NOTES

Regulating the Private Home Workplace: How to Enforce Labor Standards for an "Invisible Workforce"

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This is a workforce where the private home is their workplace. So you could go into any neighborhood or apartment building and not know which of these homes are also workplaces. There's no list anywhere. They're not registered anywhere. There's no other coworkers. You're mostly isolated and alone. And there's certainly no HR department or anything like that.

– Ai-jen Poo, PBS interview[1]

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†† This paper is based on a paper written for Professor Christopher Edley's Advanced Administrative Law Seminar and was inspired by conversations with clients, organizers, and practitioners. I am particularly indebted to attorneys at Bet Tzedek Legal Services and Legal Aid at Work for their insights.

1. Interview by Ivette Feliciano & Corinne Segal with Ai-jen Poo, *"You're Mostly Isolated and Alone." Why Some Domestic Workers are Vulnerable to Exploitation*, PBS (Aug. 12, 2018), https://www.pbs.org/newshour/nation/ai-jen-poo-domestic-workers-exploitation [https://perma.cc/YC6Q-8LWS].

INTRODUCTION: DEFINING THE "INVISIBLE WORKFORCE"

There are around 2.5 million domestic workers in the United States,[2] and over three hundred thousand of them live and work in California.[3] They are nannies, caregivers, and house cleaners in private homes; they are disproportionately immigrant women of color,[4] and many are believed to be undocumented.[5] Domestic work is sometimes referred to as "invisible

2. *About Us*, NAT'L DOMESTIC WORKERS ALL., https://www.domesticworkers.org/about-us [https://perma.cc/VA35-H7TE] (last visited Nov. 23, 2020); *see also* ECON. POL'Y INST., DOMESTIC WORKERS CHARTBOOK 39 tbl.1 (2020) [hereinafter EPI CHARTBOOK], https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/ [https://perma.cc/2UVP-S9BT] (estimating that there are 2.2 million domestic workers in the United States but that this is likely an undercount due to "under the table" work arrangements and the high proportion of immigrants in the domestic workforce).

3. EPI CHARTBOOK, *supra* note 2, at 44–46 tbl.4.

4. The Economic Policy Institute found that in 2019, 57.1 percent of domestic workers in the United States were Black, Latinx, or Asian American/Pacific Islander (AAPI). EPI CHARTBOOK, *supra* note 2, at 8. These same groups made up only 36.0 percent of the rest of the U.S. workforce. *Id.* at 42–43 tbl.3. They further found that 52.4 percent of domestic workers were women of color; specifically, over a quarter of domestic workers were Latina women, and almost one in five were Black women. *Id.* Finally, they found that 35.1 percent of domestic workers were immigrants (including foreign-born U.S. citizens and foreign-born noncitizens), compared to only 17.1 percent of the rest of the U.S. workforce. *Id.* These trends are even more pronounced in California. For example, in California, 74.5 percent of domestic workers are people of color compared to 56.1 percent of the overall workforce. ECON. POL'Y INST., DOMESTIC WORKERS CHARTBOOK SUPPLEMENTAL TABLES (2020), https://www.epi.org/files/uploads/state_domesticworker_demos.xls [https://perma.cc/5LET-J4E2]; *see also* VERÓNICA PONCE DE LEÓN & KEVIN RILEY, UCLA LABOR OCCUPATIONAL SAFETY & HEALTH PROGRAM ET AL., HIDDEN WORK, HIDDEN PAIN: INJURY EXPERIENCES OF DOMESTIC WORKERS IN CALIFORNIA 2 (2020) [hereinafter HIDDEN PAIN], https://losh.ucla.edu/wp-content/uploads/sites/37/2020/06/Hidden-Work-Hidden-Pain.-Domestic-Workers-Report.-UCLA-LOSH-June-2020-1.pdf [https://perma.cc/8SPY-D5RS] ("The vast majority of domestic workers in California are immigrant women of color; 95% are women, and 84% are immigrants.") (citation omitted).

5. It is believed that domestic workers are disproportionately undocumented. *See, e.g.*, HIDDEN PAIN, *supra* note 4, at 2 (citation omitted) ("Most immigrant housecleaners and childcare providers in Southern California are from Latin America and the Philippines and approximately half of all foreign-born domestic workers are undocumented."); NIK THEODORE, BETH GUTELIUS, & LINDA BURNHAM., NAT'L DOMESTIC WORKERS ALL. ET. AL., HOME TRUTHS: DOMESTIC WORKERS IN CALIFORNIA 13 (2013), https://www.issuelab.org/resources/15456/15456.pdf?download=true&_gl=1*eb4f2b*_ga*MTM1MTY3NzM4Ni4xNjI2NTM0Mjgy*_ga_5W8PXYYGBX*MTYyNjUzNDI4MS4xLjAuMTYyNjUzNDI4MS4w&_ga=2.210413015.314599662.1626534282-1351677386.1626534282 [https://perma.cc/P867-FKXJ] (finding that 51 percent of surveyed domestic workers in major California metropolitan areas were undocumented); Sasha Abramsky, *Undocumented Workers in Coronavirus Crisis*, THE NATION (May 14, 2020), https://www.thenation.com/article/society/coronavirus-undocumented-workers-california/

work."[6] It takes place in private homes, employment arrangements are frequently informal or "under the table," and domestic workers rarely have coworkers. While this work enables the functioning of our entire economy, it is often seen through a racialized and feminized lens as a personal and expected duty rather than as compensable labor.[7] The fight for domestic workers' rights is inherently a fight for racial and gender equity.

The "invisibility" of the workforce makes domestic workers particularly vulnerable to workplace abuses for two main reasons. First, there is a pernicious, symbiotic relationship between this "invisibility" and the racist exclusion of domestic workers from most labor standards. Second, the same characteristics of domestic work that make it "invisible" raise unique obstacles to enforcing the few labor standards that do protect domestic workers.

This Note examines each of these dynamics in turn before turning to an analysis of how different enforcement models might answer these challenges. This analysis centers on California state law enforcement because, as the largest state economy in the nation,[8] California has often served as a

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[https://perma.cc/3DRN-A5TP] ("In California's cities, garment and domestic workers are disproportionately likely to be undocumented."); Ashley Lynn Priore, *"This is a Nightmare" Undocumented Domestic Workers Share Impact of Coronavirus*, MS. (Apr. 9, 2020), https://msmagazine.com/2020/04/09/this-is-a-nightmare-undocumented-domestic-workers-share-impact-of-coronavirus/ [https://perma.cc/Q73Q-59JQ]. However, it is difficult to know exactly how many domestic workers are undocumented. *See, e.g.*, NAT'L DOMESTIC WORKERS ALL. LABS, 6 MONTHS IN CRISIS: THE IMPACT OF COVID-19 ON DOMESTIC WORKERS 7 (2020), https://domesticworkers.org/sites/default/files/6_Months_Crisis_Impact_COVID_19_Domestic_Workers NDWA Labs 1030.pdf [https://perma.cc/K722-PRCJ] ("Because our surveys are conducted inside a social media product, whose privacy policies we do not control, we deliberately do not collect data on immigration status . . . . We think it is reasonable to conclude that a significant percentage of our survey respondents are immigrants.").

6. *See, e.g.*, Feliciano & Segal, *supra* note 1 (describing how "[i]n many ways this work is almost defined by invisibility"). The term "invisible work" was coined by Arlene Kaplan Daniels to refer to the devaluation of women's work in the home. *See* Arlene Kaplan Daniels, *Invisible Work*, 34 SOC. PROBS. 403 (1987); Erin Hatton, *Mechanisms of Invisibility Rethinking the Concept of Invisible Work*, 31 WORK, EMP'T & SOC'Y 336 (2017). The term has often since been applied to domestic work. *See, e.g.*, Rosie Cox, *Invisible Labour Perceptions of Paid Domestic Work in London*, 4 J. OF OCCUPATIONAL SCI. 62 (2011); Elin Peterson, *The Invisible Carers Framing Domestic Work(ers) in Gender Equality Policies in Spain*, 14 EUR. J. OF WOMEN'S STUDS. 265 (2007); Alexandra Mateescu & Julia Ticona, *Invisible Work, Visible Workers Visibility Regimes in Online Platforms for Domestic Work*, *in* BEYOND THE ALGORITHM: QUALITATIVE INSIGHTS FOR GIG WORK REGULATION 57 (Deepa Das Acevedo ed., 2020).

7. Hina Shah & Marci Seville, *Domestic Worker Organizing Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 415–17 (2012); CAL. DOMESTIC WORKERS COAL. & WOMEN'S EMP'T RIGHTS CLINIC, KNOW YOUR RIGHTS BOOKLET 6 (2018) [hereinafter CDWC KNOW YOUR RIGHTS BOOKLET], https://www.cadomesticworkers.org/wp-content/uploads/2019/03/CDWC.KYRbooklet_Eng_091918-1.pdf [https://perma cc/DLN9-S24L] ("Lawmakers did not consider domestic work to be a real job and argued that people do it as a 'source of rewarding activity' and only for 'supplemental income.'").

8. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., NEWS RELEASE BEA 21-13, GROSS DOMESTIC PRODUCT BY STATE, 4TH QUARTER 2020 AND ANNUAL 2020 (PRELIMINARY), (March 26,

laboratory for progressive policies in many areas of the law.[9] Part I lays out the current workplace protections for domestic workers under federal and California law, which are largely characterized by racist statutory and regulatory exclusions. Part II describes the campaign for—and ultimate veto of—the California Health and Safety for All Workers Act. In doing so, it highlights three key government interests with which advocates must grapple in future versions of the bill: agency efficiency, employer privacy, and employer ability to comply with new legal obligations. Part III identifies several interrelated challenges of labor standards enforcement in the domestic work industry: the isolated nature of the work, the intimate nature of the employment relationship, and workers' justified fear of retaliation. Part IV evaluates several labor standards enforcement models based on how well they address government interests and meet workers' needs. This Note ultimately proposes that a combination of co-enforcement and an anonymized form of regulation by shaming likely best addresses the specific needs and challenges of the domestic work industry.

I. RACIST EXCLUSIONS: PAST AND PRESENT

A. Federal Law Overview

Domestic workers have systematically been excluded from workplace protection laws since the time of slavery.[10] Historically, domestic work was not considered "real" work not only because it was women's work, but more specifically because it was Black women's work.[11] Beginning with the National Labor Relations Act (NLRA) in 1935,[12] Congress carved out

2021) (showing in Table 3 that California's current-dollar gross domestic product (GDP) was the highest of any state's GDP).

9. *See* Harry N. Scheiber, *California— Laboratory of Legal Innovation*, 13 CAL. LEGAL HIST. 413, 414 (2018) ("When California law has been different . . . it has often been the bellwether of legal change nationally."); *cf.* Jeremy B. White, *California Proves It's Not as Liberal as You Think*, POLITICO (Nov. 5, 2020), https://www.politico.com/states/california/story/2020/11/05/california-proves-its-not-as-liberal-as-you-think-1334485 [https://perma.cc/LY5F-Q8GD] ("California has long been an incubator for policies that go national, so industries and labor unions know that winning a ballot fight here has much wider implications.").

10. *See* Frank Shyong, *In the Midst of Wildfires and a Pandemic, Domestic Workers Need Protections More Than Ever*, L.A. TIMES (Sept. 21, 2020), https://www.latimes.com/california/story/2020-09-21/domestic-workers-protections-california-sb1257 [https://perma.cc/W27R-39W9] (discussing the racist history of domestic workers' exclusion from federal labor protections).

11. Shah & Seville, *supra* note 7, at 415–17 (describing how "African-American women dominated the domestic services both during and after slavery in the South . . . [and also] came to supply domestic labor in northern cities" following the Great Migration).

12. The National Labor Relations Act gives employees the right to organize, form or join unions, and collectively bargain, but domestic workers are explicitly excluded from the NLRA's definition of an "employee." 29 U.S.C. § 152(3) (2018) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . . .").

exceptions for domestic workers and agricultural workers in order to get the Southern Dixiecrat vote.[13] The implication was clear: Black people were not entitled to workplace protections. These same racist exceptions wormed their way into the Fair Labor Standards Act (FLSA),[14] the Occupational Safety and Health Act (OSH Act) regulations,[15] and more subtly, Title VII of the Civil Rights Act of 1964 (Title VII).[16] Most state laws still replicate these exclusions, leaving domestic workers nationwide with fewer protections than any other group of workers.[17]

Further, immigration status can add additional layers of vulnerability for domestic workers. Specifically, many domestic workers are undocumented.[18] Though undocumented workers are technically protected by many labor laws,[19] in practice they are rarely able to secure those rights out of fear that employers or government officials will report them or their families to immigration authorities.[20] This dynamic is further complicated by the Immigration Reform and Control Act (IRCA), which imposes a mandatory duty on employers to investigate immigration status upon hiring and prohibits employers from knowingly hiring undocumented workers.[21] Employers may also attempt to inquire into the immigration status of employees that sue

13. *See* Feliciano & Segal, *supra* note 1 (explaining that "Southern members of Congress refused to support the labor law provisions of the New Deal if they included farm workers and domestic workers who were largely African-American at the time"); Paul Frymer, *Race, Labor, and the Twentieth-Century American State*, 32 POL. & SOC. 475, 481 (2004) ("Labor legislation . . . excluded large portions of African American workers, most notably by denying statutory protection to agricultural and domestic workers, effectively excluding roughly two-thirds of the black workforce population.").

14. *See* 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, 114–17 (2011) (describing how "southern members of Congress who debated the FLSA were more open about their racist desires to exclude blacks from FLSA protections"). The FLSA's maximum hours provisions do not cover live-in domestic workers. 29 U.S.C. § 213(21) (2018) (excluding from overtime regulations "any employee who is employed in domestic service in a household and who resides in such a household").

15. 29 C.F.R. § 1975.6 (2020) ("[I]ndividuals who . . . privately employ persons for the purpose of performing . . . ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall not be subject to the requirements of the Act . . . .").

16. Because Title VII only covers employers with fifteen or more employees and most domestic workers do not have coworkers, the statute's prohibition against discrimination practically excludes most domestic workers. 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day . . . .").

17. Shah & Seville, *supra* note 7, at 417.

18. *See* sources cited *supra* note 5.

19. *See generally* GALEN AGES & MIKE GAITLEY, THE WORKERS' RIGHTS CLINIC EMPLOYMENT LAW MANUAL, ch. 22 (2020) (describing employment law coverage for immigrant workers).

20. *See* Tanya L. Goldman, *Tool 5 Addressing and Preventing Retaliation and Immigration-Based Threats to Workers*, *in* THE LABOR STANDARDS ENFORCEMENT TOOLBOX 1, 2 (Janice Fine et al. eds., 2019),
https://www.clasp.org/sites/default/files/publications/2019/04/2019_addressingandpreventingretaliation.pdf [https://perma.cc/6GGG-R93Y].

21. 8 U.S.C. § 1324a (2018). *See also* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1074 (9th Cir. 2004) (describing how "an employer may request [certain documents] when fulfilling its mandatory duty to investigate immigration status upon hiring, recruiting, or referring new employees" under IRCA).

them.[22] Even domestic workers who have work visas may be discouraged from reporting workplace abuses because their visas are tied to their jobs, and any report or lawsuit that jeopardizes their work status could leave them open to deportation.[23]

B. California Law Overview

While California law has recently made some progress in extending labor standards to domestic workers, California domestic workers still face many of the same exclusions under state law as they do under federal law. In 2001, the California Industrial Welfare Commission (IWC) passed a Household Occupations Wage Order, which extended some wage and hour protections to domestic workers.[24] However, "personal attendants" who spend significant time caring for children, seniors, and people with disabilities were excluded from the vast majority of the Wage Order's protections.[25] After years of organizing, the California Domestic Workers Coalition (CDWC) and its allies succeeded in passing the California Domestic Worker Bill of Rights (DWBR) in 2013.[26] Under the DWBR, domestic workers who work as "personal attendants"[27] in private households and can be classified as employees[28] are entitled to overtime wages when they work more than nine hours in a workday or more than forty-five hours in a workweek.[29] Though the DWBR was a significant achievement, there are two important caveats to the DWBR's protections. First, under California IWC Wage Orders, most workers are entitled to overtime after *eight* hours in a workday or *forty* hours in a workweek.[30] Second, all other workers are

22. *See, e.g.*, *Rivera*, 364 F.3d at 1057 (finding that an employer's attempt to use the discovery process to inquire into employees' immigration status would not violate IRCA).

23. *Cf.* Briana Beltran, *The Hidden "Benefits" of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 237–39 (2020) (describing the factors that enable the exploitation of immigrant workers in temporary foreign worker programs).

24. CAL. CODE REGS. tit. 8, § 11150 (2001) [hereinafter "Wage Order No. 15-2001"].

25. *See* Shah & Seville, *supra* note 7, at 425–28 ("[I]n 2001, attendants gained the right to minimum wage but continue to be excluded from all other provisions of the IWC Wage Order.").

26. *See* Shah & Seville, *supra* note 7, at 433–41; CAL. LAB. CODE §§ 1450–1453, 1454 (West 2020).

27. The DWBR defines "personal attendants as workers who spend at least 80% of their weekly hours "supervis[ing], feed[ing], or dress[ing] a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision." CAL. LAB. CODE § 1451(d) (West 2020).

28. The complex issues of employee vs. independent contractor classification are beyond the scope of this Note.

29. *Id.* § 1454.

30. *See, e.g.*, CAL. CODE REGS. tit. 8, § 11010 (2001) (requiring the payment of overtime in the manufacturing industry after eight hours in a workday or forty hours in a workweek); *id.* § 11020 (personal service industry); *id.* § 11030 (canning, freezing, and preserving industry).

entitled to meal and rest breaks; personal attendants are not.[31] That is, personal attendants are still singled out for lower labor standards.[32]

Domestic workers are also covered by California anti-harassment and anti-retaliation provisions. California's Fair Employment and Housing Act (FEHA), which prohibits employment discrimination, generally only covers employers with five or more employees. Like Title VII, FEHA's general anti-discrimination provisions thus implicitly exclude most domestic workers.[33] However, FEHA's anti-harassment provision covers any employer with one or more employee and thus covers domestic workers.[34] And California's general prohibition on retaliation against workers who exercise their rights also covers domestic workers,[35] at least on paper. Further, reporting a worker or her family to immigration authorities is an unlawful form of retaliation under California law.[36] Part III will discuss the practical limitations of these protections that nominally cover domestic workers.

However, there are many California workers' rights that are not extended to domestic workers. For example, many domestic workers are barred from receiving employment-linked benefits under California law. First, the California Unemployment Insurance Code bars undocumented residents from receiving unemployment insurance or state disability insurance because of the legal fiction that those without work authorization are not "able and available to work."[37] Second, the Code specifically excludes many domestic workers from accessing these benefits, even if they have work authorization, based on a special earnings threshold.[38]

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31. AGES & GAITLEY, *supra* note 19, at ch. 8 n.1586.

32. This likely reflects the same flawed assumptions underlying the historic exclusion of personal attendants from the Wage Orders, namely that "these workers were either young or elderly persons supplementing income received from their parents or social security," and that such work is "socially desirable not only as a source of supplementary income for aging persons but also a source of rewarding activity." Shah & Seville, *supra* note 7, at 425–28 (describing the campaign to urge the IWC to issue a wage order for domestic workers, the agency's long period of inaction, and the rationales advanced in opposition to the wage order).

33. *See* CAL. GOV'T CODE § 12926(d) (West 2021).

34. *Id.* § 12940(j)(1), (4)(A).

35. *See* CAL. LAB. CODE § 98.6(a) (West 2016); *see also* CAL. GOV'T CODE § 12940(h) (West 2021) (prohibiting "any employer . . . or person [from] discharg[ing], expel[ling], or otherwise discriminat[ing] against any person because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA].").

36. CAL. LAB. CODE § 1019 (West 2016).

37. *See* CAL. UNEMP. INS. CODE § 1264 (West 2014); LEGAL AID AT WORK, EMPLOYMENT RIGHTS OF UNDOCUMENTED WORKERS FACTSHEET 4 (n.d.) (explaining that "[t]o collect unemployment insurance, workers must be both 'able to work' and 'available for work,'" but that the California Employment Development Department has determined that undocumented workers are not legally eligible, and therefore not available, for work).

38. *See* CAL. UNEMP. INS. CODE § 629(a) (excluding from coverage all domestic workers "in a private home," except those paid more than $1,000 in cash by a single employer during any quarter of the current or preceding calendar year).

Finally, California's Occupational Safety and Health Act (Cal/OSHA)[39] singles out domestic workers for exclusion.[40] This exclusion has tremendous tangible impact and has been a primary focus of domestic worker organizing in California in recent years, as described *infra* Part II.

II. THE HEALTH AND SAFETY FOR ALL WORKERS ACT (SB 1257)

The COVID-19 pandemic and California wildfires have illuminated and magnified the dangers that domestic workers have always faced due to their exclusion from workplace protections.[41] Domestic workers are frontline, essential workers, but have no legally mandated protections for their health and safety.[42] Even outside of emergency situations, domestic workers face occupational risks and hazards.[43] In the private home workplace, domestic workers engage in heavy physical labor that creates ergonomic stress.[44] They are exposed daily to household cleaning chemicals that can produce negative effects on the body after long-term exposure.[45] They are at risk of suffering from psychological stress[46] and are especially vulnerable to workplace violations because of the isolated nature of their work.[47]

It is in this context that the Health and Safety for All Workers Act (SB 1257) passed the California Senate and Assembly by a wide margin, without any organized opposition, before being vetoed by Governor Gavin Newsom in September 2020.[48] SB 1257 would have ended the exclusion of domestic

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39. A note on terminology: throughout this Note, I will distinguish between the federal and state agencies responsible for occupational health and safety by referring to them as "federal OSHA" and "Cal/OSHA," respectively.

40. CAL. LAB. CODE § 6303(b) (West 2002) ("'Employment' . . . includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work . . . in which any person is engaged or permitted to work for hire, *except household domestic service.*") (emphasis added).

41. Shyong, *supra* note 10; *see generally* ISAAC JABOLA-CAROLUS, UNPROTECTED ON THE JOB: HOW EXCLUSION FROM SAFETY AND HEALTH LAWS HARMS CALIFORNIA DOMESTIC WORKERS (2020), https://academicworks.cuny.edu/gc pubs/652/ [https://perma.cc/PE6H-Y3WS]; NAT'L DOMESTIC WORKERS ALL. LABS*, supra* note 5.

42. Víctor Vorrath, *Trabajadoras Domésticas de California Protestan tras Veto al Proyecto de Ley SB 1257* [California Domestic Workers Protest Veto of SB 1257 Bill], UNIVISION (Oct. 1, 2020), https://www.univision.com/local/los-angeles-kmex/elecciones-estados-unidos-2020/trabajadoras-domesticas-de-california-protestan-tras-veto-al-proyecto-de-ley-sb-1257 [https://perma.cc/K4HF-AT3H] (describing the exclusion of domestic workers from California health and safety protections).

43. HIDDEN PAIN, *supra* note 4, at 6–8.

44. *Id.*

45. *Id.*

46. *Id.* at 8.

47. *See generally id.*

48. *See* Press Release, Gavin Newsom, Cal. Governor, SB 1257 Veto Message (Sept. 29, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/SB-1257.pdf [https://perma.cc/C7RQ-S2QK] (writing that "a blanket extension of all employer obligations to private homeowners and renters is unworkable and raises significant policy concerns"); Jacqueline Garcia, *Governor Vetoes Bill Extending Protections to Domestic Workers*, CALMATTERS (Oct. 1, 2020), https://calmatters.org/california-divide/2020/10/governor-vetoes-bill-domestic-workers/ [https://perma.cc/53XF-XD7A].

workers from California's Occupational Safety and Health Act.[49] Supporters of the bill included the CDWC, Hand in Hand: the Domestic Employers Network, and many prominent workers centers and unions throughout California.[50]

Though SB 1257 did not become law, the CDWC and its allies are not giving up. As one domestic worker said the day after the veto, "[the Governor] cut down our dream of achieving health [and] safety [at] work but he didn't cut our wings. We'll keep fighting for what we deserve [and] we will win!"[51] Another domestic worker wrote that when the Governor vetoed SB 1257, "I was sad and angry. But I want my children to remember me not as a victim, but as a warrior. We're coming back stronger, with more workers and more hope. We'll get the bill passed again – and one way or another, the governor will have to listen to us."[52]

As the domestic workers' movement continues to organize and lobby for occupational health and safety protections in the private home workplace,[53] it must contend with the unique set of enforcement challenges such a law would pose. The legislative history of SB 1257, the bill's text, and the Governor's veto message highlight these challenges from the perspective of the government and domestic employers.

A. Legislative History

Concerns raised at various points in the legislative process are worth considering. First, the Senate Committee on Labor, Public Employment, and Retirement noted the potential challenges of extending the legal obligations placed on California employers to the employers of domestic workers.[54] It raised, for example, the difficulty of even identifying domestic employers, given that they are not required to register with any government entity. It also

49. S.B. 1257 § 1, 2019–2020 Reg. Sess. (Cal. 2020) [hereinafter "SB 1257"].

50. S. RULES COMM., FLOOR ANALYSIS OF SB 1257, 2019–2020 Reg. Sess. (Cal. 2020).

51. CAL. DOMESTIC WORKERS COAL. (@CADomesticWrker), TWITTER (Oct. 2, 2020, 5:44 PM), https://twitter.com/CADomesticWrker/status/1312191740489601026?s=20 [https://perma.cc/MK2K-WZ34] (quoting Erika Chavez of La Colectiva).

52. Socorro Diaz, *Protect Care Workers – You'll Need Us Someday*, INEQUALITY.ORG (Apr. 8, 2021), https://inequality.org/research/protect-care-workers/ [https://perma.cc/KTB4-7MWM].

53. In early 2021, the CDWC relaunched its campaign for the Health and Safety for All Workers Act (introduced by State Senator Durazo as SB 321, which is virtually identical to SB 1257). S.B. 321 § 1, 2021–2022 Reg. Sess. (Cal. 2021) [hereinafter "SB 321"]; CAL. DOMESTIC WORKERS COAL. (@cadomesticworkers), INSTAGRAM (Feb. 23, 2021), https://www.instagram.com/p/CLprp1dgND-/?igshid=18dkt279cttlc [https://perma.cc/Y7EX-JB27]. As of mid-April 2021, SB 321 had passed the Senate Committee on Labor, Public Employment and Retirement and the Senate Judiciary Committee (with proposed amendments). *See* S. COMM. ON LABOR, PUB. EMP'T & RET., ANALYSIS OF SB 321, 2021–2022 Reg. Sess. (Cal. 2021); S. JUD. COMM., ANALYSIS OF SB 321, 2021–2022 Reg. Sess. (Cal. 2021).

54. S. COMM. ON LABOR, PUB. EMP'T & RET., ANALYSIS OF SB 1257, 2019–2020 Reg. Sess., at 4 (Cal. 2020).

asked two questions that reveal the extent to which domestic employers are not thought of *as employers*:

> [1] If the employer, after learning of the laws, realizes that they can't or don't want to employ a domestic worker anymore (maybe simply because their household isn't set up to be safe for a worker per the Occupational Safety and Health Act), are we then setting them up for a retaliation complaint and lawsuit?
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> [2] If we are bringing domestic worker employers into the laws around occupational safety and health, does this also open the door to other laws that should be enforced in this industry—like laws around hiring of individuals, payment of payroll taxes, and securing workers' compensation insurance?[55]

Both questions demonstrate a reflex to insulate domestic employers from the responsibilities all other employers bear through a slippery slope argument.[56]

Second, the Assembly Committee on Labor and Employment raised a related—but somewhat more sympathetic—concern about the ability of domestic employers to comply with the law. The text of the bill (described below) would have required employers to respond to a Cal/OSHA complaint by letter, explaining the efforts they had undertaken to mitigate any alleged hazards.[57] The Committee was "concerned that some recipients of domestic services, particularly the elderly or severely ill, will not have the practical know-how to engage in this process, nor the resources to effectively mitigate [a hazard]."[58] It also highlighted a potential privacy concern: what would Cal/OSHA do if, in the course of an inspection of a private dwelling, it discovered evidence of legal violations outside its jurisdiction?[59] Though the Committee invited the bill's authors to add clarifying language addressing each of these concerns, the final bill did not include clarifications on either point.[60]

Lastly, and more tangibly, the Senate Committee on Appropriations flagged the difficulty of reliably estimating the scope and cost of enforcement of SB 1257,[61] given that there are around 11.5 million households in California, and "[a]ny household may hire a domestic worker at any given

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55. *Id.*

56. That domestic employers are not treated as "real employers" cannot be de-linked from the idea that domestic work is not "real work." *See, e.g.*, CDWC Know Your Rights Booklet, *supra* note 7, at 6 (describing how historically, lawmakers have regarded domestic work as a "source of rewarding activity" and only for "supplemental income"). For example, if childcare is not "real work," the logic goes, why should the child's parents bear the legal responsibility of ensuring their nanny's safety on the job or ability to access workers' compensation?

57. SB 1257 § 3.

58. ASSEMB. COMM. ON LABOR & EMP'T, ANALYSIS OF SB 1257, 2019–2020 Reg. Sess., at 5 (Cal. 2020).

59. *Id.* at 4–5.

60. *See id.*; SB 1257 § 3.

61. S. COMM. ON APPROPRIATIONS, ANALYSIS OF SB 1257, 2019–2020 Reg. Sess., at 3 (Cal. 2020).

time."[62] Thus, 11.5 million households could theoretically come under the enforcement authority of Cal/OSHA or the retaliation protection jurisdiction of the Division of Labor Standards Enforcement (DLSE).[63] Though the Committee was unable to forecast the specific cost of enforcement, it expected the cost "to be in the millions of dollars annually."[64]

These concerns notwithstanding, it bears emphasizing that the legislative history indicates that no public opposition to the bill was ever received.[65] Instead, the bill received formal support from nearly one hundred organizations, including labor groups; legal services organizations; and groups advocating for immigrant's rights, racial justice, women's rights, and economic justice.[66]

B. Text of SB 1257

SB 1257 had three substantive sections that would have amended the California Occupational Safety and Health Act. The first section would have removed the general exclusion of "household domestic service" from the Act's definition of "employment," but it also would have added a specific exclusion of "household domestic service that is publicly funded."[67] This amendment would thus extend the Act to all privately employed domestic workers.

The second section would have required Cal/OSHA to convene an advisory committee charged with recommending industry-specific regulations to the Occupational Safety and Health Standards Board, which would in turn adopt regulations within a specified amount of time.[68] The advisory committee was to "include an equal number of representatives of household domestic service employees and employers who represent diverse stakeholders."[69]

Finally, the bill provided that Cal/OSHA would follow a special inspection procedure in the event that a domestic worker filed a complaint

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* S. RULES COMM., FLOOR ANALYSIS OF SB 1257, 2019–2020 Reg. Sess., at 7–9 (Cal. 2020).

66. *Id.*

67. SB 1257 § 1. For example, domestic workers who are paid to provide in-home assistance to "aged, blind and disabled individuals" through the publicly-funded In Home Supportive Services (IHSS) program would not fall under the Act's definition of employment. *In Home Supportive Services (IHSS) Program*, CAL. DEP'T OF SOC. SERVS , https://www.cdss.ca.gov/inforesources/ihss [https://perma.cc/Q8WY-3AP5] (last visited Apr. 14, 2021). According to the California Department of Social Services, there are "[o]ver 520,000 IHSS providers currently serv[ing] over 600,500 recipients." *Id.*

68. SB 1257 § 2.

69. *Id.*

alleging a health or safety violation.[70] First, Cal/OSHA would contact the employer by phone and in writing to notify them of the complaint and describe any alleged hazards and regulatory violations.[71] At that time, the agency would inform the employer of their obligation to investigate and resolve the alleged hazards.[72] The agency would also inform the employer that if Cal/OSHA determined that the employer's response was unsatisfactory, the agency would "seek permission from the employer to enter the residential dwelling to investigate the matter, and, if permission [wa]s denied, [could] secure an inspection warrant . . . ."[73] The employer would then have fourteen days to send a response letter to the agency "describing the results of the employer's investigation of the alleged hazard and a description of all actions taken, in the process of being taken, or planned to be taken, by the employer to abate the alleged hazard . . . ."[74] Importantly, the bill specified that any such investigations "shall be conducted in a manner to avoid any unwarranted invasion of personal privacy and shall not contain any personal, financial, or medical information of residents . . . that is not pertinent to the investigation of the complaint."[75]

C. Veto Message and Unanswered Questions

Governor Newsom's message accompanying his veto of SB 1257 echoed many of the concerns raised in the Senate committees:

> This [bill] would in effect bring approximately 11 million homes and apartments under the regulatory jurisdiction of Cal-OSHA. . . . [T]he places where people live cannot be treated in the exact same manner as a traditional workplace or worksite from a regulatory perspective. . . . Many individuals to whom this law would apply to [*sic*] lack the expertise to comply with these regulations. The bill would also put into statute a potentially onerous and protracted "investigation by letter" procedure between Cal-OSHA and private tenants and homeowners. In short, a blanket extension of all employer obligations to private homeowners and renters is unworkable and raises significant policy concerns.[76]

In other words, from the governor's perspective, organizers, advocates, and legislators must answer the following questions before a future version of SB 1257 becomes law: (1) How will Cal/OSHA *efficiently identify and prioritize cases* for investigation to reduce the fiscal and administrative costs of enforcement? (2) What measures would *safeguard the privacy* of

70. SB 1257 § 3.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Newsom Press Release, *supra* note 48.

homeowners and renters in the event of an on-site inspection? And (3) How will Cal/OSHA ensure that domestic employers have the *knowledge and means to comply* with their statutory and regulatory obligations to provide a safe and healthy workplace?

III. OBSTACLES TO ENFORCEMENT

In addition to addressing these government concerns, legislation that aims to establish and enforce labor standards in the domestic work industry must respond to three interrelated areas of concern: (1) the isolated nature of domestic work; (2) the intimate nature of the employment relationship; and (3) the fear of retaliation, particularly for undocumented domestic workers.

The fact that most domestic workers do not have coworkers and work in their employers' homes has far-reaching implications. Domestic workers were historically viewed as "unorganizable" not only because they were excluded from the NLRA, but also because they worked in isolation, "each for a different employer"; thus, it was more difficult for them to engage in traditional union-based organizing.[77] Though domestic workers in California and elsewhere have had tremendous success organizing through grassroots, worker-led centers as an alternative to unions,[78] the fragmented nature of the industry may still present an obstacle to industry-wide regulation and information-sharing between workers.

An additional, and perhaps more intractable, challenge is the intimate nature of the employment relationship, which is also deeply tied to fears of retaliation. In general, workers are less likely to complain about a potential labor violation while they are still employed by the violating employer. [79] In other words, the potential risks of complaining may feel unacceptably high until the employment relationship ends.

The reticence of domestic workers to complain about work violations by a current employer intuitively makes sense for a number of reasons. Consider a hypothetical scenario in which the parents of a child in Los Angeles hire a full-time nanny at the local minimum wage. The nanny, who is undocumented, often works ten or twelve hours in a given workday yet is never paid overtime. If the nanny files a wage claim with DLSE, the agency will not realistically be able to shield her identity from her employers during the ensuing investigation. Throughout that time, the employers will know that their nanny has complained about them and that they may ultimately be liable

77. Shah & Seville, *supra* note 7, at 418.

78. *Id.* at 428.

79. *See* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 82–84 (2005) (citing information-related costs and costs like "retaliatory assignments, schedule changes, or . . . the possibility of being fired" as reasons for workers' hesitance to file complaints).

for tens of thousands of dollars in backpay and penalties. If the nanny files the claim while she still works for the employer, the work relationship will be tense and uncomfortable at minimum. The employer may also threaten to report (or actually report) the nanny or her family to Immigration and Customs Enforcement (ICE) if she does not withdraw her complaint, or they may simply cut her hours or fire her. Each of these actions would likely constitute unlawful retaliation for which the nanny could file a separate DLSE complaint, but at that point, the harm may be irreparable.

Under a future health and safety regime that protects domestic workers, one can easily imagine a similar scenario in which the nanny reports a work hazard to Cal/OSHA and faces the same post-complaint risks as in the hypothetical above. Thus, any effective enforcement model must address each of these obstacles, as well as the government concerns discussed *supra* Part II.

IV. CHOOSING AN ENFORCEMENT MODEL

There are several enforcement options from which a labor standards agency can choose depending on its goals and the characteristics of the industry it seeks to regulate. This Part will briefly describe and evaluate the efficacy of four labor standards enforcement models: complaint-driven, agency-driven, regulation by shaming, and co-enforcement. An effective labor standards enforcement model for the domestic work industry must address both the government's concerns outlined *supra* Part II—namely, efficient resource allocation, privacy safeguards, and facilitation of employer compliance—and the particular obstacles to enforcement described *supra* Part III, namely the heightened fear of retaliation due to the isolated and intimate nature of domestic work. Though none of the four models discussed below perfectly resolve these unique sets of issues, a combination of regulation by shaming and co-enforcement may offer the best solution for the government, domestic employers, and domestic workers alike.

A. Complaint-Driven Enforcement

Complaint-driven enforcement is perhaps the most common model of labor standards enforcement.[80] In this model, which is essentially reactive, the agency allocates resources based on when and where workers make complaints.[81] Because complaint-driven enforcement relies on workers to contact the agency to report a violation (e.g., wage theft or dangerous working conditions), it is most effective when workers know their rights, feel empowered to file complaints, and know how and where to file complaints.

80. Weil & Pyles, *supra* note 79, at 59.

81. *Id.* at 60.

Such a model operates on the assumption that there is a strong positive correlation between complaint rates and violation rates (i.e., the more dangerous a workplace is, the more worker complaints will be filed).[82] In other words, "[q]uiet industries should be compliant industries, not industries where workers are suffering silently."[83]

David Weil and Amanda Pyles's 2005 study of complaint activity under the FLSA and federal OSHA found this assumption to be flawed as there are significant gaps between complaint rates and violation rates, and the size of that gap varies radically by industry.[84] Weil and Pyles suggest that a worker's decision of whether to complain is based not only on the nature of the violation, but also on the worker's awareness of her rights and on the cost of exercising those rights (e.g., retaliation).[85] They also note that "workers that feel vulnerable to exploitation are less likely to use their rights—these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements."[86]

In other words, a complaint-driven model is unlikely to effectively enforce labor standards in the domestic work industry—an industry largely made up of immigrant women of color and characterized by small, intimate workplaces and informal work arrangements. Indeed, a 2020 study analyzing rates of compliance with San Francisco's minimum wage ordinance across industries found that domestic workers are far less likely to complain about violations than workers in any other sector.[87] The study estimated that for every 1,327 minimum wage violations in the domestic work industry, only *one* is reported to the Office of Labor Standards Enforcement (San Francisco's local agency).[88] Though the study did not probe the reasons for the different complaint rates across industries, the authors noted that "the industries with the most false negatives . . . tend to employ many women and immigrants, while industries with the most false positives [where complaints significantly 'outstrip' estimated violations]. . . typically employ more men and historically have been more unionized."[89] This correlation provides

82. *Id.*

83. DANIEL J. GALVIN, JENN ROUND & JANICE FINE, RUTGERS CTR. FOR INNOVATION IN WORKER ORG., A ROADMAP FOR STRATEGIC ENFORCEMENT: COMPLAINTS AND COMPLIANCE WITH SAN FRANCISCO'S MINIMUM WAGE 2 (2020), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CIWO/20_0828_sanfrancisco_study.pdf [https://perma.cc/3F27-FNWZ].

84. Weil & Pyles, *supra* note 79, at 61.

85. *Id.* at 82–83.

86. *Id.* at 91.

87. GALVIN ET AL., *supra* note 83, at 7 tbl.4 (note that Galvin et al. use the term "private households" instead of "domestic work industry").

88. *Id.*

89. *Id.* at 4, 6.

further support for the proposition that vulnerable workers, including many immigrant women of color, are afraid to complain.

Given the inefficacy of complaint-driven enforcement in the domestic work industry and the wage and hour context—and Weil & Pyles's broader findings in both the wage and hour and health and safety context—such a model is unlikely to be an efficient use of government resources. And a complaint-driven model would not address domestic workers' fear of retaliation because it places the onus on an individual worker who lacks meaningful bargaining power to move a complaint forward.

B. Agency-Driven Investigations

Another option is for agencies to launch proactive investigations in industries with a high risk of violations.[90] For example, around 60 percent of federal OSHA inspections are "programmed inspections," targeting facilities based in particular high-risk industries or based on their likelihood of possessing certain types of hazards.[91] Unfortunately, no labor standards enforcement agency has the resources to investigate every workplace.[92] Currently, Cal/OSHA only employs one inspector for every 102,000 workers in California.[93] And California's domestic work industry includes millions of workplaces, many with only one employee. In the cold calculus of resource allocation, the potential benefits of enforcing labor standards for a single worker absent a complaint is unlikely to move an agency like Cal/OSHA to expend resources on an investigation.

Rather than attempting to investigate *all* domestic workplaces, Cal/OSHA could seek to investigate a random sample of such workplaces. However, it is unclear how Cal/OSHA would select this random sample, given that there is no legal requirement for domestic employers to register as

90. *See* Tanya L. Goldman, *Tool 4 Introduction to Strategic Enforcement*, *in* THE LABOR STANDARDS ENFORCEMENT TOOLBOX 1, 3 (Janice Fine et al. eds., 2018), https://www.clasp.org/sites/default/files/publications/2018/09/2018_introductiontostrategicenforcement.pdf [https://perma.cc/3RT8-9V4D].

91. Matthew S. Johnson, *Regulation by Shaming Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1872 (2020).

92. TERRI GERSTEIN & TANYA GOLDMAN, CLASP & HARVARD LAW SCH. LABOR & WORKLIFE PROGRAM, PROTECTING WORKERS THROUGH PUBLICITY: PROMOTING WORKPLACE LAW COMPLIANCE THROUGH STRATEGIC COMMUNICATION 4 (2020), https://lwp.law.harvard.edu/files/lwp/files/protecting_workers_through_publicity_gerstein_goldman_0.pdf [https://perma cc/7C3E-H6AN].

93. TIA KOONSE, KEN JACOBS & JENNIFER RAY, UCLA LABOR CTR., ET. AL, WORKERS AS HEALTH MONITORS: AN ASSESSMENT OF LOS ANGELES COUNTY'S WORKPLACE PUBLIC HEALTH COUNCIL PROPOSAL 3 (2020), https://www.labor.ucla.edu/wp-content/uploads/2020/07/Workers-As-Health-Monitors-2-.pdf [https://perma.cc/JM6D-Z4H9].

such with the government and that many domestic employment relationships, especially when the worker is undocumented, are informal.[94]

In sum, an enforcement model that relies solely on either exhaustive or random proactive agency investigations is unlikely to be attractive to the state government. While it could address workers' fear of retaliation by placing the decision to investigate with the agency, such a model would be inefficient for the government, would likely leave many violations unaddressed, and could raise significant privacy concerns for domestic employers.

C. Regulation by Shaming

A third option is "regulation by shaming," or, more broadly, strategic communications. This option meets government interests and workers' needs better than either the complaint-driven or agency-driven enforcement models. Because this model is focused on deterrence, it is not only extremely efficient from an agency perspective, but it also has the potential to reduce opportunities for retaliation against individual workers while safeguarding employer privacy and facilitating future employer compliance.

In 2009, federal OSHA adopted an agency-wide policy of issuing press releases whenever inspections resulted in penalties over a certain threshold.[95] The press releases described the violations found through investigation and the penalties associated with each violation.[96] The policy was internally referred to as "regulation by shaming."[97] A 2020 empirical study of this policy strikingly found that a single press release by federal OSHA about egregious violations had the same level of general deterrence as 210 inspections of individual facilities, within a given local industry.[98] The study also suggested that this effect was stronger in industries where workers had greater bargaining power (e.g., via membership in a labor union) to leverage the power of a press release.[99]

This approach focuses on preventing violations before they occur, rather than on restitution after the fact. As Lorelei Salas, New York City Department of Consumer and Worker Protection Commissioner, put it: "We need to send a message to the industry that we regulate, that we are out there, and we're going to be watching."[100] This model rests on the assumption that employers generally want to avoid the financial and reputational harms of

94. *See* S. COMM. ON LABOR, PUB. EMP'T & RET., ANALYSIS OF SB 1257, Reg. Sess. 2019–2020, at 4 (Cal. 2020).

95. Johnson, *supra* note 91, at 1872. The threshold was set at $40,000 for some regional offices, and $45,000 for others. *Id.* at 1873.

96. *Id.*

97. *Id.*

98. *Id.* at 1888.

99. *Id.* at 1902.

100. GERSTEIN & GOLDMAN, *supra* note 92, at 6.

bad publicity.[101] Additionally, press releases about labor standards violations may also be a powerful way to educate both workers and employers about the laws that apply to them.[102]

Though "shaming" often has a negative connotation, Sharon Yadin argues that there are at least three compelling justifications for regulatory shaming.[103] First, as the federal OSHA example demonstrates, "[s]haming is cheap."[104] Publishing a press release will invariably cost less in time and resources than an inspection, and these savings are amplified by the deterrent effects of shaming. Second, regulatory shaming can encourage democratic engagement with regulations by bringing effective enforcement into the public eye and helping to "address the current crisis in trust between citizens and their governments."[105] Third, Yadin argues that as long as the regulated entity is a corporation that is legally targeted in line with legitimate enforcement priorities, then regulation by shaming presents no moral dilemma: "shaming of corporations does not involve hurting their feelings but rather influencing their reputation and prestige."[106]

Yadin's first justification for regulatory shaming, cost efficiency, is most applicable to the domestic worker context. In an industry with millions of actual and potential workplaces, broad general deterrence is crucial for efficiently increasing compliance with new occupational health and safety obligations in private dwellings. Cal/OSHA has limited resources for inspections, and press releases about violations and associated penalties cost much less than inspections. This particular type of efficiency could also lessen the occurrence of retaliation as a consequence of enforcement and as a fear that dissuades workers from reporting violations. One can imagine that as more employers are preemptively deterred from workplace violations, fewer domestic workers will experience labor standards violations. As a result, fewer domestic workers will have to choose between enduring unsafe working conditions and risking retaliation.

At the same time, per Yadin's democratic engagement justification, such press releases can help to educate employers about what is required of them and how they can comply, as well as inform domestic workers of their rights.

Yadin's moral justification for shaming is more complicated in this context, given that the regulated entity is often a family or an individual rather than a corporation. In order to mitigate this moral concern, Cal/OSHA could have specific guidelines requiring anonymization of press releases. For example, a press release could refer to the employer not by name but by

101. *Id.* at 4.

102. *Id.* at 6–7.

103. Sharon Yadin, *Regulatory Shaming*, 49 ENV'T L. 407, 433–34 (2019).

104. *Id.* at 437.

105. *Id.* at 445.

106. *Id.* at 446–48.

neighborhood or city. It could still then describe specific violations and associated penalties. Such press releases would be less about shaming domestic employers than about putting other domestic employers on notice that Cal/OSHA will enforce health and safety regulations in private homes, should violations occur.

It should be noted that this anonymization modification addresses a privacy concern that is closely linked to the privacy concerns discussed in Part II (i.e., the invasion of privacy resulting from the agency inspecting a private home). An anonymized regulatory shaming regime potentially protects privacy on both the large and small scales. First, the efficient deterrent effects discussed above could significantly reduce the number of investigations Cal/OSHA would have to perform, in turn reducing the number of in-home inspections required. Second, the anonymization of press releases would protect an individual employer from any public dissemination of private information discovered in the course of the investigation.[107]

Anonymized regulatory shaming could be an invaluable component of any labor standards enforcement in private homes because it addresses key government interests while effectively improving industry compliance to workers' benefit.

D. Co-enforcement

Finally, co-enforcement models offer perhaps the most promising development in labor standards enforcement.[108] In the private home workplace, co-enforcement has the potential to maximize government efficiency; facilitate employer compliance; and educate, empower, and support workers experiencing workplace violations.

Under a co-enforcement model, the labor standards agency enters into formal relationships with community-based organizations (CBOs), such as worker centers, to aid in enforcement in high-risk industries.[109] The CBOs and the agency can then share information and resources based on their own expertise. For instance, CBOs often have linguistic and cultural competence

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107. Remember, though, that even SB 1257 specified that investigations "shall be conducted in a manner to avoid any unwarranted invasion of personal privacy and shall not contain any personal, financial, or medical information of residents . . . that is not pertinent to the investigation of the complaint." *See* SB 1257 § 3.

108. *See generally* Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010).

109. *See* Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing* 1 ("Could Experiments at the State and Local Levels Expand Collective Bargaining and Workers' Collective Action?" Harv. Law Sch. Symp. Working Paper, 2018); Cailin Dejillas & Jenn Round, *Tool 7 Sharing Information with Community Organizations*, *in* THE LABOR STANDARDS ENFORCEMENT TOOLBOX 1, 2 (Janice Fine et al. eds., 2019), https://www.clasp.org/sites/default/files/publications/2019/09/2019_sharinginformation.pdf [https://perma.cc/Z7FQ-FZ6K].

with the worker population, relationships with workers, and knowledge of the particular problems workers in the industry face.[110] The agency, on the other hand, has expertise in the laws protecting workers, as well as the authority to enforce those laws.[111] This information- and resource-sharing reduces the regulatory burden on the agency while allowing the agency to efficiently identify violations.

San Francisco pioneered a co-enforcement model for its minimum wage ordinance after decades of worker organizing.[112] In 2006, the San Francisco Board of Supervisors amended the city and county's minimum wage ordinance to require the local Office of Labor Standards Enforcement (OLSE) to "establish a community-based outreach program to conduct education and outreach to [San Francisco] employees."[113] OLSE then sought and entered into formal contractual relationships with a number of community partners (known as the "community collaborative").[114] The contracts with the community collaborative required each CBO to conduct workshops, trainings, and other forms of outreach to help workers understand their rights and report violations to OLSE and DLSE.[115] In addition to these outreach and education responsibilities, OLSE and CBO staff held regular meetings to share updates on contract-related activities, the legal landscape, and major cases referred from the community collaborative to the agency.[116] The head of DLSE at the time, Julie Su, worked to implement similar co-enforcement partnerships throughout California.[117]

These partnerships have allowed OLSE and DLSE to more effectively allocate resources, as CBOs help the agencies identify workers to file complaints, communicate effectively with workers, and build trust with vulnerable worker populations who may fear employer retaliation and government involvement.[118] "Partnerships lead to uncovering more violations per investigation and recovering more money for employees."[119] For example, in 2014, co-enforcement efforts between OLSE, DLSE, and two local CBOs led to "the single largest monetary wage settlement attained by OLSE or DLSE": nearly three hundred workers in a popular dim sum restaurant, mostly monolingual Chinese immigrants, won a $4.25 million settlement for wage and hour violations, in addition to important workplace

110. Patel & Fisk, *supra* note 109, at 1.
111. *Id.*
112. *Id.* at 5–6.
113. *Id.* at 6 (quoting S.F., CAL., ADMIN. CODE § 12R.25 (2003)).
114. *Id.* at 8.
115. *Id.* at 9.
116. *Id.* at 11.
117. *Id.* at 17.
118. *Id.* at 18.
119. Dejillas & Round, *supra* note 109, at 2.

policy changes.[120] The involvement of the CBOs who had linguistic and cultural competency was crucial, particularly because "many workers were afraid to talk to agency staff; this was not uncharacteristic of immigrant workers' general distrust of government agents on the whole."[121] The CBOs also played an indispensable role in "organizing the claimants, investing in the workers' education about the wage laws and their rights, and in developing many of the workers into leaders during the campaign."[122] As this example demonstrates, co-enforcement is efficient for the agency *and* good for workers.

California has already committed to funding a co-enforcement pilot program through 2024, "primarily focused on" the domestic work industry.[123] The DLSE Domestic Work Industry Outreach and Education Program is intended to "establish and maintain an outreach and education program . . . to promote awareness of, and compliance with, labor protections that affect the domestic work industry and to promote fair and dignified labor standards in this industry."[124] The program invites CBOs with a demonstrated track record in the domestic work industry to develop, in consultation with DLSE, education and outreach materials for domestic workers and employers on relevant rights and obligations, administrative adjudication procedures, and prohibitions on retaliation.[125] The program also establishes information-sharing between DLSE and the CBOs to "shape and inform the overall enforcement strategy of the division."[126]

Though the DLSE program focuses on wage and hour violations and retaliation, one can imagine a similar co-enforcement arrangement between Cal/OSHA and CBOs, in which CBOs help Cal/OSHA identify violations and provide targeted outreach and education to domestic workers and employers about the laws that newly apply to them. There is already a robust network of grassroots domestic worker organizations in California that could become formal co-enforcement partners for the agency. Specifically, the CDWC is comprised of grassroots member organizations throughout California. For example, in Los Angeles, Cal/OSHA could partner with Mujeres en Acción, a program of Instituto de Educación Popular del Sur de California (IDEPSCA) that supports Latina domestic workers in their struggle for economic independence and justice; the Pilipino Workers Center (PWC) of Southern California, which provides resources and leadership development training to Pilipinx domestic workers in Southern California;

120. Patel & Fisk, *supra* note 109, at 15–16 (discussing the dim sum restaurant case and campaign).

121. *Id.* at 15.

122. *Id.*

123. CAL. LAB. CODE § 1455 (West 2019).

124. *Id.*

125. *Id.* § 1455(d).

126. *Id*. § 1455(e).

and the Coalition for Humane Immigrant Rights in Los Angeles (CHIRLA), which provides immigration-related advocacy, education, and legal services in Los Angeles. Because the majority of domestic workers in Los Angeles are Latina and Pilipina immigrant women,[127] the organizations described above have been central to organizing and advocacy efforts advancing domestic workers' employment rights in the Los Angeles area, utilizing community relationships and cultural and linguistic competence to bridge the gap between Cal/OSHA and domestic workers facing occupational hazards. Similarly well-situated CBOs throughout California could partner with Cal/OSHA to enhance and optimize enforcement in their localities, while also educating employers about how to comply with their new obligations.

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The enforcement models that best meet the needs of domestic workers while also addressing the government concerns raised in response to SB 1257 are anonymized regulation by shaming and co-enforcement. California could combine these models for maximal efficiency and efficacy. Co-enforcement models are highly effective at efficiently allocating government resources in industries that are comprised of diffuse and vulnerable worker populations, like the domestic work industry. And an anonymized regulatory shaming regime, as discussed above, could amplify the deterrent and educative impact of co-enforcement efforts. This blended model has the potential to efficiently (1) educate domestic employers about their obligations and how to comply; (2) put domestic employers on notice that DLSE and Cal/OSHA are watching and will initiate enforcement actions when necessary; (3) educate workers about their rights, including the right to be free from retaliation; and (4) create conditions in which workers know that they can complain, and actually do complain, when their rights are violated.

CONCLUSION

Domestic workers are the backbone of our economy. They care for the elderly and people with disabilities, raise middle- and upper-class children, provide essential healthcare and companionship, and clean homes while their employers are at work. Yet, they are subject to rampant wage theft, unsafe working conditions, harassment and assault, and vicious retaliation. And the gaps in California work law vis-à-vis domestic workers simply replicate even larger gaps in federal work law. This status quo entrenches the racial wealth gap and perpetuates the devaluation of the labor of immigrant women of color.

127. HIDDEN PAIN, *supra* note 4, at 2 ("Most immigrant housecleaners and childcare providers in Southern California are from Latin America and the Philippines and approximately half of all foreign-born domestic workers are undocumented.") (citation omitted).

The domestic work industry poses unique obstacles to labor standards enforcement. However, the difficulties of enforcing labor standards in the private home are not insurmountable and should not stop California from extending crucial health and safety protections to nannies, caregivers, and house cleaners. The blended model proposed here—co-enforcement partnerships with worker centers, amplified by anonymized regulatory shaming—addresses the interests of all stakeholders: efficient allocation of resources for the government, privacy and education for employers, and meaningful access to justice for domestic workers.

Identifying and implementing an effective labor standards enforcement model in the California domestic work industry may also have broad, national impact in this political moment. Under a Biden-Harris administration, we may see the passage of the National Domestic Workers Bill of Rights and other pro-worker reforms on the federal level.[128] As it often has in the past, California will likely serve as a laboratory and bellwether for such policies. If California—the largest economy in the United States—and its domestic workers can implement and optimize an effective regulatory enforcement scheme, there is a path forward for the nation.

128. As a then Senator, Vice President Kamala Harris introduced the first ever National Domestic Workers Bill of Rights in 2019 along with Representative Pramila Jayapal. *See* Kamala Harris, Pramila Jayapal & Ai-jen Poo, Opinion, *Change Begins at Home – and on the Floor of Congress*, CNN (Nov. 29, 2018), https://edition.cnn.com/2018/11/29/opinions/domestic-workers-bill-of-rights-harris-poo-jayapal/index.html [https://perma.cc/882B-W4T7]; *Bill of Rights*, NAT'L DOMESTIC WORKERS ALL., https://www.domesticworkers.org/bill-rights [https://perma.cc/S5XY-8TFF] (last visited May 3, 2021).