Lawsuits

Where a statute creates a private cause of action, class action lawsuits can be used as a form of collective action. "Class actions permit individual litigants and their attorneys to construct a formal collectivity, the class, without actually mobilizing a group . . . ." Once the class is formed and the legal issue narrowed, the claim can "serve as a focal point for the mobilization of a group," and a group identity can develop around the class representatives. Furthermore, the practical benefits of class actions increase the chances of statutory enforcement.

131. See Summers, supra note 51, at 545-46.
132. See id.
133. See id.
134. See id. Similarly, Charles Craver argues that the greatest impediment to worker organization is workers' ignorance of their legal rights and their fear of employer reprisals. See CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 80 (1993).
135. See Summers, supra note 51, at 545-46.
137. Id. at 32. Despite the potential for mobilization, Garth is skeptical of the broad, political effects of class actions. See id. He concludes that class action attorneys do not seek to use the procedure as a tool to build an activist class. See id.
138. See id. at 40.
139. For example, class actions aggregate many claims that are otherwise too small to be worth an attorney's time to litigate individually. See Stephen C. Yeazell, From Group Litigation to Class Action, Part II: Interest, Class, and Representation, 27 UCLA L. REV. 1067, 1089 n.114 (1980); see also GARTH, supra note 136, at 43-44,
Despite the benefits, this method faces some of the same limitations that individual plaintiffs face because the focus of the class action remains on particular employees' efforts. First, the case needs at least one activist individual to take initiative for the good of the group. An individual may lack incentive to take the lead because named plaintiffs face greater risks. These risks include ostracism and hostility from the individual's current employer and a "scarred reputation as a trouble-maker within the industry where [the individual] works . . . ." It is also difficult for plaintiffs to get the necessary evidence to prove their claims because employers may not keep sufficient records. And finally, once a class is formed, collective action problems make it unlikely that class members will have the incentive to monitor the lawyer's behavior because each member's stake in the outcome is quite small.

The costs and benefits associated with class actions differ depending on the type of rights involved. This section examines the availability and effectiveness of class action litigation under OSHA, WARN, and FLSA. Class actions are available under WARN and FLSA, but they prove effective only where a representative can sue on behalf of employees. Thus, because WARN provides for such representation, it should serve as a model for statutory amendments to OSHA and FLSA. In addition, OSHA should be amended to include litigation as an enforcement method, and the opt-in requirement of FLSA should be removed to bring the act in line with the Federal Rules of Civil Procedure.

OSHA foresees only a limited role for litigation and does not provide for class action suits. Employees are dependent on the Health Administration to conduct frequent, effective inspections and to impose penalties to deter future violations.

47 (arguing that a certified class justifies the initial expense of litigation and increases attorney efforts).
140. See GARSH, supra note 136, at 21 (concluding that starting a class action "takes remarkable initiative and some anger").
141. Sofia C. Hubscher, Making It Worth Plaintiffs' While: Extra Incentive Awards to Named Plaintiffs in Class Action Employment Discrimination Lawsuits, 23 COLUM. HUM. RTS. L. REV. 463, 470 (1991-92); see also GARSH, supra note 136, at 24 (finding certain situations in which the attorney may have difficulty getting additional plaintiffs involved).
142. See, e.g., Summers, supra note 51, at 492-93 (referring to employer record-keeping violations, where the investigator is forced to track down employees in order to collect payroll information).
143. See GARSH, supra note 136, at 9.
144. FED. R. CIV. P. 23.
OSHA should be amended, using WARN as a model, to provide an opportunity for a class action on behalf of similarly situated employees injured due to statutory violations.

Litigation is the only enforcement scheme created under WARN. The statutory language allows private suits on behalf of "other persons similarly situated," and courts have held that this language, as well as the nature of the statute, provide for class action suits under Federal Rule of Civil Procedure 23. In *Finnan v. L.F. Rothschild & Co., Inc.*, the court noted that WARN "seems particularly amenable to class litigation. By its terms, WARN is applicable only in the context of employer action which affects a large number of employees." More specifically, in concluding that the plaintiffs met the initial requirements of Rule 23(a), the court in *Cruz v. Robert Abbey, Inc.* found that "plaintiffs' limited economic resources makes it unlikely that separate actions would be brought if the plaintiffs' motion [for class certification] were denied." The two cases both recognize the reality of collective action difficulties, and that the availability of the class action procedure alleviates those difficulties to some degree.

WARN goes one step further by allowing representational lawsuits. Under WARN, a union representative may sue on behalf of a class of employees. Although this alternative may avoid some of the initial problems in forming a class action, the union representative may have very little stake in the lawsuit. A union is not crucial to start a WARN suit. Because WARN suits most likely involve employees who have been laid off, concerns regarding plaintiffs' fear of a continuing

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147. 726 F. Supp. at 465.
148. *Id.*
149. *FED. R. CIV. P. 23(a).* Rule 23(a) lists four prerequisites to a class action: numerosity, common questions of law or fact, typicality of claims or defenses of class members, and class representatives who fairly and adequately protect class interests. *See id.* Section (b) provides three types of classes with additional prerequisites to those in section (a). *See id.* 23(b).
150. 778 F. Supp. at 612.
151. *Id.* at 612.
hostile working relationship are absent. For these reasons, litigation may not be one of the better methods for enforcing WARN.

In contrast to OSHA and WARN, litigation is one of the basic enforcement mechanisms under FLSA. Specifically, the statute creates a private cause of action in addition to lawsuits brought by the Secretary of Labor on behalf of aggrieved employees. The Secretary's role is discussed later.

Despite the individualized nature of the remedy in FLSA actions, violations of the Act usually apply to a group or category of individuals. While FLSA anticipates group litigation, the procedure differs from that under Federal Rule of Civil Procedure 23. Under FLSA, potential plaintiffs must opt-in, that is, give written consent to join the class. In contrast, the federal rules utilize an opt-out procedure.

As a result of the opt-in requirement, FLSA class actions are less effective than they could be in enforcing the statute. First, the requirement mandates availability of information regarding legal rights and procedures because potential plaintiffs must affirmatively act to be included. Also, it is unclear how much latitude named plaintiffs have to notify potential co-plaintiffs. The statute itself gives no guidance to courts about whether the original plaintiff is allowed to provide notice.

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154. See infra Part III.B.3.
155. See Summers, supra note 51, at 497.
156. See FLSA § 211(b).
157. See id. One author proposes a possible solution to this procedural dilemma. See Janet M. Bowermaster, Two (Federal) Wrongs Make A (State) Right: State Class-Action Procedures As An Alternative to the Opt-In Class Action Provision of the ADEA, 25 U. Mich. J.L. REFORM. 7, 51 (1991) (noting that federal causes of action can sometimes be brought in state court, where more protective state procedural rules may apply). FLSA litigants may file in state court to take advantage of greater protection that may be available under state rules of procedure. However, in state court an employee will have to show that the employer owes her more than the minimum amount required under state law, which may be higher than the federal minimum wage. See YATES, supra note 60, at 243.
158. See Fed. R. Civ. P. 23(c)(2)–(3) (allowing class actions under (b)(1) or (b)(2) to proceed without notice of an option to request inclusion in the class, but requiring such notice for actions under (b)(3)). For an interesting discussion of the philosophies underlying the structure of Rule 23, see Yeazell, supra note 139.
159. See Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267–68 (10th Cir. 1984) (recognizing that “the § 216(b) action tends to discourage collective litigation by virtue of the requirement of an affirmative act by each plaintiff,” but nevertheless refusing to issue notice to putative plaintiffs).
but the Supreme Court has held that district courts have discretion in appropriate cases to facilitate notice to potential plaintiffs.\textsuperscript{161} While this holding is somewhat helpful, the opt-in requirement continues to discourage claims by nonunion employees. The requirement "has injured unorganized workers, who, deprived of the opt-out class action, are remitted to a very ineffectual means of pressuring employers to comply with FLSA."\textsuperscript{162} The opt-in requirement creates a particularly acute problem in minimum wage cases because employees are difficult to locate due to frequent job changes.\textsuperscript{163}

\textbf{B. Federal Agency Enforcement}

In light of the limitations of class actions, potential intervention by the Department of Labor is an important alternative method for overcoming collective action problems. Both OSHA and FLSA create a variety of roles for the Department. This Part analyzes how effectively those statutory roles address the problems associated with collective action. As for WARN, the statute does not empower the Department to act on behalf of employees. Granting the Department power to enforce WARN is a potential area of reform. This reform could be achieved by combining the roles played by the agencies under OSHA and FLSA and using those statutes as a model.

1. Agency Action Under OSHA—Under OSHA, the Secretary of Labor is responsible for inspecting facilities,\textsuperscript{164} issuing citations,\textsuperscript{165} and handling employee allegations of retaliation

\footnotesize{(discussing a circuit split on the issue of whether plaintiffs can send notice to potential plaintiffs of a pending action under section 216(b) of FLSA, and concluding that a negative answer could effectively eliminate the class action tool for FLSA and ADEA cases). Note that this article was published before the Supreme Court decided the issue.}

\textsuperscript{161} See Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989). This case is relevant to FLSA because section 216(b) is incorporated into the ADEA by section 626(b). See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1994).

\textsuperscript{162} Linder, supra note 117, at 167. Linder is extremely critical of cases and law review articles that play down the restrictive nature of FLSA procedures. See id. at 167-75. He concludes that "the restrictive individualistic framework imposed by the consent requirement" limits the remedial value of the statute. Id. at 175.

\textsuperscript{163} See Summers, supra note 51, at 497-98.


\textsuperscript{165} See id. § 658(a).
by employers. The agency may be most effective at the initial complaint stage, because it only takes knowledge of a phone number or an address and a small investment of time to file a complaint. If a worker is likely to take any action at all, she might at least make a phone call or write a letter to the agency. This is based in part on the cost-benefit analysis the employee performs.

Under OSHA, the collective good of a safety inspection is provided by an external source, the Department of Labor. Consequently, it takes merely a one-time commitment to get the agency to act for the benefit of all. This remedy is limited depending on the seriousness of the alleged safety hazard. If the complaint does not require immediate attention, the Occupational Safety and Health Administration (the Administration) sends a letter to the employer and a copy to the employee. If the employer fails to take corrective action, the employee must notify the agency again. This procedure may increase the costs and risks to the employee; and if her stake in the outcome is not high enough, she will probably wait for someone else to act.

Overall, the availability of an administrative scheme and an active agency establishes a permanent representative who can advance the collective interests of employees. Because OSHA has the ability to obtain workplace improvements before accidents happen, an administrative component is particularly important for health and safety enforcement. However, the Administration’s power is limited. A former Assistant Secretary of Labor for Occupational Safety and Health admitted that “OSHA cannot do the task alone.” He emphasized that enforcement can only go so far, and “[t]he key is to convince those affected by OSHA that safety and health in the workplace is beneficial to all.”

Although agency enforcement is not optimal, and the Administration faces severe limits, other alternatives should

166. See id. § 660(c)(2).
167. See HARDIN, supra note 11, at 52.
168. See Whiting, supra note 39, at 265.
169. See id.
170. See id. at 260.
172. Id.
173. The Occupational Safety and Health Administration’s lack of resources limits the number of inspections it can perform. See Summers, supra note 51, at 509–10. In
not completely eclipse the agency's role. It is insufficient to argue merely that the Administration's role as enforcer of workplace health and safety should be abolished. "We cannot imagine a comprehensive program to secure workplace health and safety other than through the resources of a government agency such as OSHA."174

Kneisner and Leeth discuss several problems with OSHA in particular and with regulation in general. They also suggest reforms to solve these problems. First, they assert that "there is no indication that OSHA's actions have led to any significant reductions in injuries on the job."175 In place of the current scheme, they propose alternative ideas that do not address the collective action problems associated with those alternatives.176 Because they believe that OSHA gets too involved in minor hazards, they mention a Republican proposal that would require workers to report their concerns about health and safety to their employers before going to the Administration.177 Classic problems associated with lack of incentive due to risk of retaliation call into question the plausibility of this method.178

In response to the lack of adequate penalties imposed by the Administration, Kneisner and Leath propose a second change—"allowing workers to sue their employers for clear-cut cases of negligence."179 The problem with this solution is that all of the limitations typically associated with litigation also surface here, including high costs, low incentives, and proof problems because of limited access to employer records (if in fact such records exist at all). And even if this option has some advantages, it could simply be added to the statute rather than replacing the agency's role altogether.

general, regulatory enforcement is inadequate because there are too many work sites, and the activity at those sites varies too much. See Freeman & Rogers, supra note 12, at 22.

174. Rabin, supra note 8, at 195.
176. One particular alternative, that "OSHA would set performance goals and allow firms to determine how best to achieve the desired outcomes," id. at 51, ignores collective action problems among companies themselves. The so-called Prisoner's Dilemma model is often used to depict why an individual (here a company) will choose not to make the decision that is best for all, and instead focus on self-interest. See HARDIN, supra note 11, at 25-30.
177. See Knesner & Leeth, supra note 175, at 52.
178. See supra notes 23-30 and accompanying text.
179. Kniesner & Leeth, supra note 175, at 54.
In support of their proposals, Kniesner and Leeth claim that workers have fairly accurate information on the frequency of workplace accidents. They neglect to mention, however, workers' lack of knowledge about their legal rights. Their acknowledgment that "information must be presented in a way that permits informed judgments" actually supports an increased role for the Administration, because it can require employers to supply this information and enforce regulations designed to keep workers informed. For example, the Administration supplies information through agency-sponsored training, education, and consultation programs.

Another crucial role for the Administration is handling statutory discrimination claims. But enforcement of the antidiscrimination provision is inadequate. When an employee files a complaint alleging employer retaliation for involvement in an OSHA investigation, the process of dealing with the complaint is painfully slow. Several thousand employees file complaints alleging retaliation with the Administration each year, and the Department of Labor pursues less than one percent of them. Because the Department has no time constraints for evaluating these complaints, claims "languish for years in a bureaucratic black hole." From 1980 to 1992, the Department determined that more than five thousand cases had evidence of whistleblower discrimination, yet only eight cases were litigated on behalf of whistleblowers. The logical conclusion is that either some additional enforcement method must be made available to employees or Labor Department resources must be increased.

2. Agency Action Under WARN---WARN does not provide for the involvement of an agency in enforcing the statute. One commentator proposes an amendment to WARN providing for filing claims with the Department of Labor and investigation by the Department. Also, a government agency could provide activities to better advise unions and workers of their rights. Consequently, statutory reform to WARN

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180. See id. at 55.
181. Id. at 56.
182. See Whiting, supra note 39, at 270.
183. See YATES, supra note 60, at 237.
184. See Jefferson, supra note 46, at 49.
185. Dodge & Shuck, supra note 47, at 11.
186. See id.
187. See McHugh, supra note 105, at 67.
188. See id. at 70.
should involve inclusion of a provision empowering an agency to field complaints and assist in collecting information. In addition, the agency should have the ability to bring suits on behalf of employees.

3. Agency Action Under FLSA—The Secretary of Labor's role under FLSA focuses more on litigating suits on behalf of workers than on preventing problems. Because direct suits by employees against their employers are few in number, the Department's role is key. Even shortly after the Act's passage in 1939, however, lack of funding caused enforcement problems. "The range of its regulatory activity, together with the limited resources of the Wage and Hour Division [of the Department of Labor], ... make adequate administration impractical, if not virtually impossible, without the aid of outside sources." Recent congressional fact-finding revealed that Wage and Hour Division field offices are "overwhelmed, severely understaffed, and lacking essential equipment and necessary supplies." Certain statutory weaknesses also make the Division's job more difficult. For collective action purposes, agency action under FLSA, like under OSHA, needs a supplemental method for enforcement.

Another limitation on suits by the Wage and Hour Division involves the remedies available. Unlike Department-initiated suits, private litigants can and often do recover liquidated damages. But once the Secretary files an action against an employer, individual employees are foreclosed from bringing private suits. This increases the need for employees to understand their rights and act quickly. When the agency chooses not to pursue a case, employees are left to their own...

189. See Summers, supra note 51, at 496.
191. See Herman, supra note 114, at 370.
192. Id. at 376.
194. For a discussion of the statutory weaknesses, see Enforcement Hearings, supra note 190, at 162 (identifying lack of incentive to maintain payroll records, requirement for litigation to enforce the statute and limitations on collection of back wages as weaknesses of the statute).
195. See Summers, supra note 51, at 498. In an injunction suit, however, the employee cannot collect liquidated damages. See YATES, supra note 60, at 243.
devices. Such individuals are often working at minimum wage jobs and have neither the means nor the information necessary to pursue a legal settlement.\textsuperscript{197} The Department should litigate those cases that involve many employees to whom small amounts of money are owed because it is precisely these situations which pose the most serious collective action problems.\textsuperscript{198}

\textit{C. Employee Participation Groups}

Employee participation in the workplace has emerged as a means for improving the work place and protecting employee rights. Since the 1980s, companies have instituted a variety of efforts to involve workers in more aspects of the business.\textsuperscript{199} This Part focuses on how well these participation groups can mitigate the collective action problems associated with enforcing OSHA, WARN, and FLSA.

"An alternative to ... inefficient noncooperative solution[s] is a cooperative strategy in which all firm members choose to work at the socially optimal level."\textsuperscript{200} This type of cooperation and workplace organization is crucial for enforcement of the statutes discussed here because external legal controls\textsuperscript{201} are unlikely to be sufficient.\textsuperscript{202} "[A] well-designed system of worker representation ... can usefully supplement state efforts to regulate labor market outcomes."\textsuperscript{203} As beneficial as employee participation can be for a company, however, employees must have incentives to participate. This includes perceiving the programs as legitimate and as a source of empowerment.

A major debate in this area is whether these participation groups can replace unions, or whether they are effective only

\begin{itemize}
\item \textsuperscript{197} See Enforcement Hearings, supra note 190, at 170–71.
\item \textsuperscript{198} See id. at 170 n.11 (noting that in such cases it will be harder for employees to obtain the assistance of private attorneys).
\item \textsuperscript{199} See U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 29 (1994) [hereinafter FACT FINDING REPORT].
\item \textsuperscript{201} See supra Part III.B (discussing the role of agencies).
\item \textsuperscript{202} See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 159 (1990).
\item \textsuperscript{203} Freeman & Rogers, supra note 12, at 16.
\end{itemize}
when working with unions. Some argue that in order to serve as an independent source of employee power leading to long-term changes, a union must exist as a backdrop to the participation groups. On the other hand, firmly established, employee-controlled groups may serve as an attractive alternative to unions. While a survey done by the AFL-CIO showed that nonunion workers recognize that concerted activity is more useful and effective than acting alone, the survey also found that "non-union workers do not perceive unions as pursuing an institutional agenda drawn from the needs and desires of their members." Unions themselves have offered some support for "limited purpose, statutory committees to assist in public regulation." Where a union already exists, the union would coordinate the committees; where there is no union, employees would hold secret ballot elections to determine their representatives.

Difficulty in initial organization of these groups stems from classic collective action problems. Being an activist employee is both time consuming and risky, and the rational employee will probably not participate if the benefits do not outweigh the costs, or if she can free-ride on the benefits achieved by the efforts of others.

204. Paul Weiler concludes that nonunion employee involvement may provide participation, but there is no serious protection from management. See WEILER, supra note 202, at 34.
205. See AFL-CIO COMM. ON THE EVOLUTION OF WORK, supra note 28, at 11.
206. Id. at 9. Nonunion employees also believe that unions care solely about union members and not the workforce as a whole. See CRAVER, supra note 134, at 65. Craver argues that unions need to branch out and seek gains beyond the narrow interests of a particular bargaining unit. See id. By providing benefits for a more diverse range of employees, unions will demonstrate the influence that collective action can have, both politically and in bargaining with the employer. See id. at 65–66. In order to finance these efforts, unions could impose service fees on nonmembers. See id. at 70. Still, the union should provide additional benefits available only to members. See id. at 70–71. This type of associational membership was also recommended by the AFL-CIO in 1985. See AFL-CIO COMM. ON THE EVOLUTION OF WORK, supra note 28, at 15–16.
207. See AFL-CIO COMM. ON THE EVOLUTION OF WORK, supra note 28, at 38.
208. See id. A government commission similarly has recommended the expansion of participation groups with the employees choosing whether or not to have formal representation. See U.S. COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS [Jan. 9, 1995] (BNA Special Supp.) S-12-17 (Jan. 10, 1995) [hereinafter COMMISSION REPORT].
209. See supra notes 23–30 and accompanying text.
210. See supra notes 23–30 and accompanying text.
In one case study, the workers surveyed expressed a strong interest in issues relating to the quality of working life.\textsuperscript{211} In particular, the study found that workers already involved in participation programs had a stronger interest in quality of working life issues than nonparticipating employees.\textsuperscript{212} The researchers proposed two reasons for this result.\textsuperscript{213} First, those workers who initially volunteer for quality of working life team activities may start out with a higher overall interest in participation. Second, participation may increase an employee's interest in having a say about her working environment.\textsuperscript{214} The first reason is consistent with the need for motivated individuals to initiate class actions.\textsuperscript{215} The second reason is consistent with the idea that worker commitment to the job improves through cooperation.\textsuperscript{216} Once an employee recognizes the benefits of cooperation and commitment, the free-rider problem is mitigated by continual teamwork toward mutual interests.

From a legal standpoint, employee work groups can provide additional protection for employees when they confront management. Pursuant to section 7 of the National Labor Relations Act,\textsuperscript{217} employees have the right to form and join organizations and engage in concerted activities for the purpose of protecting the rights of the group.\textsuperscript{218} The protection offered by "concerted" activity provides additional legal protection against employer retaliation, thereby lessening the risks an individual faces.


\textsuperscript{212} See id. at 110.

\textsuperscript{213} See id.

\textsuperscript{214} See id. The study also found that an average of 35 percent of nonparticipating workers were interested in getting involved. See id. at 123. However, the range across the four cases studied went from 15 percent interest to 63 percent. See id. at 123–24. The authors concluded that the interest level depended on how the specific programs were perceived by the workers. See id. at 124.

\textsuperscript{215} See supra notes 140–41 and accompanying text.

\textsuperscript{216} See Peter J. Robertson, & Shui-Yan Tang, The Role of Commitment in Collective Action: Comparing the Organizational Behavior and Rational Choice Perspectives, PUB. ADMIN. REV., Jan.–Feb. 1995, at 67, 69. Robertson and Tang present a useful discussion of two models for explaining how commitment affects collective action. See id. at 69–70. The first is Olson's brand of rational choice, which finds cooperation inherently problematic. See id. The second is organizational behaviorism, which takes for granted individual willingness to act in accordance with group interests. See id. Both theories are useful for explaining how and why workplace participation groups develop.


\textsuperscript{218} See id § 157.
1. Employee Participation Under OSHA—Safety and health committees are widely used to monitor and improve the workplace. Such committees, when properly structured and planned, "can significantly improve safety and health protection" for workers.220 Employee participation is particularly useful to an OSHA enforcer because of the nature of the rights being protected. Unlike the interests protected by WARNA and FLSA, employee safety and health require ongoing, day-to-day enforcement, which an OSHA agent cannot accomplish on his own. Also, where union contracts traditionally focus on negative aspects of the job, such as protection from injury, participation groups seek employee contribution to positive aspects of the job.

Existing participation groups can be especially effective by cooperating with the Occupational Safety and Health Administration. One proposal for employee participation recommends that the Administration develop guidelines allowing workplace programs to be internally responsible for applying the vast number of regulations that exist.222 The existence of an agency that can step into the picture when needed, in combination with an on-site organization that actively seeks a safe workplace, seems like the best method for overcoming collective action problems. Furthermore, the presence of a representative may increase employee involvement in an OSHA walk-around.

Despite these advantages, there is at least one situation where unions prove to be better enforcers than safety committees. When an employee files a workplace safety grievance, the process of resolving that grievance internally may take longer than if a local union files an OSHA complaint.223 By filing the complaint, the union puts pressure on management to deal with the grievance more quickly. However, there is no

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222. See Commission Report, supra note 208, at S-14. Under this proposal, workplaces that have approved safety and health programs in place would get preferential OSHA treatment. See id. One concern with preferential treatment is that it seems to move too much toward the proposals advanced by Kniesner & Leeth. See discussion supra notes 175–82 and accompanying text.
apparent reason why an entrenched safety committee cannot use the same strategy.

2. Employee Participation Under WARNAA—While OSHA envisions a role for any representative of employees, only a union has authority under WARNAA to receive notice for all employees and to sue on their behalf. Thus, another potential reform under WARNAA is to expand the statutory definition of “representative” beyond labor unions. An established representative is crucial because it may be easier for aggrieved non-employees to organize a class action when a group relationship and ongoing reliance on representatives already exists. When groups of individuals have already demonstrated a high level of commitment to workplace cooperation and involvement, those individuals will be more likely to engage in further behavior oriented toward the good of the entire group.

3. Employee Participation Under FLSA—Participation groups formed to deal with wage and hours under FLSA are more problematic because they might fall directly under prohibitions contained in the National Labor Relations Act (NLRA). Under section 8(a)(2), it is an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization,” where “labor organization” is defined as any organization or employee representation committee that exists for the purpose of dealing with employers concerning wages, rates of pay, or hours of employment. If employee participation groups are prohibited as an unfair labor practice, they cannot be used to improve FLSA enforcement.

Not all participation groups, however, will run afoul of the NLRA. If the group is run more like a traditional labor union, where employees elect their own representatives and contribute the money necessary to keep the group financed, employer interference will be absent and the group will avoid an unfair

224. See 29 U.S.C. § 159(c) (1994) (requiring that exclusive representatives must be selected by a majority of employees in the unit they will represent); id. § 2101(a)(4) (defining “representative” as an exclusive representative within the meaning of § 159(a)); id. § 1204(a)(5) (allowing a “representative” of employees to enforce liability).

225. See Robertson & Tang, supra note 216, at 69.


227. Id. § 158(a)(2).

228. See id. § 152(5).
labor practice charge. It is likely that employees will set up such independent organizations, because it appears that workers express a high interest in having a say about issues relating to wage and grievance resolution.

The Wage and Hour Division of the Department of Labor has had some success with programs in which workplace groups are responsible for assuring compliance with regulations. In the 1960s and 1970s, the Wage and Hour Division operated a voluntary self-audit program known as Compliance Utilizing Education (CUE). The program involved training seminars for company officials in personnel departments who then verified company compliance with wage and hour laws. CUE proved successful but the program was terminated because of the perception that the Wage and Hour Division was shirking its enforcement duties. Nevertheless, this example provides hope for future programs in which workplace groups supplement agency enforcement.

D. Labor Unions

For a labor union to participate in collective bargaining, it must first become the exclusive representative of a group of employees. To attain exclusive status, a labor organization must gain the support of a majority of the employees it wishes to represent. As the exclusive bargaining representative, the union can represent and bargain for all employees in that unit, including employees that did not vote in favor of representation. Unions provide a collective voice, allowing workers to communicate with management.

229. See generally Electromation, Inc. v. NLRB, 35 F.3d 1148, 1157-70 (7th Cir. 1994) (discussing and applying a two-prong test which requires that a participation group be both a labor organization and be dominated, interfered with, or influenced by the employer in order to be an unfair labor practice).

230. See KOCHAN, supra note 211, at 107, 111-12 (noting survey data which suggests that a majority of workers in its sample want a substantial say over wage and hour grievance procedures).

231. See COMMISSION REPORT, supra note 208, at S-62.

232. See id.

233. See id. at S-63.


235. See id.

236. See id.

237. See FREEMAN & MEDOFF, supra note 23, at 8.
When a union successfully obtains benefits from an employer, those benefits apply to both union and nonunion employees in the represented unit. Because such benefits are collective gains for the entire workforce, there is incentive for employees to remain nonunion and to free-ride on the efforts of others. Free-riding may explain problems with low membership and low involvement in union activities.

Legislators have attempted to respond to concerns about free-riders. The National Labor Relations Act permits unions and employers to agree to "union shop" clauses requiring employees to become members of the union within thirty days of being hired. Commentators argue such coercion is needed to enable unions to supply collective goods to large groups.

Despite the free-rider problem, workers do join unions and serve as active members. The decision to participate depends on how much the collective action will "cost" the individual worker. For example, showing up to a meeting may require only one hour of time, whereas participating in an economic strike could mean losing one's job to a replacement worker.

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239. The free-rider problem is exacerbated as the union gets larger. The larger it becomes, the less each individual's contribution will have an effect and the less the absence of her contribution will be noticed. Therefore, the larger a union becomes, "the less it will further its common interests." OLSON, supra note 11, at 36. In addition, an individual sees her contribution as a less effective way of generating a kind of quid pro quo among other members. See HARDIN, supra note 11, at 133 (arguing that as groups get larger, "the efficacy of contingent behaviors . . . is likely to decline").


241. See id. at § 158(a)(3) ("[N]othing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement . . ."). It is permissible to require "membership" only from a financial standpoint. See Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1953) (allowing "unions security agreements . . . to compel payment of union dues and fees"); NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) ("It is permissible to condition employment upon membership, but membership . . . may in turn be conditioned only upon payments of fees and dues."); Communications Workers of Am. v. Beck, 487 U.S. 735, 745 (1988) (noting that membership may only be required in the form of financial support for "collective bargaining, contract administration, and grievance adjustment").

242. See OLSON, supra note 11, at 71 (arguing that without compulsory membership and coercive picket lines, the individual has little incentive to join a union).

243. See HARDIN, supra note 11, at 15.

244. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938) (holding that employers can replace striking employees, and do not have to discharge the replacements when strikers want to resume their employment).
Cost must be considered in light of the potential benefits of successful collective action. The value of collective action in terms of costs and benefits varies depending on the circumstances of each situation. But it seems clear that when the union calls for a strike, higher participation increases the pressure on the employer, thereby increasing workers' bargaining power and obtaining employer concession to more demands. In this way, action by unions can improve enforcement of OSHA, WARN, and FLSA.

1. Union Action Under OSHA—Because OSHA is best enforced through collective action, a union is a natural enforcement vehicle. Studies show that OSHA enforcement is significantly higher when there is a union in the workplace.

When a union is involved during the early stages of OSHA enforcement, a union representative can file the formal complaint and protect employees from retaliation. A union presence adds protection over and above the confidentiality provisions of OSHA. The union's role becomes even more crucial as time commitments and risks of retaliation increase later in the process.

An important part of statutory enforcement is the physical inspection done by the Secretary of Labor or his agent. Although OSHA provides an opportunity for a representative of the employees to join the employer and inspector in the

245. See Elster, supra note 10, at 141.
246. See YATES, supra note 60, at 245.
247. See Patricia A. Greenfield & Robert J. Pleasure, Representatives of Their Own Choosing: Finding Workers' Voice in the Legitimacy and Power of Their Unions, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 169, 171 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (explaining that unions use collective bargaining to establish grievance and arbitration procedures). Additional union involvement in the enforcement of OSHA may be easier said than done. Lack of government commitment and resources is one reason that American workers are still injured and killed on the job. See Jefferson, supra note 46, at 47. Another is that organized labor itself is "too busy fighting for its own life to fight for the lives of workers." Id.
248. See David Weil, Enforcing OSHA: The Role of Labor Unions, 30 INDUS. REL. 20, 21 (1991). Additionally, the higher the percentage of unionized employees, the higher the likelihood that an OSHA complaint will lead to an inspection. See id. at 26–27.
249. See LOFGREN, supra note 70, at 205 ("Unions can provide a shield for employees by presenting the health or safety concern to management and later if necessary to OSHA. The union representative thus takes any 'heat.'").
Collective Action Problems

walk-around, one author has found that employees rarely join the inspection when there is no union. This is understandable because nonunion forms of employee representation have several legal and practical limitations. But, when a representative of the employees is present during the walk-around, the intensity of the inspection increases which may lead to better identification of safety hazards.

Beyond filing complaints and participating in walk-arounds, the presence of a union increases access to health and safety information; employers are required to provide unions with such information for collective bargaining purposes. The union can utilize the information, in conjunction with scientific studies it collects, to “form the basis for a rank-and-file education campaign.” It seems highly unlikely that one individual would have the incentive or the bargaining power to collect and organize the amount of information necessary to educate the entire workforce as the union does.

One benefit of a better informed workforce is increased individual participation resulting from increased awareness of the filing procedures. Another is an increased ability to provide substantive assistance to the inspector’s investigation. One author has found that union representatives often

251. See OSHA § 657(e).
252. Summers, supra note 51, at 502. The statute seems to anticipate employee involvement even in the absence of union representation. A “representative authorized by [the] employees . . . [may] accompany the Secretary . . . during the physical inspection.” OSHA § 657(e). Furthermore, “representative” is neither qualified by the word “union” nor defined at all in the definition section of the statute. See id. § 652.
253. For a discussion on the employee participation alternative, see supra Part III.C. Although unlikely, some nonunionized employees do select representatives. In cases involving mine workers, employee representatives participate in walk-arounds despite the absence of union representation. See, e.g., Magma Copper Co. v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981).
255. An interesting caveat must be addressed here. Surveys in the 1970s indicated that some union representatives avoided participating in a walk-around for fear of causing a plant closure and being responsible for lost jobs. See Zalusky, supra note 223, at 229. Although this fear is not quite part of the collective action problem, it demonstrates an additional practical limitation on the effectiveness of union representatives.
256. See YATES, supra note 60, at 117–18. Also, employers generally must allow union agents to enter plant premises when necessary to monitor health and safety conditions. See NLRB v. American Nat’l Can Co., 924 F.2d 518, 524 (4th Cir. 1991).
257. YATES, supra note 60, at 244. Unions also institute health and safety programs that increase employee exercise of their rights by providing on-the-job risk education and information about legal rights. See Weil, supra note 248, at 22.
258. See Weil, supra note 248, at 27 (explaining a study which demonstrates that more employees file complaints when a union is present in the workplace).
259. See id. at 28.
feel freer than nonunion members to express opinions to inspectors. This may result from improved information, better understanding of the importance of that information, and confidence in increased protection from employer retaliation.

2. Union Action Under WARN-A—In light of the collective nature of rights protected by WARN, future effectiveness of the Act depends on a strong union role. The statute itself recognizes the presence of a "representative of employees." Union importance under WARN is enhanced because, in comparison to OSHA and FLSA, no administrative agency has tried to enforce the civil penalty provision in the statute. While agency action would probably be helpful in enforcing WARN because, as an external source of enforcement, it can increase employees' willingness to act for the collective good, this has not occurred. If an agency were involved, an employee could simply file a complaint and leave the investigation to that agency, thus lowering the cost to the employee and consequently raising her likelihood of acting. Under WARN, where there is no agency involvement, a union can serve a similar function because it is a pre-existing organization with the time and resources to investigate the situation and file a complaint on behalf of the employees it represents. It appears that Congress contemplated this type of role for unions by requiring employers to provide notice of mass layoffs and plant closings to the union instead of to individual employees when a union exists. Furthermore, the law is now clear that under WARN, a union representative has standing to sue an employer for union members' damages without joining individual employees.

260. See LOFGREN, supra note 70, at 204.
262. See McHugh, supra note 105, at 67.
263. See HARDIN, supra note 11, at 50–53; see also supra Part III.B.1.
264. See supra Part III.B.1.
265. WARN § 2102.
266. See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 116 S. Ct. 1529, 1531 (1996). Brown argued that WARN eliminates a union's power to sue on behalf of its members because a union is not entitled to a penalty in its own right. See id. at 1533. The Court rejected this argument. See id. As required by the doctrine of associational standing: The union's members would have had standing to sue on their own, the interests the union sought to protect were germane to its purpose, and neither the claim nor the relief sought required individuals' participation in the lawsuit. See id. at 1534.
The ability of an association such as a union to bring a lawsuit is an important method of enforcing collective rights. In fact, the Supreme Court recognized that "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."\footnote{International Union v. Brock, 477 U.S. 274, 290 (1986). If one envisions a labor union as having an identity separate from its individual members, see Feldman, \textit{supra} note 22, at 745, and a purpose directed at the association itself, then associational standing makes sense on the ground that the union "seeks to protect an interest that is identifiably collective and therefore not equivalent to any atomistic interests." \textit{Id.} at 749.} In addition to the improved effectiveness of union suits as compared to individual suits, representational lawsuits can also overcome collective action problems suffered by class actions. First, once a pre-existing association such as a union is in place, no particular employee needs to start the process for everyone else. Second, an association "can draw upon a pre-existing reservoir of expertise and capital."\footnote{Brock, 477 U.S. at 289.}

Finally, in addition to the role it plays when an employer has already violated the act, a union presence may also prevent litigation by increasing employer compliance with WARN Act notice requirements.\footnote{WARNA § 2102.} During debates in the Senate prior to passage of WARN Act, Senator Metzenbaum argued that "[i]t is the nonunion operations that fail to give adequate notice, more then [sic] the union operations."\footnote{WARNA § 2102.}

3. \textit{Union Action Under FLSA}—The current version of FLSA limits the role of unions because the 1947 amendments\footnote{See supra notes 113–117 and accompanying text.} eliminated the provision allowing representational suits.\footnote{Portal-to-Portal Act of 1947, Ch. 52, § 5, 61 Stat. 84, 87 (current version at 29 U.S.C. § 216(b) (1994 & Supp. I 1995)).} This change closed one avenue through which unions could address collective action problems. This is therefore a crucial area of needed statutory reform—reinstatement of representative actions by unions or any employee representative.

Despite repeal of union rights to sue on behalf of employees, unions can still play a major role in successful lawsuits. The union can become a crucial source of information. "The role of
labor organizations would shift to one of providing advice and assistance to individuals . . . seeking unpaid wages or overtime pay . . . ." 273 Even a non-majority union can demonstrate the benefits of a union presence by informing employees of their individual employment rights and helping them enforce those rights. 274

Furthermore, the existence of a group representative may increase employees' ability and willingness to begin a class action. 275 If employees feel empowered by the union's presence, they may feel empowered to step forward and advance the collective good. Especially in cases in which the employee desires to continue her employment, the presence of the union increases the chance that she will be able to do so without retaliation.

A union presence may also facilitate agency enforcement at a particular plant because the Department of Labor may conduct more thorough investigations if a union is involved in the process. One example of such investigations involved an extensive investigation of Food Lion, a large supermarket chain allegedly violating federal wage and hour laws. 276 The Wage and Hour Division conducted fifty investigations from 1979 through 1990. 277 Later, the union representing Food Lion employees filed a supplemental complaint and provided the agency with additional information regarding violations. 278 The agency addressed the union complaint and "had several meetings with [union] representatives to keep them apprised of the progress" of the investigation. 279 If there had been no union assisting the employees and serving as a contact for the agency, the investigation might not have been as thorough.

273. Craver, supra note 134, at 70; see also, Rabin, supra note 8, at 206-07 (proposing that unions could serve as a source of advice and guidance for individuals regarding their private rights by charging a nominal fee). A union could also assist the employee in preliminary fact-finding efforts. See id.

274. See Clyde Summers, Unions Without Majority—A Black Hole?, 66 CHI.-KENT L. REV. 531, 542-43 (1990). "When unions cannot represent employees for the purpose of collective bargaining, non-majority unions can represent employees for the protection of individual employment rights." Id. at 545. Despite Summers' reference to "individual employee rights," many of the rights that unions can help enforce most effectively are in fact collective rights.

275. See supra Part III.A (discussing class actions as enforcers of statutes).

276. See Enforcement Hearings, supra note 190, at 2.

277. See id. at 213.

278. See id. at 215.

279. Id.
Finally, the concept of group action offers general protection to employees who engage in concerted activity. The presence of a union supporting an employee's assertions of her rights transforms the individual's complaint into "concerted activity." In fact, even in the absence of exclusive representation, other rights are still available.

CONCLUSION

The need to improve enforcement of worker rights legislation is clear, but the best method to do so is unclear. The most effective reform would involve including provisions in OSHA, WARN, and FLSA allowing class actions, expanding agency involvement, and creating roles for employee representatives, either through unions or otherwise. Overall, strengthening the roles available to employee participation groups may be the most productive route in light of diminishing union membership.

This Note proposes formalizing this alternative. First, Congress should amend OSHA and define "representative" in a way that provides a method for electing a representative. Second, representational suits should be reintroduced into FLSA, allowing a representative of aggrieved employees to bring suit for the collective group. Third, the definition of representative in WARN should be expanded beyond unions to include employee participation groups. The availability of an administrative structure would assist employees in mobilizing for collective action in the first instance. Employee participation groups can best advance the collective interests of employees and obtain public goods that individuals desire but lack the incentive to obtain.

280. Summers, supra note 274, at 542 (noting that unions can provide a "shield of 'concerted activity'.")

281. See id. at 531; see also Liberty Natural Prod., Inc. v. NLRB, Nos. 94-70489, 94-70619, 1995 U.S. App. LEXIS 38232 (9th Cir. Nov. 15, 1995), cert. denied, 116 S. Ct. 2528 (1996) (holding that a nonunionized company violated the NLRA by firing two employees after they drew up a petition complaining about low wages and late paychecks); supra Part III.C (discussing a similar role played by employee participation groups).