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Enduring Exclusion

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ENDURING EXCLUSION

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Economic justice has long been a part of the civil rights agenda, and minimum labor standards statutes play a crucial role in eradicating the exploitation and subordination of historically marginalized workers. While statutes establishing labor standards are characterized as "universal," their effect has been anything but universal. Racial and ethnic minorities, women, and those at the intersection experience disproportionate violations of labor standards laws concerning minimum wage, overtime, and occupational safety and health. Through legislative maneuvering dating back to the New Deal era, Congress carved out many female workers and workers of color from core protections of minimum labor standards legislation. Due to the vigorous advocacy of civil rights groups, amendments to these statutes expanded coverage, making these statutes more inclusive of marginalized workers. Nevertheless, the exclusionary legacy of these New Deal era-laws lingers today. Black, Latinx, and female workers are more likely to be retaliated against for asserting rights or reporting employer misconduct pursuant to these statutes. Tracing the racial and gendered origins of exemptions to labor standards statutes from the early twentieth century to the present, this Article argues that, despite expanded coverage, female workers and workers of color remain largely excluded from "universal" workplace protections. Although antiworker forces previously sought to thwart creation of legal rights for marginalized workers, contemporary antiworker campaigns seek to gut marginalized workers' protections through actual and threatened retaliation. Examination of the traditional rationales for employer retaliation reveals that the retaliation disparity is incongruent with these conventional motivations. This Article argues that securing compliance with both minimum labor standards and antiretaliation reform should be integral parts of the civil rights agenda.

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INTRODUCTION

Civil rights lawyers have effectively used employment discrimination legislation to advocate for those experiencing discrimination. Statutes like Title VII of the Civil Rights Act of 1964,[1] Section 1981 of the Civil Rights Act of 1866,[2] and Section 1983 of the Civil Rights Act of 1871[3] have been treasured tools in the civil rights arsenal for combating discrimination. While these statutes are not without their faults, they have been the traditional statutes invoked in civil rights lawsuits seeking to redress discrimination in employment.

Minimum labor standards statutes have been less utilized by civil rights lawyers as a means of redressing the subordination and exploitation of traditionally marginalized groups.[4] These statutes set minimum criteria by which covered employers must abide regarding pay and working conditions. Although these statutes are facially neutral, employers violate these statutes in ways that harm members of traditionally marginalized groups.

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1. 42 U.S.C. § 2000e.

2. *Id.* § 1981.

3. *Id.* § 1983.

4. Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws' Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 84 (2018) ("[Theorists and practitioners] often categorize wage and hour statues [sic] like FLSA as important vehicles for worker protections, but do not engage in serious consideration of ways in which such statutes contribute to the broader goal of anti-subordination and economic justice.").

The Fair Labor Standards Act of 1938 (FLSA)[5] establishes a federal minimum wage and maximum hours, among other provided protections.[6] Nevertheless, wage theft abounds, with disparities driven by race, ethnicity, and gender. Occupational segregation contributes to this disparity, as workers in low-wage jobs experience a disproportionate level of wage theft.[7] Although Black and Latinx workers jointly comprise nearly one-third of American laborers,[8] they are overrepresented among low-wage workers, comprising 40 percent of these workers.[9] Moreover, low-wage workers are disproportionately female, with women comprising 54 percent of the low-wage workforce.[10]

The Occupational Safety and Health Act of 1970 (OSH Act)[11] provides safety standards and establishes a general duty for employers to maintain a work environment free from recognized hazards that may cause physical injury or death.[12] Despite the universalist nature of the OSH Act, racial and ethnic minorities and women are more likely to suffer occupational injuries. Black and Latinx workers are also more likely to die on the job than other workers.[13] In 2019, there were 5,333 workplace trauma deaths, representing a 2 percent increase from the previous year.[14] Additionally, there has been a 10.3 percent increase in overall deaths from 2015 to 2019.[15] However, there are

5. 29 U.S.C. §§ 201–219.

6. *Id.* §§ 206–207.

7. DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 8 (2017), https://files.epi.org/pdf/125116.pdf [perma.cc/N59H-2ELD].

8. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2018, at 1–2 (2019), https://www.bls.gov/opub/reports/race-and-ethnicity/2018/pdf/home.pdf [perma.cc/TBP6-X25G].

9. MARTHA ROSS & NICOLE BATEMAN, BROOKINGS, MEET THE LOW-WAGE WORKFORCE 9 (2019), https://www.brookings.edu/wp-content/uploads/2019/11/201911_Brookings-Metro_low-wage-workforce_Ross-Bateman.pdf [perma.cc/7SXW-U5GZ]. Of the nation's low-wage workers, 52% are White, 25% are Latinx, 15% are Black, and 5% are Asian American. *Id.*

10. *Id.*

11. 29 U.S.C. §§ 651–678.

12. *Id.*

13. AFL-CIO, DEATH ON THE JOB 1 (30th ed. 2021), https://aflcio.org/sites/default/files/2021-05/DOTJ2021_Final.pdf [perma.cc/JDF2-PHTL]; *see also* Dana Loomis & David Richardson, *Race and the Risk of Fatal Injury at Work*, 88 AM. J. PUB. HEALTH 40, 40 (1998) (noting that during the first half of the twentieth century, discrimination against African Americans in hiring and work assignments led to elevated risks of occupational disease among African American workers); James C. Robinson, *Exposure to Occupational Hazards among Hispanics, Blacks, and Non-Hispanic Whites in California*, 79 AM. J. PUB. HEALTH 629, 630 (1989) (finding that exposure to risk of occupational injury and acute illness is higher for Hispanic and Black workers in California than for non-Hispanic White workers).

14. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2020, at 6 tbl.1 (2021), https://www.bls.gov/news.release/pdf/cfoi.pdf [perma.cc/544E-KLFU].

15. *Five-Year Trend in Workplace Deaths Shows Stark Racial Disparities*, NAT'L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH (Dec. 21, 2020), https://coshnetwork.org/2020-12_CFOI_Trend_Statement [perma.cc/PY67-FR7D].

glaring disparities in the increase in deaths among different racial and ethnic groups. The rate of workplace trauma deaths increased 20 percent for Hispanic or Latinx workers, 28 percent for Black workers, 56 percent for Native Hawaiian workers, 59 percent for Asian American workers, and 1.7 percent for White workers.[16]

While neither the FLSA nor OSH Act are considered antidiscrimination statutes, they play a pivotal role in in the economic well-being of workers. Disparities regarding compliance with and enforcement of these laws' protections inevitably lead to disproportionate benefits to workers. Inequitable application of these laws converts a facially universal law into a mechanism for discrimination. To truly bring about economic justice, both employment discrimination and minimum labor standards laws must be enforced in tandem, and racial and gender disparities regarding which employees experience violations of these laws must be eliminated.

A medley of statutes seeks to protect workplace rights, and these statutes, though divergent in many ways, share one common element—a prohibition against retaliation. Once regarded as bulwarks aimed at fortifying rights created by statutes, statutory antiretaliation provisions were broadly interpreted by the courts in an effort to maximize protections. However, courts' interpretations of these provisions have made it more difficult for retaliation victims to bring and prove retaliation claims.

In August 2020, twenty-one U.S. senators sent a letter to the U.S. Department of Labor (DOL) expressing concern about a recent research study that highlighted racial and ethnic disparities in how workers experienced employer retaliation.[17] The study, conducted by the National Employment Law Project (NELP), found that Black and Latinx employees are more likely to experience retaliation for reporting occupational safety and health concerns related to the pandemic than White workers.[18] The letter stressed the importance of holding employers accountable for retaliation and aptly noted that without safeguards against retaliatory behavior, "employers will be free to silence and punish Black and Latin[x] workers."[19]

The senators' concern about employers eroding workplace rights through retaliation is well-founded. Actual retaliation and the fear of retaliation are primary reasons for the underenforcement of workplace laws, regardless of

16. *Id.*

17. Press Release, Chris Coons, U.S. Senate, Sen. Coons, Colleagues Urge Trump Admin to Address Reports of Retaliation Among Workers of Color Who Report COVID-19 Workplace Concerns (Aug. 5, 2020), https://www.coons.senate.gov/news/press-releases/sen-coons-colleagues-urge-trump-admin-to-address-reports-of-retaliation-among-workers-of-color-who-report-covid-19-workplace-concerns [perma.cc/AW43-TZ8S] [hereinafter Sen. Coons Press Release].

18. IRENE TUNG & LAURA PADIN, NAT'L EMP. L. PROJECT, SILENCED ABOUT COVID-19 IN THE WORKPLACE 2 (2020), https://s27147.pcdn.co/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf [perma.cc/2AJG-CLEN] [hereinafter NELP STUDY ON EMPLOYER RETALIATION].

19. Sen. Coons Press Release, *supra* note 17.

whether these laws pertain to antidiscrimination or labor standards.[20] The typical rationales for employer retaliation include punishing employees for asserting rights or reporting misconduct, discrediting these employees, and deterring other employees from attempting to bring about compliance with these laws.[21] One would expect an employer to utilize these rationales equally against all similarly situated employees. However, racial and gender disparities concerning which employees are punished, discredited, and used as examples to deter others,[22] indicate that racial and gender bias are additional drivers for retaliation.

As a result, this Article illustrates the deceptive "universality" of labor standards statutes. It describes the disparities female workers and workers of color suffer in pursuing claims under these statutes and under their corresponding prohibition on retaliation. Because enforcement of this regime implicates core questions of discrimination and access to justice, this Article argues that securing compliance with minimum labor standards legislation and antiretaliation reform should form an integral part of the civil rights agenda.

Part I examines the inability of people of color and women to benefit from economic legislation from a historical lens. It explains how these groups were carved out of labor protections through legislative maneuvering and illustrates how coverage exemptions and unequal enforcement diluted the universality of these laws.

Part II examines contemporary racial, ethnic, and gender disparities in both the violation of minimum labor standards laws and employer retaliation for having engaged in protected activity under these laws. It explores how systemic racism and sexism have made workers of color, female workers, and those at the intersection particularly vulnerable economically, and how this vulnerability may lead to these workers' acceptance of substandard working conditions and a heightened fear of employer retribution for asserting labor rights. It discusses the rationales for employer retaliation and how disparities with respect to which employees are retaliated against alter the conversation about these motivations.

The salience of antiretaliation reform to the civil rights agenda is discussed in Part III. This Part describes the centrality of antiretaliation laws to the civil rights project generally and discusses the strengthening and subsequent weakening of antiretaliation protections through judicial interpretation. It describes the need for interventions to assure robust antiretaliation protections and the urgency of pursuing these protections through litigation, education, and legislative advocacy.

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20. *See infra* Part II.

21. Marcia A. Parmerlee, Janet P. Near & Tamila C. Jensen, *Correlates of Whistle-Blowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17, 19–20 (1982).

22. *See infra* Part II.

I. HISTORICAL EXCLUSIONS TO "UNIVERSAL" LEGISLATION

This Part traces the historical exclusion of workers of color and female workers through the twentieth century. It explains the discriminatory origins of coverage exemptions in certain workplace statutes and examines the lingering effects of these exclusions.

Though minimum labor standards legislation is considered universal legislation, that has not always been the case. Indeed, laws that appear universal on their face can exclude disproportionate numbers of members of protected classes through devices like coverage exemptions and inequitable enforcement. Such was the case with numerous statutes passed during the New Deal. President Franklin Roosevelt's New Deal produced legislation aimed at providing economic security for Americans. However, racial minorities and women were systemically excluded from benefiting from this legislation through exemptions by industry and sector. Specifically, the lack of a discrimination proscription in the legislation and limited statutory coverage prevented minority groups from benefiting. Particularly with respect to the FLSA, the exemptions of agricultural and domestic workers from minimum wage and overtime pay protections had a devastating impact on the economic conditions of racial and ethnic minority workers.

A comprehensive understanding of the FLSA's agricultural and domestic exemption and its effect on racial minorities and women requires examination of both the political and legal landscape of the New Deal era, as well as the FLSA's New Deal predecessor statutes, including the National Industrial Recovery Act of 1933 (NIRA),[23] the Agricultural Adjustment Act of 1933 (AAA),[24] the Social Security Act of 1935 (SSA),[25] and National Labor Relations Act of 1935 (NLRA).[26]

A. *The Legal and Political Landscape of the New Deal*

The Progressive Era ushered in many social and political reforms, including federal and state regulations pertaining to the workplace. Yet the U.S. Supreme Court struck down many of these workplace laws as an

23. The U.S. Supreme Court declared it unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

24. Agricultural Adjustment Act, 7 U.S.C. §§ 601–659.

25. Social Security Act, 42 U.S.C. §§ 1–18647. The exclusion of agricultural and domestic workers from the Social Security Act of 1935 was done to prevent Black workers from being able to benefit from the legislation. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 109 (2011); JILL QUADAGNO, THE COLOR OF WELFARE 19–20 (1994); JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 115–16 (1988); Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 512, 515 (1995); Robert C. Lieberman, *Race and the Organization of Welfare Policy*, *in* CLASSIFYING BY RACE 156, 159–61 (Paul E. Peterson ed., 1995).

26. National Labor Relations Act, 29 U.S.C. §§ 151–169.

unconstitutional violation of the freedom of contract. The Court's staunch reliance on freedom of contract to invalidate workplace regulations ebbed and flowed depending in part on whether the law at issue regulated men.

Two U.S. Supreme Court cases decided only three years apart illustrate the differences in the treatment of men and women with respect to labor standards. In 1905, the Supreme Court famously invalidated a New York law that prohibited bakers from working more than sixty hours a week or more than ten hours a day. In *Lochner v. New York*, the Court reasoned that the state statute interfered with freedom of contract, thus infringing upon the Fourteenth Amendment's right to liberty.[27] In 1908, the Court upheld an Oregon statute that limited women to working no more than ten hours per day in laundries and factories in *Muller v. Oregon*.[28] The Court justified the disparity between its holding in *Muller* and its holding in *Lochner*, just three years earlier, based on the differences between the sexes.[29] Hence, courts permitted regulation of hours for female workers, but this same type of regulation for male workers was deemed to violate freedom of contract. These types of laws that treat male and female workers differently due to the supposed differences between the sexes have come to be known as "protective legislation."[30]

From 1912 to 1923, fifteen states, the District of Columbia, and Puerto Rico passed protective legislation to establish a minimum wage for women,[31] but these laws were short-lived.[32] In *Adkins v. Children's Hospital of the District of Columbia*,[33] the Court invalidated a law enacted by Congress to guarantee a minimum wage for women working at the District of Columbia's Children's Hospital.[34] While the freedom of contract doctrine did not preclude restrictions on women's working hours, the Court was willing to apply

27. 198 U.S. 45, 64 (1905).

28. 208 U.S. 412, 416, 421–22 (1908).

29. The Court reasoned:

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 422–23.

30. David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1972 (2003) (reviewing JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN (2001)).

31. Ellen Mutari, Marilyn Power & Deborah M. Figart, *Neither Mothers nor Breadwinners: African-American Women's Exclusion from U.S. Minimum Wage Policies, 1912–1938*, 8 FEMINIST ECON., no. 2, 2002, at 37, 42.

32. Ava Baron, *Protective Labor Legislation and the Cult of Domesticity*, 2 J. FAM. ISSUES 25, 34 (1981).

33. 261 U.S. 525 (1923).

34. *Id.* at 562.

the doctrine to invalidate the protection of a woman's right to earn a minimum wage.[35]

While unions helped procure higher wages and other employment protections in some instances, union discrimination against women and racial minorities prevented these groups from fully benefiting from unionization and more robust workplace protections.[36] The economic situation deteriorated during the Great Depression, and once elected president, Franklin Roosevelt set out to improve social and economic conditions. He would pursue an ambitious agenda and have to gain the support of Southern Democrats to do so.

The Southern Democrats wielded substantial political power during the New Deal era. They held about thirty-five Senate seats and a disproportionate number of seats in the House of Representatives because of a system of apportionment that counted Black citizens despite their inability to vote.[37] Many Southern Democrats were committed to maintaining the racist and exploitative social and economic structure of the South.[38] Having ingrained racism, subordination, and exploitation into their economic, political, and social fabric, Southern states worried that New Deal legislation would be disruptive to their pattern of exclusion. Roosevelt did not want to alienate Southern Democrats, which would jeopardize his legislative agenda.[39] Moreover, the lack of Black political power as a result of poll taxes and other restrictive voting laws made the desires of Black citizens easy for Democrats to overlook.[40] Consequently, the exclusion of Black workers was viewed as collateral damage in President Roosevelt's efforts to push his legislative agenda.[41]

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35. *See id.* at 553–54 (explaining that unlike laws fixing hours or work, minimum wage laws affect "the heart of the contract").

36. *See* Richard D. Kahlenberg & Moshe Z. Marvit, "*Architects of Democracy*": *Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 230–31 (2013) (discussing racism and sexism in the trade union movement); Paul Frymer, *Race, Labor, and the Twentieth-Century American State*, 32 POL. & SOC'Y 475, 478 (2004) [hereinafter Frymer, *Twentieth-Century American State*] (noting that some unions were segregationist and discriminatory); PAUL FRYMER, BLACK AND BLUE 44–69 (2008) (discussing racism among unions).

37. Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1 (2005).

38. For a detailed discussion of the racialized nature of New Deal legislation, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987), and Perea, *supra* note 25.

39. *See* Linder, *supra* note 38, at 1336. Linder states as follows:

> To enact the social and economic reforms of the New Deal, President Roosevelt and his allies were forced to compromise with southern congressmen. Those congressmen negotiated with Roosevelt to obtain modifications of New Deal legislation that preserved the social and racial plantation system in the South—a system resting on the subjugation of blacks and other minorities.

Id.

40. SUZANNE METTLER, DIVIDING CITIZENS 185–86 (1998).

41. For a discussion of racism against African Americans during the New Deal, see Perea, *supra* note 25.

In the 1930s, agricultural workers comprised 21.5 percent of the national labor force.[42] However, because most of the nation's farms during this time were in the South, the percentage of the workforce engaged in agriculture was much higher in Southern states, ranging from 42.8 percent to 66 percent.[43] Women predominated domestic labor.[44] In fact, from 1870 until 1940, more women worked in domestic service than any other occupation.[45] While numerous states had protective legislation that set maximum hours for women, domestic workers were excluded from this legislation.[46]

B. *The FLSA's New Deal Predecessor Statutes*

Early exclusion and disparate treatment of racial minorities and women did not come from carve-outs in the statutory text itself; rather, this occurred in the administration and enforcement of statutes. For instance, the NIRA provided for the establishment of codes of fair competition that set minimum wages and maximum working hours in different industries.[47] During the code hearings, lawmakers considered the prospect of an explicit wage differential based on race in which Black workers would be paid less than White workers.[48] While the explicit differential was rejected, occupational and geographic distinctions permitted the payment of lower wages to most Black workers on a facially neutral basis.[49] Moreover, manipulative practices like changing the title of occupation for Black workers but requiring the same job duties as another job title dominated by White workers, allowed employers to continue discriminatory wage practices.[50]

Similarly, the AAA was a law that sought to increase the incomes of farmers by raising prices for crops and providing subsidies to farmers in exchange for them reducing the number of acres they cultivated.[51] In practice, monies were distributed to landowners, who were mostly White, and the owners were supposed to dispense the monies to the Black tenants.[52] However, Black tenant

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42. *See* Linder, *supra* note 38, at 1343.

43. *Id.*

44. JANET M. HOOKS, U.S. DEP'T OF LAB., WOMEN'S OCCUPATIONS THROUGH SEVEN DECADES 23 (1947), https://fraser.stlouisfed.org/files/docs/publications/women/b0218_dolwb_1947.pdf [perma.cc/J287-UFXJ].

45. *Id.* at 52; Peggie R. Smith, *The Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers*, 23 CANADIAN J. WOMEN & L. 309, 313 (2011).

46. Legislation setting maximum working hours had been passed in forty-three states by 1941, yet only one state, Washington, included domestic workers in these protections. Smith, *supra* note 45, at 313.

47. Perea, *supra* note 25, at 104.

48. *Id.* at 104–05.

49. *Id.*

50. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 98 (Univ. Wis. Press 1985) (1977).

51. *See* Agricultural Adjustment Act, 7 U.S.C. §§ 601–624.

52. Perea, *supra* note 25, at 108.

farmers were routinely cheated out of payments.[53] Locally elected county committees settled disputes.[54] These committees routinely ruled in favor of the White landlords, and not one Black farmer ever served on a local committee in the South.[55]

Discriminatory administration plagued programs set up by early New Deal statutes. Efforts of civil rights lawyers to lobby for the inclusion of nondiscrimination clauses in the statutes proved futile. For instance, during the passage of the NLRA, a statute that gives employees in the private sector the right to unionize, engage in collective bargaining, and participate in concerted activity,[56] civil rights advocates made valiant efforts to convince legislators of the necessity of an antidiscrimination provision.[57] However, legislators omitted such a provision to placate the Southern Democrats in Congress.[58] Hence, while the NLRA strengthened the bargaining power of unions, the harm to workers of color and female workers caused by the discriminatory practices in which unions engaged went ignored.[59] This strategy of appeasement prevented subsequent New Deal legislation from including nondiscrimination clauses that would prohibit discrimination against covered workers.

By 1935, discrimination against women and people of color in New Deal programs had evolved. Instead of mere discriminatory administration and enforcement, exclusions that disproportionately impacted minority and female workers were included in the statutory text.[60] A month after the NLRA was enacted, Congress passed the SSA.[61] While the legislation was pending, civil rights groups advocated for both inclusion of a nondiscrimination clause and coverage that would include agricultural and domestic workers. During congressional hearings, George Edmund Haynes, one of the cofounders of the National Urban League, urged Congress to include a nondiscrimination clause in the SSA, noting, "there has been repeated, wide-spread, and continued discrimination on account of race or color as a result of which Negro men, women, and children did not share equitably and fairly in the distribution of the benefits accruing from the expenditure of such Federal funds."[62]

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53. *Id.*

54. *Id.* at 108–09.

55. *Id.* at 109.

56. *1935 Passage of the Wagner Act*, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [perma.cc/Y82S-V37J].

57. Frymer, *Twentieth-Century American State*, *supra* note 36, at 476, 478.

58. *See id.* at 476 ("The Democratic Party's reliance on southern segregationists to achieve legislative goals prohibited any type of civil rights policy.").

59. *See* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 340 (2005).

60. *See* Perea, *supra* note 25, at 109.

61. Social Security Act, 42 U.S.C. §§ 1–18647.

62. *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways and Means*, 74th Cong. 602 (1935) [hereinafter *Economic Security Act Hearings*] (statement of George Edmund Haynes, Federal Council of Churches); *Haynes, George Edmund (1880–1960)*,

Similarly, Charles Hamilton Houston, General Counsel of the NAACP, testified before the House of Representatives about the negative ramifications of passing the legislation without providing nondiscrimination guarantees, and the disparate impact the agricultural and domestic exclusion would have on African Americans.[63] Houston also testified before the Senate explaining,

> When you realize that out of the 5,500,000 Negro workers in this country, approximately 2,000,000 are in agriculture and another 1,500,000 in domestic service—3,500,000 Negroes dropped through the act right away when it comes to the question of old-age annuity.[64]

Despite his testimony warning of the detrimental effect such exemptions would have on people of color, Houston saw the writing on the wall. After Houston's congressional testimony, the NAACP's magazine, *The Crisis*, published an editorial titled "Social Security—for White Folk" that described President Roosevelt and his advisors as "preparing to dump overboard the majority of Negro workers in this security legislation program by exempting from pensions and job insurance *all farmers, domestics and casual labor.*"[65]

Ultimately, Congress passed the SSA without an antidiscrimination prohibition but with the agricultural and domestic worker exemption, leaving two-thirds of Black workers uncovered.[66] Furthermore, the decision to allow local administration enabled discrimination against even the minorities the SSA covered.[67]

The SSA's exemptions set a precedent for future economic legislation in the New Deal and beyond. A few years later, when the legislation that would become the FLSA was being debated, excluding agricultural and domestic workers was viewed as a given.[68] However, unlike the debates for the SSA or previous New Deal legislation, the racism in the FLSA debate was explicit.[69]

C. *The FLSA's Exclusion of Agricultural and Domestic Workers*

Though a letter from President Roosevelt that accompanied the introduction of the FLSA bill called for the setting of maximum hours and minimum

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SOC. WELFARE HIST. PROJECT, https://socialwelfare.library.vcu.edu/social-work/haynes-george-edmund [perma.cc/PCS9-7J5D].

63. *Economic Security Act Hearings*, *supra* note 62, at 798 (statement of Charles H. Houston, NAACP).

64. *Economic Security Act: Hearings on S. 1130 Before the S. Comm. on Finance*, 74th Cong. 644 (1935) (statement of Charles H. Houston, NAACP).

65. Editorial, *Social Security—for White Folk*, 42 CRISIS 80, 80 (1935).

66. Dona Cooper Hamilton & Charles V. Hamilton, *The Dual Agenda of African American Organizations Since the New Deal: Social Welfare Policies and Civil Rights*, 107 POL. SCI. Q. 435, 439–40 (1992).

67. Perea, *supra* note 25, at 109.

68. *Id.* at 114.

69. *Id.*

wages for industrial *and agricultural* workers,[70] the original version of the bill that became the FLSA excluded agricultural and domestic workers.[71] The initial Senate and House bills excluded agricultural workers from the definition of "employee."[72] The exclusion of domestic workers was less implicit inasmuch as the bill defined employee as "engaged in commerce or in the production of goods for commerce."[73] These exclusions were part of a pattern of exclusion of racial minorities and women that began with previous New Deal legislation.

Southern legislators denounced the FLSA legislation and analogized it to the antilynching bill that was making its way through the legislature contemporaneously.[74] These legislators characterized both as an attack on the South and a political ploy designed to win Black votes.[75] The opposition of Southern congressmen[76] to the equal treatment of Black workers was evident during the debate. Representative Mark Wilcox of Florida stated, "[y]ou cannot put the Negro and the white man on the same basis and get away with it."[77] Other congressmen worried about the enforceability of the law in the South. For instance, Representative Bertrand H. Snell of New York stated,

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70. Farhang & Katznelson, *supra* note 37, at 13; *see also* Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 I*, 53 POL. SCI. Q. 491 (1938).

71. Because the original Senate and House bills only covered employees "engaged in interstate commerce or . . . engaged in the production of goods which are sold or shipped to a substantial extent in interstate commerce," domestic workers were excluded. S. 2475, 75th Cong. § 5 (1937); H.R. 7200, 75th Cong. §§ 5, 9, 10 (1937); *see* Perea, *supra* note 25, at 114; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 58 (2005).

72. *See* S. 2475, 75th Cong. § 11 (1937); H.R. 7200, 75th Cong. § 2(b)(7) (1937).

73. Farhang & Katznelson, *supra* note 37, at 13; *see also* METTLER, *supra* note 40, at 185–86.

74. Farhang & Katznelson, *supra* note 37, at 14.

75. *See id.*

76. Not all Southern congressmen held the same convictions about excluding Blacks or other racial minorities. For example, the congressional record quotes Representative Maury Maverick of Texas as saying, "if a black man does the same work as a white man, he ought to receive the same pay. . . . I think Negroes should have economic justice." 82 CONG. REC. 1,407 (1937).

77. *Id.* at 1404. During the House debate on the bill on December 13, 1937, Representative Wilcox argued:

> Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that when we turn over to a Federal bureau or board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.

Id.

> If there is any industrialist in New England or the northern part of this country who thinks they can force southern industrialists to pay the less efficient, colored laborer of the South 40 cents an hour, you are just as much mistaken as you can be, and you ought to know it. There is no more chance of enforcing regulations of this kind on the industrial South than there is of enforcing the fourteenth and fifteenth amendments.[78]

Civil rights lawyer and head of the National Negro Congress, John P. Davis, testified at the congressional hearings in opposition to the exclusions, noting that the bulk of Black workers were engaged in agricultural or domestic work and explaining that Black workers had not been afforded the same benefits of New Deal legislation as White workers.[79] He noted, "[u]norganized and without perceptible collective-bargaining power, the Negro worker was soon singled out by pressure groups of employers as the legitimate victim for all manner of various differentials."[80]

Ultimately, the FLSA passed with exemptions for agricultural and domestic workers, occupations dominated by workers of color and female workers. In addition to excluding domestic work, the FLSA excluded workers in hotels, laundries, cosmetology, and restaurants.[81] Despite the legislation being the outgrowth of a desire to protect workers by remedying unequal bargaining power between employers and employees, some of the most vulnerable workers were excluded from the statute. Asian American, Black, and Latinx workers were overrepresented in these occupations and were left uncovered. Women, particularly Black women, were twice as likely as men to be exempt from the FLSA.[82] The FLSA's passage was lauded as gender-neutral legislation;[83] however, this legislation would, through exemptions, carve most women out of its protections.

D. *Inclusion Through Amendment (as Usual)*

As has been the case since the very founding of the United States, racial and ethnic minorities and women typically acquire their rights not at the outset but rather through subsequent amendment.[84] Such was the case with coverage under the FLSA. Inclusion in minimum labor standards statutory coverage came about as a result of civil rights work.[85] This Section describes

78. *Id.* at 1475.

79. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Lab. and the H. Comm. on Lab.*, 75th Cong. 571–75 (1937) (statement of John P. Davis, National Negro Congress).

80. *Id.* at 571.

81. METTLER, *supra* note 40, at 186.

82. Eileen Boris, *Labor's Welfare State: Defining Workers, Constructing Citizens*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 319, 335 (Michael Grossberg & Christopher Tomlins eds., 2008).

83. METTLER, *supra* note 40, at 184.

84. *See, e.g.*, U.S. CONST. amends. XIII, XIV, XV, XIX.

85. Boris, *supra* note 82, at 353.

the work of civil rights groups to expand the FLSA's coverage and the subsequent amendments resulting from this advocacy.

The New Deal's failure to procure nondiscrimination guarantees and its exemption of agricultural and domestic workers from legislation had detrimental and ongoing effects on minority communities. However, civil rights activists continued to advocate for inclusion in economic legislation. The NAACP adopted a resolution in 1955 calling for the expansion in minimum wage coverage.[86] Representatives of several civil rights organizations, including the NAACP and National Council of Negro Women, testified at a 1957 hearing concerning the possible expansion of FLSA coverage.[87] The fight for expanded coverage continued into the 1960s, with one of the ten demands of the 1963 March on Washington for Jobs and Freedom being "[a] broadened Fair Labor Standards Act to include all areas of employment which are presently excluded."[88] Another called for a national minimum wage for all Americans.[89]

A 1966 amendment to the FLSA changed the statute to institute a minimum wage[90] for most, but not all, agricultural workers. The amendment also expanded protections to workers in hotels, restaurants, schools, hospitals, nursing homes, and entertainment.[91] However, agricultural workers are still exempt from the FLSA's overtime provisions.[92] This expanded coverage, coupled with the passage two years earlier of Title VII, gave civil rights groups what they had been seeking since the New Deal era—a prohibition against discrimination and coverage under the law.

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86. *From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Lab.*, 117th Cong. 10 (2021) [hereinafter *Hearing: From Excluded to Essential*] (statement of Rebecca Dixon, Executive Director, National Employment Law Project).

87. *Id.*

88. MARCH ON WASHINGTON FOR JOBS AND FREEDOM: LINCOLN MEMORIAL PROGRAM (1963), https://www.crmvet.org/docs/mowprog.pdf [perma.cc/A8Q5-SSXS].

89. *Id.*

90. *See History of Changes to the Minimum Wage Law*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage/history [perma.cc/R9MR-Q85B]. Some agricultural workers are still paid a piece rate. *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEP'T OF LAB. (Jan. 2020), https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture [perma.cc/JNK7-DBNP].

91. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended at 29 U.S.C. § 203).

92. *Id.* at 833–34; *see also* Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES, Jan.–June 2020, at 1, 5, https://doi.org/10.1093/jlb/lsaa036; Autumn L. Canny, Note, *Lost in a Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 365 (2005).

When signing the FLSA amendment into law, President Lyndon Johnson stated that the expanded coverage would "help minority groups who are helpless in the face of prejudice that exists."[93] It helped indeed; the economic situation of racial minorities improved after expanded coverage. Perhaps some of the most compelling evidence of the detrimental effects of the New Deal's exclusion of large numbers of Black workers is the stark contrast between the economic status of African Americans pre- and post-1966 amendments of the FLSA. The extension of FLSA coverage to agricultural workers also correlates with a 26 percent decrease in the poverty rate for African Americans.[94] Additionally, over 20 percent of the reduction in the racial earnings gap can be attributed to the 1966 amendments.[95]

Though the 1966 amendments expanded coverage to workers in additional employment sectors, domestic workers remained excluded.[96] Advocates from civil rights and feminist groups encouraged the elimination of the exclusion of domestic workers. In 1969, Edith Barksdale-Sloan was appointed to lead the National Committee on Household Employment (NCHE), an entity formed under the umbrella of the Department of Labor Women's Bureau.[97] Originally, the NCHE was more of an employer's organization, but it gradually developed a heightened focus on advocacy for domestic workers.[98] NCHE's collaboration with other organizations led to the formation of the Household Technicians of America, a domestic workers' rights advocacy organization.[99]

In 1971, a bill was introduced in Congress that would add domestic workers to the FLSA's coverage as part of a larger minimum wage reform effort.[100] While the measure passed both houses of Congress, President Richard Nixon vetoed the bill in 1972.[101] Another measure was reintroduced the following year, and advocacy organizations played an even more prominent role in the

93. Remarks at the Signing of the Fair Labor Standards Amendments of 1966, 2 PUB. PAPERS 1062 (Sept. 26, 1966).

94. *Gradually Raising the Minimum Wage to $15: Good for Workers, Good for Businesses, and Good for the Economy: Hearing Before the H. Comm. on Educ. & Lab.*, 116th Cong. 27 (2019) (statement of William E. Spriggs, Chief Economist, AFL-CIO); *see also Hearing: From Excluded to Essential*, *supra* note 86, at 12–13 (statement of Rebecca Dixon, Executive Director, National Employment Law Project).

95. Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q.J. ECON. 169, 171 (2021); *Hearing: From Excluded to Essential*, *supra* note 86, at 12–13 (statement of Rebecca Dixon, Executive Director, National Employment Law Project).

96. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830 (codified as amended at 29 U.S.C. § 203).

97. Eileen Boris & Premilla Nadasen, *Domestic Workers Organize!*, 11 WORKINGUSA: J. LAB. & SOC'Y 413, 422 (2008); *see* Premilla Nadasen, *Citizenship Rights, Domestic Work, and the Fair Labor Standards Act*, 24 J. POL'Y HIST. 74, 78 (2012).

98. Nadasen, *supra* note 97, at 78.

99. *Id.*

100. *Id.*

101. *Id.* at 80–81.

legislative debate over the bill.[102] Opponents of providing domestic workers with rights under the FLSA advanced racialized and gendered arguments. These arguments ranged from congressmen not wanting to address the issue because they did not want to intrude on the domain of their wives[103] to women not having enough business acumen to be able to maintain adequate records.[104] Indeed, during the legislative hearings, Secretary of Labor Peter Brennan stated, "[h]omemakers are not engaged in business in the traditional sense with experience in maintaining business records."[105]

Congresswoman Shirley Chisholm, herself the daughter of a domestic worker, was a staunch advocate for adding domestic workers to the FLSA's coverage.[106] She united the Black and women caucuses in support of adding domestic workers.[107] In 1974, an amendment to the FLSA was passed that extended coverage to household workers.[108] Domestic workers are now covered under the minimum wage provision of FLSA but not the maximum hours provision.[109]

Through the years, what qualifies as domestic work has fluctuated. The 1974 FLSA amendments excluded elder companions and casual babysitters from the definition of domestic, thus excluding them from FLSA coverage.[110] In 2007, the U.S. Supreme Court upheld a DOL regulation that would classify homecare workers employed by private companies as elder companions,[111] therefore upholding the exemption of these workers, most of whom are female and people of color, from FLSA coverage.[112] In 2013, the DOL changed its rule[113] and brought these employees within the scope of the FLSA's coverage.[114]

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102. *Id.* at 81.

103. *Id.*

104. *Id.* at 82.

105. *Fair Labor Standards Amendments of 1973: Hearing on H.R. 4757 and H.R. 2831 Before the Gen. Subcomm. on Lab. of the H. Comm. on Educ. & Lab.*, 93d Cong. 264 (1973) (statement of Peter J. Brennan, Secretary of Labor).

106. Nadasen, *supra* note 97, at 74.

107. *Id.* at 85.

108. Boris, *supra* note 82, at 344.

109. 29 U.S.C. § 213(b)(21).

110. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 62 (codified as amended at 29 U.S.C. § 213(a)(15)).

111. Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 162 (2007).

112. Women comprise 87 percent of home health aides, and 66.8 percent of these workers identify as Black, Asian, or Hispanic. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 20, 2022), https://www.bls.gov/cps/cpsaat11.htm [perma.cc/D8TY-MKS8].

113. *See* Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454, 60557 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552) (revising the definition of "companionship services" that are exempt from the FLSA).

114. The 2013 DOL regulation revision was challenged, but the appellate court upheld the revised regulation. Home Care Ass'n of Am. v. Weil 799 F.3d 1084, 1087 (D.C. Cir. 2015) ("The

The nation's agricultural workers continue to be predominately workers of color, with Latinx workers comprising 83 percent of agricultural workers.[115] Likewise, domestic work continues to be dominated by women and people of color. People of color, women, and foreign-born persons comprise 95 percent of domestic workers.[116] Moreover, 52.4 percent of all domestic workers are Asian American, Black, or Latinx.[117] The struggle to make the FLSA truly universal lasted for decades and, in some instances, remains ongoing.

E. *Modern Exclusion*

The exclusions from the early 1930s were passed down from one workplace statute to another. When the OSH Act was passed in 1970, agricultural workers had been added to the FLSA via the 1966 amendment, but domestic workers would not be added until 1974.[118] The OSH Act followed the FLSA, including some agricultural workers but not domestic workers.

For decades, domestic workers were not included under the OSH Act's definition of an employee.[119] Notwithstanding statutory language wherein Congress declares that the purpose of the OSH Act is to ensure "every working man and woman in the Nation safe and healthful working conditions,"[120] the Act does not cover the entire workforce. Domestic workers are still excluded from coverage.[121] Racial and ethnic minorities, women, and those at the intersection are disproportionately affected by this exclusion, prompting calls for amending the OSH Act to include domestic workers.

The literature is replete with accounts of the racism and sexism inherent in exemptions to workplace laws.[122] Despite minimum labor standards having

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Department's decision to extend the FLSA's protections to those employees is grounded in a reasonable interpretation of the statute and is neither arbitrary nor capricious.").

115. TRISH HERNANDEZ & SUSAN GABBARD, JBS INT'L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016, at 2 (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf [perma.cc/2HPK-EFPX] ("Eighty-three percent of workers identified themselves as members of a Hispanic group: 65 percent as Mexican, 9 percent as Mexican-American, and the remaining 9 percent as Chicano, Puerto Rican, or other Hispanic.").

116. Kyle Boyd, *The Color of Help*, CTR. FOR AM. PROGRESS (June 17, 2011, 9:00 AM), https://www.americanprogress.org/issues/race/news/2011/06/17/9783/the-color-of-help [perma.cc/VC56-X8UR].

117. JULIA WOLFE, JORI KANDRA, LORA ENGDAHL & HEIDI SHIERHOLZ, ECON. POL'Y INST., DOMESTIC WORKERS CHARTBOOK 1 (2020), https://files.epi.org/pdf/194214.pdf [perma.cc/95H2-BX2K].

118. *See supra* Section I.D.

119. Chelsy Castro, *Dying to Work: OSHA's Exclusion of Health and Safety Standards for Domestic Workers*, MOD. AM., Spring 2008, at 3, 5 (2008).

120. 29 U.S.C. § 651(b).

121. *See id.* § 652.

122. Perea, *supra* note 25; Elizabeth Keyes, *CASA of Maryland and the Battle Regarding Human Trafficking and Domestic Workers' Rights*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 14, 19 (2007) ("This exclusion flows directly from the history of slavery in this country; field workers and house workers were the two work forces comprising the vast majority of slaves

the ability to contribute significantly to civil rights work, one major hindrance to the efficacy of these laws is employer retaliation or the threat thereof.[123] Attempts to provide labor standards for traditionally marginalized workers are still underway.[124] Nevertheless, the statutes are much more inclusive now than at the time of their original enactment, and they should be used to combat subordination and exploitation of traditionally marginalized groups in the workplace.

II. DISPARITIES IN VIOLATION AND RETALIATION

Legislation that began as a pursuit of economic justice for those individuals with unequal bargaining power widened and reinforced this inequality through exemptions.[125] Some of this discriminatory legacy still lingers today, both through employer violations of minimum labor standard laws and retaliation. This Part examines racial and gender disparities regarding labor standards violations and employer retaliation for engaging in protected activity. This Part also discusses the traditional rationales for employer retaliation and how the disparate retaliation against workers of color and female workers alters the conversation about these rationales.

A. *Violation Disparities*

Despite the hard-fought battle for expansions in coverage of minimum labor standards law, violations proliferate. Minimum wage violations are higher for workers of color and women.[126] A 2009 NELP study showed that

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in the United States. The exclusion is therefore racism perpetuated through modern day labor laws . . . .").

123. Many of these statutes still have gaps that exclude certain groups from protections. *See* 29 U.S.C. §§ 203, 652. Approximately ten million workers in the United States are classified as independent contractors, and many of these workers are in low-wage positions, such as construction, landscaping, and nail salons. JENNY R. YANG & JANE LIU, ECON. POL'Y INST., STRENGTHENING ACCOUNTABILITY FOR DISCRIMINATION 24 (2021), https://files.epi.org/pdf/218473.pdf [perma.cc/3R2L-73TR]. Women, immigrants, and people of color hold a disproportionate number of these positions. *Id.* Low-wage workers are the fastest growing population of independent contractors according to Internal Revenue Service data. KATHERINE LIM, ALICIA MILLER, MAX RISCH & ELEANOR WILKING, INTERNAL REVENUE SERV., INDEPENDENT CONTRACTORS IN THE U.S. 4 (2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf [perma.cc/8PZW-M8EW]; YANG & LIU, *supra*, at 24.

124. For instance, in July 2021, a group of Democratic senators reintroduced the National Domestic Workers Bill of Rights. The bill, which was originally introduced in July 2019 by then-Senator Kamala Harris, would, among other things, provide paid sick leave, meal and rest breaks, and additional occupational safety and health protections for homecare employees. Press Release, Pramilla Jayapal, U.S. House of Representatives, Jayapal, Gillibrand, and Luján Re-Introduce National Domestic Workers Bill of Rights Alongside National Domestic Workers Alliance (July 29, 2021), https://jayapal.house.gov/2021/07/29/domestic-workers-bill-of-rights [perma.cc/J358-TTS8].

125. *See* Boris *supra* note 82, at 335.

126. Ruth Milkman, Ana Luz González & Peter Ikeler, *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 INDUS. RELS. J. 378,

the highest rate of minimum wage violations occurred among foreign-born Latinx workers.[127] Moreover, among workers born in the United States, there was a racial disparity. Black workers' minimum wage violation rate was triple that of White workers.[128] Additionally, a 2017 study from the Economic Policy Institute showed that women were more likely to experience minimum wage violations than men.[129]

In addition to the disparities regarding wage theft, racial and ethnic minority workers have higher fatality rates from occupational injuries and diseases.[130] Latinx workers experience higher rates of occupational injuries and illnesses.[131] Asian American, Black, and Latinx workers also have higher rates of work-related disabilities than White workers.[132] While not all occupational injuries, illnesses, or fatalities result from violations of the OSH Act, it stands to reason that if minority workers experience higher rates of injury, illness, or death overall, they do so both with respect to those caused by OSH Act violations, as well as those that are not.

U.S. workers bear the responsibility of enforcing their own workplace protections. Employees are reluctant to report workplace hazards, illnesses, or injuries to OSHA because they fear employer retaliation.[133] Systemic racism has made workers of color and female workers particularly vulnerable. Economic insecurity may make workers of color more risk averse, decreasing their likelihood of reporting instances of labor standards violations. The more vulnerable workers are economically, the more likely they are to experience not only violations of their workplace rights but also employer retaliation.[134]

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388 (2012); COOPER & KROEGER, *supra* note 7, at 15; ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS 5 (2009), https://s27147.pcdn.co/wp-content/uploads/2015/03/Broken-LawsReport2009.pdf [perma.cc/AEQ6-XR29].

127. BERNHARDT ET AL., *supra* note 126, at 5.

128. *Id.*

129. COOPER & KROEGER, *supra* note 7, at 3.

130. Candice A. Shannon, Kathleen M. Rospenda, Judith A. Richman & Lisa M. Minich, *Race, Racial Discrimination, and the Risk of Work-Related Illness, Injury, or Assault: Findings from a National Study*, 51 J. OCCUPATIONAL ENV'T MED. 441, 441 (2009).

131. *Id.*; Lee S. Friedman & Linda Forst, *Ethnic Disparities in Traumatic Occupational Injury*, 50 J. OCCUPATIONAL ENV'T MED. 350, 353 (2008).

132. Seth A. Seabury, Sophie Terp & Leslie I. Boden, *Racial and Ethnic Differences in the Frequency of Workplace Injuries and Prevalence of Work-Related Disability*, 36 HEALTH AFFS. 266, 270 (2017).

133. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-12, WORKPLACE SAFETY AND HEALTH: BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT WORKERS AT MEAT AND POULTRY PLANTS 51 (2017).

134. *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1098–99 (2014) ("[T]he least politically, economically, and socially powerful and secure workers were the least likely to make claims, the most likely to experience retaliation, and the least likely to have accurate substantive and procedural legal knowledge: women, workers without legal immigration status, and workers with low education levels."); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005) ("As the perpetrator's power increases relative to the target, reporting discrimination is less likely to lead to a positive

B. *Retaliation Disparities*

The disparity that exists in violations of minimum labor standards also exists with respect to which employees are retaliated against. This is true generally, regardless of which workplace statute is involved. The less power an employee who reports wrongdoing has, the more likely that employee will be retaliated against,[135] putting workers of color and women at higher risk of retaliation.[136] While retaliation has always been a concern for those seeking to enforce their rights or aid in the enforcement of the rights of others, empirical research suggests that certain marginalized groups are more likely to be retaliated against for exercising rights than others.

A recent nationwide survey showed that Black employees were more than twice as likely as White employees to experience possible retaliation from employers for reporting safety and health violations.[137] Additionally, Black workers were twice as likely as White workers to have the occupational safety and health concerns that they raised to their employers go unaddressed.[138] Among all the workers surveyed, one out of five workers stated stronger antiretaliation protections would make it easier for them to speak out about occupational health and safety concerns.[139]

In addition to experiencing more retaliation, workers of color and women are more likely to avoid raising concerns to employers out of fear of retaliation.[140] Hence, racial minorities and women are both more likely to experience actual retaliation for protected activity and more likely to forego engaging in protected activities out of fear of employer retaliation. Actual or fear of retaliation can prevent employees from speaking up about hazards or lead them to decide to work in dangerous conditions anyway. Workers of color are more likely to report to work despite dangerous working conditions.[141]

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outcome for the target. The potential for retaliation increases as the power disparity widens between a low-status target and a higher-status perpetrator." (footnote omitted)); Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169 (2015).

135. Michael T. Rehg, Marcia P. Miceli, Janet P. Near, & James R. Van Scotter, *Antecedents and Outcomes of Retaliation Against Whistleblowers: Gender Differences and Power Relationships*, 19 ORG. SCI. 221, 224 (2008).

136. *See* Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [perma.cc/QP6L-VMGT]; Carly McCann, Donald Tomaskovic-Devey & M.V. Lee Badgett, *Employer's Responses to Sexual Harassment*, CTR. FOR EMP. EQUITY, https://www.umass.edu/employmentequity/employers-responses-sexual-harassment [perma.cc/9VJE-AJG4]; *see also* Rehg et al., *supra* note 135.

137. NELP STUDY ON EMPLOYER RETALIATION, *supra* note 18, at 2.

138. *Id.* at 3–4.

139. *Id.* at 4.

140. Feldblum & Lipnic, *supra* note 136, at 21–22; NELP STUDY ON EMPLOYER RETALIATION, *supra* note 18, at 3.

141. NELP STUDY ON EMPLOYER RETALIATION, *supra* note 18, at 3 ("Black and (non-Black) Latinx workers were much more likely than white workers to have gone to work even

Scholars have posited several rationales for employer retaliation including a desire to punish employees for asserting rights or reporting wrongdoing, to discredit the employee, and to deter future employees from asserting rights or reporting wrongdoing.[142] But scholars have missed a major one: bias. That women and employees of color are disproportionately targeted suggests that bias itself is one motivation for retaliation. In other words, the race or gender of the worker engaged in protected activity motivates retaliation. Bias does not replace the traditional employer motivations for retaliation; rather, it is incorporated into them. For instance, the desire to punish employees for daring to challenge the existing organizational power structure is still there. However, this punishment may be more frequent and severe for female employees and employees of color.

This retaliation bias is not confined to one segment of the workforce. While low-wage workers face a high risk of retaliation,[143] so do workers with higher wages. For instance, in the NELP study that found a retaliation disparity based on race, the salary range of survey participants was broad, ranging from 6.2 percent of participants having an annual salary of less than $10,000 per year and 18 percent of participants earning more than $100,000 annually.[144] Moreover, differentials based on employee identity exist at the supervisory level.[145] For instance, female supervisors who report employer wrongdoing are not protected from retaliation to the extent that male supervisors are.[146] This retaliation disparity is not limited to one segment of the workforce; instead, it is pervasive throughout the workforce.[147]

The disparity in targets of retaliation is indicative of who employers believe are entitled to the statutory protections and who are excluded. It is, in essence, employers crafting their own coverage standards for minimum labor standards laws, wherein some employees may seek redress but not others, and this suitability is based on membership in a protected class. If employers only respect these provisions with respect to White or male employees, they are only complying with respect to those employees, signaling their belief that only these employees are worthy of having their labor standard rights upheld.

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though they believed they were seriously risking their health or the health of family member . . . .").

142. *See* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 465 (2008); Brake, *supra* note 134, at 20.

143. LAURA HUIZAR, NAT'L EMP. L. PROJECT, EXPOSING WAGE THEFT WITHOUT FEAR 2 (2019), https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf [perma.cc/AP8Y-E6U9].

144. The annual salary breakdown of participants in the NELP study is as follows: 6.2 percent earning less than $10,000; 9.1 percent earning $10,000 to $19,999; 11 percent earning $20,000 to $29,999; 22 percent earning $30,000 to $49,999; 21.2 percent earning $50,000 to $74,999; 12.6 percent earning $75,000 to $99,999; and 18 percent earning more than $100,000. NELP STUDY ON EMPLOYER RETALIATION, *supra* note 18, at 9.

145. Rehg et al., *supra* note 135, at 224–25.

146. *Id.*

147. *Id.* at 225.

The retaliation disparity provides additional revelation not necessarily seen in the disparities of the labor standards violations. The intentional nature of retaliation offenses suggests that the employer is signaling belief about who is deserving of coverage. For example, suppose an employer is violating the rights of only its low-wage workers. Undoubtedly, this would be problematic for numerous reasons. However, if the employer is violating the rights of all low-wage workers, regardless of race or gender, the employer is violating labor standards, but not necessarily singling out employees for violation based on intentional different treatment. Occupational segregation and its resulting disparity of having female workers and workers of color overrepresented in low-wage jobs would mean there is a disparate impact on these workers. However, the courts have ruled, much to the chagrin of many antidiscrimination scholars, that such conduct is not indicative of discriminatory intent.[148]

Unlike the labor standard violation disparity, the race and gender retaliation disparity is indicative of two intentional employer decisions. The first is the intentional decision to engage in retaliatory behavior against an employee. Retaliation is, by its very nature, intentional.[149] The second decision is intentionally selecting women and people of color, at least more often, for the retaliation. If employer retaliation was free of bias, the retaliation rationales, that is, punishing and discrediting the employee who reported the wrongdoing and deterring others from engaging in similar reporting, should apply to all employees. The fact that they do not is indicative of employer selectivity about who is deserving of attempts to exercise statutory rights and report misconduct. The same selectivity that led to occupations dominated by women and people of color being excluded from the FLSA and other legislation during passage in the New Deal era is evident in employers allowing some employees to engage in protected activity free of retribution but not others. Employers' ability to engage in retaliation at all and disparate retaliation in particular, unchecked by vigorous enforcement of antiretaliation laws, will lead to the same exclusion and, consequently, the same harmful systemic economic effects female workers and workers of color have continuously endured.

This retaliation disparity establishes a cycle where employees of color and female employees are more likely to have their workplace rights violated, triggering the need to engage in protected activity. They are more risk averse, so they are less likely to actually engage in the needed protected activity. For those who overcome this aversion and assert workplace rights, they are more likely to be retaliated against. The increased rate of retaliation makes them less likely to engage in protected activity, which makes them more attractive targets of violations of labor standards and other workplace laws.

148. *E.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976).

149. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) ("Retaliation is, by definition, an intentional act.").

C. *Disparate Coverage*

The racial and gender disparities with respect to violation of workplace statutes and retaliation against whistleblowing employees suggest that coverage differentials remain. While these coverage disparities are no longer contained in the statutory text, they are implemented via employer practice. Like some of the legislators during the New Deal, some employers today decide who should have the rights conveyed in this "universal" minimum labor standards legislation. Because antiretaliation provisions in workplace statutes are enforcement tools, the universal applicability of retaliation to all workplace rights makes antiretaliation provisions a critical component of regulatory enforcement. However, the Court has started issuing restrictive interpretations of antiretaliation provisions, changing course from its prior practice of interpreting antiretaliation provisions to provide robust protection from retaliation.

Antiretaliation provisions in statutes were once broadly interpreted to provide the greatest possible protections.[150] The U.S. Supreme Court viewed antiretaliation protections as a cornerstone to effective enforcement of the underlying statute.[151] The practice of interpreting antiretaliation protections broadly to provide the most expansive protection had come to be viewed as a canon of statutory interpretation.[152] The first modern case involving a workplace statute's antiretaliation provision, *Mitchell v. Robert DeMario Jewelry, Inc.*,[153] offers a helpful summary of the premise behind broad interpretation of antiretaliation provisions:

> Plainly, effective enforcement [of the FLSA] could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.[154]

After *Robert DeMario Jewelry*, half a century's worth of antiretaliation jurisprudence that followed interpreted antiretaliation provisions in the workplace and other statutes in a broad manner to fulfill their statutory purpose.[155]

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150. For a discussion of the U.S. Supreme Court's history of broadly interpreting antiretaliation laws, see Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RSRV. L. REV. 375, 384–85 (2010).

151. *Id.* at 384.

152. *Id.* at 377–78, 390.

153. 361 U.S. 288 (1960).

154. *Id.* at 292.

155. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (holding that 42 U.S.C. § 1982 contains an implied retaliation cause of action); NLRB v. Scrivener, 405 U.S. 117, 124–25 (1972) (holding that the NLRA's antiretaliation provision was not limited in application to only those employees who testified or filed a formal charge but applied to employees who gave written sworn statements to a National Labor Relations Board field examiner); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 744 (1983) (interpreting the NLRA to allow courts to enjoin baseless retaliatory lawsuits by employers seeking to retaliate against employees); Brock

However, this has changed in recent years, and multiple barriers have been erected, most of them coming through judicial interpretation, making it more difficult for employees to prove retaliation claims. These include heightened causation standards for retaliation claims,[156] increased thresholds for what constitutes an adverse action,[157] and the narrowing of the definition of protected activity. The law simultaneously encourages employees to report wrongdoing and makes it more difficult for employees to recover for employer retaliation once they have done so. The racial and gender disparities regarding violation of workplace laws and retaliation for seeking redress under workplace laws illustrate the importance of antiretaliation provisions to effective civil rights enforcement.

III. ANTIRETALIATION REFORM: AN INTEGRAL PART OF THE CIVIL RIGHTS AGENDA

Civil rights lawyers should give retaliation the focus it deserves, not simply in litigation but also in legislative advocacy and education. Allocation of scarce resources in a way that will do the most good and affect the most people has always been a core tenant of civil rights lawyering. In an era where constant, systemic civil rights violations abound, civil rights lawyers must engage in a tactical calculus about how to apportion scarce resources across issues and strategies. Civil rights lawyers and activists, therefore, should use minimum labor standards statutes (in addition to employment discrimination laws) to the maximum extent possible to prevent subordination and exploitations of members of protected classes. Labor standards protections, and their accompanying antiretaliation protections, should form an integral part of the

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v. Roadway Express, Inc., 481 U.S. 252, 258–59 (1987) (interpreting the Surface Transportation Assistance Act of 1982 to allow an administrative agency to temporarily reinstate a whistleblower given the importance of employee reporting in detecting unlawful safety violations); Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that the Title VII antiretaliation provision's applicability to "employees" included former employees in the scope of its protection); Haddle v. Garrison, 525 U.S. 121, 125–27 (1998) (holding that at-will employees were covered under the antiretaliation provision of 42 U.S.C. § 1985); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005) (holding that Title IX of the Education Amendments of 1972 contains implied protections from retaliation); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (permitting actions occurring outside of the workplace to qualify as adverse actions under the Title VII retaliation provision); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (holding that there is an implied cause of action for retaliation under 42 U.S.C. § 1981); Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008) (interpreting the Age Discrimination in Employment Act as containing an implied cause of action for retaliation); *see also* Moberly, *supra* note 150 (discussing many of these cases).

156. Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1891–93 (2020) (discussing the effect of a heightened causation standard in workplace retaliation cases).

157. Federal courts have begun finding that numerous types of retributory behavior by employers do not constitute an adverse action. These include negative performance evaluations, removing an employee from the office, alterations in work schedules, threatening to discipline an employee, threatening to fire an employee, and filing lawsuits. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2035–36 (2015).

civil rights agenda, with particular attention paid to litigation and administrative enforcement, education, and legislative advocacy.

A. *Litigation and Administrative Enforcement*

Pursuing retaliation claims, whether through litigation or administrative enforcement, is vital to the successful enforcement of labor standards protections. In many cases, retaliation may be a business decision for employers. When the probability of having any liability is weighed against the benefit of discrediting the complainant and, perhaps more importantly for employers, deterring future employees from asserting rights or reporting misconduct, the employer might rationally retaliate. Recent judicial interpretations that make it more difficult for employees to prove their retaliation claims have in effect lowered the business costs of retaliating against employees.[158] This is not only harmful to employees, but it is also harmful to compliant employers. Because compliance with workplace laws has associated costs, noncompliant employers actually have a competitive advantage over those who abide by the statutory labor standards.

Additionally, when deciding whether to report workplace violations, employees weigh the costs and benefits.[159] If employers are able to retaliate against employees with low associated costs, employers may rationally decide to retaliate more often. This frequent retaliation without consequence may make retaliation more present, prompting employees to perceive reporting illegal employer conduct as costly. This may also lead employees to rationally refrain from reporting employer misconduct. However, an increased focus on litigation and administrative enforcement could provide a remedy. Litigation is costly, and the more likely it is that employers will have to bear the costs of litigating retaliation claims, the more of an incentive employers will have to put effective measures in place to curtail retaliation.[160]

Pursuing cases through administrative enforcement is also crucial, but it has advantages and disadvantages. One advantage is that employees may be more likely to pursue an action through an administrative agency than a court because of the expense and complexity of litigation. Agencies provide technical assistance on what the rights and responsibilities of employers and employees are,[161] and this compliance assistance may prove useful in simplifying complex material. Additionally, agencies provide guidance on how to file a complaint and what to expect during the process.[162] This simplified process

158. *See* Steele, *supra* note 156, at 1891–93.

159. Brake, *supra* note 134, at 36.

160. For a discussion of employer incentives to curb retaliation, see Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 713–17 (2021).

161. *Compliance Assistance*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/compliance-assistance [perma.cc/MXM9-ZWNV].

162. *See, e.g.*, *How to File a Complaint*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/contact/complaints [perma.cc/Z2NS-Q3R2]; *How to File a Charge*

may make agency enforcement more attractive to employee complainants than litigation.

A possible disadvantage is the time it takes to resolve the case, as well as the level of enforcement. Sometimes scarce agency resources lead to delayed enforcement. Agency backlogs can occur because of government shutdowns, unexpected events that increase the number of complaints filed, and shrinking budgets.[163] Other times, political considerations may affect such enforcement. For example, in 2020, Trump administration DOL officials issued a policy preventing federal investigators from seeking liquidated damages in FLSA cases.[164] The Biden administration rescinded this policy in 2021.[165] Moreover, some laws, like the OSH Act, do not give employees a choice between pursuing the case in federal court or through a federal agency, as there is no private right of action.[166] The best approach is to pursue both in concert.[167]

B. *Education*

Educating workers on their rights is crucial to effective enforcement because it helps mitigate information asymmetry between employees and employers. However, ensuring employees have knowledge of their substantive workplace rights and the procedural requirements of exercising those rights can be a daunting task.[168] The current regulatory system places the responsibility on employers to inform employees of their rights.[169] While these requirements are an important aspect of any compliance program, they must be

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of Employment Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/how-file-charge-employment-discrimination [perma.cc/P8EM-2L4Y].

163. *See, e.g.*, Lisa Rein, *Federal Agencies Are Still Dealing with Pandemic Backlogs. A Shutdown Could Make Delays Worse.*, WASH. POST (Sept. 29, 2021, 6:00 AM), https://www.washingtonpost.com/politics/government-shutdown-pandemic-delays-irs-passports/2021/09/29/0d175068-209c-11ec-9309-b743b79abc59_story.html [perma.cc/3LSB-R7KA]; Chris Kirkham & Benjamin Lesser, *Special Report-U.S. Regulators Ignored Workers' COVID-19 Safety Complaints amid Deadly Outbreaks*, REUTERS (Jan. 6, 2021, 7:04 AM), https://www.reuters.com/article/us-health-coronavirus-workplace-safety-s/special-report-u-s-regulators-ignored-workers-covid-19-safety-complaints-amid-deadly-outbreaks-idUSKBN29B1FQ [perma.cc/6VVL-HL4X]; Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1143–44 (2015).

164. WAGE & HOUR DIV., U.S. DEP'T OF LAB., FIELD ASSISTANCE BULLETIN NO. 2020-2 (2020) (on file with author).

165. WAGE & HOUR DIV., U.S. DEP'T OF LAB., FIELD ASSISTANCE BULLETIN NO. 2021-2 (2021), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_2.pdf [perma.cc/J4Z2-YGHT].

166. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 732 (2003) (discussing the lack of a private right of action under the OSH Act).

167. *See* Alexander & Prasad, *supra* note 134, at 1119 ("Public and private workplace law enforcement should exist in a complementary relationship, in which one mode of enforcement compensates for the failings and inadequacies of the other.").

168. *Id.* at 1110.

169. *See, e.g.*, 29 C.F.R. § 1903.2(a)(1) (2020) (requiring covered employers to post notices informing employees of the protections and obligations provided for in the OSH Act).

supplemented. Relying *solely* on employers to inform employees of what employers are prohibited from doing is unwise, as the less information employees have about their rights, the better positioned employers are to benefit.

While employers are required by law to post certain information about workplace rights (e.g., wage and hour laws), research shows that about 59 percent of low-wage workers are unaware of their rights to minimum wage and overtime, and 78 percent do not know how to file a complaint despite both of these subjects being covered on mandatory posters.[170] Moreover, while these posters mention that employers are prohibited from retaliating against employees, they provide little if any information about what types of actions may constitute retaliation.[171]

Civil rights groups must educate workers on their workplace rights, including rights to be free from retaliation. Traditional outreach mediums like fliers, television, and radio can be paired with the plethora of social media platforms and podcasts to help ensure wide dissemination. This type of focus on education serves dual purposes. First, it decreases the information asymmetry between employers and employees. Additionally, it alerts employers that this information is being widely disseminated, and the employees are aware of their right to be free from retaliation. This may contribute to the alleviation of certain retaliatory behavior by employers.

The type of education described here is typically performed by unions for organized workers.[172] However, the sharp decrease in the unionization of workers[173] leaves this educational role unfilled.[174] Civil rights organizations, along with other advocacy and legal services organizations, are well situated to fill this role for several reasons. First, any distrust that may result from employees having to be informed of their rights by the very employers who stand to benefit from employees' lack of information is not present when the information is coming from an advocacy group. Second, civil rights groups are poised to deliver this information in forums where individuals are accustomed

170. Alexander & Prasad, *supra* note 134, at 1110.

171. *See, e.g.*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., JOB SAFETY AND HEALTH: IT'S THE LAW!, https://www.osha.gov/sites/default/files/publications/osha3165.pdf [perma.cc/SH9J-E843] (noting that employers may not retaliate and employees have the right to "[f]ile a complaint with OSHA within 30 days (by phone, online or by mail) if you have been retaliated against for using your rights" but not providing information about what constitutes retaliation or even a mailing address for complaints); *see also* Alexander & Prasad, *supra* note 134, at 1110–11 (discussing the efficacy of workplace posters).

172. *See* JOSH BIVENS ET AL., ECON. POL'Y INST., HOW TODAY'S UNIONS HELP WORKING PEOPLE 9, 12, 16–17 (2017), https://files.epi.org/pdf/133275.pdf [perma.cc/3UKA-7JXH].

173. *See* Niv Elis, *Union Membership Falls to Record Low of 10.3 Percent*, HILL (Jan. 22, 2020, 1:52 PM), https://thehill.com/policy/finance/479400-union-membership-falls-to-record-low-of-103-percent [perma.cc/X9GB-SF5L] (reporting that the percentage of salaried workers who are union members declined by 50 percent from 1983 to 2019).

174. Unions represent only 10 percent of U.S. workers. Of these, only 6 percent are in the private sector. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 620 (2019).

to receiving information like community centers and places of worship.[175] Whereas mid-size and large employers may have lawyers on staff, many employees may not be able to get legal assistance with the same ease that employers can. Access to legal advice is an essential component of increasing workers' knowledge, and civil rights groups' access to lawyers can prove valuable in these educational endeavors.[176] Additionally, state, local, territorial, and tribal governments that require continuing legal education or pro bono hours should allow workplace law trainings to qualify for such credit.[177]

C. *Legislative Advocacy*

Legislative advocacy offers a vital tool for advancing the civil rights agenda. Many state and local governments are starting to legislatively fill in gaps in protections left by federal statutes in the areas of wage theft and occupational safety and health.[178] Statutory coverage, retaliation reform, and agency resources should be among the focal areas.

Several normative proposals for antiretaliation reforms relate to the following: which individuals are covered,[179] what employee conduct is protected,[180] what employer conduct is prohibited,[181] what standards of proof are

175. *See* Alexander & Prasad, *supra* note 134, at 1110.

176. *See id.* at 1111.

177. Other activities, such as serving as a poll worker, qualify for continuing legal education credit in some states. *See, e.g.*, Anne Yeager, *Ohio Lawyers as Poll Workers: Supreme Court Approves Innovative Plan for Nov. 3*, CT. NEWS OHIO (July 23, 2020), https://www.courtnewsohio.gov/happening/2020/attorneyPollsCLE_072320.asp#.YleU75EpBD8 [perma.cc/P2UH-54RU]; *Poll Worker Program*, STATE BAR OF GA. YOUNG LAWS. DIV., https://www.gabar.org/committeesprogramssections/younglawyersdivision/poll.cfm [perma.cc/24LN-GPCK]; *SC Attorneys Can Get Training Credit by Being Poll Workers*, ABC4 NEWS (Oct. 11, 2020), https://abcnews4.com/news/local/sc-attorneys-can-get-training-credit-by-being-poll-workers [perma.cc/MTB2-LZDX].

178. For example, in 2019, Colorado, Minnesota, and New Jersey strengthened laws criminalizing wage theft. COLO. REV. STAT. § 8-4-114 (2020); MINN. STAT. § 16C.285(3) (2020); N.J. REV. STAT. § 34.1A-1.12 (2020).

179. *See* Nancy M. Modesitt, *The* Garcetti *Virus*, 80 U. CIN. L. REV. 137, 176 (2011) (advocating for the for elimination of the job duties exclusion by including statutory language that explicitly provides for antiretaliation protections even if the employee conduct related to their job functions).

180. *See* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 56–57 (2018) (arguing for abandoning the reasonable belief requirement in Title VII claims and lowering the threshold to meet the materially adverse standard); Sperino, *supra* note 157, at 2070 (asserting that the adverse action standard for retaliation should not be an onerous one); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 984–85 (2007) (proposing the elimination of a reasonableness standard for protected activity in favor of a good faith standard).

181. *See* Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 852–53 (2019) (advocating for the elimination of the requirement that the employee have a reasonable belief that they were complaining about behavior that violated the ADA or entitled to an accommodation and lowering the threshold to meet the material adversity standard).

required,[182] and what forums are available for legal redress.[183] All of these proposals would work in tandem to strengthen retaliation provisions, thus reinforcing protections for the underlying statutory rights. Below are proposed reforms that will further bolster antiretaliation protections.

1. Inclusion of Interference Clauses

Interference clauses should be added to the retaliation provisions of all workplace law statutes, including those prescribing labor standards. The NLRA, OSH Act, Employee Retirement Income Security Act of 1974 (ERISA),[184] Americans with Disabilities Act (ADA),[185] and Family and Medical Leave Act of 1993 (FMLA)[186] contain interference clauses. Of the three types of retaliation clauses (opposition, participation, and interference),[187] the interference clause provides the most protection. For instance, the FMLA has an interference clause stating, "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."[188] To prove a prima facie case of interference, the plaintiff must show (1) that they were entitled to FMLA leave, (2) that the employer's adverse action interfered with the right to take FMLA leave, and (3) that the adverse action was related to the exercise or attempted exercise of FMLA rights.[189] Retaliation claims usually require intent, but claims brought under the FMLA interference clause do not.[190] The ability to hold employers liable for adverse actions based on leave entitlement without the employee having to prove intent strengthens the retaliation prohibition.

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182. *See id.*

183. *See* MARTHA MCCLUSKEY ET AL., CTR. FOR PROGRESSIVE REFORM, THE NEXT OSHA 4 (2012), https://cpr-assets.s3.amazonaws.com/documents/Next_Generation_OSHA_1207.pdf [perma.cc/YD7L-WXY7] (arguing that a private right of action for OSH Act claims would strengthen enforcement).

184. 29 U.S.C. § 1140.

185. 42 U.S.C. § 12203.

186. *Id.*; 29 U.S.C. § 2615.

187. *See Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues [perma.cc/RH4D-556D].

188. 29 U.S.C. § 2615(a)(1).

189. Jones v. Denver Pub. Schs., 427 F.3d 1315, 1319 (10th Cir. 2005).

190. Stallings v. Hussmann Corp., 447 F.3d 1041, 1051 (8th Cir. 2006) ("[T]he interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent."); Russell v. N. Broward Hosp., 346 F.3d 1335, 1340 (11th Cir. 2003) (concluding that the burden to establish an interference claim is lower than that of a retaliation claim, which requires a showing that the adverse action was motivated by an impermissible retaliatory animus); Nero v. Indus. Molding Corp., 167 F.3d 921, 927 (5th Cir. 1999) ("Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer." (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998))).

Even in cases where statutes have an interference clause, the courts still require intent, but protections are broader than in statutes without an interference clause. The ADA is illustrative; it contains an opposition, participation, and interference clause.[191] The interference clause provides,

> [i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA].[192]

Because the interference clauses found in the ADA and the Fair Housing Act (FHA)[193] are virtually identical,[194] courts use FHA antiretaliation jurisprudence to inform their analytical framework for ADA interference claims.[195]

Plaintiffs alleging an ADA interference claim must show that (1) they engaged in activity protected by the statute; (2) were engaged in, or aided or encouraged others in, the exercise or enjoyment of rights protected by the ADA; (3) the employer coerced, threatened, intimidated, or interfered on account of the protected activity; and (4) the defendants were motivated by an intent to discriminate.[196] The U.S. Equal Employment Opportunity Commission (EEOC) has explained that while the ADA prohibits both retaliation and interference, ADA interference is broader than retaliation.[197] The agency also notes that threats do not have to be carried out for ADA interference to have occurred.[198] This lowers the employee's burden with respect to proving an adverse action and increases protections for anticipatory retaliation.

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191. *See* 42 U.S.C. § 12203.

192. *Id.*

193. The Fair Housing Act, 42 U.S.C. §§ 3601–3631.

194. The FHA interference provision states,

> [i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the FHA].

Id. § 3617.

195. *See* Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 550–51 (7th Cir. 2017) (stating that guidance on analyzing ADA interference claims "can be found in our application of the anti-interference provision of the Fair Housing Act"); Brown v. City of Tucson, 336 F.3d 1181, 1191 (9th Cir. 2003) (concluding that the court's treatment of FHA interference claims should guide its analysis of ADA interference claims because "similarities between statutory provisions are an indication that Congress intended the provisions to be interpreted the same way").

196. *Frakes*, 872 F.3d at 550–51.

197. *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues [perma.cc/JP2W-VJS3].

198. *Id.*

Retaliation prohibitions protect private enforcement statutory rights. Whether the right at issue is the right not to have an employee's race be considered as a factor in an employment decision, the right not to be sexually harassed at work, or the right to work in a safe, hazard-free workplace, the statute's purpose is to convey rights. Any form of retaliation is interference with these statutory rights. Inclusion of both interference clauses and opposition and participation clauses ensures more robust protections.

2. Exclusion of Statutory Employment Rights from Mandatory Arbitration Agreements

A statutory prohibition on arbitrating employment rights would also strengthen workplace antiretaliation protections. Courts are divided on the validity of provisions of arbitration agreements that alter certain workplace rights.[199] Additionally, scholars have observed that mandatory arbitration can harm both employees and the public,[200] noting that mandatory arbitration will keep meritorious claims from being pursued.[201] Many arbitration agreements also contain class action waivers that prohibit participation in class actions. These waivers were upheld by the U.S. Supreme Court in a 5–4 decision, notwithstanding the NLRA's grant of the statutory right to engage in concerted activity.[202]

Given the harmful effects mandatory arbitration can have on employees and the public, an explicit statement that mandatory arbitration provisions, particularly those executed before the rights at issue even existed, do not prevent employees from bringing retaliation claims would strengthen retaliation provisions. Even if Congress is not willing to create a blanket exclusion for all workplace statutes, it should create an exclusion for rights not in existence when the agreement to arbitrate was signed.

The Age Discrimination in Employment Act of 1967 (ADEA)[203] provides an example of how Congress could prevent the waiver of employment rights

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199. *Compare* Clymer v. Jetro Cash and Carry Enters., Inc., 334 F. Supp. 3d 683 (E.D. Pa. 2018) (holding that a provision in an arbitration agreement requiring claims to be submitted to an arbitrator within one year of the event giving rise to the claim was substantively unconscionable and unenforceable as applied to FMLA claims because FMLA regulations precluded employers from limiting FMLA rights of employees, including shortening the applicable statute of limitations), *with* Jann v. Interplastic Corp., 631 F. Supp. 2d 1161 (D. Minn. 2009) (concluding that the FMLA regulation stating that employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA did not prohibit arbitration of a former employee's FMLA claims because by agreeing to arbitrate, the former employee did not forgo her substantive rights but instead only submitted to their resolution in an arbitral forum rather than a judicial one).

200. Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 186 (2019).

201. *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 691–93 (2018).

202. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

203. 29 U.S.C. §§ 621–634.

through arbitration agreements. The ADEA has provisions that (1) prohibit a person from waiving rights through an agreement unless the waiver specifically refers to rights or claims arising under the statute and (2) does not permit an individual to waive rights or claims that may arise after the date the waiver is executed.[204] Moreover, the ADEA also prevents waiving the ability to file a charge with EEOC.[205] This is important because compelling arbitration itself can be retaliatory.[206] All retaliation statutes should include this type of prohibition that prevents an arbitration agreement or other agreement from waiving an individual's ability to provide information to the government. Making this language a standard part of all retaliation provisions would prevent waiver of rights in an agreement signed before the rights existed and help not only protect employee rights but also those of the general public. Courts have recognized the relationship between allowing employees to waive workplace rights and the public interest, and they typically prohibit waiver when it would be against the public interest.[207]

3. Reporting by Employers and Federal Agencies

Many employers are staunchly protective of their reputations, as these can affect their customer base and profit margin. Implementing affirmative disclosure requirements on employers may induce employers to ensure their workplaces are free from retaliation.

Employers already have a duty to report certain information to the federal government, such as workplace fatalities and severe injuries,[208] EEO-1 forms,[209] and reporting of changes to retirement and pension plans.[210] Mandatory reporting of instances of retaliation to the requisite government officials could help curb retaliation. Other scholars have noted the importance of public disclosure in helping to curb violation of workplace laws like Title

204. *Id.* § 626(f)(1).

205. *Id.* § 626(f)(4).

206. Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201 (2014).

207. *See, e.g.*, Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 697, 704 (1945) ("[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."); *see also* Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 ALA. C.R. & C.L. L. REV. 1, 11–15 (2019) (discussing the public interest inherent in the passage and implementation of the FLSA).

208. *OSHA Injury and Illness Recordkeeping and Reporting Requirements*, U.S. DEP'T OF LAB., https://www.osha.gov/recordkeeping [perma.cc/3ELJ-4RS6].

209. The EEO-1 report is a report all private sector employers with 100 or more employees and covered federal contractors with fifty or more employees must submit that includes demographic data on the employer's workforce. *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/eeo-1-data-collection [perma.cc/4WQ2-MUQF].

210. INTERNAL REVENUE SERV., PUB. 5411, RETIREMENT PLANS REPORTING AND DISCLOSURE REQUIREMENTS (2020), https://www.irs.gov/pub/irs-pdf/p5411.pdf [perma.cc/BT8N-ZEVS].

VII.[211] Such reporting could similarly reduce employer abuses regarding labor standards and retaliation.

Recordkeeping by government agencies would also enhance transparency and accountability. Agencies charged with handling retaliation complaints should collect demographic data on the individuals either filing the retaliation claims or, in the case of a third-party reporting, data on the alleged retaliation victim(s).

CONCLUSION

Despite their discriminatory origins, labor and employment laws protect vital civil rights. However, "universalist" laws carved out many workers from protection, with female workers, workers of color, and those at the intersection being the groups primarily affected. An examination of the legislative history of New Deal workplace and social welfare legislation shows the racial and gendered considerations that fueled the exclusion of so many Black, brown, and female workers. These exclusions were passed down from one statute to another throughout the twentieth century. While the advocacy of civil rights groups led to the eventual, although partial, inclusion of previously excluded groups, the initial period of exclusion had severe and long-lasting economic consequences.

Though statutory amendments now bring more racial and ethnic minorities and women within the scope of the laws' coverage, disparities in violations abound. Female workers and workers of color experience more violations of wage and hour, occupational safety and health, and family and medical leave laws.

Moreover, disparities exist with respect to retaliation against employees for asserting rights under these laws. Both the disparate violations and disparate retaliation suggest that employers seek to mimic Southern Democrats during the New Deal, handpicking which workers are deserving of "universal" workplace rights along race and gender lines.

The disparity in retaliation victims signals a departure from traditional rationales for employer retaliation, namely a desire to punish the complainant, discredit the complainant, or use the complainant as an example to deter other employees from asserting workplace rights or reporting employer misconduct. If these constituted the exclusive reasons for employer retaliation, then retaliatory actions would be taken against the total population of workers engaging in protected activity. However, retaliation's disproportionate effect on women and workers of color suggests employers engage in selective retaliation. Despite marginalized workers' gains made in coverage under minimum labor standards laws, discriminatory compliance by employers threatens to undermine the coverage gains of the mid- to late-twentieth cen-

211. *See, e.g.*, Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287 (2021) (advocating for the imposition of public disclosure requirements that track employee pay, promotion, and the race and gender of harassment victims).

tury. Coupled with the weakening of antiretaliation protections, discriminatory compliance poses a threat to workplace rights. For these reasons, retaliation reform should be an integral part of the civil rights agenda. Litigation, mobilization, education, and legislative advocacy are critical to combatting retaliation and ensuring enforcement of rights under labor standards legislation.