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THE CHALLENGE FOR ENFORCING WORKERS’ RIGHTS

So much of what we know about workers’ rights focuses on what makes them enter into the legal system in the first place, or, conversely, what factors bar their entry. What happens when workers decide to engage the law to demand their rights? And then what comes next? In this chapter, I begin to answer by examining the structure and logic underlying the labor standards enforcement system in the United States through the lens of the San Francisco Bay Area and California state systems. While not meant as a comprehensive overview, the following pages help frame our understanding of how the state regulates employer behavior and what are the narrow protections that exist for workers.

Two general trends have affected workers’ rights in the United States over the past several decades: a slow decline of union strength and a growing focus on individual protections as opposed to broader collective bargaining tactics (Lichtenstein 2002). These individual rights have reconfigured the balance of power between employer and worker, with the latter bearing the enormous burden of pursuing justice despite having considerably fewer resources and less influence. This shift has paralleled the broader trend of redefining deeper structural inequalities as individual grievances that require individual, rather than system-wide, redress.

Alexander J. S. Colvin (forthcoming) outlines two distinct mechanisms in the US labor standards enforcement system: inspection-based and adjudicatory-based processes. In the former, the state has the authority to investigate labor practices, as does the Occupational Safety and Health Administration when it goes out to inspect businesses for safety protocols and hazardous exposures. Resource and personnel limitations restrict the reach of this enforcement method, which also
depends on the political will of an agency’s directorate (Government Accountability Office 2007; Bobo 2008; Gleeson 2012a). Adjudicatory, or claims-based, approaches allow workers to bring complaints through the courts, administrative hearings, and other bureaucratic processes. With each of these mechanisms, an individual claimant’s success hinges largely on her private resources, unless she is among the few to have agency litigators representing her case. As Colvin argues, “individual employment rights will only have limited impact on employment relations unless they can alter the facts on the ground of the workplace by affecting the pattern of practices engaged in by employers.”

Thus, merely establishing formal protections is inadequate for at least two reasons. First, the bureaucratic implementation of rights, even those that represent vast improvements, requires that claimants and employers alike invest enormous amounts of time and energy. Charles R. Epp (2010) calls this painstaking process “making rights real,” as it requires not only familiarizing oneself with bureaucratic minutiae but also conducting staff training and community outreach. Furthermore, it also assumes that workers themselves are equipped to come forward and denounce those who have wronged them.

Second, as Ruben J. Garcia (2012a) highlights, formal protections leave marginal workers unprotected. These are workers who “are technically covered by labor and employment laws, but because of competing policy concerns or laws, they end up losing full protection. This is especially true of those workers who are more institutionally vulnerable, such as noncitizens, people of color, and women. Despite the additional protections that these workers enjoy on paper, they are often unable to fully enforce their rights” (3). These most vulnerable workers face the biggest challenges in ensuring that they enjoy the same formal protections as their coworkers. Sometimes this difficulty arises from shortcomings in the construction of the given law, but at other times, the complexity of workers’ lives affects their ability, or desire, to see their claims through to the end.

Employers often count on the economic calculus of lax or nonenforcement. According to Noah D. Zatz (2008), two mechanisms shape enforcement failures. Employers may evade detection through the “manipulation or suppression of record-keeping,” or instead they may choose to defy the law outright by “simply integrating noncompliance into ordinary business operations” (43). For example, common business practices such as subcontracting (relying on temporary workers) allow employers to reduce the coverage of employment law, thus reducing their labor costs.

However, beyond the problem of “judicial misconstruction,” which Garcia (2012a) defines as the ways weak labor laws fail to protect the most vulnerable, a further problem is that the labor standards enforcement regime does little to address either the long-standing logics of capital production or the system of white, male, and heterosexual domination. This is a broader structural discussion that
goes far beyond the limits of this chapter, though it is important to understand that legislating against inequality is not the same as undoing the foundations of such inequality. Indeed, previous laws have led to decades of compounding disadvantage for vulnerable workers, and current expanding protections are hard-pressed to address these structural disadvantages.

For example, the prohibitions against racial discrimination passed under Title VII of the Civil Rights Act have not ushered in a color-blind society. However, the mistaken belief that we do actually live in a color-blind society has determined how legal institutions function and how we address the racial implications of their edicts (Haney López 2000). These legal institutions function as if structural prejudice doesn’t exist (Bonilla-Silva 2006), and oftentimes even social scientists themselves give insufficient weight to the societal factors driving certain policies (Bonilla-Silva and Baiocchi 2001). For instance the vulnerabilities of undocumented workers, despite the formal protections offered to them under labor and employment law, must also be understood in the context of immigration laws that almost exclusively impact Latino workers (Gleeson 2014b; Gomberg-Muñoz 2011; Armenta 2016). Moreover, deep-seated disadvantages can lead to institutional inequality across socio-legal realms, such as the ways in which patriarchy shapes sexual harassment (Marshall 2003) and family leave (Albiston 2010) policies. As I demonstrate in the ensuing chapters, this context of social inequality shapes not only how problems are legitimized and framed, but also how the rights established to combat these problems are exercised.

In the remainder of this chapter, I walk readers through the legal foundations of labor and employment law, including the rules governing wage and hour protections, workplace injury, employment discrimination, collective bargaining, and unemployment insurance. While by no means exhaustive, these summaries provide a scaffolding for understanding the bureaucratic environment that the workers involved in this study attempted to traverse. For the most part, workers had very basic, often inaccurate, understandings of the scope of their protections. But in order to understand the constraints that their advocates, as well as often well-meaning bureaucrats, were up against, we must start here by outlining the complex labor standards enforcement system. I end by discussing what happens when employment laws collide with federal immigration enforcement laws, which impact 5.1 percent of the US labor force, 9 percent of California workers, and a third of the respondents in this study (Krogstad and Passel 2015).

**THE STATUTORY SILOS OF WORKERS’ RIGHTS**

Two features stand out about the labor standards enforcement system. First, it is a patchwork of agencies and bureaucracies, each with a distinct history of struggle to improve different aspects of the worker experience. Second, as with other legal
arenas, labor and employment law exists within a federalist system of laws. The idea is that federal law sets a minimum floor, leaving states and localities to act as “laboratories of innovation” (Freeman and Rogers 2007; Bernhardt 2012). In restrictionist places, governments have enacted punitive policies aimed to limit workplace rights and to deter employers from hiring undocumented workers. In progressive places, state and local laws have created an added layer of enforcement to regulate employer behavior. In practice this creates a series of agencies and processes that, while they may communicate with one another on occasion, are focused on jurisdictional silos that workers on the ground may struggle to navigate.

Wage and Hour Protections

Perhaps the most fundamental aspect of the employment relationship, wage and hour standards, was first codified in 1938 by the Fair Labor Standards Act (FLSA) in the midst of an economic depression. At the time, the act covered only a fifth of all workers, set a forty-hour work week, established the national minimum wage at twenty-five cents per hour, and put in place provisions prohibiting child labor. The FLSA was the product of years of wrangling in the courts and in congressional debates (J. Grossman 2009), and the 1938 minimum wage it established, though a milestone, was comparatively low. It was a compromise with Southern business interests who raised loud objections, issuing dire warnings about massive potential job losses that would sound familiar in congressional debates on the issue today. Were the wage to be adjusted for inflation, it would be the 2015 equivalent of $4.06 (Elwell 2014).

As of June 2015, the federal minimum wage is $7.25 and currently covers approximately 84 percent of workers, or 130 million total (Bradley 2015, 1). There are two tracks of FLSA coverage, enterprise and individual, but exceptions exist within the law. To fall under enterprise coverage, workers must be employed by a company with at least two employees and annual sales of $500,000; if they don’t, they aren’t covered, unless their employer engages in interstate commerce. Many workers are also exempted from the federal minimum wage, most notably “executive, administrative, and professional employees,” seasonal workers, and certain agricultural and domestic service workers (Bradley 2015).

Wage and hour protections vary considerably from state to state, though despite the patchwork of laws—and in some cases states have no wage laws at all—workers must be paid at least the federal minimum. Twenty-nine states have instituted a minimum wage that is higher than the federal one (Wage and Hour Division 2015). In California the minimum wage is currently $9 per hour (as it is in Massachusetts and Rhode Island). As of this writing, states with higher rates include Washington ($9.47), Oregon ($9.25), Connecticut ($9.15), and Vermont ($9.15) (National Conference of State Legislatures 2015). Failure to pay this minimum wage, or the contractually agreed upon rate if it is higher, is considered a wage and hour violation,
regardless of employer intent. Failure to follow overtime rules or forcing workers to labor during uncompensated time are also wage and hour violations (Interfaith Worker Justice 2015).

Wage and hour violations have been the focus of several labor campaigns across the country. Kim Bobo (2008), whose book *Wage Theft in America* has become an indispensable work on the topic, defines wage theft simply as “people not getting paid for their work” (xii), and has described the United States as experiencing an epidemic of wage theft. Advocates such as Bobo argue that in addition to stripping workers of their livelihoods, wage theft also encourages unfair business competition by inducing a race to the bottom in contract bidding wars, thus undercutting the true cost of “high road” employment (Restaurant Opportunities Centers United and Batt 2012). That is, even employers who aspire to be honest feel pressured by dishonest ones to compete by lowering their payroll and acting unscrupulously. Unpaid wages also translate into unpaid taxes, which robs local communities of resources. In their study of low-wage workers in Chicago, Los Angeles, and New York City, Bernhardt et al. (2009) found that minimum-wage violations were one of the most commonly reported worker complaints. Among that study’s respondents, 26 percent of workers surveyed were paid less than the legally required minimum wage, and 60 percent reported underpayment of at least $1.

Nationally, the federal Department of Labor has the primary responsibility for addressing wage and hour violations. But in jurisdictions where state or local laws are stronger than federal ones, state and local enforcement agencies may play a much bigger role. For example, in California, the Division of Labor Standards Enforcement (DLSE), or the California Labor Commissioner, as the agency is often known, offers a higher minimum wage and more generous overtime provisions than the federal government. As such, it is incumbent on them to enforce their standards.

The new frontier of wage protection is by all accounts happening at the local level in the form of living wage policies, municipal minimum wages, and wage theft ordinances. As of June 2015, twenty-three pioneering cities and counties have also enacted minimum wage policies for all workers employed within their jurisdiction. The San Francisco Bay Area in particular has been a vital region in this progressive march. Oakland and San Francisco have set their minimum wage at $12.25 (the latter set to raise to $15 by 2018), Berkeley at $12.53, Mountain View, San Jose, and Sunnyvale all at $10.30, and Emeryville set to rise to $16 by 2019 (National Employment Law Project 2015). By comparison, federal and state governments are far behind the curve.

Establishing living wage policies has also been a key goal for many local labor movements. In localities where a living wage policy has been enacted, qualifying employers (most often those working under a public contract) must pay their employees at least as much as the policy demands. In some places, such as
Los Angeles, a two-tier rate has been established to incentivize employers to offer health insurance benefits to their employees (Luce 2004, 2007). Though living wage policies cover only a small percentage of workers, they can send a powerful message to employers and taxpayers about the wide disconnect between the arbitrary wage floor set by federal and state legislatures and the true cost of living in most American cities (Glasmeier 2015). For example, the current living/prevaling wage in San Jose, California, is $19.06 without health benefits; this local rate is more than 50 percent higher than the state-mandated rate (City of San Jose 2015).

Often overlooked in the struggle for fairer wages is underpaid overtime, a commonly underreported violation. The federal standard is time-and-a-half an employee’s regular rate for any hour worked over forty hours in a week. Some states, such as California, provide more stringent policies, such as time-and-a-half of the regular pay rate after eight hours in a workday, and double time after twelve (State of California Department of Industrial Relations 2015d). However, not all workers qualify for overtime. As of June 2015, federal wage and hour law exempted “bona fide executive, administrative, professional and outside sales employees” who met certain requirements, including being paid at least $455 per week on a salary basis (Wage and Hour Division 2008). Advocates have argued that these exemptions should be reconsidered, pointing out that assuming one works fifty-two weeks a year earning that minimum qualifying rate, the annual salary of $23,660 is far below the poverty line for a family of four (Conti 2014). Furthermore, not only office workers but also farmworkers and some domestic workers are exempted from overtime under federal law.

Beyond compensation, rest and meal breaks are also regulated by wage and hour legislation. In California these are often industry specific, but generally workers are entitled to a thirty-minute lunch break after five hours, and a ten-minute break for every four-hour period (State of California Department of Industrial Relations 2011). The Labor Code assesses penalties for each of these violations. While regular rest breaks are seen by critics as a luxury demanded by entitled workers, evidence has shown that they “can be an effective means of maintaining performance, managing fatigue and controlling the accumulation of risk over prolonged task performance” (Tucker 2003, 123). Other studies reveal that rest breaks have no significant impact on productivity and can help alleviate worker discomfort (Dababneh, Swanson, and Shell 2001) and promote worker dignity (Linder 1998). However, despite their benefits, employers frequently deny workers their breaks, and this can be very difficult to prove in the absence of clear records (Ballon et al. 2009). Unless there is consistent evidence, legal advocates often opt to focus their cases on unpaid wages.

Once a federal, state, or local violation has been committed, the practical process of filing a wage and hour claim differs from jurisdiction to jurisdiction. The basic requirement is that workers must be able to establish that they are an eligible
employee. In the context of the Fair Labor Standards Act, the Department of Labor offers the following guidance: “The FLSA defines ‘employ’ as including to ‘suffer or permit to work,’ representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA’s definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees.” Various “economic realities” can be assessed for this test, including “the extent to which the work performed is an integral part of the employer’s business”; “whether the worker’s managerial skills affect his or her opportunity for profit and loss”; “the relative investments in facilities and equipment by the worker and the employer”; “the worker’s skill and initiative”; “the permanency of the worker’s relationship with the employer”; and “the nature and degree of control by the employer” (Wage and Hour Division 2014a). Time or mode of pay alone is not a qualifying factor, but nonetheless misclassifications (for instance identifying an employee as an independent contractor) run rampant and can impact a worker’s eligibility for protections.

After establishing their eligibility, employees must then show the hours they worked and the amount they were paid through credible testimony and/or documentation. As a result of this requirement, one of the main outreach tools worker advocates have used in communities with high rates of nonstandard pay arrangements is to pass out calendars where workers can keep track of their schedules and payments even if their employer does not. This record keeping is vital because it is not uncommon for nonexempt workers to report a “salary” or periodic lump sum payments (sometimes in cash), for which they worked variable and often unpredictable hours, with no regard to overtime pay. In the absence of records (which the employer should have been keeping), testimony sometimes suffices.2

Once the eligibility and records are verified, the claim can proceed. At the Division of Labor Standards Enforcement (DLSE), the process requires that workers file their form (available online) either via mail or at one of the several state agencies located throughout the region, along with supporting evidence (State of California Department of Industrial Relations 2015c). The claimant and defendant, or employer, are then asked to appear at a settlement conference at the agency office with a deputy commissioner present. The goal is to resolve the claim without proceeding to a hearing. The employer may offer a settlement amount, and the worker will be encouraged to consider taking it based on the strength of her evidence. If an agreement cannot be reached, a formal complaint form initiates the hearing process. At this hearing, each party may bring witnesses and present evidence, which is reviewed by a hearing officer.3 Lawyers are not required in this process, and workers can bring a non-attorney representative. If requested, the DLSE will provide an interpreter for the worker.
The statute of limitations for filing a wage and hour claim at the DLSE is generally between two to three years from when the violation occurred, depending on the specific issue and whether the worker entered into a verbal or oral contract (Legal Aid Society—Employment Law Center 2004). As a result, victims of long-running violations may only be able to recover a portion of their full restitution. Further exacerbating the statute of limitations issue is the often lengthy claims process. According to the DLSE’s own official reports, a Berman claim (that is, one resulting in a hearing) takes on average 179 days from initial filing to conclusion (Su 2013).

In the best-case scenario, workers win their cases and receive some monetary restitution. However, a positive judgment does not necessarily guarantee that a worker will receive payment. Employer compliance can be the biggest challenge for workers who, even after mustering the courage to file a claim, and even after a judge rules in their favor, often never see their fair pay (Cho, Koonse, and Mischel 2013; Gleeson, Silver Taube, and Noss 2014). For example, in 2012–13 the DLSE granted $84,512,152 in hearing awards (that is, judgments actually issued by the DLSE), but collected only $11,285,085 to be returned to the claimants. To remedy this, the agency has partnered with nonprofit organizations such as the Wage Justice Center to make advances in enforcing judgments, building on a partnership with the California Franchise Tax Board (Department of Industrial Relations 2013, 38). Local wage theft ordinances are also attempting to tie nonpayment to business license revocation and instituting criminal penalties for noncompliant employers (National Employment Law Project 2011).

Workplace Injury

Two sets of policies shape worker safety and health. The first, via the Occupational Safety and Health Act, is focused on enforcement and holding employers accountable for hazardous work environments. The second, via the state-run workers’ compensation system, is meant to provide workers with temporary pay and medical treatment in the event of a workplace accident. I discuss each in turn.

OCCUPATIONAL SAFETY AND HEALTH

Since 1970, workers in the United States have been protected under the federal Occupational Safety and Health Act, which requires employers to provide a “safe and healthful” work environment (US Department of Labor 2015b). Since safety requirements and conditions can vary widely from industry to industry, an exceedingly detailed list of requirements is published and updated in the federal register (Occupational Safety and Health Administration 2015b). Updates aside, the agency is commonly criticized for its inability to keep up with the rapidly changing,
postindustrial workforce. For example, while construction regulations for scaffolding and trench shoring have been implemented for decades, basic protections in more modern industries have often gone overlooked or are still poorly understood.5

A network of regional occupational safety and health advocates (Committees on Occupational Safety and Health, or COSH groups) have worked to hold OSHA accountable and highlight the health and safety needs of underrepresented workers. Some of their recent campaigns include improving training for temporary workers, making a contractor’s safety record a key factor in the bidding process, addressing the vulnerabilities facing immigrant workers, and strengthening protections against retaliation (National Council for Occupational Safety and Health 2015).6 The National Institute for Occupational Safety and Health (NIOSH), housed at the Center for Disease Control, also conducts research on how to prevent illness and workplace injury.

The data on the rate of workplace injury is limited by a variety of factors: lack of workers’ knowledge of their rights, fear of retaliation, competition among workers, and limits on workers’ willingness to report injuries (Gleeson 2012b; Cox and Lippel 2008). With few exceptions, employers only have to report severe injuries and fatalities to OSHA (Occupational Safety and Health Administration 2014). Consequently the “official” data provides an incomplete picture of workplace safety (Occupational Safety and Health Administration 2015a). For certain industries, existing Bureau of Labor Statistics categories do not adequately represent groups of workers. For example, no clear category exists for those doing forestry replanting work on federal land, an industry that employs high numbers of subcontracted undocumented immigrants (Sarathy 2012).

Bureau of Labor Statistics data we do have reveal that in 2013, 845 foreign-born workers died on the job (accounting for 19 percent of the 4,405 fatal work injuries that year). Of these deceased immigrant workers, 352 were from Mexico. Overall, 797 deaths were of Hispanic/Latino workers (18 percent of the total), an increase from the year prior (Bureau of Labor Statistics 2014). Research confirms that immigrant workers are at higher risk for dangerous work (Orrenius and Zavodny 2009), and undocumented workers face an especially heightened risk (Hall and Greenman 2015), though there is no evidence that they receive additional wage returns for this increased risk.7

The Occupational Safety and Health Administration aims to prevent these injuries or fatalities before they occur; its mandate is to monitor employer compliance, and in some cases train workers on how to prevent injury (Occupational Safety and Health Administration 2015c). It may do this in response to confidential requests for an inspection. The agency may also identify certain enforcement priorities, allotting its resources to deal with particularly dangerous workplace conditions. In addition to the federal Occupational Safety and Health Administration, twenty-two states, including California, run programs that have the
primary enforcement responsibility. These states have additional protections and draw on state resources. However, there is no private right of action under the Occupational Safety and Health Act (OSHA); that is, individuals cannot file claims for restitution under OSHA.\(^8\)

**WORKERS’ COMPENSATION**

Once a worker is injured, she must turn to the workers’ compensation system for help. Workers’ compensation was established between 1910 and 1920 as a state-sponsored program that employers must comply with by purchasing insurance that covers both the medical costs of any injury that occurs “out of and in the course of employment” and temporary disability pay (Fishback and Kantor 2006). In every state except Texas, employers are required to carry insurance for their employees.\(^9\) The contemporary workers’ compensation apparatus is a “no-fault” system that largely exempts employers from civil liability; barring gross negligence, workers are taken care of and the employers are protected from being sued. As a result, assigning personal responsibility and culpability—a lengthy and costly process—is not the primary focus of claims-making in the workers’ compensation system (Schmidtz and Goodin 1998). However, despite the streamlining benefits of the no-fault principle, it has given rise to a culture that systemically allows employers to shirk their obligation to maintain a healthy and safe workplace (Spieler 1994; Stone 1984).

Grant Duncan (2003) argues that, viewed in the context of industrial development, the workers’ compensation system was designed to “minimize industrial conflict and maximize capital accumulation, while simultaneously managing the conduct of the injured worker” (454). Not to be confused with a universal health insurance scheme meant to maintain the overall health of beneficiaries, the goal of the workers’ compensation system is to return employees to their “bodily, vocational, and social status quo ante” as determined by a team of administrative, legal, and medical experts (455). The workers’ compensation system was hailed by reformers as an “economically efficient bargain” for business (McCluskey 2003, 849)—“efficient” because it stopped far short of providing workers an income that would give them a feasible alternative to the labor market (Wright 2004). Today, workers’ compensation benefits provide injured workers approximately two-thirds of their wages, up to a maximum of roughly $1,075 per week (State of California Department of Industrial Relations 2014b), thus encouraging them in theory to return to work.

As with many of the other concessions workers have gained from management, workers’ compensation was won out of a conflict between labor and capital. Janet Schmidt (1980) describes the program as a result “of a massive and violent struggle between labor and capital in the late nineteenth century, and an ensuing effort by
the business class to co-opt, institutionalize, and bureaucratize this militancy” (46). This struggle was not as spectacular as past labor battles; indeed, the whole point was to bury conflict within a growing bureaucracy. Employers wanted to avoid the massive strikes protesting dangerous working conditions that characterized early twentieth-century labor organizing (for example the protests in the wake of the 1911 Triangle Shirtwaist Factory fire that claimed the lives of eighty-seven mostly immigrant women). Volatile strikes, protests, and unanticipated lawsuits are bad for business. Therefore, along with progressive intellectuals and middle-class reformers, the business community lobbied in favor of this new, predictable insurance scheme (Hacker 2002, 290), a workers’ compensation system based on a rationalized view of individual rights.

In this system, workers’ individual claims are adjudicated with bureaucratic, rational precision. Over time, Grant Duncan (2003) contends, the workers’ compensation system has shifted the focus from civil liability (and the right to sue one’s employer) to an arbitrary quantification based on medical observation. Industry doctors provide their expertise to corroborate the existence of a worker’s injury and to evaluate the extent of the resulting impairment. Crucially, these doctors must certify the existence of a “medically verifiable injury” that occurred “out of and in the course of employment (456).” To verify the conditions and extent of employee injuries, insurers may even subject claimants to the video recording and monitoring of their daily activities.

Worker disabilities are quantified and ultimately assigned a monetary value. This approach, while seemingly objective and rational, can also lead to “systematic disrespect and humiliation of work-injured claimants” (Parrish and Schofield 2005, 33). Pain and suffering alone, per se, are not compensable, and palliative care and treatment geared toward long-term rehabilitation (such as chiropractic sessions or mental health services) can be challenging to obtain.

Though workers’ compensation systems can vary from state to state and from plan to plan, a claim usually begins with a formal report following the incident that resulted in injury. Ideally workers would report incidents immediately to their employer, who would then assist them in filing a formal report. While data on reporting behavior is limited, one study of a sample of Washington state workers revealed that of the 13 percent who reported an occupational injury or illness, only 52 percent filed a workers’ compensation claim (Fan et al. 2006). Industry-specific studies reveal even higher rates of injury and lower rates of claiming. Take a survey of unionized hotel room cleaners in Las Vegas, which found that 75 percent of respondents experienced work-related pain, while only 31 percent reported it to management (Scherzer, Rugulies, and Krause 2005).

One reason for this unwillingness to file is that the process of reporting a claim can be confusing and intimidating for workers. A number of factors may deter full disclosure of injury, as in other arenas of worker protections, including fear,
lack of information about workers’ rights, and the time and hassle that navigating
the bureaucracy requires. Workers may also be concerned with leveraging their
“health capital” in highly competitive environments where admitting pain and in-
jury is stigmatized and can result in job loss, being passed over for advancement,
or receiving less preferential scheduling (Gleeson 2012b; Bloor 2011).

Coverage can also vary by industry, even though in most states all employers are
required to carry the workers’ compensation benefit. “Independent contractors,”
who are not classified as employees, do not qualify for coverage (State of California
Department of Industrial Relations 2015c). Workers in the informal economy, and
who are often misclassified as independent contractors themselves, can find them-
selves unprotected (Quinlan and Mayhew 1999; Quinlan 2004; Nicholson, Bunn,
and Costich 2008). These workers can retain their rights to coverage, however, if
they are able to show that they were truly misclassified. To do so relies on appeal-
ing to the insurer and/or the workers’ compensation board, a lengthy process that
often requires the help of an attorney.

While workers are not required to hire an attorney to file an injury claim, attorney-
involved claims generally garner higher claim awards, even if a longer claim dura-
tion, according to one Louisiana study (Bernacki and Tao 2008). Attorneys can be
especially important for non–English proficient and immigrant workers (Rudolph
et al. 2002). In California, workers’ compensation attorneys are entitled to a fixed
amount of any final settlement (15 to 25 percent), and over time, state reforms have
reduced the profitability of claims, leading to a higher caseload and attorneys tak-
ing on cases more selectively.

Domestic workers, the vast majority of whom are women, have generally been
excluded from workers’ compensation benefits. Remedying this is a major demand
of recent Domestic Worker Bill of Rights movements. Recent attempts at reform
on this issue failed to gain support from the governor in California, and at present
those who work fewer than fifty-two hours or earn less than $100 over a ninety-
day work period are excluded (Kazan, McClain, Satterley, Lyons, Greenwood,
and Oberman: A Professional Law Corporation 2015). A survey of 631 domestic
workers in Los Angeles, San Diego, San Francisco, and San Jose found that only
1 percent worked for employers who paid into workers’ compensation (Theodore,
Gutelius, and Burnham 2013).

In large companies, centralized human resources departments often have
a standardized protocol for filing workers’ compensation reports. However, in
subcontracted arrangements, small business workers can struggle to identify the
appropriate person to whom they should report. Like all insurance programs,
repeated claims can lead to an increase in premiums. These payments depend on
the size of the company, the level of risk employees are subject to, and the em-
ployer’s history of claims (Harrington and Danzon 2000). In addition to wanting
to avoid having their dangerous work conditions exposed, then, employers also
have this other incentive to minimize claims. As for the insurers, they understand-
ably do not want to assume more liability than they are mandated to take on,
and therefore take extreme care to verify that the employee's injury resulted from
working at the covered company. Verification can complicate matters for work-
erers who have previous medical conditions, multiple jobs, and/or a long history of
backbreaking work. For instance, of the Central Coast day laborers and field work-
ers with chronic pain to whom I spoke, many commonly switched among several
contractors from season to season and were sometimes working under the table.
While mechanisms exist to share liability among employers, this can be difficult to
establish, especially when workers have little information about the employer they
believed hired them.

Depending on the severity of the accident, once an injury is reported to man-
agement, the worker is either taken to the hospital for emergency treatment or
referred to a designated occupational clinic. While workers can pre-designate a
physician from a list of in-network providers, they commonly overlook this option
and are subsequently left with a narrow set of choices within a medical provider
network. Workers with language barriers and limited experience in the health care
system face additional challenges in navigating the occupational health care bu-
reaucracy (Shor 2006). Insurance companies vary tremendously in how proactive
they are in providing workers with language-appropriate information and follow-
ups. When workers unfamiliar with the process interact with an overworked in-
surance staff person whose job it is to save the company money, tense relationships
often emerge between claimants and adjusters, even if the employer is supportive
of the claim (Strunin and Boden 2004).

Once the recovery process has begun, the workers’ compensation system en-
courages employers to provide modified work (if available) to returning injured
workers. However, employers are not required to provide this benefit if they can
show that it is not economically or practically feasible for them to do so. In terms
of retaliation, state and federal laws prohibit employers from firing workers for
reporting an injury;11 and disabled workers receive certain protections under the
Americans with Disabilities Act (Farrell 2008). But in practice it can be difficult
for at-will workers to prove that they were retaliated against specifically for filing a
workers’ compensation report. And if the resulting injury leaves a worker unable
to do her job, and an alternative position is unavailable, then the worker is left to
rely on disability payments. Insurers are vigilant in ensuring that injured workers
are genuinely disabled, requiring extensive medical reporting; at times, insurers
even employ private investigators to surveil beneficiaries at home, at work, and in
their communities. Katherine Lippel (2007) describes this apparatus in dystopian
terms as a series of “big machines that seek to control the injured worker, control
his future, control costs, control his body, control his appeal, control the return to
work process, control his behavior at work, or at occupational therapy, or at the
doctor's office, and, in the case of clandestine surveillance, control his personal life and that of his family” (435).

Finally, injured workers whose employers violate the law by not carrying workers’ compensation insurance may be eligible for benefits from a public fund (if it is solvent). In fiscal year 2009–10, the California Uninsured Employers Benefit Trust Fund (UEBTF) paid out more than $38.6 million in primary uninsured claims and another $20 million in subsequent injury claims (Division of Workers’ Compensation 2012a, 2012b). Here, too, access to an attorney can be crucial, but workers in these circumstances often face difficulty securing one (Worksafe! 2010)

**Employment Discrimination**

The legal concept of discrimination is buttressed by a range of federal and state statutes. The legal landscape is constantly evolving, as litigation over what constitutes discrimination and the legality of the steps taken to combat it is ongoing across the country. At the federal level, the Equal Employment Opportunity Commission (EEOC) is the agency with the primary task of enforcing laws related to employment discrimination on the basis of race, color, religion, sex, age, disability, pregnancy, and, most recently, genetic information. The EEOC is the result of decades of civil rights struggles, and was created in 1965 with the primary purposes of enforcing Title VII of the 1964 Civil Rights Act (US Equal Employment Opportunity Commission 2015a). It has since taken on enforcement responsibility for a variety of other statutes, including the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, the Americans with Disabilities Act of 1990, and more recently the Genetic Information Nondiscrimination Act of 2008, the Lilly Ledbetter Fair Pay Act of 2009, and a variety of executive orders, including a 2010 prohibition against discrimination on the basis of sexual orientation or gender identity for federal contractors.

There were fifty-three EEOC offices throughout the country as of June 2015. More than ninety state and local Fair Employment Practices Agencies (FEPAs) work with the federal government to ensure comprehensive enforcement capacity; this means that the federal agency will also enforce state laws where applicable. The complaint processes at the EEOC (US Equal Employment Opportunity Commission 2015e) and the California Department of Fair Employment and Housing (California Department of Fair Employment and Housing 2015) are fairly similar, except that workers have 180 days to file a charge under federal law but 300 if a state law also applies. In the private sector, a worker may choose to file a complaint with the EEOC either in person or by mail, and can get help online and over the phone. Usually the EEOC will investigate the case within six months, subpoena evidence, and then render a decision. If the agency finds a violation, it will encourage the parties to settle. If this mediation is unsuccessful, the agency then decides whether to pursue a lawsuit on the worker’s behalf. If the agency neither finds a
violation nor chooses to file a lawsuit on the claimant’s behalf, the worker is given a Notice of Right to Sue, which then allows the worker to file the case in court. The EEOC still encourages an alternative dispute resolution, or mediation, process even after it has granted such a notice (US Equal Employment Opportunity Commission 2000).

The socio-legal scholarship on discrimination is extensive, with narrow legal decisions differing starkly from social science understandings of inequality, which tend to be wider (Lucas 2008). Many factors impact the success of discrimination court cases, such as the social characteristics of the claimants, whether they have retained legal counsel, and whether they are working within a class action suit and/or a broader social movement (Nielsen, Nelson, and Lancaster 2008; Galanter 1974; Miller and Sarat 1980; Burstein 1991; McCann 1994). In fiscal year 2014, a mere 167 suits were filed in federal district court, 144 of which reached some sort of resolution (US Equal Employment Opportunity Commission 2015c). These small numbers represent narrow definitions of discrimination under the law and the high bars to pursuing a litigation strategy.

In 2014 employment discrimination cases were classified by complaint as follows: race (35 percent), sex (29.3 percent), national origin (10.8 percent), religion (4.0 percent), and color (3.1 percent). Other bases included age (23.2 percent), disability (28.6 percent), equal pay (1.1 percent), and genetic information (0.4 percent). In 42.8 percent of cases, claimants alleged employer retaliation (US Equal Employment Opportunity Commission 2015b). As these data suggest, workers may file a claim of discrimination on the basis of multiple protected categories. However, work by Rachel Kahn Best et al. (2011) suggests that individuals with intersectional identities (such as black women) and/or intersectional claims (such as those based on religion and national origin) are less likely to win. The very specific statutory protections of discrimination law also mean that what a worker perceives as unfair treatment is not necessarily covered under the discrimination statutes. Currently, for example, there are no protections against dismissal on the basis of gender identity (National Center for Transgender Equality 2015) or sexual orientation (Human Rights Campaign 2015) in the civilian workforce.

Oftentimes the real reason behind a worker’s termination may be at odds with what that worker believes is the reason. For example, Gilda, a longtime, union-represented nurse, was suspended multiple times, then ultimately fired, after aggressively advocating for improved patient care. She perceived her supervisor’s behavior as racially motivated, since she was a Filipina immigrant and her superior was black. Unfortunately for her there was no clear evidence to label her termination as racially motivated, and patient advocacy is not a protected status. Her experience is one of many illustrating the complicated intersections between sanctioned and unsanctioned discriminatory practices, as well as the complicated dynamics of race, immigrant status, and power at work.
Employment discrimination is difficult to prove. Critical race and feminist scholars have examined the wide gulf that exists between the legal test of discrimination and the lived experience of marginalized individuals (Saucedo 2009; Crenshaw 2011; J. Grossman 2003). The standard concepts of differential treatment and disparate impact tend to ignore “individuals’ complex and entangled experiences with inequality at work” (Hirsh 2014, 256), not to mention long-standing inequalities entrenched in the broader society (Fischer et al. 1996). Compounding this limitation is what Samuel R. Lucas (2008) argues is a legal preoccupation with individual intent rather than cultural or institutional injustices. (One exception would be the notion of hostile work environments in sexual harassment cases.) According to Lucas, unless a specific individual with prejudicial views and intentional behaviors can be assigned blame, there is no mechanism for assessing a remedy. Consequently, structural inequalities can be buried under seemingly equitable practices, and the bar for actually proving discrimination is exceedingly high.

Mediation has also become an increasingly important element of the discrimination claims process, a trend that is evident in other statutory arenas as well. While the EEOC itself has a long history and well-developed system for referring cases to mediation (US Equal Employment Opportunity Commission 2015d), workers alleging discrimination are also likely to be urged by their companies to enter mediation. At the same time, companies have responded to increased discrimination laws, Lauren B. Edelman (1992) argues, by instituting elaborate formal structures that create visible signs of compliance.

Underpinning many of the cases classified as discrimination suits in this study was a misunderstanding of the bounds of discrimination protections and the nature of at-will employment. Many workers believed that they were the victims of unjust discrimination when actually other, no less unfair economic factors were at play. For example, in the last chapter we saw how Melita was fired for having made a minor error on her vacation request form, a misunderstanding with her supervisor. She and many of her coworkers were gradually let go and replaced under such pretexts when new management took over the child care facility where they worked. She described her disillusionment with how she was treated with a keen understanding of the motives behind her dismissal: “Look, I feel very frustrated, deceived, and I attribute a lot of it to the economic situation going on in this country, but I feel a lot of discrimination. . . I think especially toward Hispanics, because there almost always has to be a scapegoat during an economic recession who they will target to take their jobs away.” Though Melita had years of experience and had completed more than four times the required professional development hours, she was more expensive than the young, US-born women who replaced her. As with many other such cases, it is difficult to determine whether Melita’s firing was a case of outright, prosecutable discrimination or the sadly inevitable outcome of her precarity as a low-wage, at-will worker.
All too often, the evidence available is simply not strong enough to prove a legal basis for discrimination. For example, Wanda, another child care provider, needed to take time off from work to recover from two separate surgeries. In a variation of a story I heard in many of my interviews, Wanda’s director promised that she would have a job waiting for her but ultimately fired her after her unanticipated seven-month break. She had made the mistake of asking for a minor accommodation upon her return. Though Wanda felt entirely able to fulfill her duties at work, she informed her director that she would need to use the bathroom on occasion: “She told me, ‘You cannot leave the children even one minute; you cannot leave the room or have someone cover you . . . at any time.’” Wanda ultimately regretted having shared information about her condition, especially after finding herself without a job after three years with this company. Unable to afford a lawyer, she submitted her claim directly to the EEOC, but was told that she had insufficient evidence to proceed.

Not only do wage and hour claimants find it difficult to find an attorney to represent a case alleging minimum wage, overtime, or meal or rest break violations, but discrimination cases like Wanda’s can also be exceedingly difficult to pursue due to their high evidentiary standards and the narrow scope of protected categories. Although the EEOC/DFEH system allows workers to take their claim to court if the agency does not find cause or chooses not to pursue an investigation, the resources required are simply prohibitive for many. Most attorneys will not take a case on contingency, demanding an hourly fee that is out of reach for most low-wage workers.

**Collective Bargaining**

In the United States, employees have the right to collectively bargain under the National Labor Relations Act (NLRA). The NLRA was passed in 1935 to “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy” (National Labor Relations Board 2015d). The Wagner Act, as it was also known, set up for the first time “a government-monitored election system” that initially favored the industry-based organizing style of the Congress of Industrial Organizations (CIO), which merged with the American Federation of Labor two decades later (Fantasia and Voss 2004). The Wagner Act, however, excluded several significant categories of workers, most notably agriculture and domestic workers, two industries made up overwhelmingly of immigrants, African Americans, and women, in a clear reflection of the lasting racist and sexist foundations of US labor law (Perea 2011). In California, by contrast, agricultural workers have been uniquely protected under the California Agricultural Labor Relations Act since 1975. This has been a salutary development, although, as research shows, “almost four decades [after the California act passed], fewer than 20,000 of the 600,000 to 800,000 workers
employed for wages sometime during the year on state farms are covered by collective bargaining agreements” (Martin 2012, 5).

Nationwide, union participation has long been declining. In 2014, 7.4 percent of private sector workers were represented by a union, a nearly 16-point drop from the earliest available data in 1977 (Hirsch and Macpherson 2015). Unionization levels vary substantially from state to state, due to provisions in the 1947 Taft-Hartley Act (National Labor Relations Board 2015a). Briefly, in states with “right to work” statutes on the books, unions that attain majority status through elections or voluntary card check agreements are required to represent all employees covered by a collective bargaining agreement, regardless of whether the covered employees pay union dues. In these contexts, a union must administer nonmembers’ grievances and bargain on their behalf to gain contractual rights above statutory minimums, even though the nonmembers are not paying for these services. This state of affairs severely limits the capacity of unions to mobilize and collectively bargain. In 2014, the anti-union National Right to Work Legal Defense Foundation boasted of twenty-five states in which unions were thus hamstrung. Not surprisingly, the ten states with the lowest union representation in the private sector are all among these Right to Work states. Of greater concern to organized labor is that several heavily unionized states with long histories of organizing in manufacturing (most recently Wisconsin, Indiana, and Michigan) have adopted Right to Work legislation in recent years. California, which is not a Right to Work state, ranks eighth in the nation, with 10 percent of the private sector represented by unions. The San Francisco Bay Area, the focus of this study, had a union representation rate of 10.7 percent in 2014 (Hirsch and Macpherson 2015).

What is the function of a labor union? Depending on whom you ask, you will receive a different response. The NLRA sees its mission as protecting some forms of collective activity around workplace concerns from employer interference. Despite this mission, collective bargaining rights in the United States are far more limited than in other countries, such as France, where unions may act as the collective voice of broader groups of workers (Lichtenstein 2002, 37; Fantasia and Voss 2004, 25). Critics of the emergent “business unionism” era in the United States note that US unions have generally evolved toward a focus on processing individual grievances rather than organizing new workers. Rick Fantasia and Kim Voss (2004) point to the growth of automatic dues and the role of the business agent in the postwar period to exemplify this contrast from earlier militant tactics. Bureaucracy was taking root: “Much less concerned with the mobilization of workers than it was to the servicing of existing labor agreements . . . the job of the business agent is mostly absorbed by the minutiae of job specifications and the arcane language of the legal contract (84).”

We should be careful not to paint an oversimplified picture of an automated or bureaucratic union. Few could look at the tremendous mobilization carried out by
immigrant labor unions over the last decade and not be impressed by their vitality. Beyond organizing new contracts in key sectors such as the janitorial and grocery industries (Jayaraman and Ness 2005; Ness 2005), unions have also ventured into supporting alt-labor groups such as the National Day Laborer Organizing Network, the National Guestworker Alliance, OUR Walmart, and the Fight for $15 (a minimum wage group). Organized labor has also played an important political role in fighting for key protections that working people in the United States often take for granted (Murolo, Chitty, and Sacco 2001).

However, the majority of unionized workers I spoke with were disillusioned with their union.\textsuperscript{20} Given the context of our conversations (that is, in a legal aid clinic where they were seeking additional assistance that their union was unable to provide), this is not surprising. Their experiences highlight some of the limitations of union representation and reveal cracks in the current systems of protection.

It will be useful to outline the process of union organizing before proceeding. When a union is engaged in a new campaign to organize, it must typically either conduct an election or come to an agreement using the more streamlined “card-check” process. To call an election under NLRA rules, the union must get 30 percent of workers in a unit to agree. In practice, though, many unions strategically wait until they have support from at least half of their workers to call a vote. This is more time-consuming than the “card-check” method, which calls for workers merely to sign cards rather than participate in a government-supervised election.\textsuperscript{21}

Employers are formally restricted from interfering with some forms of collective activity, though they do have the power to shape worker attitudes. For example, “captive audience” speeches—that is, assemblies that employers require their on-duty workers to attend—are permitted, as long as they do not occur within twenty-four hours before the election. Critics argue that such gatherings are in essence one-way conversations that emphasize the risks of union membership, most palpably job loss. Employers, on the other hand, have argued that they are merely exercising their free speech rights (Secunda 2009; Masson 2004).

The power imbalance is so stark between management and the union that it makes formal restrictions on management interference extremely inadequate, especially with the threat of job loss hovering in the air. Indeed, a thriving industry of union-busting consultants guides employers as they chip away at labor power (Massachusetts AFL-CIO 2016).

Once a union overcomes these challenges and is in place, one of its key functions is to negotiate a collective bargaining agreement for workers. These agreements put in place contractual benefits and procedures that the employer must agree to for a set period, as well as the specific steps to be followed in a grievance procedure. The structure of unions at the workplace varies, but in general, a work unit that is represented by a union will have a steward on the “shop floor” to whom a worker can go for help and who will meet with the supervisor, then upper management if
necessary. A grievance panel may be convened, and then typically arbitration follows. This process demands time and resources from union staff, and therefore not all worker complaints turn into actual—or successful—grievances. For example, as the Service Employees International Union communicates to its members, “the decision to go to arbitration will not be made lightly. It will depend on such things as importance of the issue (problem), severity of the case, cost, and chances of winning. Your investigation, notes, and reports will become really important when such decisions have to be made” (SEIU Local 521 2015). Despite its clear limitations, arbitration provides an opportunity for recourse, and in this context allows workers to have a representative present in disciplinary proceedings.22

Despite the advantages of union representation, many of the workers in my study who sought help from the legal aid clinic were upset with the outcome of their union grievance and/or frustrated by their inability to communicate with their union leadership. Some of the complaints I heard from unionized workers included: an employer refusing to pay the raise that the union negotiated;23 the union refusing to address bullying management behavior;24 the union’s inability to help a worker get their job back after an arbitrary termination;25 an unjust firing for having led a group in concerted activity to demand better conditions;26 and a union’s complicit refusal to address a sexual assault.27 However, just as unions have limited resources, which they distribute among efforts to launch new campaigns, negotiate collective bargaining agreements, and address individual complaints from members, so do workers’ rights clinics have to pick and choose where to invest the time of their staff, volunteers, and law students.

Consequently a busy legal aid clinic will often seek to steer workers toward other resources available to them. If a union-represented worker showed up at the clinic seeking help, she was first directed either to return to the union to file a grievance or to seek help from the National Labor Relations Board to lodge a complaint against the union. As with discrimination claims, however, the requirements to successfully win a charge before the board are significant. According to the agency, the board receives 20,000 to 30,000 charges per year from employees and unions (National Labor Relations Board 2015e). In 2014, of the 20,415 unfair labor practice charges that were filed, 6,504 were settled and 1,216 turned into a formal complaint (National Labor Relations Board 2015c). The number of cases actually heard in appellate court has gone from 298 in 1974 to only 13 in 2014 (National Labor Relations Board 2015b). It is possible that fewer cases in appeals signifies a more effective initial claim. Yet evidence does not reveal that a more efficient process has emerged. While the charges that are dismissed for lack of merit (28 percent), are withdrawn (35 percent), or are settled (34 percent) are handled fairly efficiently, the contested cases are often drawn-out affairs. In 2011–13, for instance, the median time from the filing of a charge to a board decision ranged from 508 to 653 days (Harper, Estreicher, and Griffith 2015, 70).
Chapter Three

Unemployment and State Disability Insurance

A final set of protections available to some workers, and often not discussed in concert with other workers’ rights policies, is unemployment insurance, a frequent issue that brought workers to the clinic. Unemployment insurance is a national program coordinated by the Department of Labor under the Social Security Act but administered separately by each state (State of California Employment Development Department 2015). The benefit provides “partial wage replacement to workers, who are unemployed through no fault of their own, while they conduct an active search for new work” (Legal Aid Society—Employment Law Center 2009). It is funded by employer contributions, and therefore employers have an incentive to avoid liability whenever possible. Furthermore, there are several categories of workers who may find themselves ineligible for benefits if they didn’t pay into the system, were an independent contractor, or were otherwise self-employed.

During the period of this study, unemployment in the United States fluctuated between an annual average of 9.6 percent in 2010 to 7.4 percent in 2013 (Bureau of Labor Statistics 2015c). In California, unemployment was at 12.2 percent in 2010 (Bureau of Labor Statistics 2015a), dropping to 8.9 percent in 2013, but still among the highest rates in the country (Bureau of Labor Statistics 2015b). Of all the workers who participated in this study, only 160 (35 percent) were employed at the time of the initial survey, as were 34 (38 percent) of 89 follow-up interviewees. Given that workers had to meet low-income requirements to receive services at this legal aid clinic, it is not surprising that they were some of the hardest hit by the recent recession.

Workers in California must work through the Employment Development Department to apply for and manage their unemployment benefits. After a one-week waiting period, payments go out based on the highest earning quarter of the base period (the prior twelve months ending four to six months before the claim began). This means that while workers should apply for benefits as soon as possible, they must also be sure to have enough past earnings to qualify. In California, benefits are generally $40 to $450 a week, paid out for up to twenty-six weeks, and can also cover bouts of underemployment. For many workers I spoke to, an unemployment claim was often the consolation prize for broader, failed attempts to win unfair termination charges.

For those workers unable to return to work, state disability insurance provides another set of benefits. Workers could turn to this in the wake of an unsuccessful workers’ compensation claim, while they awaited their workers’ compensation claim to come through, or if they became injured outside of work (Legal Aid Society—Employment Law Center 2015d). State disability insurance claims require careful monitoring, often with the help of an advocate, to avoid receiving dual benefits that would have to be repaid later.
WHERE AND HOW DOES IMMIGRANT LEGAL STATUS MATTER?

A third of the workers surveyed and interviewed for this study were unauthorized. The Immigration Reform and Control Act (IRCA) of 1986 was notable for creating a legalization program for an estimated three million undocumented immigrants, including those who had been in the country since 1982 and other seasonal agricultural workers. It was the last major broad-based legalization program in this country. IRCA also placed immigration enforcement in the hands of employers by instituting employer sanctions and verification requirements. Recognizing that this could lead to employer abuse, IRCA enacted protections against some forms of immigration status–related employment discrimination, creating the Office of Special Counsel at the Department of Justice, which works in coordination with the Equal Employment Opportunity Commission (EEOC).

In theory, immigration status has little to no effect in legal terms on a worker’s right to file a claim against workplace abuse. However, as held by the 2002 US Supreme Court decision in Hoffman Plastic Compounds Inc. v. the National Labor Relations Board, undocumented status precludes these workers from accessing some key remedies. Specifically, this seminal case ruled that unauthorized immigrants cannot receive payment for the hours they would have worked if they had not been illegally fired for engaging in collective concerted activity. Though specific to the NLRA context, the case has caused negative ripple effects across a range of other statutory arenas (Garcia 2012b).

At the state and local levels, there seem to be divergent trends regarding undocumented workers’ rights. Some states have sought to strengthen punitive policies against undocumented workers. For example, Arizona’s Legal Arizona Workers Act (2008) has mandated that all employers use the otherwise voluntary federal E-Verify system, leading to a decrease in both naturalized and noncitizen Hispanic workers (Bohn, Lofstrom, and Raphael 2013). State courts have also differed in their rulings regarding undocumented workers’ access to workers’ compensation benefits (Chen 2013). Meanwhile, other states have expanded rights to undocumented workers. Most notably, California has recently strengthened sanctions against employer retaliation against undocumented workers (National Employment Law Project 2013).

Still, there are a range of employment-related benefits that unauthorized workers simply do not enjoy. For example undocumented/unauthorized immigrant workers do not qualify for federal benefits such as unemployment insurance, even if they have paid into the system by using false identity documents. As a practical matter, this is due to the fact that they are not legally permitted to work and are thus “unavailable and unable” to return to work (Legal Aid Society—Employment Law Center 2015b). Other benefit areas are a gray zone. For example, because workers pay directly into state disability accounts, undocumented workers could also
apply. However, as with any legal proceeding, undocumented workers I observed were often advised to tread carefully for fear of revealing their status and true identity. Further, unauthorized immigrants also pay into the Social Security and Medicare systems, but upon retiring are unable to collect these federal benefits. In 2010, undocumented workers paid an estimated $12 million into the Social Security Earnings Suspense File, which currently holds approximately $1 trillion worth of tax contributions (Kugler, Lynch, and Oakford 2013).

Despite this patchwork of formal protections, most undocumented immigrants face a constant threat of deportation in the United States. The Barack Obama administration gradually moved away from the previous administration's approach of staging public-spectacle raids that would arrest hundreds of workers at a time, as in for instance the 2008 raids on a poultry processing plant in Postville, Iowa (McCarthy 2009), and an electronics factory in Laurel, Mississippi (Bacon 2008). Instead, the administration has increasingly favored “silent raids,” which use methods such as Social Security No-Match Letters, IRS audits, and the voluntary federal E-Verify program (National Immigration Law Center 2012) to identify undocumented workers. Immigration advocates argue that mandatory adoption of employer-based enforcement, such as E-Verify, runs contrary to workers' rights enforcement efforts and stifles fair business competition. While the Obama administration invested in advancing the workplace rights of undocumented workers by empowering the Department of Labor’s more aggressive enforcement of abusive employers, IRCA's legacy continues to enhance employers' power. Critics argue that these restrictive policies and employer sanctions work in direct opposition to the goal of holding employers accountable for worker protections.

Many undocumented workers on the ground remain wary of the separation of powers between the immigration enforcement arms of the federal government (the Department of Homeland Security and Immigration Customs Enforcement) and the many federal, state, and local government agencies whose job it is to hold unscrupulous employers accountable and protect workers' rights (Griffith 2011b; Griffith and Lee 2012). Various federal labor standards enforcement agencies do have memoranda of understanding that preclude Immigration Customs Enforcement (ICE) from interfering in their investigations, and legal scholars have argued in favor of additional coordination (Griffith 2011b; S. Lee 2009). However, as a practical matter, I found that workers often were fearful of the consequences even if they had already worked up the courage to come forward with a claim. When asked about the workplace climate of fear with regard to immigration enforcement, only one out of the 170 undocumented workers said she had experienced a raid at the workplace, and only four had employers who had threatened to call immigration authorities on them. And yet, this is not to say that these workers did not grasp the vulnerability of their position. Among all immigrant workers, 60 percent affirmed that they had “been treated unjustly at work” because of their
immigrant status, and 86 percent agreed that “workers who don’t have papers are more targeted for workplace abuse.”

Beyond the workplace, it is important to contextualize the everyday lives of immigrant workers within the broader community, where they are also at risk for deportation. In California, undocumented workers were ineligible for drivers’ licenses (although this changed in California under Assembly Bill 60 on January 1, 2015) and at the time of this study were still subject to coordinated enforcement through the Secure Communities program (despite the efforts of some localities to resist coordination with federal authorities). The recent passage of the California Trust Act, which limits hold requests in local jails and was meant to foster trust and cooperation with rights enforcement authorities, has only somewhat improved the situation (“California Trust Act” 2015).

In the next chapter, I walk readers through the process of navigating the labor standard enforcement bureaucracy, and identify the various gatekeepers that workers must confront and the strategies they must develop for seeking restitution.