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Articles

ENFORCING EQUITY

Daiquiri J. Steele

ABSTRACT—Federal administrative agencies that enforce workplace laws have dual responsibilities: (1) to prevent or remedy noncompliance with the underlying workplace law and (2) to prevent or remedy noncompliance with the law’s antiretaliation provisions. Disparities based on race, sex, and their intersection exist with respect to both of these types of employer noncompliance, as female workers and workers of color experience more violations of the substantive provisions and the retaliation provisions of these laws. While effective enforcement is vital to preserving workplace regulation as a whole, there is also an equity component to enforcement. Because workplace law violations disproportionately harm women and people of color, ineffective enforcement by administrative agencies disproportionately harms these groups.

Retaliatory conduct by employers is an impediment to the enforcement of workplace laws that administrative agencies are charged with enforcing. Antiretaliation provisions in workplace statutes are crucial enforcement tools for these agencies, but—where these laws were once broadly construed—their construction is narrowing. Restrictive interpretations of workplace laws can make obtaining redress more difficult for victims of retaliation and can deter other employees from reporting employer misconduct. Moreover, Black workers and female workers experience retaliation in the workplace at a much higher rate than other workers. Consequently, retaliatory conduct by employers is not only an impediment to effective enforcement of workplace laws, but the conduct itself can implicate racial discrimination, exploitation, and subordination.

These agencies find themselves facing a dilemma with respect to the other branches of government. The judiciary is issuing restrictive interpretations of antiretaliation laws and affording no deference to agency interpretation. Congress is slow in legislatively correcting the courts’ limiting interpretations. Because retaliation protections are so vital to the regulatory scheme Congress developed, narrow interpretation by the courts causes underenforcement and stifles the ability of administrative agencies charged with enforcing workplace laws to fulfill their missions.

This Article examines the challenges administrative agencies face in providing robust protections against retaliation, given the current postures of the legislative and judicial branches of government. The Article proposes a shift in administrative agencies' predominant enforcement model—from an individual-complaint-based model to a compliance-audit-based model—and data collection that will incentivize employers to comply with nonretaliation mandates, leading to stronger antiretaliation safeguards.

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“It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.”

—President Joseph R. Biden Jr.[†]

INTRODUCTION

Fear of retaliation is a leading reason why employees do not report violations of workplace law.¹ Apprehension of retributory employer conduct is a major reason why many employees accept working conditions that are noncompliant with workplace laws and that range from subordinating, discriminatory, and exploitative, to outright dangerous. This fear of employer retaliation is quite rational. More charges of retaliation were filed with the Equal Employment Opportunity Commission (EEOC) in 2022 than any other kind of discrimination charge,² and a high percentage of retaliation

[†] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

¹ Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797, 803–04 (2020).

² EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2020, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [<https://perma.cc/5N24-TL7V>].

charges are found to be meritorious³ by the agency.⁴ Simply put, employees who report wrongdoing in the workplace face retaliation at startling rates.⁵

In addition to being rational, the fear of retaliation is also foreseeable. The federal government is well aware of the impact that fear of retaliation can have on effective enforcement of workplace laws, as Congress has included an antiretaliation provision in workplace laws passed in the last century to assist with effective enforcement.⁶ While the text of these provisions varies,⁷ the purpose is the same—to ensure individuals are free to exercise rights under the statute without employer retribution. Even older statutes from the nineteenth century have been interpreted to contain implied

³ Charges resolved with a favorable outcome for the charging party or charges with substantiated allegations are considered “merit resolutions” by the Equal Employment Opportunity Commission (EEOC). Negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations comprise this category. *Definitions of Terms*, EEOC (2020), <https://www.eeoc.gov/statistics/definitions-terms> [<https://perma.cc/B5RG-PEMY>].

⁴ EEOC, RETALIATION-BASED CHARGES (CHARGES FILED WITH EEOC) FY 1997–FY 2020, <https://www.eeoc.gov/statistics/retaliation-based-charges-charges-filed-eeoc-fy-1997-fy-2020> [<https://perma.cc/3E9E-6CFW>].

⁵ See Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 255 (2003) (finding that 66% of employees who reported workplace mistreatment faced some form of retaliation); ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON & MICHAEL SPILLER, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATION OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES* 24–25 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> [<https://perma.cc/46U5-LYKF>]; Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1098, 1100 (2014); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 40 (2005); Mindy E. Bergman, Regina Day Langhout, Patrick A. Palmieri, Lilia M. Cortina & Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting*, 87 J. APPLIED PSYCH. 230 (2002); Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983); Michael T. Rehg, Marcia P. Micell, 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); CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EEOC, REPORT OF CO-CHAIRS OF SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [<https://perma.cc/9K9H-L95A>].

⁶ See, e.g., 29 U.S.C. § 215(a)(3) (prohibiting retaliation under the Fair Labor Standards Act (FLSA)); 42 U.S.C. § 2000ff-6(f) (proscribing retaliation under the Genetic Information Nondiscrimination Act (GINA)); *id.* § 2000e-3(a) (making retaliation unlawful under Title VII); 29 U.S.C. § 623(d) (barring retaliation under the Age Discrimination in Employment Act (ADEA)); 42 U.S.C. § 12203(a) (outlawing retaliation under the Americans with Disabilities Act (ADA)); 29 U.S.C. § 2615(b) (prohibiting retaliation under the FMLA); *id.* § 660(c)(1) (proscribing retaliatory behavior under OSHA); *id.* § 158(a)(4) (outlawing retaliatory actions under the National Labor Relations Act).

⁷ See Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 528–29 (2011) (describing the textual differences in antiretaliation provisions of workplace statutes).

antiretaliation provisions where no express provision was present in the statutory language.⁸

Despite this foreseeability, some recent judicial decisions have all but ignored this reality. In the mid-twentieth century, the U.S. Supreme Court noted that fear of retaliation may well induce employees to accept substandard working conditions.⁹ Understanding the importance of antiretaliation provisions in workplace statutes, the Court construed these provisions broadly for over half a century.¹⁰ However, the Court has now started issuing restrictive interpretations of antiretaliation provisions. Whereas the Court previously prioritized employee protection over workplace retaliation, some of the Roberts Court's recent decisions, including *University of Texas Southwestern Medical Center v. Nassar*, have relied on the plain meaning rule and the excuse of the fear of a flood of retaliation claims to curb protections available to employees.¹¹ Additionally, lower courts have started narrowing the scope of antiretaliation protections by making it more difficult to recover for retaliation.¹² Specifically, lower courts are refusing to find that some retaliatory behavior indeed constitutes an adverse action and are raising the threshold for what activity is protected.¹³

These narrow interpretations undermine rights created by the workplace statutes. Furthermore, they make it more difficult for employees to recover for retaliation and can deter employees from reporting violations of workplace law. Underreporting can have detrimental effects on these employees, their coworkers, the employers' contractors and corporate

⁸ See, e.g., *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008) (interpreting 42 U.S.C. § 1981 as containing an implied prohibition against retaliatory behavior despite the statute not containing an express antiretaliation clause).

⁹ See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("Plainly, effective enforcement of [the Fair Labor Standards Act] could thus only be expected if employees felt free to approach officials with their grievances.").

¹⁰ See generally Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010) (examining the history of broad construction of antiretaliation laws).

¹¹ 570 U.S. 338, 358 (2013).

¹² See, e.g., *Salak v. Pruitt*, 277 F. Supp. 3d 11, 24 (D.D.C. 2017); *Medero v. NBC Merchs., Inc.*, No. 16-6583, 2017 WL 3328361, at *7 (E.D. Pa. Aug. 3, 2017); *Shaniga v. St. Luke's Med. Ctr. LP*, No. CV-14-02475, 2016 WL 1408289, at *11 (D. Ariz. Apr. 11, 2016); *Donald v. UAB Hosp. Mgmt., LLC*, No. 2:14-cv-727, 2015 WL 3952307, at *4 (N.D. Ala. June 29, 2015); *Childs-Bey v. Mayor & City Council of Balt.*, No. 10-2835, 2013 WL 5718747, at *2 (D. Md. Oct. 17, 2013); *Foster v. Univ. of Md. E. Shore*, No. 10-1933, 2013 WL 5487813, at *2 (D. Md. Sept. 27, 2013), *rev'd*, 787 F.3d 243 (4th Cir. 2015).

¹³ Federal courts have ruled that the following types of retributory behavior do not constitute an adverse action: threatening to discipline an employee, negative performance appraisals, removing an employee from the office, alterations in work schedules, threatening to fire an employee, and filing lawsuits. See Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2036 (2015).

business partners, compliant businesses in competition with the noncompliant employers, and society as a whole. This can allow various types of employer misconduct to persist, including wage theft, benefits theft, harassment and other forms of discrimination, family and medical leave violations, and occupational safety and hazard violations.

Adding to the already troubling nature of the narrowing of retaliation protections is the racial disparity in retaliatory behavior. In addition to a racial disparity with respect to workplace law violations, race and gender disparities also exist with respect to which employees are retaliated against for reporting suspected employer misconduct. Black workers and female workers report retaliation at higher rates for engaging in protected activity.¹⁴ The racial disparities in both workplace violations and employer retaliation lead to different levels of workplace justice.

The three branches of government are troublingly discordant on the issue of retaliation protections, which has undermined the effectiveness of the protections.¹⁵ The judiciary is issuing narrow interpretations of workplace laws, and Congress has not yet intervened legislatively to override¹⁶ these restrictive interpretations.¹⁷ Despite the courts' weakening of statutory

¹⁴ IRENE TUNG & LAURA PADIN, NAT'L EMP. L. PROJECT, SILENCED ABOUT COVID-19 IN THE WORKPLACE (2020), <https://www.nelp.org/wp-content/uploads/Silenced-About-COVID-19-Workplace-Fear-Retaliation-June-2020.pdf> [<https://perma.cc/N42K-FC9X>]; Rehg et al., *supra* note 5, at 224.

¹⁵ See *infra* Part I.

¹⁶ Congress has legislatively overridden workplace law court decisions on several occasions. For instance, the Civil Rights Act of 1991 abrogated the following decisions in whole or in part: EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), which holds that that Title VII does not apply extraterritorially to regulate conduct of U.S. employers who employ U.S. citizens abroad; W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991), which disallows the shifting of fees for services rendered by expert witnesses in civil rights litigation to losing party; Patterson v. McLean Credit Union, 491 U.S. 164 (1989), which limits the application of § 1981 in the employment arena to making contracts; Lorraine v. AT&T Techs., Inc., 490 U.S. 900 (1989), which holds that an employment discrimination claim based on facially neutral seniority system begins to run when the seniority system is adopted; Martin v. Wilks, 490 U.S. 755 (1989), which holds that white employees who did not intervene in earlier employment discrimination proceedings in which consent decrees were entered could challenge employment decisions that were taken in accordance with those decrees; Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), which holds that statistical evidence showing high percentage of nonwhite workers in employee's cannery jobs and low percentage of such workers in other jobs did not establish prima facie case of disparate impact; Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which allows mixed motive Title VII claims; and Library of Cong. v. Shaw, 478 U.S. 310 (1986), which holds that when Congress passed Title VII, it did not waive the federal government's traditional immunity from interest. See also Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1492-94 (2014). For a comprehensive discussion of the Civil Rights Act of 1991 (1991 CRA), see Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281 (2011).

¹⁷ Among subject matter areas in which Congress legislatively overrides court opinions, civil rights laws and workplace laws ranked second and fourth respectively in highest frequency of congressional overrides. Christiansen & Eskridge, *supra* note 16, at 1357.

antiretaliation provisions—the federal agencies’ primary enforcement tool—agencies must still fulfill their missions of enforcing workplace laws effectively. The fact that noncompliance with these laws is more likely to impact workers of color and female workers means issues of equity are inherently implicated in administrative enforcement of workplace laws. It becomes clear, then, that ineffective enforcement due to government discord will have a disproportionately pronounced effect on female workers and workers of color.

Courts need to recognize the crucial role of administrative agencies in fostering compliance and enforcing workplace laws outside of the courts, and give agencies appropriate deference.¹⁸ For example, agencies like the EEOC and the U.S. Department of Labor (DOL) provide valuable technical assistance to employers regarding compliance and notices of rights and responsibilities to employees. The EEOC serves as a gatekeeper agency, with complainants required to exhaust administrative remedies for the majority of the statutes the EEOC enforces before accessing the courts.¹⁹ Imposing restrictive interpretations of antiretaliation laws, particularly interpretations that are antithetical to the EEOC’s interpretation as exhibited by its manuals and court briefs, hinders the performance of the agency’s mission. Interestingly, this hindrance by the judiciary may lead to an increased number of complainants receiving right-to-sue letters from the EEOC, leading to an actual increase in the judiciary’s workload.

While certain enabling statutes, like those governing the EEOC, require exhaustion of administrative remedies, others, like the one governing DOL’s Wage and Hour Division (WHD), do not. Nevertheless, they are still integral to promoting compliance with workplace laws. Agencies like WHD investigate and settle many complaints of noncompliance, further alleviating the workload for the judiciary.²⁰ Moreover, their ability to provide attorneys to employees unable to afford their legal fees plays a vital role in access to justice by ensuring employees are informed of their rights.

Finally, there are some workplace laws for which no private right of action exists. For instance, the Occupational Safety and Health Act, which articulates occupational safety and health standards for covered employers, is enforced by DOL’s Occupational Safety and Health Administration (OSHA). There is no private right of action, so aggrieved employees must go through OSHA. Hence, in instances like these, any redress to which an employee is entitled must come through an administrative agency.

¹⁸ Daiquiri J. Steele, *Rationing Retaliation Claims*, 13 U.C. IRVINE L. REV. 993 (2023).

¹⁹ *Id.* at 1017.

²⁰ *Id.* at 1019.

The judiciary's decisions play a pivotal role in agency enforcement. However, Congress also has a crucial part to play. Because antiretaliation provisions are enforcement tools, Congress should prioritize strengthening them to provide the most robust retaliation protections possible. Congress can help fortify these provisions by legislatively overriding the judiciary's narrow interpretations of existing antiretaliation provisions. The legislative branch has the power to legislate away court decisions that are not in accordance with congressional will, and it has done so in the past with respect to workplace laws.²¹ However, Congress has not legislatively corrected this problem as of the time of this writing. These actions also take time, and in the past an average of eleven years has elapsed between the time the Court issues a decision and when Congress overrides it.²² Moreover, congressional attempts to fortify antiretaliation provisions in statutes based on U.S. Supreme Court antiretaliation jurisprudence are typically not comprehensive.²³ Additionally, Congress could strengthen retaliation protections by drafting new antiretaliation provisions in a manner that clearly establishes broad interpretation as the legislature's intent.²⁴ Congress could also override the inconsistent interpretations stemming from varied language of antiretaliation provisions across myriad workplace statutes by issuing an omnibus retaliation statute to apply universally to all workplace statutes.²⁵

Because antiretaliation provisions are contained in each workplace statute, the statutory language of these provisions can vary, leading to inconsistent interpretations.²⁶ An omnibus retaliation statute would include regulatory reforms regarding retaliation to be implemented across numerous workplace statutes.²⁷

Though Congress has effective tools and strong rationales for intervening to strengthen retaliation protections, Congress could not possibly anticipate every scenario that would arise concerning these provisions. Hence, in addition to congressional action, administrative agencies ought to structure their internal processes in a manner that deters employers from retaliating against those who report employer misconduct.

²¹ Civil rights laws and workplace laws are some of the most popular areas for congressional overrides. 1991 CRA and the Americans with Disabilities Act Amendments Act (ADAAA) provide examples. See Christiansen & Eskridge, *supra* note 16, at 1357.

²² *Id.* at 1355.

²³ For a critical assessment of congressional drafting of antiretaliation provisions in recent legislation, see Daiquiri J. Steele, *Preserving Pandemic Protections*, 42 BERKELEY J. EMP. & LAB. L. 312 (2021).

²⁴ Steele, *supra* note 18, at 1026.

²⁵ See *id.* at 1031–32.

²⁶ Long, *supra* note 7, at 528–29.

²⁷ See Steele, *supra* note 18, at 1032.

No agency can have certainty that its interpretations will receive deference from the courts. Consequently, the agencies that enforce workplace laws will have to find ways to ensure they are fulfilling their missions despite not being able to rely on the judiciary for deference or to ensure agency complaint receipts do not affect judicial interpretation of antiretaliation laws.

It is important to understand why agencies are key actors in the workplace law enforcement scheme. At the same time, it is also important to understand why the agencies are now swimming upstream when they attempt to enforce workplace laws, including antiretaliation laws. Though the agencies must enforce the applicable statutes, the power to interpret the law and decide how much, if any, deference to give to the agencies' interpretation of the laws the agencies enforce rests with the judicial branch. Because antiretaliation provisions are enforcement tools, broad interpretation of these provisions is vital to a healthy regulatory regime, yet both the U.S. Supreme Court and the lower courts are issuing restrictive interpretations of antiretaliation provisions in workplace statutes. In addition to needing to fulfill their mission despite the impeding actions of the judiciary, administrative agencies must also continue to be diligent about enforcement despite the silence of the legislature. While the legislative branch has the power to change restrictive interpretations through subsequent legislation, this process requires elusive consensus and consciously prioritizing this issue over other pressing issues. Moreover, the piecemeal nature of antiretaliation law would require amendment of multiple different statutes.

For successful enforcement of workplace antiretaliation statutory provisions, it is imperative not only that the branches of the government align on enforcement goals but also that employers be incentivized to comply. This compliance project is twofold. First, employers must comply with the underlying labor standards required by law (e.g., payment of minimum wage, nondiscrimination in the workplace, adherence to occupational safety and health standards, etc.). Second, employers must abide by antiretaliation laws by not retaliating against employees who report suspected noncompliance and not threatening to retaliate in an attempt to prevent employees from reporting.

The latter principle especially underscores that employees must be empowered to bring claims of noncompliance without fear of retaliation. The retaliation claims filed with agencies only represent instances in which employees have brought underlying noncompliance claims and are alleging retaliation as a result of those claims. Not represented in the number of claims are those instances in which employees were too fearful of employer retaliation to raise noncompliance issues on behalf of themselves or others.

This fearful deterrence from filing claims also hinders the agencies' enforcement of the rights and duties created in the statute they enforce. In addition, other employees are also deterred from reporting misconduct, and the regulatory scheme Congress has created for enforcing workplace laws—which is dependent upon employees serving as complainants and witnesses—is weakened.

Employer retaliation is a formidable foe for administrative agencies because employers may be violating workplace laws on several fronts. While compliance with workplace laws has always been important, the equity issues that arise from noncompliance heighten the importance of the compliance function. No longer can we look at workplace law violations as simply a minimum-labor-standards issue. Even violations of a minimum labor standard like minimum wage requirements—a law that is not considered an antidiscrimination law—have discriminatory implications.²⁸ Consider the example of an employer who violates the Fair Labor Standards Act of 1938 (FLSA), which prescribes the federal minimum wage requirements, but does so exclusively or predominately with respect to its Latinx employees.²⁹ While the adverse action itself (i.e., wage theft) may seem only to violate the FLSA, Title VII of the Civil Rights Act of 1964 is also implicated, as the decision to target Latinx employees for wage theft is discriminatory.³⁰ In other words, employers may be discriminating under a different treatment theory, a disparate impact theory, or both in their selection of which employees to target for violations of workplace laws that are not necessarily classified as antidiscrimination laws. Additionally, employers may be discriminating with regard to which employees they retaliate against for reporting violations of workplace laws. Regardless of the type of workplace law being violated, antiretaliation provisions are a crucial tool for the enforcement of workplace regulation.

This Article proposes two primary interventions that administrative agencies can implement to increase employer compliance, decrease instances of retaliation, and promote equity. The first is enhanced demographic data collection from complainants and employers to help reveal discriminatory patterns. For instance, if most meritorious claims of pension theft are filed by women over age forty, the data will show a pattern of sex and age discrimination in pension theft. This can be tracked across all industries, specific industries, states, job titles, and individual employers.

²⁸ See 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 (2018).

²⁹ 29 U.S.C. §§ 201–19.

³⁰ 42 U.S.C. § 2000e.

The second intervention is use of that data to transition from an enforcement model primarily based on individual complaints to a model grounded in compliance reviews. While most federal agencies do some combination of both, the proportion of an agency's investigations of individual complaints as compared with compliance reviews can vary drastically from one agency to another, even within the same federal department. For instance, DOL's Office of Federal Contract Compliance Programs (OFCCP) maintains a caseload that is dominated by compliance reviews, though the agency also receives individual complaints. Contrarily, agencies like the EEOC have a caseload dominated by individual complaints.³¹ A compliance review-oriented framework better effectuates the purposes of federal workplace law while alleviating fears of an overloaded judiciary.

This Article contends that the weakening of retaliation protections is contributing to the disparate administration of workplace justice. Diluted retaliation protections, coupled with agency reliance on employees reporting workplace misconduct as the primary method of triggering an investigation into possible noncompliance, leads to underenforcement. Because workers of color and female workers are disproportionately subject to workplace abuses, such anemic enforcement hinders racial and gender equity in the receipt of services of the administrative state. This Article argues that enhanced data collection from complainants and employers is vital to effective enforcement. An agency enforcement model that is primarily based on compliance reviews, rather than individual-complaint investigations, would incentivize employers to comply with workplace laws and frustrate the purpose of employer retaliation.

Part I of the Article examines the equity component of administrative agency enforcement. It outlines the scholarship on racial disparities in administrative enforcement and its causes. It explores three primary areas of scholarship: explicit racist enforcement and administration of laws, representative bureaucracy, and administrative burdens. Each of these areas of literature examines how agency equity outcomes are affected by agency policies, processes, and procedures. Part I also introduces the notion that agency decisions regarding enforcement models influence agency equity outcomes.

³¹ For evidence that the EEOC's caseload is dominated by individual charges, compare *Commissioner Charges and Directed Investigations*, EEOC, <https://www.eeoc.gov/commissioner-charges-and-directed-investigations> [<https://perma.cc/V9PZ-MXQW>], which shows the numbers of Commissioner Charges from FY2020 to FY2022 and Directed Investigations from FY2015 to FY2022, with EEOC, *supra* note 2, which shows the numbers of charges filed from FY1997 to FY2022.

Part II describes the current enforcement model for federal agencies that enforce workplace law and details the problems with this model. It illustrates that complaints by applicants or employees are the principal mechanism for triggering an investigation of noncompliance. It also explains some of the constraints that agencies have in launching compliance reviews without a triggering complaint and describes the variation in these constraints among the different agencies.

Part III proposes enhanced data collection and details the types of data that should be collected, as well as the methods of collection. It argues for the collection of data from complainants and the establishment of affirmative reporting requirements for employers. It compares such a mandatory disclosure requirement in workplace law generally to disclosure requirements in other areas, including securities regulation and federal contractors, and addresses the importance of agency information sharing.

Finally, Part IV explains how the collection of this data can inform strategic enforcement by the agencies. This Part also details the structure and characteristics of a compliance-review-based enforcement model needed to address existing inequities and maximize deterrence.

I. THE EQUITY COMPONENT OF AGENCY ENFORCEMENT

On the day of his inauguration, President Joseph R. Biden Jr. issued an executive order instructing federal agencies to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.”³² While agencies that enforce antidiscrimination laws have a clear role in advancing equity, the advancement of equity is the responsibility of the administrative state as a whole. Even agencies that enforce so-called universalist³³ laws that do not explicitly implicate discrimination on the basis

³² Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

³³ There are varying definitions of “universalist” in the literature, but neutrality to identity-based protected classes is the common thread that runs through these definitions. See Erika K. Wilson, *Charters, Markets, and Universalism*, 26 GEO. J. ON POVERTY L. & POL’Y 291, 296 (2019) (characterizing universalism as the “phenomenon of deemphasizing legal or policy approaches that specifically target race-based inequality and instead emphasizing a baseline of commonalities related to the human condition”); Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2842 (2014) (defining a universalist approach to civil rights law as providing “a uniform floor of rights or benefits for all persons or, at least, guarantees a set of rights or benefits to a broad group of people not defined according to the identity axes (e.g., race, sex) highlighted by our antidiscrimination laws”); Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011) (describing the primary components of universalism as “(1) changing the axis of protection from identity traits to universal conditions like vulnerability, (2) shifting focus from equal rights to universal rights like liberty or dignity, or (3) moving away from condemnation of prejudice toward banning disrespect or irrational decision making”).

of a protected class become conduits of inequity if ineffective enforcement or administration disproportionately affect historically marginalized communities.

This Part briefly discusses the explicit and implicit racist and sexist history of the administrative state across areas of law and describes how modern ineffective enforcement of workplace laws can lead to the perpetuation of inequity by administrative agencies.

A. *The Myth of the Neutral Administrative State*

The administrative state is often associated with neutrality, but it has been shaped by historical, social, and environmental narratives.³⁴ Systemic racism is embedded in American society, and this racism has influenced public administration. Administrative agencies have contributed to the marginalization and subordination of women and people of color, sometimes intentionally and at other times unintentionally, and in many ways the administrative state controls the level of access certain groups receive.³⁵

The literature exploring the racial and gender disparities in administrative enforcement can be categorized into three scholarly areas—racist laws and methods of administration, representative bureaucracy, and administrative burdens. Racist and sexist enforcement scholarship explores how enforcement of racist laws or racist administration of neutral laws has affected the fulfillment of administrative agencies' mission with respect to racial and ethnic minorities. Representative bureaucracy explores how the composition of a bureaucracy's personnel affects its success in enforcing its mission. Administrative burdens scholarship addresses how the burdens to accessing services through administrative agencies impacts agency efficacy. The common thread running through the literature is disparate agency enforcement by race, sex, or both, whether this disparity is intentional or negligent on the agency's part. This Section discusses each of these categories and argues that agency enforcement models can also indirectly propagate racial and gender disparities in administrative enforcement.

³⁴ Jennifer Alexander & Camilla Stivers, *Racial Bias: A Buried Cornerstone of the Administrative State*, 52 ADMIN. & SOC'Y 1470, 1471 (2020).

³⁵ See CAMILLA STIVERS, GENDER IMAGES IN PUBLIC ADMINISTRATION 3 (2d ed. 2002); Alexander & Stivers, *supra* note 31, at 1472; Bijal Shah, *Administrative Subordination*, U. CHI. L. REV. (forthcoming 2023) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4392123 [<https://perma.cc/BN3Y-ZPUM>]; Shalini Bhargava Ray, *Citizenship and Racial Subordination*, 3 AM. J.L. & EQUAL. 319 (2023); K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2447 (2018); Noah D. Katz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 552 (2012).

1. *Racist Laws and Methods of Administration*

Racism has been embedded in the administrative state from its beginning.³⁶ Administrative agencies are charged with providing certain services to the public. However, these services are not always administered equally. The racism entrenched in society has led to the enforcement of racist policies by administrative agencies. There is a myriad of examples of agencies enforcing explicitly racist laws or enforcing facially neutral laws discriminately.

In several instances, Congress passed laws that excluded people of color from certain worker protections and welfare entitlements. These exclusions were written into the statutory language, though not all of them would actually use explicit racial terms. During the New Deal Era, many of the statutes passed specifically excluded agricultural and domestic workers, most of whom were people of color.³⁷ For instance, the Social Security Act of 1933 and the Fair Labor Standards Act of 1938 both contained exemptions of agricultural and domestic workers. The introductory letter President Franklin Roosevelt sent accompanying the FLSA bill called for the setting of maximum hours and minimum wages for industrial *and agricultural* workers.³⁸ Nonetheless, the original version of the bill that became the FLSA excluded agricultural and domestic workers.³⁹ At the time these statutes were passed, approximately 2 million of the 5.5 million Black workers in the United States were in agricultural jobs and an additional 1.5 million Black workers were engaged in domestic service.⁴⁰ These exclusions left two-thirds

³⁶ Although the term “administrative state” was coined in the late 1940s, the first modern federal administrative agency was the Interstate Commerce Commission, created in 1887. Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 34 (2021).

³⁷ For a discussion of racism against African Americans during the New Deal, see Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origin of the Agricultural and Domestic Workers Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104 (2011), and Daiquiri J. Steele, *Enduring Exclusion*, 120 MICH. L. REV. 1667, 1676 (2022).

³⁸ Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 13 (2005); see also Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 I*, 53 POL. SCI. Q. 491, 493 (1938).

³⁹ 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. (1937); see also Perea, *supra* note 40 at 114 (noting that the exclusion of agricultural and domestic workers represented “the purposeful exclusion of most black employees by proxy from an originally inclusive proposal”); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 58 (2005) (tracing the history of the FLSA and the exclusion of agricultural and domestic workers, which, as one member of Congress noted, was done “as a matter of ‘political expediency’”).

⁴⁰ 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, 440 (1992).

of the nation's Black workers uncovered by laws intended to improve worker well-being and working conditions.⁴¹

These statutes contributed to a pattern of exclusion of racial minorities and women that began with previous New Deal legislation and persisted throughout the twentieth century. For example, the same type of racialized exclusions was included in workplace legislation like the Occupational Safety and Health Act, passed almost four decades after the FLSA.⁴² Because of these exclusions, the agencies enforcing these statutes were not charged with serving many people of color.

Even in the statutes in which there was no express language that excluded workers of color, the administration and enforcement mechanisms set up by the statutes themselves or by federal agencies at times led to discriminatory administration. The National Industrial Recovery Act of 1933 (NIRA) is one example.⁴³ NIRA required the establishment of codes of fair competition that set minimum wages and maximum working hours in different industries, and the National Recovery Administration—a federal agency that President Roosevelt created via executive order—enforced these laws.⁴⁴ During the code hearings, the agency considered inserting an express race-based wage differential in which white workers would be paid more than Black workers.⁴⁵ While the overt differential was rejected, distinctions based on occupation and geography allowed employers to pay most Black workers a lower wage based on facially neutral factors.⁴⁶

In some instances, the federal government gave administrative authority to state and local officials.⁴⁷ For instance, Congress passed the Agricultural Adjustment Act of 1933 (AAA) in an effort to increase farmers' incomes by raising crop prices and providing other subsidies.⁴⁸ Black farmers, however, were regularly cheated out of payments. Yet, the authority to settle disputes was given to committees comprised of locally elected members, and these committees routinely disfavored Black farmers.⁴⁹ In the South, no Black farmer ever served on a local committee.⁵⁰ This type of exclusion of Black workers persisted throughout the twentieth century.

⁴¹ *Id.*

⁴² *See* 29 C.F.R. § 1975.6.

⁴³ NIRA was declared unconstitutional on nondelegation grounds in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

⁴⁴ Exec. Order No. 6173 (June 16, 1933) (establishing the National Recovery Administration).

⁴⁵ Perea, *supra* note 37, at 104.

⁴⁶ *Id.* at 125.

⁴⁷ *Id.*

⁴⁸ 7 U.S.C. §§ 601–24.

⁴⁹ Perea, *supra* note 37, at 108–09.

⁵⁰ *Id.* at 109.

Though many of the overt exclusions have been rectified, the effects still linger. President Biden's executive order acknowledges the racial disparities entrenched in both the nation's public and private institutions, some of which have been perpetuated by administrative agencies.⁵¹ The executive order calls on agencies to help remedy social injustices by addressing inequities in agency policies and programs that create obstacles to equal opportunity in society. But employer retaliation remains the primary obstacle to effective enforcement of workplace laws.

2. *Representative Bureaucracy*

Representative bureaucracy focuses on the relationship between the demographics of an agency's personnel and the agency's effectiveness at achieving its mission. While systemic racism has been perpetuated in some instances by administrative agencies in an intentional and direct way, propagation of racial inequality has at times been less direct, as is the case when the demographics of an agency's personnel do not resemble the demographics of the population the agency serves. In such cases, actions and processes created by administrative agencies have impacted the agencies' efficacy in fulfilling their mission and providing bureaucratic services to people of color.

At its core, representative bureaucracy theory posits that the more the demographics of personnel in a bureaucracy look like the demographics of the bureaucracy's constituency, the more effective the bureaucracy will be in fulfilling its mission. Representative bureaucracy theory has its origins in the 1940s work of J. Donald Kingsley.⁵² Studying the English Civil Service, Kingsley's work noted that members of society's upper class staffed the upper levels of the civil service system in Britain, while the lower levels were staffed by people in the working class. Kingsley questioned the ability of a class-biased civil service system to serve the needs and interests of the working class and suggested that a bureaucracy should be representative, with all social groups being represented among its workforce. He asserted that, to govern effectively, the civil service's composition should reflect the class-based demographics of the society it serves.⁵³

Decades later, Frederick C. Mosher expounded upon Kingsley's work, arguing that a bureaucracy can be representative through passive or active representation.⁵⁴ Passive representation occurs when underrepresented

⁵¹ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

⁵² Norma M. Riccucci & Gregg G. Van Ryzin, *Representative Bureaucracy: A Lever to Enhance Social Equity, Coproduction, and Democracy*, 77 J. PUB. ADMIN. REV. 21, 21 (2017).

⁵³ *Id.* at 22.

⁵⁴ See FREDERICK C. MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE* (1968).

groups are included in a bureaucracy's workforce, typically in proportion to their representation among the population being governed.⁵⁵ Active representation occurs when employees in administrative agencies perform acts, consciously or unconsciously, to ensure the interests of those who belong to their same social group(s) are considered when making policy.⁵⁶ Because an individual's background influences their bureaucratic decisions, passive representation yields active representation.⁵⁷

Despite Black civil servants' substantial numbers in the federal workforce during and after Reconstruction, the policies of President Woodrow Wilson regarding the racial composition of the federal workforce removed many Black civil servants from the federal workforce.⁵⁸ Those who were not forced out were relegated to low-level positions.⁵⁹ Moreover, Black applicants to the federal civil service were discriminated against in hiring.⁶⁰ During Wilson's presidency, the civil service began requiring photographs to be submitted with employment applications.⁶¹ While the Pendleton Act of 1883 and Civil Service Commission were created to ensure the neutral, merit-based selection of job applicants, administrative officials were able to circumvent the hiring of many qualified Black applicants by filtering the applications by race based on the applicants' submitted photographs.⁶² The civil service gains Blacks made during and after Reconstruction were overshadowed by the losses inflicted as a result of the Wilson administration's segregationist policies.⁶³

After the segregationist policies were relaxed, personnel of color now constitute nearly 40% of the federal government's workforce.⁶⁴ However,

⁵⁵ See *id.*; Mark Bradbury & J. Edward Kellough, *Representative Bureaucracy: Assessing the Evidence on Active Representation*, 41 AM. REV. PUB. ADMIN. 157, 158 (2011).

⁵⁶ See MOSHER, *supra* note 54.

⁵⁷ Bradbury & Kellough, *supra* note 55, at 160.

⁵⁸ Alexander & Stivers, *supra* note 34, at 1481. For a detailed discussion of Woodrow Wilson's segregation of the federal civil services, see Kathleen L. Wolgemuth, *Woodrow Wilson and Federal Segregation*, 44 J. NEGRO HIST. 158, 158 (1959).

⁵⁹ Wolgemuth, *supra* note 58, at 161.

⁶⁰ *Id.* at 162.

⁶¹ *Id.* at 161.

⁶² Alexander & Stivers, *supra* note 34, at 1481.

⁶³ Wilson's purported justification for the segregationist policies was to improve the efficiency of administrative agencies by eliminating any friction that would result from Black and white civil servants working together. Abhay Aneja & Guo Xu, *The Costs of Employment Segregation: Evidence from the Federal Government Under Woodrow Wilson 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27798, 2021), <https://www.nber.org/papers/w27798> [<https://perma.cc/5E9H-47LH>].

⁶⁴ Currently, people of color comprise approximately 40% of the federal government's workforce and approximately 38% of the U.S. population. Brandon Lardy, *A Revealing Look at Racial Diversity in the Federal Government*, P'SHIP FOR PUB. SERV. (Mar. 23, 2023), <https://ourpublicservice.org/blog/a-revealing-look-at-racial-diversity-in-the-federal-government> [<https://perma.cc/QX5C-NT4J>].

most of these employees, particularly Black employees, are concentrated at the lowest levels of government.⁶⁵ Empirical research shows that the harmful effects on Black wealth have been long lasting.⁶⁶ In addition to the harmful effects on Black civil servants, active representation theory would predict that the dearth of Black civil servants at the higher levels of the federal workforce negatively impacts bureaucratic service provided to Blacks throughout the country.

Past segregationist policies and their lingering effects on the federal workforce have resulted in the normalizing of whites as the standard for bureaucrats.⁶⁷ As a consequence, the level of services people of color receive has become linked to the proportion of the agency's personnel that matches their identities. The same has not been the case for white bureaucratic clients.⁶⁸ Scholars in this area continue to explore how representation in the federal workforce can improve administrative outcomes for communities of color.

3. *Administrative Burdens*

Another area of research exploring hindrances to the administrative state's provision of equitable services to communities of color is the area of administrative burdens. Administrative burdens are the arduous experiences individuals encounter when attempting to access a public benefit.⁶⁹ These burdens serve as obstacles to receiving benefits and services from administrative agencies.⁷⁰ Administrative burdens include the challenges associated with learning about available services and the requisite eligibility criteria, onerous application processes that require extensive paperwork or

⁶⁵ *Id.*

⁶⁶ For example, Black civil servants were less likely to own a home following Wilson's segregationist policies than other civil servants, and this gap persisted decades after Wilson left office. The gap increased for Black civil servants but notably did not increase for other Black workers in comparable jobs outside of the civil service. Hence, Blacks who worked for the civil service had higher wealth losses than Black workers in comparable private sector positions. Aneja & Xu, *supra* note 63, at 4.

⁶⁷ Shannon Portillo, Nicole Humphrey & Domonic A. Bearfield, *Representative Bureaucracy Theory and the Implicit Embrace of Whiteness and Masculinity*, 82 PUB. ADMIN. REV. 594, 595 (2022).

⁶⁸ *Id.*

⁶⁹ Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *The Effect of Administrative Burden on Bureaucratic Perception of Policies: Evidence from Election Administration*, 72 PUB. ADMIN. REV. 741, 741 (2012). There is a growing body of literature that uses the term "sludge" to refer to administrative burdens. See, e.g., Richard H. Thaler, *Nudge, Not Sludge*, 361 SCIENCE 431 (2018) (coining the term); Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1850 (2019).

⁷⁰ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT 21 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf [<https://perma.cc/3J6L-AR7Q>].

documentation, and the stigma associated with accessing benefits.⁷¹ Examples include traveling to administrative offices for in-person visits, navigating agency websites, and responding to inquiries about eligibility for services. Scholars have argued that administrative burdens are one of the primary tools administrative agencies use to discriminate against people of color.⁷² Some scholars suggest that racialized administrative burdens evolved once more direct forms of racial discrimination were outlawed.⁷³

Where administrative burdens exist, they fall disproportionately on people of color, as well as women, the LGBTQIA+ community, individuals with disabilities, and the elderly.⁷⁴ Administrative burdens can make it more difficult to obtain certain services from the government, or in some cases, preclude acquisition of such services altogether.⁷⁵ These can include rights and benefits ranging from the right to vote to the ability to access life-altering benefits.⁷⁶ Governments have a long history of using administrative burdens to deny Black citizens rights and services. The use of literacy tests to

⁷¹ Carolyn Y. Barnes, “It Takes a While to Get Used To”: *The Costs of Redeeming Public Benefits*, 31 J. PUB. ADMIN. RSCH. & THEORY 295, 295 (2021).

⁷² Victor Ray, Pamela Herd & Donald Moynihan, *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, 32 J. PUB. ADMIN. RSCH. & THEORY 139, 139 (2022) (“[A]dministrative burdens serve as the handmaiden of the racialized state: the experience of discrimination by state actors and processes often occurs via the experience of racialized burdens.”).

⁷³ See *id.* at 140–41.

⁷⁴ Justin Schweitzer, *How to Address the Administrative Burdens of Accessing the Safety Net*, CTR. FOR AM. PROGRESS (May 5, 2022), <https://www.americanprogress.org/article/how-to-address-the-administrative-burdens-of-accessing-the-safety-net/> [<https://perma.cc/N6T4-VC4K>]; Suzanne Wikle, *Administrative Burdens Exacerbate Inequities and Must Be Reduced*, CTR. FOR L. & SOC. POL. (Aug. 23, 2021), <https://www.clasp.org/blog/administrative-burdens-exacerbate-inequities-and-must-be-reduced/> [<https://perma.cc/TTD4-RW53>] (“Worst of all, administrative burdens perpetuate inequity because they tend to be most heavily placed on supports for low-income people rather than those that serve the population as a whole.”); Ashley Burnside, *The Biden Administration Should Increase LGBTQ Public Benefit Access and Data Collection*, CTR. FOR L. & SOC. POL. (Feb. 18, 2021), <https://www.clasp.org/blog/biden-administration-should-increase-lgbtq-public-benefit-access-and-data-collection/> [<https://perma.cc/299X-M5Z>] (finding that LGBTQ individuals are two times more likely to experience poverty than the general population, yet their utilization of services is unknown because administrative agencies do not collect information on LGBTQ status); PAMELA HERD, GERONTOLOGICAL SOC’Y OF AM., HOW ADMINISTRATIVE BURDENS ARE PREVENTING ACCESS TO CRITICAL INCOME SUPPORTS FOR OLDER ADULTS: THE CASE OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 52–55, <https://web.archive.org/web/20230728135909/https://sbgg.org.br/wp-content/uploads/2015/07/3.pdf> [<https://perma.cc/M2SK-ZRQ6>] (finding that only one-third of eligible elderly adults receive SNAP assistance due to difficulty of access); Pamela Herd & Donald Moynihan, *How Administrative Burdens Can Harm Health*, HEALTH AFFS. (Oct. 2, 2020), <https://www.healthaffairs.org/doi/10.1377/hpb20200904.405159/full/> [<https://perma.cc/95W8-GZZZ>] (asserting that cumbersome bureaucratic processes are often targeted at certain marginalized groups).

⁷⁵ Sunstein, *supra* note 69, at 1849.

⁷⁶ *Id.*

disenfranchise Blacks is a prominent example.⁷⁷ However, even where administrative burdens are not specifically targeted at Blacks, these burdens can nevertheless have a disproportionate impact on them.

The scholarship on administrative burdens underscores both the inequity that can stem from these burdens, as well as the benefits to the overall system of provision of bureaucratic services. Administrative burdens serve several laudable purposes, including protecting the integrity of governmental programs; avoiding waste, fraud, and abuse; useful data collection; protecting privacy; and ensuring scarce resources are allocated to the individuals who are willing to spend the most time trying to obtain them.⁷⁸ Hence, some administrative burdens are necessary to achieve legitimate government objectives. However, agencies must be careful to ensure burdens are no more burdensome than absolutely necessary and work to eliminate the disparities based on race and other protected characteristics that exist with respect to these burdens. Experts have suggested that federal agencies engage in audits to assess the effect of burdens on equity.⁷⁹ The U.S. Office of Management and Budget has acknowledged that mitigating administrative burdens is an essential element to advancing equity.⁸⁰ Focusing on administrative burdens' creation of a racial disparity in receipt of bureaucratic services allows for a type of exploration of systemic racism in the administrative state in a manner that focusing on individual discrimination does not.⁸¹

B. Inequity in Modern Workplace Law

Racial disparities are rampant throughout many, if not all, facets of the administrative state. Indeed, agency assessments of compliance with federal laws show that people of color are disproportionately affected by noncompliance in a myriad of areas, including agriculture, criminal justice, fraud and other business practices, education, the environment, healthcare,

⁷⁷ See *id.* at 1864 (“[A]dministrative burdens have long been used to disenfranchise African Americans. For decades, literacy tests were a favorite instrument; they were eventually forbidden by the Voting Rights Act of 1965. In recent years, administrative burdens have become less onerous, in the sense that voting is more convenient, and registration is generally easier. But such burdens continue to exist, and in some states, they are mounting. They are plainly being used as a political weapon, most prominently by Republican leaders seeking to impose sludge so as to increase their electoral prospects.”).

⁷⁸ *Id.* at 1865–72.

⁷⁹ Cass R. Sunstein, *Sludge Audits*, 6 BEHAVIOURAL PUB. POL’Y 654, 666 (2020).

⁸⁰ See OFF. OF MGMT. & BUDGET, *supra* note 70.

⁸¹ See Ray et al., *supra* note 69, at 139.

and housing.⁸² The disparities in workplace law are particularly prominent. Thus, compliance with equal employment opportunity and minimum labor standards laws are a vital component of advancing economic justice, and affecting outcomes in other areas like education, housing, and health.

Workplace law noncompliance is widespread, with many of America's workers experiencing issues like wage theft, pension fraud, persistent occupational safety and health hazards, discrimination and harassment, unlawful family and medical leave denials, and many other workplace injustices.⁸³ Female workers, workers of color, and those at the intersection experience disproportionately high rates of these types of workplace law violations.⁸⁴ Workers of color also experience higher rates of occupational illnesses and injuries resulting from violations and underenforcement of workplace safety laws, with Latinx workers having the highest rate.⁸⁵ The rates of work-related disabilities are also higher for Asian-American, Black, and Latinx workers than for white workers.⁸⁶ Moreover, women of color experience sexual harassment in the workplace at a higher rate than white women.⁸⁷ Hence, though certain labor and employment laws are considered

⁸² See, e.g., FTC, SERVING COMMUNITIES OF COLOR A STAFF REPORT ON THE FEDERAL TRADE COMMISSION'S EFFORTS TO ADDRESS FRAUD AND CONSUMER ISSUES AFFECTING COMMUNITIES OF COLOR 1 (2021), https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf [<https://perma.cc/XJ34-RCVH>] (“[F]raud, as well as certain other business practices, have a disproportionately negative impact on communities of color, as compared to White communities.”). U.S. DEP’T OF HEALTH & HUM. SERVS., EQUITY ACTION PLAN SUMMARY 1 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/04/HHS-EO13985-equity-summary.pdf> [<https://perma.cc/2B9E-AYLB>] (“Underserved communities in the United States— including communities of color, disability communities, LGBTQI+ communities, women, rural communities, and communities experiencing persistent poverty and inequality—often face entrenched and persistent disparities in health outcomes and healthcare access.”).

⁸³ Jayne S. Ressler, *Workplace Anonymity*, 70 BUFF. L. REV. 1495, 1506 (2022).

⁸⁴ See, e.g., 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 [<https://perma.cc/T6PD-MZH7>] (describing socioeconomic backgrounds of low-wage workers); AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT: A NATIONAL AND STATE-BY-STATE PROFILE OF WORKER SAFETY AND HEALTH IN THE UNITED STATES 1–2 (30th ed. 2021), https://aflcio.org/sites/default/files/2021-05/DOTJ2021_Final.pdf [<https://perma.cc/4B6W-QMCW>]; 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 higher risk of occupational injury and illness for both male and female Black and Hispanic workers).

⁸⁵ AFLI-CIO, *supra* note 84, at 1–3; Lee S. Friedman & Linda Forst, *Ethnic Disparities in Traumatic Occupational Injury*, 50 J. OCCUPATIONAL ENV’T MED. 350, 353 (2008).

⁸⁶ 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).

⁸⁷ AMANDA ROSSIE, JASMINE TUCKER & KAYLA PATRICK, NAT’L WOMEN’S L. CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 4 (2018), <https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf> [<https://perma.cc/HP7T-MDJC>].

universal laws, and do not apply specifically to members of protected classes, workers of color have a disproportionate need for these protections, as they are the most vulnerable to being victims of the violations.

Administrative enforcement of workplace laws by federal agencies is key to advancing workplace justice and employer compliance. However, most administrative agencies that enforce workplace laws rely on a complaint by an employee, applicant, or another community member to trigger an investigation of possible noncompliance. In general, as regulators uncover employer misconduct through the investigative process, they react by requiring the employer to implement reforms to come into compliance with statutory and regulatory mandates.⁸⁸ This system, therefore, makes the detection and subsequent remedy of workplace violations contingent upon a person reporting the alleged noncompliance, despite the risk of employer backlash.

The central problem with the reporting system is that many employees do not report workplace misconduct out of fear of employer retaliation.⁸⁹ As a result, employer misconduct can go undetected. Workers of color face disproportionately high rates of employer retaliation.⁹⁰ While collecting data to get an accurate depiction of the number of workers who do not report employer misconduct out of fear of retaliation is impracticable, it stands to reason that if workers of color are more likely to experience employer retaliation, then they are less likely to report misconduct. This reticence to report employer noncompliance may lead to increased instances of

⁸⁸ See Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1012 (2017).

⁸⁹ See, e.g., Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U.L. REV. 287, 294, 299 (2021) (“Because enforcement relies nearly entirely on private lawsuits brought by employees who fear retaliation if they complain, only a fraction of discrimination and harassment claims are ever pursued, leaving significant gaps in enforcement.”); Andrew Tae-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 426–28 (2011) (noting that fear of retaliation is the most common explanation reported by employees for their failure to report perceived discrimination); Brake, *supra* note 5, at 37, 39–40 (“In this cost-benefit analysis, reporting discrimination is perceived to entail high costs. Fear of provoking retaliation, in particular, drives many persons to choose not to report or challenge discrimination.”); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 755 (2014) (“[T]he two most common explanations for why employees do not report internally are fear of retaliation and feelings of futility if they choose to report, with fear of retaliation supported by a very real risk that internal whistleblowers will be penalized for disclosing misconduct.”); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 465 (2008) (“Fear of retaliation is the most common explanation reported by employees for their failure to report perceived discrimination.”).

⁹⁰ JESSICA MASON & PAULA MOLINA ACOSTA, NAT’L P’SHP FOR WOMEN & FAMS., CALLED TO CARE: A RACIALLY JUST RECOVERY DEMANDS PAID FAMILY AND MEDICAL LEAVE 15 (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/called-to-care-a-racially-just-recovery-demands-paid-family-and-medical-leave.pdf> [https://perma.cc/SRQ7-PHPJ]; TUNG & PADIN, *supra* note 14, at 3.

noncompliance specifically toward these workers, creating a cycle that continues to exacerbate inequity.

If agencies use enforcement models that rely on employee complaints to trigger an investigation and employers can prevent employees from filing complaints through actual or threatened retaliation against employees, then employers can effectively cause underenforcement of workplace laws. However, the promotion of racial equity seems to be part of the Biden administration's political agenda, and administrative agencies have been directed to assess the ways in which policies and programs propagate obstacles to equal opportunity for people of color and other marginalized groups and allocate resources to advance those opportunities.⁹¹

One way to accomplish this could be transitioning to an enforcement model whereby the majority of agency investigations are initiated by a compliance audit that can help minimize the effects of employer retaliation and bring issues of noncompliance to light without the need for an employee complaint. However, this transition will only reach its maximum effectiveness if the agencies have the data needed to inform strategic enforcement efforts. This will help agencies that enforce workplace statutes to fulfill their missions and is critically important given the weakening of retaliation protections by the judicial branch and the failure of Congress (to date) to fortify antiretaliation provisions through legislation overrides.

II. ADMINISTRATIVE AGENCIES' ROLE IN WORKPLACE JUSTICE

Private enforcement is the hallmark of the workplace law regulatory scheme.⁹² The regulatory framework Congress has established relies on employees to file complaints and provide information in investigations of alleged employer misconduct. Compliance with workplace laws can be costly to employers, and market forces often incentivize noncompliance. For most administrative agencies that enforce workplace laws, the current structure is one in which complaints trigger the overwhelming majority of investigations.

This Part explores the crucial role federal administrative agencies play in the advancement of equity in the workplace and explains the integral position of administrative agencies in securing workplace justice, given the

⁹¹ OFF. OF MGMT. & BUDGET, *supra* note 70, at 10.

⁹² See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1151 (2012) ("In various domains of public law, as in Title VII and the FLSA, Congress has vested in private parties a great deal of responsibility for enforcement by extending the statutory mechanisms provided to private parties in order to facilitate and incentivize private suits."); David Kwok, *The Public Wrong of Whistleblower Retaliation*, 69 HASTINGS L.J. 1225, 1242 (2018) (highlighting the problems and benefits of treating whistleblower retaliation claims as private disputes).

workplace regulatory scheme created by Congress. It also describes the current enforcement model of most federal agencies that enforce workplace laws and the inefficiencies and inequities associated with these models.

A. Current Agency Enforcement Approaches

Many of the federal agencies that enforce workplace laws have enforcement tools available to them that are akin to compliance reviews.⁹³ Two prominent tools are directed investigations and Commissioner charges. Directed investigations are ones in which the agency does not need a member of the general public to file a charge in order to trigger an investigation.⁹⁴ Commissioner charges are charges that are filed by an EEOC Commissioner rather than a member of the general public.⁹⁵ Directed investigations, which are authorized for use by the EEOC and DOL, and Commissioner charges, which are exclusive to the EEOC, can be used by agencies to trigger investigations without a complaint being filed. However, both directed investigations and Commissioner charges have attributes that distinguish them from compliance reviews and lack many of the features needed to create maximum deterrence incentives.

Prior research shows that while compliance levels rose where there were more prior directed investigations, the same was not true for prior individual complaints.⁹⁶ In a study of the effects of prior WHD investigations on deterrence in the fast food industry, Professor David Weil found that prior investigations, whether triggered by a complaint or a direct investigation, had a deterrent effect on employers.⁹⁷ However, the impact on the likelihood of compliance increased from 33% for any type of previous investigation to 56% where the prior investigation was a direct investigation.⁹⁸ He found

⁹³ Most federal administrative agencies that enforce workplace laws use a combination of enforcement and nonenforcement tools. Technical assistance is an example of an agency nonenforcement mechanism designed to promote compliance. However, the appropriate balance between enforcement and nonenforcement tools can be a point of contention. There are those who adamantly oppose taking an agency's already limited resources away from enforcement activities. Other employers may feel that assistance that is provided by the government disadvantages firms that use their own resources to promote compliance. Technical assistance has great value, but primarily for employers who are actually seeking to comply with regulations. Technical assistance is not helpful in obtaining compliance from employers who possess the opposite goal: to find ways to violate workplace laws.

⁹⁴ See *Commissioner Charges and Directed Investigations*, *supra* note 31.

⁹⁵ *Id.*

⁹⁶ DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 50 (2010), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/strategicEnforcement.pdf> [<https://perma.cc/22E4-2MDQ>].

⁹⁷ *Id.* at 54.

⁹⁸ *Id.*

similar results when studying employers in the hotel industry.⁹⁹ Professor Weil aptly sums up the finding, stating: “The shadow cast by directed investigations is longer and more influential than that of complaint investigations.”¹⁰⁰

Regulatory systems are designed to influence behavior, and enforcement is the mechanism that brings about these behavioral changes.¹⁰¹ While antiretaliation provisions in statutes function as enforcement tools, narrow interpretations of retaliation protections weaken their efficacy, thereby decreasing the ability of the respective agencies to affect employer behavior. Additionally, weakened retaliation protections foster a regulatory system in which the employees provide agencies with information that helps agencies fulfill their missions, but subsequently experience retaliation against which agencies are incapable of protecting them.

The complaint-based model that many administrative agencies currently use has several deficiencies. Pursuing enforcement predominantly through individual complaints can be resource-intensive.¹⁰² Moreover, because the most vulnerable workers are subject to reprisal for reporting workplace misconduct, they may be the least likely to file complaints, making a complaint-based enforcement model ineffective for the workers who need enforcement the most. Additionally, when an employer is settling a complaint, both the employer and the agency are typically focused on remedying the discrete harm at issue in the complaint instead of implementing more comprehensive reforms.¹⁰³

B. Proposal for a Compliance-Review Enforcement Model

Administrative agencies must use the tools at their disposal that are independent of the individual complaints to help incentivize employer compliance with antiretaliation laws and the underlying statutory rights and responsibilities these laws reinforce. One significant way to do this is to transform agencies’ caseloads from being driven by individual complaints to compliance reviews. Transforming administrative agencies focused on regulating workplace misconduct from an individual-complaint-dominant model to a model with a heightened focus on compliance reviews will help disincentivize employer retaliation. A compliance review focus will lead to

⁹⁹ *Id.* at 74.

¹⁰⁰ *Id.* at 71.

¹⁰¹ See David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL’Y J. 125, 127 (2007).

¹⁰² 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, 62 (2005).

¹⁰³ Root, *supra* note 88, at 1018.

more manageable individual-complaint caseload while transforming workplace culture in organizations to a culture that disincentivizes retaliation. As compliance reviews increase, employers will be incentivized to comply, without an employee having to report and risk retaliation or not report out of fear of retaliation. Creating a system whereby an employee complaint is not needed to initiate an investigation will create deterrence incentives for employees.

The likelihood that a violation of workplace law will be detected depends on (1) the probability that an investigation or audit will be conducted and (2) the likelihood that the investigation or audit will uncover any wrongdoing.¹⁰⁴ While conventional wisdom would suggest that engaging private actors—employees—in the regulatory process will increase the likelihood of detection, the prevalence of employer retaliation undermines this principle. The overarching rationale for retaliation is to ensure that workplace misconduct is not discovered or remedied by regulators. Because most agencies use an enforcement model that heavily relies on complaints to trigger an investigation, actual and threatened retaliatory conduct decreases the number of complaints filed. This decrease in filings results in a decrease in enforcement to the benefit of noncompliant employers. However, an enforcement model in which covered employers were randomly selected for compliance audits would lessen the need for employees to report, making employer retaliation ineffective at warding off regulatory enforcement.

III. ENHANCING DATA COLLECTION

A highly salient model that encourages compliance with workplace laws is strategic enforcement. Strategic enforcement seeks to use limited agency resources in a tactical manner to sustain compliant behavior.¹⁰⁵ Strategic enforcement is particularly concerned with heightening detection¹⁰⁶—data is an integral component of the model, as it helps agencies identify patterns of noncompliance across multiple sectors.¹⁰⁷

This Part argues that administrative agencies should enhance their data collection in two ways. The first one is by altering internal agency processes to collect demographic information on the individuals who are filing

¹⁰⁴ See David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58 INDUS. & LAB. RELS. REV. 238, 240 (2005).

¹⁰⁵ David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. RELS. 437, 437 (2018).

¹⁰⁶ Tess Hardy, *Digging Into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement*, 37 INT'L. J. COMPAR. LAB. L. & INDUS. RELS. 133, 141 (2021).

¹⁰⁷ Data collected by administrative agencies is also used by Congress to support proposed legislation. *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

complaints. In the event the complaint is not filed by the person aggrieved by the misconduct, the agency should seek to collect demographic data about the aggrieved party. The second way is by instituting affirmative reporting requirements for employers. This augmented data collection will provide administrative agencies with the information they need to improve enforcement of workplace regulations and track whether suspected noncompliance is being disproportionately levied against women and people of color.

A. Agency Collection of Complainant Demographic Data

It is well settled that data collection is a pivotal function of federal administrative agencies.¹⁰⁸ Agencies collect data on almost every facet of societal life, including work. In some instances, particularly where exhaustion of administrative remedies is required, administrative agency data provides the most comprehensive information on the types of misconduct occurring in the workplace.¹⁰⁹ However, most agencies that enforce workplace laws do not require, or even request, that individuals who file complaints provide demographic data.¹¹⁰ In fact, even the EEOC—the agency charged with enforcing employment discrimination laws—does not require that complainants provide demographic information such as race or

¹⁰⁸ See *Opp Cotton Mills, Inc. v. Adm’r of the Wage & Hour Div. of the Dep’t of Lab.*, 312 U.S. 126, 145 (1941) (noting that the data supplied by administrative agencies enables Congress to fulfill its constitutionally mandated legislative function); *Yakus*, 321 U.S. at 424–25 (acknowledging that administrative agencies collect data that is then used by Congress to support proposed legislation); see also Nicholas Mader, *The Big Data Era and an Integrated Mode of Inquiry for Social Policy-Relevant Research*, 11 I/S: J.L. & POL’Y FOR INFO. SOC’Y 97, 103 (2015) (“Public agencies from school district offices to health and human services, to juvenile and adult criminal courts, to child and family welfare, to employment security, to city public health departments maintain records on human populations from literally birth to death, and a wide range of critical human welfare concerns in between. These domains represent, by design, the most important human affairs for which we consider improvements in social policy.”).

¹⁰⁹ Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1117 (2017) (“Charge-filing data, therefore, should provide the fullest and most representative picture of the types of discrimination going on in the workplace . . .”).

¹¹⁰ See, e.g., *OSHA Online Complaint Form*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/ords/oshaw7/ecomplaintform.html> [<https://perma.cc/B9X9-WTE3>] (offering no option to include demographic information); *Information You Need to File a Complaint*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/contact/complaints/information> [<https://perma.cc/WC43-QF28>] (requiring no submission of demographic data); Form NLRB-501: Charge Against Employer (Mar. 2021), https://www.nlr.gov/sites/default/files/attachments/pages/node-195/501_3-21.pdf [<https://perma.cc/JRC6-VUD4>] (featuring no means of including demographic information).

gender when filing a charge of discrimination.¹¹¹ The agency requests only the following information: the name and contact information of the person filing; the name and contact information of the employer; the name and contact information of the employment agency or union against which the charge is being filed; the employer's number of employees; a brief description of the discriminatory act(s); the date of the discriminatory action; the basis for the complaint (e.g., race, color, national origin); and the filer's signature.¹¹²

Augmenting agency efforts to obtain data may help with future enforcement. For example, suppose an employer was systemically retaliating against workers of color and female worker. Collection of demographic data on the individuals filing retaliation complaints against this employer will assist the agency in identifying racial bias that is part and parcel of the retaliation. This type of identification would be particularly conceivable when the complainant demographic data is coupled with other disclosures that are already required in several areas of workplace law, including the disclosure of the racial and gender composition of an employer's workforce.¹¹³

Likewise, other agencies that enforce workplace laws also do not collect demographic information about complainants. For instance, the WHD website lists the information individuals will need to provide to file a complaint regarding employer noncompliance with workplace laws, but demographic data about the complainant is not requested.¹¹⁴ Similarly,

¹¹¹ EEOC Form 5—Charge of Discrimination does not request this information, though it does ask for year of birth from which age can be calculated. EEOC Form 5: Charge of Discrimination (June 2022), EEOC, https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf [<https://perma.cc/LE6C-LSDC>].

¹¹² *How to File a Charge of Employment Discrimination*, EEOC, <https://www.eeoc.gov/how-file-charge-employment-discrimination> [<https://perma.cc/CU7T-ZNBH>].

¹¹³ *EEO-1 Data Collection*, EEOC, <https://www.eeoc.gov/data/eo-1-data-collection> [<https://perma.cc/63ET-33H7>].

¹¹⁴ The WHD website states that the following information is useful to file a complaint:

- Your name
- Your address and phone number (how you can be contacted)
- The name of the company where you work(ed)
- Location of the company (this may be different from where you worked)
- Phone number of the company
- Manager or owners [sic] name (who should we ask to speak to?)
- Type of work you did
- How and when you were paid (e.g., cash or check, every Friday)

OSHA does not request complainant demographic data on its complaint form.¹¹⁵ OFCCP includes a section on its complaint form where the complainant may specify the reason the individual believes they have been discriminated against by checking a particular box.¹¹⁶ Some of the boxes allow the complainant to declare a protected class.¹¹⁷ For example, under the “race” category, the complainant can check a box to specify the race.¹¹⁸ Similarly, under the national origin category, a complainant may specify their national origin.¹¹⁹ However, there are no subcategories under the additional categories, including sex, sexual orientation, religion, or disability.¹²⁰ Moreover, the question asks the individual why they believe their employer is retaliating against them, but it does not ask directly for any information about the individual completing the complaint form (other than contact information).¹²¹ Often an individual may believe they are being targeted by their employer because the employer perceives the worker as having a particular identity, even when the worker does not. This “perception discrimination” or “perceived-as” discrimination is also prohibited under antidiscrimination laws.¹²² Hence, the box selected under the basis of the misconduct may not match the complainant’s actual identity.

Any additional information that you can provide such as copies of pay stubs, personal records of hours worked, or other information on your employers [sic] pay practices are helpful.

Information You Need to File a Complaint, *supra* note 110.

¹¹⁵ See *OSHA Online Complaint Form*, *supra* note 110.

¹¹⁶ See *Complaint Involving Employment Discrimination by a Federal Contractor or Subcontractor*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://webapps.dol.gov/ofccp-claims/english.html?_ga=2.43327597.918310324.1687566910-1370624281.1680062655 [<https://perma.cc/8UVF-5MKV>].

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² For example, the Americans with Disabilities Act’s prohibitions against disability discrimination apply not only to individuals with disabilities or those with a record of a disability but also those who are regarded as having a disability, irrespective of whether this perception is correct. 42 U.S.C. § 12102; see also *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, EEOC, <https://www.eeoc.gov/laws/guidance/employment-discrimination-based-religion-ethnicity-or-country-origin#:~:text=Title%20VII%20of%20the%20Civil,race%2C%20color%2C%20or%20sex> [<https://perma.cc/4AD4-8LU6>] (Title VII’s prohibitions include “harassment or any other employment action based on” perception, which is defined as “[h]arassing or otherwise discriminating because of the perception or belief that a person is a member of a particular racial, national origin, or religious group whether or not that perception is correct”); Dallan F. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87, 106 (discussing religious discrimination claims based on misperception).

Collecting demographic data on complainants would allow the EEOC to better identify patterns of systemic discrimination in employer retaliation. The first method by which the agencies can achieve this goal is through direct collection. The agencies should provide an area on complaint forms to allow complainants to provide demographic information, should the complainant choose to do so. This section may state that provision of this information is optional.

Many respondents do not answer questions about demographics such as race and sex because they are fearful that this information will be used for a discriminatory purpose. There are a few protections that can be implemented to alleviate respondents' fears. The first is listing the purposes for which the information will be used, and explicitly excluding discriminatory purposes. The second is by educating investigators on the importance of obtaining this information, so that the investigators may adequately and accurately convey that importance to complainants, with the intent to persuade them to provide the information. The next option is to offer an opportunity to provide the information after the investigation. This way, individuals who fear that the use of this information will negatively impact their complaint will already have a decision on the complaint prior to providing the data. Finally, while the portion of the form that asks for the information should be mandatory (i.e., the complainant should not be allowed to continue to the next page or next question without responding), an option labeled "choose not to answer" or similar language could be provided.

In addition to having agencies collect data directly from complainants, agencies should also collect data from other agencies, which will require coordination. This will provide agencies with data that can assist with systemic enforcement. For instance, if WHD shares its complainant demographic data with the EEOC, then the EEOC would be able to observe certain patterns, such as a particular employer targeting only or mostly women for wage theft. While such behavior would certainly be a violation of the FLSA, which WHD enforces, it would also constitute sex discrimination, which the EEOC enforces. However, the lack of coordination between agencies has garnered much attention from scholars, and calls for more coordination abound.¹²³ Currently, coordination can originate from several sources, including legislative mandates, executive orders, and

¹²³ See Hiba Hafiz, *Interagency Coordination on Labor Regulation*, 6 ADMIN. L. REV. 199, 201–02 (2021).

interagency agreements.¹²⁴ Memoranda of Understanding (MOUs) are the primary mechanism used for agency coordination.

Despite the general lack of coordination, many agencies that enforce workplace laws already engage in data sharing and other types of coordination.¹²⁵ Professor Hiba Hafiz conducted a recent study of the MOUs between agencies that regulate labor and labor markets.¹²⁶ Her analysis showed that data sharing was the most prominent purpose found in the MOUs.¹²⁷ However, the existing data sharing scheme suffers from two primary flaws. The first is that the scheme is not comprehensive, as it does not incorporate all agencies that are responsible for enforcing workplace law.¹²⁸ An approach where only some workplace agencies participated in data sharing fails to provide robust protections. The second flaw is simply that if the agencies are not collecting demographic data on complainants, then no matter how robust or comprehensive interagency sharing agreements may be, the agencies will not have this data to share.

B. Affirmative Reporting Requirements for Employers

Increased data collection and disclosures will advance the mission of workplace agencies to equitably enforce workplace laws in light of employers' myriad tactics to keep employees from going to court or to administrative agencies with complaints. One such tactic is retaliation. Another popular tactic is the use of mandatory arbitration agreements to keep allegations out of administrative agencies and courts.¹²⁹ To combat these tactics, scholars have called for affirmative reporting requirements in a

¹²⁴ *Id.* at 205.

¹²⁵ *Id.* at 224.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 222–23.

¹²⁹ Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 146–51 (2014).

variety of contexts, including workplace laws,¹³⁰ securities laws,¹³¹ nonprofit organizations,¹³² and environmental law.¹³³

In addition to pursuing the collection of information from complainants, many of whom are workers or advocacy groups, agencies should also obtain data from employers directly. Employer disclosure of information is already required in several areas of workplace law, including disclosure of the racial and gender composition of an employer's workforce and known safety and health hazards.¹³⁴ Expanding these disclosures will further the mission of agencies that enforce workplace law in a number of ways. First, by placing the onus on employers to track and disclose certain information, disclosure requirements will force employers to actively monitor what is happening in their organizations and help promote employer compliance.¹³⁵ Second, disclosure requirements will help agencies monitor employer compliance with workplace regulations. Implementing mandatory disclosure will allow the administrative agencies to engage in strategic enforcement and employ their scarce resources towards enforcement in an efficient way.

Finally, several types of information should be disclosed annually. The first is the number of complaints filed internally within the last year and the steps the employer took in response to these complaints. The second is information on the individuals who filed these complaints. This information can be reported using an employee identification number or some other unique identifier besides the employee's name. This should be accompanied by information that would indicate some type of proven or alleged adverse

¹³⁰ See Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 293 (2021) (arguing for the imposition of affirmative disclosure requirements of information regarding racial and sexual disparities in pay, promotion, and harassment); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 357 (2011) (advocating for affirmative disclosure to augment efficiency, promote compliance, and incentivize social responsibility); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 783 (2014) (arguing for mandatory pay disclosures); Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN L. REV. 177, 182 (2015) (examining the role of information in the enforcement of workplace law).

¹³¹ See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 503 (2020); Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 585 (2016) (arguing for enhanced disclosure by private companies with valuations over \$1 billion); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1207 (1999) (proposing expanding corporate disclosure to promote social transparency).

¹³² Atinuke O. Adediran, *Disclosures for Equity*, 122 COLUM. L. REV. 865, 873 (2022).

¹³³ Yue Liu, Pierre Failler & Liming Chen, *Can Mandatory Disclosure Policies Promote Corporate Environmental Responsibility?—Quasi-Natural Experimental Research on China*, 18 INT'L. J. ENVIRON. RSCH. & PUB. HEALTH 6033, 6036 (2021).

¹³⁴ *EEO-1 Data Collection*, *supra* note 113; 29 C.F.R. § 1910.1200(b) (2018).

¹³⁵ Bornstein, *supra* note 130, at 300.

action against the employee. Examples include whether the employee separated from the company since the complaint through a termination, resignation, or reduction in force (i.e., layoff); whether the employee was denied any opportunity for which the employee applied, including a promotion or training opportunity; and whether the employee's working hours or wage rate changed after the complaint. To be clear, having an employee who, for instance, filed a complaint and was subsequently denied a raise or a promotion does not equate to wrongdoing by the employer. Rather, it can serve as an indicator to both the employer and the government that further investigation, internally or externally, is needed.

IV. IMPROVING ENFORCEMENT

Transitioning from an enforcement model dominated by complaints to one dominated by compliance reviews will improve enforcement while simultaneously frustrating the purpose of employer retaliation and incentivizing compliance with workplace laws. Given the prevalence of employer retaliation and the racial disparities in both workplace misconduct and retaliation, administrative agencies charged with enforcing workplace laws must ensure their enforcement schemes deter employers from retaliation. This Part provides a brief overview of deterrence theory and argues that making compliance reviews the dominant enforcement model will deter employers from violating workplace regulations. It also describes the characteristics of an effective compliance review dominant model and lists some limitations of the enforcement model.

A. Deterring Noncompliance

Orthodox deterrence theory is evolving to include workplace law concerns, and scholars have started to emphasize the role of strategic enforcement in deterrence theory. Deterrence theory assumes that regulated entities are rational, amoral, and act in their own self-interest.¹³⁶ Whether regulated entities will be deterred from certain behavior depends on the certainty, severity, and swiftness of sanctions.¹³⁷ When the probability of detection is high, and resulting sanctions are severe and swift enough, the actor is deterred from the noncompliant behavior.¹³⁸ Although increased severity and swiftness of sanctions increase deterrence, even the fastest and most severe sanctions simply never get imposed if there is no detection of the underlying misconduct that would trigger the sanction. Indeed, empirical

¹³⁶ Hardy, *supra* note 106, at 136.

¹³⁷ *Id.*

¹³⁸ *Id.*

research shows that increased likelihood of detection has a greater effect on deterrence than increased severity of punishment.¹³⁹

Hence, this Article is particularly concerned with the certainty of sanctions, with the hope that a compliance-review-based model will increase this certainty in the short run and lead to greater severity and swiftness in the long run. Over time, increased deterrence will lead to increased compliance, allowing agencies to free up more resources to increase the swiftness of sanctions. More compliance will also decrease the likelihood that the agency will fall into the “deterrence trap”—a situation in which the size of the penalty is too much for the regulated party to bear, so agencies are reluctant to impose the penalty.¹⁴⁰

While orthodox deterrence theory may seem fairly straightforward, empirical deterrence studies reveal the complexity of the theory. Additionally, deterrence theory has its origins in criminal law, but application of the theory to employment contexts introduces nuances that further complicate matters. Specifically, the assumption of rationality, role of third parties, and adversarial nature of deterrence complicate the theory in the employment context. The Article discusses all of these complications below.

B. Structure and Characteristics of the New Model

Efficient and effective use of a compliance review dominant enforcement model by agencies would require that the compliance reviews have certain characteristics, including: (1) random selection from a comprehensive pool of employers to be audited; (2) a moratorium on additional reviews of an employer for a specified time after a compliance review is completed absent a complaint being filed; and (3) the ability to merge any pending complaints into the compliance review investigation, should any complaints be filed against the same employer at the time the compliance review is pending.

1. Bifurcating the Selection Process: Random and Targeted Selection

To be effective, compliance reviews should involve random selection from a pool of all employers covered by a particular statute. It is imperative that all covered employers be in the pool from which the “sample” of

¹³⁹ Christine Parker & Vibeke Lehmann Nielsen, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation*, 56 ANTITRUST BULL. 377, 404–05 (2011); SALLY SIMPSON, CORPORATE CRIME, LAW AND SOCIAL CONTROL 93 (2002).

¹⁴⁰ Christine Parker, *The ‘Compliance’ Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC’Y REV. 591, 591 (2006); Hardy *supra* note 106, at 138.

employers will be selected for audit. Failure to have a comprehensive pool would leave some employers out of the system, and the deterrence incentives would not apply to them. Additionally, the selection must be random. Currently, many agencies that use directed investigation do not select the employers for audits randomly. Rather, other factors affect selection. One example is selection based on the size of the employer, with some agencies focusing enforcement efforts on the largest employers.¹⁴¹ The rationale behind this decision is that doing so will help the most workers, given the size of the employer.¹⁴² However, if employers know that an agency plans to target larger employers for compliance reviews, the smaller and midsize employers will have fewer deterrence incentives because they will know that their chances of being selected are small.

Random selection should also help avoid regulatory capture, a phenomenon by which administrative agencies act to serve special interests rather than the public interest.¹⁴³ Rather than risk having special interests exert influence over the compliance review selection processes in a manner that will decrease the chances of a particular employer or industry being audited, a random selection policy would ensure that all covered employers are eligible for a review.¹⁴⁴

Another factor currently used by agencies in opening investigations without the filing of an initial complaint is the risk profile of geographic areas or industries. For example, at times OSHA focuses its resources on certain hazards within certain high-risk industries.¹⁴⁵ However, as is the case with large employers, a focus on high-risk industries or even high-risk geographic areas would alert employers who are outside of these areas and industries that there is no need to be concerned about a possible compliance review; thus, deterrence incentives are decreased.

Yet another consideration is the likelihood of actually finding a violation. Violations lead to recoveries for employees, and it is axiomatic that agencies would want to direct investigatory resources where they believe violations exist. While this certainly serves the agencies' objectives, a focus on companies with higher likelihoods of violations does not lead to deterrence incentives against all employers. Employers who are able to stay off the agencies' radars through a variety of methods, including actual or

¹⁴¹ See Weil, *supra* note 101, at 135.

¹⁴² *Id.*

¹⁴³ M. Elizabeth Magill, *Courts and Regulatory Capture*, in PREVENTING REGULATORY CAPTURE 397, 401 (Daniel Carpenter & David Moss eds., 2014).

¹⁴⁴ See Hardy, *supra* note 106, at 148.

¹⁴⁵ See *Directives—National Emphasis Programs (NEP)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/enforcement/directives/nep> [<https://perma.cc/L8SN-6RDL>].

threatened retaliatory behavior, would be less incentivized to comply with applicable workplace laws.

To be clear, all of the aforementioned considerations are relevant to agency mission. However, agency enforcement has two goals: relief for the victim of workplace misconduct and future deterrence. The first is accomplished through the type of direct pressure arising from inspections and subsequently levied penalties if violations are found.¹⁴⁶ Considerations of employer size, risk level, and probability of finding a violation are certainly relevant to enforcement through direct pressure. The second enforcement goal is deterrence incentives—that is, stopping violations before they occur. Random selection is pivotal for optimal deterrence.

2. *No Requisite Indicators of Noncompliance*

Two key characteristics would mark the proposed transition to a compliance-audit-based enforcement model: political palatability and varying degrees of ease of transitioning to the new model across agencies. First, there should be no need for an indication of noncompliance to trigger a compliance audit. This should be politically palatable, as a randomized audit would not carry the stigma associated with investigations originating from individual complaints. Second, while transitioning to a compliance-review-dominant enforcement model would be beneficial to all agencies, as it would foster a culture of compliance that should decrease agency workload in the long run, enforcing workplace laws. However, the transition will be easier for some agencies than for others. This Section uses WHD and the EEOC as examples to illustrate the differing levels of difficulty.

WHD is an example of an agency that is progressing towards a lower percentage of complaint-triggered investigations. In 2010, Professor Weil conducted a study finding that directed investigations created more compliance incentives.¹⁴⁷ In 2009, only 5.18% of WHD's cases were directed investigations.¹⁴⁸ In 2010, that number more than quadrupled to 27.01%.¹⁴⁹ The numbers have mostly risen in the years since.¹⁵⁰ The high-water mark came in 2018 when 53.16% of WHD's cases were directed investigations.¹⁵¹ The rate with which WHD has increased the number of its cases that are directed investigations instead of complaints suggests that an agency like

¹⁴⁶ See Weil, *supra* note 101, at 131.

¹⁴⁷ See WEIL, *supra* note 96, at 50.

¹⁴⁸ *Data Analysis*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/data/charts/data-analysis> [<https://perma.cc/2D98-UV7N>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

WHD would have a fairly smooth transition to a compliance-review-dominant model.

Other agencies, like the EEOC, for example, are poised to have a more difficult transition, as such a transition would ultimately require legislative action. In the 1970s, the EEOC started transitioning to a model focused on targeting its resources to investigations that would help large numbers of employees.¹⁵² Under the leadership of Eleanor Holmes Norton as Chair, the EEOC focused its efforts on large-scale employer compliance initiatives.¹⁵³ This focus shifted to individual complaints in 1982 when the EEOC was under new leadership by then-Chair Clarence Thomas.¹⁵⁴ This move was widely criticized.¹⁵⁵ While the EEOC has attempted to focus on more broad-based enforcement through mechanisms like systemic enforcement over the years, an EEOC task force found in 2006 that EEOC investigators have very little incentive to look beyond individual charges.¹⁵⁶

Despite the lack of incentives to pursue a compliance-review-based model, the EEOC has the ability to assess compliance without a filed charge through two mechanisms: Commissioner charges and directed investigations.¹⁵⁷ Congress gave the EEOC authority to investigate potential discrimination under Title VII, the ADA, and the Genetic Information

¹⁵² Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1139 (2015).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See William M. Welch, *Thomas Presided Over Shift in Policy at EEOC, Records Show*, AP NEWS (July 25, 1991), <https://apnews.com/article/b419883e871b5117649d1f3fdac6f95> [<https://perma.cc/8JQJ-8FKZ>] (“During his eight-year tenure, critics say the agency charged with enforcing employment discrimination laws shifted its focus away from class action cases aimed at providing remedies to large groups of people, to a more narrow emphasis on individual cases remediating specific acts of discrimination.”); Bill McAlister, *EEOC Chief Faces Scrutiny as Court Nominee*, WASH. POST (Feb. 5, 1990), <https://www.washingtonpost.com/archive/politics/1990/02/05/eecoc-chief-faces-scrutiny-as-court-nominee/7f5ea600-1f44-4dfb-9289-d107aee4b06f/> [<https://perma.cc/9HLP-LVLA>]. But see Charles A. Shanor, *Thomas’s Record at the EEOC*, WASH. POST (Sept. 9, 1991), <https://www.washingtonpost.com/archive/opinions/1991/09/09/thomass-record-at-the-eecoc/9e23425d-c293-4b83-b5fa-95a2e5dd3e38/> [<https://perma.cc/PYA8-MXAL>] (“A recurring criticism of Clarence Thomas’s performance as chairman of the Equal Employment Opportunity Commission is that Thomas stressed individual cases to the detriment of class actions during his tenure This claim has no merit. The EEOC, led by Thomas, helped put teeth into remedies for individual victims of discrimination, whether they stood alone or as members of groups of victims.”) Shanor served as the EEOC’s General Counsel during Thomas’s tenure as EEOC Chair.

¹⁵⁶ EEOC, SYSTEMIC TASK FORCE REPORT (2006), <https://www.eeoc.gov/systemic-task-force-report-chair-equal-employment-opportunity-commission> [<https://perma.cc/EZL4-Z3FY>]; see also Kim, *supra* note 152, at 1137.

¹⁵⁷ EEOC regulations state: “Any member of the Commission may file a charge with the Commission. Such charge shall be in writing and signed and shall be verified.” 29 C.F.R. § 1601.11(a).

Nondiscrimination Act (GINA) using Commissioner charges.¹⁵⁸ Prior to 1972, Commissioner charges required reasonable cause that a violation of Title VII had occurred before filing.¹⁵⁹ Since 1972, Commissioner charges have simply had to allege an unlawful employment practice.¹⁶⁰ Investigations of Commissioner charges are conducted in the same manner as investigation of individual complaints.¹⁶¹ Persons who are the subject of a Commissioner charge or who are in the class being addressed are entitled to a right-to-sue notice upon request.¹⁶² While issuance of a right-to-sue notice typically ends the EEOC's investigation, the EEOC has the authority to continue investigating a Commissioner charge despite a right-to-sue notice being issued.¹⁶³ In addition to Commissioner charges, the EEOC has congressional authorization to investigate potential noncompliance with the Equal Pay Act (EP Act)¹⁶⁴ and the Age Discrimination in Employment Act (ADEA)¹⁶⁵ through directed investigations.¹⁶⁶ Directed investigations are conducted in the same manner as the investigations stemming from individually filed ADEA or EP Act complaints.

Commissioner charges and directed investigations share the characteristic of being initiated by the agency, not an external complainant. The fact that no employee or applicant would have to initiate the complaint helps the agency decrease the likelihood of retaliation, as there is no complaining employee against whom to retaliate. It also ensures that in the event an employer threatens to retaliate against employees should they report misconduct, the retaliation threat would have no effect on the agency's ability to investigate. Importantly, even the Supreme Court has noted the role Commissioner charges can have on antiretaliation enforcement efforts. In *EEOC v. Shell Oil Co.*, the Court stated that when a victim of discrimination

¹⁵⁸ See 42 U.S.C. § 2000e-5(b) (noting that charges may be filed by Commissioners); see also *Commissioner Charges and Directed Investigations*, *supra* note 31.

¹⁵⁹ This only speaks to Title VII because prior to 1972, neither the ADA nor GINA existed. See 29 C.F.R. § 1601.3(a) (referencing the Americans with Disabilities Act of 1990 and the Genetic Information Nondiscrimination Act of 2008). Prior to 1972, a Commissioner charge needed reasonable cause to proceed. See *Commissioner Charge and Directed Investigations*, *supra* note 31.

¹⁶⁰ See 42 U.S.C. § 2000e-5(b).

¹⁶¹ See *Commissioner Charge and Directed Investigations*, *supra* note 31.

¹⁶² 29 C.F.R. § 1601.28(a)(1).

¹⁶³ *Id.* § 1601.28(a)(3).

¹⁶⁴ The Equal Pay Act, which was passed prior to the establishment of the EEOC, does not have a requirement that a charge be filed to commence an investigation. *Id.* § 1620.30(a).

¹⁶⁵ The ADEA implementing regulations provide: "The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the powers vested in it pursuant to [the ADEA]." *Id.* § 1626.4.

¹⁶⁶ See 29 U.S.C. § 626; *id.* § 211(a); see also *Commissioner Charge and Directed Investigations*, *supra* note 31.

is reluctant to file a charge himself because of fear of retaliation, a Commissioner may file a charge on behalf of the victim.¹⁶⁷ Yet, neither Commissioner charges nor directed investigations comprise a large component of the EEOC's docket. In fiscal year 2022, there were 73,485 charges (i.e., individual complaints) filed with the EEOC.¹⁶⁸ By contrast, there were only 29 Commissioner charges and 25 directed investigations commenced in the same fiscal year.¹⁶⁹ Commissioner charges and directed investigations combined comprised less than 0.07% of the EEOC's caseload.

Despite the EEOC's ability to initiate Commissioner charges and directed investigations *sua sponte*, Commissioner charges differ from compliance reviews in that they allege noncompliance. A compliance review would simply audit the employer to determine whether the employer is compliant, without any allegation being made. However, the EEOC does not have the statutory authority to engage in an investigation not triggered by an allegation of wrongdoing, whether that allegation is from an employee, applicant, or the agency itself, under Title VII, the ADA, or GINA. As a result, while compliance reviews may be a viable option under the ADEA and the EP Act, they may not be allowed under the other statutes. Hence, the authority to trigger an audit in which there is no suspicion or allegation of wrongdoing by the employer would require Congress to amend the authority it has given to the EEOC.

3. *Publication of Results Regardless of Outcomes*

The results of compliance reviews should be made available to the public, whether or not noncompliance is found. Administrative agencies typically publicize findings of workplace law violations, as well as the remedies of sanctions that result from discovery of the violations. This should continue. The failure to publicize results can dilute the deterrent effects of enforcement.¹⁷⁰ The ability for stakeholders to incentivize employers to make changes depends on transparency.¹⁷¹ Employers who are found to be in compliance should get publicity, just as the noncompliant employers. This not only rewards compliant firms but also incentivizes at

¹⁶⁷ 466 U.S. 54, 62 (1984).

¹⁶⁸ EEOC, *supra* note 2.

¹⁶⁹ *Commissioner Charge and Directed Investigations*, *supra* note 31.

¹⁷⁰ See Shirley E. Cruz, *Essentially Unprotected*, 96 TUL. L. REV. 637, 674 (2022); Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866 (2020).

¹⁷¹ See Lipton, *supra* note 131, at 506; Roy Shapira & Luigi Zingales, *Is Pollution Value Maximizing? The DuPont Case* 30–37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23866, 2017), <https://www.nber.org/papers/w23866> [<https://perma.cc/3PRX-ZJM4>] (“[T]he main way corporations succeed in reducing their expected liability is by suppressing and distorting information.”).

least the compliant firms to avoid any tactics that may prolong the compliance audit.

Deterrence theory has expanded to include the role third parties play in compliance decisions. Numerous types of third parties are contemplated, including consumers, shareholders, insurance companies, employees, and the employer's competitors. For one, noncompliant entities are able to pass the costs of noncompliance on to third parties, thereby decreasing the deterrent effect—a phenomenon which previous scholarship has explored.¹⁷² Employers can decrease the costs of noncompliance by simply transferring those costs to consumers or shareholders.¹⁷³ Moreover, employers' ability to purchase insurance to cover these costs could also decrease the deterrent effects.

Another factor that is starting to gain more coverage in the literature on deterrence theory is the effect of increased publicity of sanctions on regulated entities. Coupling increased publicity of sanctions with increased investigations results in higher compliance.¹⁷⁴ While deterrence theory has traditionally focused on the entity setting the sanction and the entity receiving the sanctions, third parties play a vital role as well.¹⁷⁵ For instance, publicity surrounding noncompliance could harm companies with their customers, as well as with their business partners.¹⁷⁶ Because corporations are increasingly being held responsible for the conduct of other corporations with which they do business, they often enter into contractual arrangements whereby they obtain certain assurances of compliance.¹⁷⁷ Hence, any subsequent noncompliance of which an entity's business partners are made aware could not only expose the entity to legal liability but also hinder the entity's ability to do business with future potential partners.

¹⁷² See EUNICE HYUNHYE CHO, TIA KOONSE & ANTHONY MISCHEL, NAT'L EMP. L. PROJECT, HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA'S WORKERS 13 (2013), <https://www.labor.ucla.edu/wp-content/uploads/2018/06/HollowVictories.pdf> [<https://perma.cc/K4BL-H9SL>].

¹⁷³ Hardy, *supra* note 106, at 137; Brent Fisse, *Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties*, 13 U. NEW S. WALES. L.J. 1, 8 (1990).

¹⁷⁴ Johnson, *supra* note 170, at 1901.

¹⁷⁵ Jodi L. Short, *Competing Normative Frameworks and the Limits of Deterrence Theory: Comments on Baker and Griffith's Ensuring Corporate Misconduct*, 38 LAW & SOC. INQUIRY 493, 496–97 (2013).

¹⁷⁶ Root, *supra* note 88, at 1017; Scott Killingsworth, *The Privatization of Compliance*, in TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT 33, 33 (Michael D. Greenberg ed., 2014).

¹⁷⁷ Root, *supra* note 88, at 1017.

C. *The Challenges and Benefits of Compliance Review*

The language of antiretaliation provisions in workplace statutes varies from one statute to another.¹⁷⁸ However, these provisions are generally comprised of at least one of three types of clauses—an opposition clause, an interference clause, and a participation clause.¹⁷⁹ Opposition clauses protect employees from adverse actions taken against them by their employers if the employee has opposed an unlawful workplace practice.¹⁸⁰ Interference clauses proscribe employer interference with any right granted in the statute.¹⁸¹ Lastly, participation clauses protect employees who have participated in investigations or other proceedings regarding the exercise of a right conferred by statute.¹⁸²

Transitioning from an individual-complaint-dominant model to a compliance-review-dominant model would incentivize employers to comply with antiretaliation laws. Employers would be unable to keep the government from investigating them by threatening to retaliate against employees who filed complaints. Granted, being unable to keep the government from investigating would help would-be victims of participation clause violations to a lesser degree, as employers could still threaten to retaliate against employees who cooperate with the investigation. However, even if agencies were to embrace a compliance-review-dominant model, the government would still need employees to participate in compliance review investigations and could request employee participation, which the employer would have no power to refuse.

In its purest form, deterrence theory is adversarial.¹⁸³ While the adversarial nature of it may be palatable in the criminal law arena, for political reasons it is much less so in the employment arena. Agencies have

¹⁷⁸ See Long, *supra* note 7, at 561–63 (discussing the differences in the texts of antiretaliation provisions in workplace statutes).

¹⁷⁹ See *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 274 (2009) (denoting the antiretaliation clauses in Title VII as an “opposition clause” and “participation clause”); *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514–15 (1997) (labelling the provision preventing interference with ERISA rights as the “interference clause”).

¹⁸⁰ Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1919 (2020).

¹⁸¹ *Id.* at 1920.

¹⁸² *Id.* at 1919–20.

¹⁸³ Hardy, *supra* note 106, at 136. See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (proposing a formula allocation of enforcement resources dependent on “social loss,” as opposed to more traditional justifications of vengeance, deterrence, safety, rehabilitation, or compensation); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (positing that state regulation of industry sectors is done for the benefit of industry actors); Orley Ashenfelter & Robert Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333 (1979) (examining the extent to which minimum wage standards are complied with by firms who are profit-maximizing and subject to incomplete enforcement).

introduced mechanisms like outreach programs to dilute the adversarial nature of the enforcement. However, regulatory capture can be a problem. Additional features may need to be added to make transition to an enforcement model focused on deterrence politically palatable. For instance, another feature of an effective compliance-review enforcement model is having a specified amount of time between the completion of one compliance review and the start of another. The timing requirement will ensure the model does not overburden employers. Once an employer undergoes a compliance review, that employer should be shielded from another compliance review for a certain period of time. The time period should be long enough to provide the employer with some relief from the review by that particular agency, but short enough that the employer does not become complacent and consider itself shielded from an agency audit. OFCCP, for example, has already created its own audit timing rules. OFCCP will not audit a facility for which a prior OFCCP compliance review was closed within the past two years. Such a moratorium on audits for a certain amount of time after completion of one would only apply to compliance reviews, not complaints. For instance, if a complaint was filed the day after a compliance review was completed, that complaint would be investigated as usual.

The final characteristic needed for the effectiveness of the compliance-review-dominant model is the ability to merge complaints against the same employer with the compliance review. If a complaint is filed while a compliance review is ongoing, the complaint should be merged with the compliance review. This allows the investigation of all allegations pending against an employer at a particular agency simultaneously with the complaint. This helps ensure that the investigators assigned to the compliance review are aware of the complaint and helps minimize duplication of government resources.

One argument that will likely arise is that of agency overreach. These arguments are particularly surprising inasmuch as many decry administrative agencies that enforce laws related to the workplace as not doing enough to promote compliance. Many agencies that enforce workplace law are already hamstrung by lackluster regulatory power. For instance, the EEOC does not have the power to engage in substantive rulemaking with respect to Title VII, though it does have the power to make procedural rules.¹⁸⁴ Hence, the proposed changes would simply provide the agencies that enforce workplace law with the same regulatory tools that many other federal agencies already possess.

¹⁸⁴ See 42 U.S.C. § 2000e-12(a).

Converting to a compliance-review-dominant model would by no means solve the problem executive agencies face in ensuring robust retaliation protections. The legislature still needs to engage in substantive antiretaliation reform to update and reinforce antiretaliation provisions in statutes. Likewise, the judiciary should allow procedural mechanisms to do the work they were created to do with respect to balancing justice and judicial economy, as narrow interpretations of antiretaliation laws are diluting the effectiveness of the underlying statutes and encumbering agency regulatory enforcement.¹⁸⁵ While this Article's prescription is not a perfect substitute for legislative intervention or sound reasoning by the judiciary, it is a step towards incentivizing employer compliance.

CONCLUSION

The federal government wants to promote equity in the provision of services. One barrier to providing services in the workplace-law context is employer retaliation. Violations of workplace regulations disproportionately affect women and people of color. Moreover, employers are more likely to retaliate against female workers and workers of color, leading to disparate enforcement of workplace laws. Administrative agencies therefore find themselves in a quandary. They are unable to prevent the courts from issuing restrictive interpretations of antiretaliation laws and they lack the authority to legislatively correct these interpretations. Nevertheless, they are charged with enforcing workplace statutes, despite the judicial weakening of antiretaliation provisions—the primary enforcement tool contained in the statutes.

The federal government should act to increase promotion of services and equity by deterring employers from violating laws that regulate work, including antiretaliation laws. Enhanced data collection through agencies' direct collection and affirmative reporting requirements for employers will allow agencies to detect discriminatory patterns based on race and sex in workplace noncompliance, as well as strategically target enforcement efforts. Most importantly, transitioning from a complaint-dominant enforcement model to a compliance-based-dominant model will help deter employers from retaliating and bring the administrative state a step closer to ensuring equal protection and justice for all.

¹⁸⁵ Sperino, *supra* note 13, at 2041–42.

