Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations

Timothy P. Glynn
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Work law confronts a vexing enforcement gap. After decades of employer-side pushback and doctrinal erosion, the traditional mechanisms through which labor and employment protections have been enforced—command-and-control regulatory oversight and private litigation—now fall short in large sectors of the economy. And unions, once a powerful check against employer overstepping, are absent in the vast majority of workplaces and weaker where they still exist. The result is widespread noncompliance, particularly at the low end of the labor market.

As the traditional approaches to enforcement have waned, self-regulatory alternatives to fostering legal compliance have gained traction in both theory and practice. Yet, despite their rhetorical appeal and likely staying power, they, too, have failed.

This Article traces the decline of the traditional mechanisms for enforcing workplace rights and diagnoses the failure of existing self-regulatory regimes. It then proposes a different strategy for enhancing compliance within firms: imposing "professional-like" supervisory duties on high-ranking corporate officers to ensure firm compliance with work-law standards. Existing self-regulatory models fail precisely because receding oversight and enforcement risks render their inducements too weak to ensure genuine self-regulation. But the principal decision-makers within these firms would approach compliance with far greater vigor if they were bound—personally—to do so. In an era in which the shortcomings in external enforcement are unlikely to be eliminated, supplementing firm-level accountability with a carefully calibrated regime that targets firm

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decision-makers themselves offers a potentially effective and cost-efficient way to promote greater adherence to work-law mandates.

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INTRODUCTION

Business enterprises have had great success in the last three decades pushing back against regulatory oversight. These triumphs have come on multiple fronts and across a wide variety of fields, including work law.1

Yet, in the work-law area, these phenomena are not the result of direct deregulation—that is, the elimination of statutory and other worker rights. On the contrary, at least on the surface, worker protections have continued to proliferate at the state and federal levels. Instead, an interrelated array of socio-economic forces, persistent doctrinal erosions, and legal-risk-driven firm practices have resulted in widespread under-enforcement, ensuring that these rights are at best unevenly enforced and at worst not meaningful.

In a post-Great Recession world, any genuine reform must confront this now vexing enforcement gap. The traditional mechanisms through which labor and employment protections have been enforced—command-and-control regulatory oversight and private litigation—have failed to keep pace in recent decades, and unions, once a powerful check against employer overstepping, are no longer present in the vast majority of workplaces. Various reforms to these mechanisms would improve the situation, but, for a host of reasons, the kinds of comprehensive fixes necessary to ensure lasting and genuinely effective enforcement are unlikely.

As these traditional approaches have waned, self-regulatory alternatives to fostering legal compliance have gained traction both in theory and practice. Yet, despite their rhetorical appeal and likely staying power in the work-law context, these too have failed to close the gap.

After tracing the decline of the traditional mechanisms for enforcing workplace rights, this Article diagnoses the failure of existing self-regulatory regimes and proposes a different approach to enhancing norms of compliance within firms. The central cause of the failure of self-regulation is straightforward. Broadly speaking, it is ineffective when firm decision-makers have insufficiently robust incentives to promote compliance within the enterprise. Such incentives are absent when 1) firm-level enforcement risks are inadequate despite self-regulatory inducements, and 2) firm decision-makers have no meaningful, individualized duty to foster compliance. The first of these conditions is present because of the fall of the traditional approaches; the second because enforcement centers almost exclusively on firms (rather than firm decision-makers). Yet, the second also suggests a new strategy: even if firm-level enforcement risks remain inadequate, targeting appropriately calibrated legal incentives at primary firm decision-makers could make self-regulation far more effective. Thus, in this Article, I argue for imposing "professional-like" supervisory duties

“BIG SQUEEZE” (discussing the decline in the status and treatment of workers over the last three decades); see also Adam Liptak, Justices Offer Receptive Ear to Business Interests, N.Y. TIMES, Dec. 19, 2010, at A1; Jeffrey Rosen, Supreme Court, Inc., N.Y. TIMES, Mar. 16, 2008, at 38 (discussing the recent litigation success of business interests).

on high-ranking corporate officers to ensure firm compliance with work-law standards.

The case for this approach begins with the failure of the traditional enforcement mechanisms. Thus, Part I of this Article briefly explores why the risks of external enforcement of workplace legal norms—from command-and-control oversight, unions, and private enforcement—have diminished.\(^3\) It then discusses the unsurprising effect of these trends on enterprise behavior: while many firms strive to adhere to work-law standards, noncompliance, particularly at the bottom of the labor market, is now widespread.\(^4\) Finally, it examines the challenge of recalibrating enforcement risks through reforming these mechanisms alone.

Part II turns to the various self-regulatory approaches that have emerged as alternative mechanisms for facilitating legal compliance.\(^5\) These encompass “non-legal” approaches, including strategies for promoting business ethics, consumer-driven campaigns to foster adherence to external standards, and socially conscious investing and other types of shareholder activism. They also include legal incentive structures. Among these are doctrinal and quid pro quo strategies for incentivizing firms to develop internal compliance and self-monitoring programs. A leading example is the Organizational Sentencing Guidelines (O.S.G.),\(^6\) which reduces criminal sentences for firms that have established appropriate internal controls. Within employment law, such incentives are found in the affirmative defense against liability for sexual harassment established in *Burlington Industries v. Ellerth* and *Faragher v. Boca Raton*,\(^7\) and the Voluntary Protection Program (V.P.P.) of the Occupational Safety and

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3. GLOVES OFF, supra note 1, at 2 ("[A] major segment of the U.S. labor market increasingly diverges from the legal and normative bounds put into place decades ago."); Noah Zatz, *Working Beyond the Reach or Grasp of Employment Law*, reprinted in GLOVES-OFF, supra note 1, at 31 (2008) (noting the paradox of deteriorating work conditions at the low-end of the market even as substantive rights have expanded).

4. See infra note 111 (citing the literature and studies of the frequency of work-law violations).


7. 524 U.S. 742 (1998); 524 U.S. 775 (1998). These decisions provide employers with a defense against liability for sexual harassment if the employer exercised reasonable care to prevent and correct harassing behavior and the employee unreasonably failed to take advantage of preventative or corrective opportunities. See infra Part II.B.1.
Health Administration (O.S.H.A.). A second group of legal approaches—which I call “deputation” strategies—aims to enhance legal compliance through incentivizing or empowering individual actors to monitor for compliance or report wrongdoing. This strategy is prominent in financial regulation: for example, the Sarbanes-Oxley Act (S.O.X.) and, more recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), emphasize the role of whistleblowers and other gatekeepers. In the employment area, it is manifest in anti-retaliation regimes and in some independent monitoring structures.

Yet, as this Part details, all of these self-regulatory approaches fall short in the work-law context. To varying degrees, each fails to create sufficient incentives for firm decision-makers to ensure compliance in the face of powerful countervailing inducements. This is most apparent in the non-legal approaches, but it is also true of the legal strategies. While scholars offer various explanations for the lack of definitively positive outcomes, one conclusion with regard to the firm-based self-regulatory strategies is inescapable: in the absence of an adequate threat of biting firm-level sanctions, decision-makers lack robust inducements to foster genuine compliance. The deputization regimes, in turn, are undercut by

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8. Although there are other such initiatives, the V.P.P. Program is perhaps the best known. Under the program, the agency agrees to scale back oversight in exchange for firms’ maintaining compliance procedures and strong safety records. See Lobel, Interlocking, supra note 5, at 1104-47.


10. See infra Part II.B.2. One often-discussed example of an approach utilizing independent outside monitors is New York’s Greengrocer Code of Conduct program. See ESTLUND, REGOVERNING, supra note 5 at 112-15.

11. See infra Part II.A. Although there are some success stories here, see Estlund, Rebuilding, supra note 5, at 369, there are also colossal failures and little evidence that these approaches reduce legal violations across labor markets. This is unsurprising, given that compliance often conflicts directly with the incentives that drive firm decision making, and ethical actors are undercut in competitive markets by less socially responsible firms.

12. See infra Part II.B.1. While these approaches have helped spawn the rise of the compliance industry, there is little empirical evidence that they are actually effective at preventing violations. See, e.g., Mariam Hechler Baer, Governing Corporate Compliance, 50 B.C. L. Rev. 949, 949-50, 965 (2009); Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 Fla. St. U. L. Rev. 571, 574 (2005); Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 Wash. U. L.Q. 487 (2003).

13. For example, because few statutory regimes impose criminal liability and detection by underfunded agencies is extremely unlikely, the O.S.G. and other quid pro quo approaches are insufficient to entice good faith compliance. Moreover, Ellerth/Faragher-type defenses add a hurdle that may make private enforcement more difficult and may fail to create incentives for firms to engage in
gatekeepers’ informational and resource constraints, as well as the countervailing pressures potential whistleblowers face. Moreover, because these approaches do not alter the basic incentive of corporate decision-makers to maximize the firm’s surplus, they are likely to view monitors and whistleblowers not only as potential adversaries, but also as obstacles to the “core mission”—making money.

In light of these failures, Part III proposes a variation on the deputization strategy in the work-law context, but one that, by *deputizing high-level corporate actors*, is far more likely to alter decisional norms. Here, I develop my proposal for imposing “professional-like” duties on high-ranking corporate officers to ensure compliant behavior within their firms and show why this is a potentially effective and cost-efficient way to promote compliance in a world in which the traditional mechanisms for enforcing work law are inadequate.

This strategy would supplement firm-level accountability with an individualized compliance obligation for high-ranking officers, who, to date, have been largely overlooked in work-law doctrine and self-regulatory structures. While there is no exact parallel elsewhere in the law, such an individualized duty for those high in the firm hierarchy is not unique: corporate officers are subject to compliance obligations under securities laws; the S.E.C. can impose nonmonetary sanctions, such as suspension and bar, on corporate officials who fail to address underlying violations; and supervisory accountability regimes already exist for broker dealers, accountants, and lawyers. Deputizing high-ranking officers to foster compliance with work-law mandates would introduce new, powerful incentives at the top of the firm’s governance structure. Moreover, because high-ranking officers exert direct control over the firm’s affairs, supervise lower-level managers, can bargain with directors for resources, and are perceived (by both insiders and outsiders) as the driving force behind firm strategies and culture, they are best situated within the enterprise to more than “cosmetic compliance” — that is, minimally burdensome compliance measures that reduce the probability of liability but do not prevent underlying misconduct. See *infra* Part II.B.1; see generally Susan Bisom-Rapp, *Puzzling Evidence From a Troubled Time: Rethinking State Promotion of Safe Work During the Bush Administration* 10, 12-14 (TJSL Research Paper No. 1552667), available at http://ssrn.com/abstract=1552667; Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1097, 1231-39 (2009).


15. See *infra* notes 229, 305, and 313-15 and accompanying text.
implement optimal compliance structures. Thus, like professionals and others with supervisory duties, high-ranking officers ought to be directly accountable and subject to an array of monetary and nonmonetary sanctions for negligent failures to prevent, detect, and correct work-law violations within their firms.

The aim of this Article is to offer a framework for developing an effective approach to holding high-ranking officers accountable for work-law violations. It does not—nor could it—provide a detailed blueprint for structuring such a regime top-to-bottom. Nevertheless, Part III will explore several features that are critical for promoting cost-efficiency and effectiveness. First, the duty ought to be imposed on high-ranking officers rather than on either lower-level supervisors or directors. In addition, negligence ought to be the standard of care. Moreover, the duty ought to be enforced through an administrative regime and an adjudicatory process before a tripartite body, rather than through a private right of action. Finally, monetary and nonmonetary sanctions ought to be fashioned like sanctions in the professions to avoid both over-deterrence and under-deterrence (via risk-shifting).

Enforcement actions under such a scheme would capture only a subset of offenders, most likely those in firms that are repeat or egregious violators. Yet, the high-profile sting of professional-like sanctions on some officers and corresponding lessons regarding effective monitoring and prevention would resonate on a much wider scale. This would create economic and reputational incentives for high-ranking officers to press their firms to migrate to the top rather than race to the bottom—that is, follow industry leaders in developing genuinely effective compliance systems. Holding high-ranking officers accountable in this way also would enhance the effectiveness of other self-regulatory structures.

I do not claim that such a regime would solve work law’s enforcement or other problems. It would not address other shortcomings in existing doctrine, facilitate direct employee voice in workplace governance, or prevent firms from avoiding some employment mandates through outsourcing. Nevertheless, by altering the obligations of those best positioned within the enterprise to reshape business practices, the duty proposed holds the potential to enhance meaningfully compliance norms within firms and across industries, adding a new dimension to self-regulation where firm-level incentives otherwise pull in the other direction. As a result, firm decision-makers would have compelling reasons to take self-regulation seriously.

16. See infra notes 305-306 and accompanying text.
17. See infra Part III.B.1.a.
I.

WORKPLACE LAW AT THE BEGINNING OF THE TWENTY-FIRST CENTURY: A BRIEF LOOK AT THE DESCENT OF EXTERNAL ENFORCEMENT

Labor and Employment Law is a relatively new field, and one that, at least at a general level, has seen steady “growth” over the last century. Before 1900, there were few meaningful legal protections for workers. Since then, there have been waves of reform at both the state and federal levels that have imposed greater substantive limits on the at-will doctrine and subjected the employment relationship and work conditions to greater regulation. These waves include Progressive Era reforms, such as the rise of workers’ compensation regimes; New Deal “labor” statutes, including the National Labor Relations Acts (N.L.R.A.) and the Fair Labor Standards Act (F.L.S.A.); a growing panoply of protections against class-based discrimination, beginning with Title VII and continuing today at both the state and federal levels; 1970s federal regulatory oversight regimes in the areas of workplace safety (O.S.H.A.) and employee benefit plans (Employee Retirement Income Security Act (E.R.I.S.A.)\textsuperscript{19}); and, since the 1960s, common law and statutory limits on employer power through a more expansive view of contract protections, and public policy tort and statutory whistleblower protections.\textsuperscript{20}

Now, at the beginning of the 21st Century, all of these statutory and common-law regimes remain “on the books.” And, as union density has declined, the role of external law—as reflected by the statutory and common-law protections for individual employees mentioned above—has grown.\textsuperscript{21} Moreover, given the complexity and range of these employment law doctrines, corporate counsel and human resource personnel often see liability- and litigation-risk management in this area as of paramount importance. The costs and risks of employment-law-based litigation (as well as potential negative publicity) affect hiring, discipline, and promotion practices in many firms.\textsuperscript{22}

One looking at this snapshot of work-law might conclude that business enterprises face greater employment-related legal risks than ever before. Yet, this doctrinal growth has not always resulted in more effective legal protection for workers. Over the last thirty years, significant, interrelated developments in the legal landscape and labor markets have reduced the risks of public and private enforcement of workplace legal norms and

\textsuperscript{18} See Glynn et al., supra note 2, at xxv-xxxvii.
\textsuperscript{20} See, e.g., Glynn et al., supra note 2, at xxv-xxvii; GLOVES OFF, supra note 1, at 14-16.
\textsuperscript{21} See Estlund, Rebuilding, supra note 2, at 327-33.
\textsuperscript{22} See id. at 334-35.
sanctions for noncompliance. These developments span the three primary regulatory methods of protecting workers' rights: 1) command-and-control enforcement of labor and employment standards, 2) collective bargaining, and 3) private civil litigation to enforce individual rights. While there are counter-examples, and these phenomena do not affect all parts of the market evenly, an array of forces now cut decisively in favor of reducing the probability and size of employer sanctions for violations.

A. The Decline in Agency Enforcement

As is now widely recognized, agencies charged with enforcing workplace laws have not kept pace in recent decades with the growth of the labor force. This is due in substantial part to budget pressures, which have forced agencies to cut back on enforcement activities. It is also a result of significant pushback against regulatory activities by industry. Moreover, as will be discussed in Part II, there have been accompanying changes in regulatory philosophy that have aided the shift from traditional command-and-control structures to more self-regulatory approaches. These phenomena have led to inadequate regulatory oversight in numerous areas.

Critiques of O.S.H.A. and accounts of its infamous failures are now legion. Regulatory capture is undoubtedly part of the story, as is the agency's chronic underfunding and lack of resources. There are far too few inspections of worksites and insufficient sanctions to deter violations.

23. See GLOVES OFF, supra note 1, at 13-14 ("Indeed, we see the trajectory toward labor cost reduction progressing along four axes: business has become less inclined toward self-regulation, government regulation of business has increasingly gone under enforced, the decline in unions has limited civil society regulation of business, and government has reduced the social safety net and adopted policies that expand the group of vulnerable workers.").

24. See, e.g., id. at 13 (discussing the decline in regulatory resources and the shift away from enforcement to compliance assistance); Zatz, supra note 3, at 46 (same); Estlund, Rebuilding, supra note 5, at 341 (same).

25. See Estlund, Rebuilding, supra note 5, at 340, 360-61.


27. See GLOVES OFF, supra note 1, at 13 (discussing O.S.H.A. budget cuts since 2001); Orly Lobel, Interlocking, supra note 5, at 1080-81 (explaining that O.S.H.A. is understaffed and overextended despite having a reputation of being intrusive and overbearing); Andrew Chin, Spoiling the Surprise: Constraints Facing Random Regulatory Inspections in Japan and the United States, 20 NW. J. INT'L L. & BUS. 99, 110-11 (1999) (stating that O.S.H.A. might need four times as many staffers for annual inspections of high-risk industries).

28. GLOVES OFF, supra note 1, at 13 (citing a 2007 study suggesting that it would take O.S.H.A. 133 years to inspect every worksite under its jurisdiction); Estlund, Rebuilding, supra note 5, at 330
And regulatory innovations often have not produced better outcomes; for example, while O.S.H.A.'s cooperative ventures with industry—including the V.P.P. program—were once lauded as success stories, ultimately, they have not improved workplace oversight or safety.

Other federal agencies charged with protecting workers' rights also have failed to keep pace, including the Department of Labor, which is charged with the critical role of enforcing wage and hour laws. Moreover, the E.E.O.C. and the N.L.R.B. have both been criticized for their lax enforcement of the labor and employment laws in recent years. Although the Obama Administration is genuinely committed to more active enforcement, resource constraints remain a key barrier to effectiveness.  

("Occupational health and safety standards, too, have been chronically under-enforced, in part because of a lack of inspectors and enforcement resources. . . . The combination of rare inspections and typically modest penalties creates a predictable incentive on the part of employers to ignore health and safety requirements that impose costs.") (footnotes omitted).

29. See Lobel, Interlocking, supra note 5, at 1108-11; see also Estlund, Rebuilding, supra note 5, at 343-44 (discussing favorable critiques). Under the program, employers can receive relief from the ordinary inspection requirements and other concessions in exchange for demonstrating internal measures to ensure workplace safety. For further discussion of the program and similar programs, see Estlund, Rebuilding, supra note 5, at 343-44; Lobel, Interlocking, supra note 5, at 1104-47.


31. In recent years, the Department of Labor failed to provide sufficient oversight to stem the tide of noncompliant behavior. See generally GREGORY D. KUTZ, GOV'T ACCOUNTABILITY OFFICE, U.S. DEP'T OF LAB.: CASE STUDIES FROM ONGOING WORK SHOW EXAMPLES IN WHICH WAGE AND HOUR DIVISION DID NOT ADEQUATELY PURSUE LAB. VIOLATIONS 2-4 (2008), http://www.gao.gov/new.items/d08973t.pdf; GLOVES OFF, supra note 1, at 13 (discussing a study showing that between 1975 and 2004 the number of Labor Department investigators declined, while the labor force and number of worksites grew dramatically); Michael A. Fletcher, Labor Dept. Accused of Straying From Enforcement, WASH. POST, Dec. 1, 2008, at A2; Steven Greenhouse, Departing Chief Fends Off Critics, N.Y. TIMES, Jan. 10, 2009, at A12.


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State-level regulatory efforts supplement and expand upon federal ones in some areas, but they too frequently fall short.\footnote{35}

\textbf{B. The Decline in Union Density}

Union density in the private sector has been in decline for half a century—now hovering around seven percent of the private sector workforce.\footnote{36} Of course, this phenomenon is related to the decline in regulatory oversight, since employer resistance to union organizing, doctrinal changes that make such organizing more difficult, and labor law’s inadequacy in deterring employer violations are among the causes.\footnote{37} The resulting absence of unions from the workplace, in addition to reducing employee bargaining power, lowers the probability of enforcement of work-law standards.\footnote{38}

\textbf{C. Growing Impediments to Private Enforcement}

The final method of enforcing labor and employment law standards is through private enforcement. Some regulatory regimes—most notably O.S.H.A.—do not authorize such enforcement.\footnote{39} However, given the constraints on public agency enforcement activities and the absence of unions in most workplaces, private rights of action have become the primary means for workers seeking to enforce their workplace rights.\footnote{40}

\footnote{34. Obviously, there are other contributing factors, including delays in appointments and other effects of political deadlock.  
37. See, e.g., Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1771-1803 (1983); see also GLOVES OFF, supra note 1, at 11 (discussing the weakening in compliance with the N.L.R.A.); Cynthia Estlund, Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace, 12 LEWIS & CLARK L. REV. 671, 678 (2008) (discussing the factors contributing to the decline in union membership and suggesting that sweeping reform is needed to reverse this trend).  
38. See, e.g., Estlund, Rebuilding, supra note 5, at 323; GLOVES OFF, supra note 1, at 12-13.  
40. See Estlund, Rebuilding, supra note 5, at 333-334; see also Estlund, Who Mops the Floors, supra note 37, at 679 (“Employees in our society are largely responsible for enforcing their own legal rights at work, either by suing or by bringing complaints to public enforcement agencies.”).}
There is a significant amount of employment-related litigation in the courts, administrative tribunals, and arbitral fora. And the private enforcement scheme has allowed some workers to enjoy “gold-plated” protection and favorable outcomes in adjudication or settlement. Yet numerous hurdles make private enforcement both costly and uncertain, reducing the probability that many workers will attempt to enforce their rights. As Professor Estlund has observed, “[g]iven the cost of litigation and the difficulty of proving the requisite unlawful motive, many employees are still unable or unwilling to mount a legal challenge to a discharge or other adverse action they believe to be illegal.”

Recent developments present growing challenges to workers seeking redress of violations of workplace rights through private enforcement. The first is socio-economic (albeit related to background legal conditions). Over the last thirty years, there has been significant growth of socio-economically vulnerable workers—undocumented and other workers existing on economic margins. And, since the onset of the Great Recession, the growth in the low-wage workforce has accelerated.

These workers must overcome nearly insurmountable impediments to vindicate their rights. Few may know these rights or have access to representation, and fewer still may be willing to complain. Moreover, because remedies often are tied to compensation, attorneys may avoid taking lower-paid workers’ cases. As a result, the risks of pursuing claims frequently are too great. As commentators have detailed, claims by such workers—much less successful ones—are rare indeed, even though the conditions under which they toil are the most likely to violate other labor standards.

41. See Estlund, Rebuilding, supra note 5, at 395 (discussing the wild inconsistency in private enforcement, which is gold-plated for some and entirely absent for many others). The data on outcomes are mixed, but there is growing evidence that employees prevail infrequently. See infra note 72.

42. Estlund, Rebuilding, supra note 5, at 332; Estlund, Who Mops the Floors, supra note 37 at 679.

43. See BIG SQUEEZE, supra note 1, at 5 (stating that since 1979, hourly earnings for eighty percent of the workforce have risen only one percent after inflation, while worker productivity has increased by sixty percent); GLOVES OFF, supra note 1, at 17-21 (discussing the growing number of socially and economically vulnerable workers and the causes of this trend, including immigration and welfare policy).

44. See, e.g., Michael Luo, New Job Means Lower Wages for Many, N.Y. TIMES, Sept. 1, 2010, at A12 (discussing how the recession may have strengthened the decades old trend towards growth of low-wage sectors).


46. See Becker & Strauss, supra note 45, at 1333-1334; Zatz, supra note 3, at 46.

47. See, e.g., Estlund, Who Mops the Floors, supra note 37, at 679-80.
organizations occasionally fill the gap, but are too rare to address the wider problem.

In addition, doctrinal changes and emergent employer risk-management techniques have affected the likelihood of relief. Three phenomena have reduced the employer risks and costs for violations of workplace standards: (1) expanding doctrinal hurdles limiting liability and remedies; (2) the rise of employer litigation-management techniques; and (3) the growing use of enterprise structures—i.e., outsourcing—to avoid accountability for workplace violations.

1. Expanding Doctrinal Hurdles

Private enforcement often is deterred by doctrinal impediments that impose significant barriers to establishing liability. Indeed, the various hurdles workers must overcome to vindicate their rights is the focus of much of modern employment-law scholarship. These impediments come in many forms. For instance, some protections are too narrowly applied to safeguard certain at-risk workers; limits on the scope of F.L.S.A. protections, such as the exclusion from coverage of many agricultural workers and home health care providers, are one example. Limitations on protections and remedies within the underlying regulatory schemes also can stymie enforcement. Again, examples abound: while the F.L.S.A.'s wage and hour mandates are straightforward, vagaries in terms of coverage—e.g., employee status and nonexempt status—as well as the "opt-in" requirement for bringing collective actions make private enforcement uncertain and often infeasible, particularly for low-wage workers. The N.L.R.A.'s relatively weak remedies for unfair labor practices likewise deter workers from enforcing their rights.

Yet, even where viable and enforceable substantive protections exist, recent judicial developments have created additional procedural and substantive hurdles. A number of these have had an impact across doctrinal areas, including more searching pleading requirements in the wake of Bell Atlantic Corporation v. Twombly and Ashcroft v. Iqbal, highly restrictive
interpretations of statutes of limitations; limitations on punitive damages; and, as exemplified by the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, barriers to class certification and collective treatment of claims.

Many other judicially crafted limitations have emerged within specific employment and labor law regimes. One type is restrictive interpretations of the reach of the underlying statutory mandates, such as the federal courts’ narrow approach to defining “disability” prior to the recent A.D.A. Amendments Act. Another includes expansive preemption-based limitations on state-law protections and remedies, particularly in the employee benefits and labor contexts. Moreover, wrongful discharge requirements therefore create a significant burden for plaintiffs. Moreover, eighty percent of summary judgment motions in employment discrimination cases are granted (at least in part) in favor of the plaintiff.


56. See Philip Morris USA v. Williams, 549 U.S. 346 (2007) (holding that the Fourteenth Amendment bars punitive damages for harm done to a party not directly involved in the litigation); State Farm v. Campbell, 538 U.S. 408 (2003) (finding that the Due Process Clause generally prohibits punitive damages that exceed ten times the compensatory damage award); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (holding that a $2 million award in punitive damages was grossly excessive); see generally Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008).


59. Supreme Court decisions have imposed significant preemption-based limitations claims for participants and beneficiaries of E.R.I.S.A.-governed benefit plans. See, e.g., Linda P. McKenzie,
claimants often face a gauntlet of strictly construed procedural and substantive hurdles,\(^\text{60}\) and workers relying on state-law public policy theories face a similar array of obstacles to recovery.\(^\text{61}\) In addition, an extensive body of literature explores how other developments have made establishing liability more difficult and weakened remedies under anti-discrimination laws\(^\text{62}\) and the N.L.R.A.\(^\text{63}\) Finally, as a practical matter,

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*Eligibility, Treatment, or Something In-Between? Plaintiffs Get Creative to Get Past ERISA Preemption, 23 J. CONTEMP. HEALTH. L. & POL’Y 272, 276-83 (2007).* Likewise, the N.L.R.A.’s expansive preemption doctrine often precludes state-level efforts to protect workers’ rights. And there have been recent expansions. See, e.g., Chamber of Commerce v. Brown, 554 U.S. 60 (2008) (holding preempted a California statute prohibiting grants to private employers who use the funds to assist, promote, or deter union organizing); Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States To Make More Labor Relations Policy, 70 LA. L. REV. 97 (2009).*


61. For a general discussion of state-law public policy tort claims, see GLYNN ET AL., *supra* note 2, at 183-226.

62. Because scholarly critiques are legion, I will mention only a few illustrative examples. Despite Supreme Court guidance to the contrary, lower federal courts frequently adopt a narrow view of the types of evidence that is sufficient to infer a discriminatory motive, see generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination Through Comparators, 60 ALA. L. REV. 191 (2009)* (arguing that lower courts frequently demand that comparators be identically situated to the discrimination plaintiff to infer discrimination), and are willing to presume a nondiscriminatory motive where an employer’s explanation for the adverse employment action is suspect, see generally Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment, 81 TEX. L. REV. 1177 (2003)*; Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII, 39 ARIZ. L. REV. 1003 (1997).* Also, once discrimination is established, the after-acquired evidence doctrine allows employers to limit liability by invoking a legitimate termination justification even when the facts underlying that justification were not known at the time or the employee misconduct was minor. See, e.g., Melissa Hart, *Retaliatory Litigation Tactics: The Chilling Effects of “After-Acquired Evidence”, 40 ARIZ. ST. L.J. 401, 415 (2008)*; Christine Neylon O’Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing, 23 PEPP. L. REV. 65, 79-85 (1995).* As a practical matter, *Kolsstad v. Am. Dental Ass’n, 527 U.S. 526 (1999)*, further limits remedies, barring punitive damages when an employer undertakes good faith efforts to comply with Title VII – i.e., through implementing anti-discrimination policies.

63. As mentioned above, aspects of the N.L.R.A. enforcement scheme, including weak remedies, act as disincentive for employees to pursue claims and, even when enforced, may fail to deter employer violations. See, e.g., Zatz, *supra* note 3, at 46. Recent developments have compounded these disincentives. Most notably, in *Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151-52 (2002)*, the Supreme Court held that the N.L.R.B. lacks the authority to award undocumented workers back pay. The decision reduces employers’ incentives to comply, and chills N.L.R.A. claims when the relevant workforce includes undocumented workers. And the chill may extend to legal immigrants, who may face additional discovery (pertaining to immigrant status) and potential repercussions for undocumented family members. See Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond, 22 HOFSTRA LAB. & EMP. L.J. 473, 493-95 (2005).* Although the reach of *Hoffman* remains in doubt, the decision could also deter claims in other areas, given the risk that courts might refuse to provide remedies in those contexts. See, e.g., Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny, 29 BERKELEY J. EMP. & LAB. L. 1, 40-41 (2008)*; Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law, 77 FORDHAM L. REV. 113, 136-55 (2008).*
some of the self-regulatory developments discussed in Part I—most notably the Ellerth/Faragher affirmative defense—have imposed on workers greater evidentiary hurdles and new defenses.64

This picture is painted in broad strokes. Some workers—individually and collectively—are able to vindicate their rights through private enforcement, enjoying favorable outcomes in litigation or settlement. Moreover, not all recent developments have favored employers. For example, some judicial decisions have expanded the scope of potential claims.65 In addition, Congress has stepped in occasionally to “correct” what it perceives as judicial overstepping, including though passage of the 1991 Civil Rights Act,66 the A.D.A. Amendments Act,67 and the Lilly Ledbetter Fair Pay Act.68 It also has filled gaps in substantive protections, through, for example, passage of the Family Medical Leave Act (F.M.L.A.)69 and, more recently, the Genetic Information Nondiscrimination Act.70 Still, Congress acts infrequently, and, when it has sought to address judicial overstepping, the impact of its actions often is blunted by later judicial interpretation.71

Viewed holistically, underlying statutory limitations on coverage and remedies combined with judicially-fashioned barriers have made it increasingly difficult for many workers to vindicate their rights under regimes originally designed to protect them. This is consistent with a number of recent studies showing that plaintiffs’ bringing various types of employment-related claims rarely prevail.72 In my view, the takeaway from

64. As discussed in Part II.B.1., infra, this defense has been criticized for creating a relatively easy way for employers to avoid sexual harassment liability, in part by enabling them to deter suits through the use of prophylactic measures that may not help reduce or correct violations.

65. For example, the Supreme Court recently has expanded protection against retaliation in the anti-discrimination context. See Michael J. Zimmer, A Pro-Employee Supreme Court?: The Retaliation Decisions, 60 S.C. L. REV. 917 (2009); Richard Moberly, The Supreme Court’s Antiretaliation Principle, 61 Case W. RES. L. REV. 375 (2010). The harassment theory itself is an example of such an expansion. At least in terms of the theory’s scope, the Supreme Court has taken a broad view. See, e.g., Oncale v. Sundown Offshore Servs., 523 U.S. 75 (1998) (holding that Title VII bars same sex discrimination).


67. See supra note 58 and accompanying text.


72. Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (finding that employment discrimination plaintiffs lose disproportionately often at the pre-trial, trial, and appeals phases); Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARV. L. & POL’Y REV. 103 (2009) (reporting updated results similar to those in their previous study: very low success rates for plaintiffs on appeal, and a recent decline in the number of employment discrimination claims filed in federal court); Moberly, Unfulfilled, supra note 14, at 67 (finding that
all of this is largely uncontroversial: while private enforcement of workers' rights is theoretically available, socio-economic and doctrinal impediments now make such enforcement costly, time-consuming, very uncertain, and, for a substantial subset of workers, either infeasible or not worth pursuing.73

2. Employer Litigation-Management Techniques

But the story does not end with doctrinal hurdles; employer risk-management techniques may further reduce the risks of private enforcement. Most prominent among these tools are pre-dispute mandatory arbitration agreements. Indeed, spurred by recent Supreme Court decisions upholding their enforceability,74 employers now frequently include arbitration clauses in their employment agreements.75

Mandatory arbitration alone does not eliminate employer incentives to comply with work-law standards. And while some studies suggest employers enjoy more favorable outcomes in arbitration than in court, the data on outcomes are mixed.76 Nevertheless, even in the absence of

S.O.X. whistleblower claims filed with O.S.H.A. between 2003 and 2005 were resolved in favor of employees only 3.6% of the time, and only 6.5% of whistleblowers won appeals; see also Hoffman, supra note 58, at 308 (discussing studies showing very low win rates for A.D.A. plaintiffs); cf. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States, 7 J. EMPIRICAL LEGAL STUD. 175-201 (2010) (finding in their study of employment discrimination claims from 1988 to 2003 that nineteen percent are dismissed on the pleadings; over fifty percent are settled, but typically for small amounts; eighteen percent are dismissed on summary judgment; and, of the six percent that proceed to trial, one third—two percent—resulted in a verdict for the plaintiff); Michael Selmi, Why Are Employment Discrimination Cases So Hard To Win?, 61 LA. L. Rev. 555 (2001) (finding lower success rates among employment discrimination plaintiffs than civil plaintiffs generally).

73. Cf. Estlund, Rebuilding, supra note 5, at 322 (stating that litigation “is a costly, slow, and often inaccessible mechanism for securing workplace rights”); Estlund, Who Mops the Floors, supra note 37, at 681 (expressing doubt that private enforcement can fill the enforcement gap left by declining unionization and public enforcement); Clermont & Schwab, Employment Discrimination Litigation, supra note 72, at 131-32 (suggesting that a possible reason for the recent, substantial decline in employment discrimination claims is that “plaintiffs' lawyers are now recognizing their low chances for success in federal court, and thereby becoming less inclined to venture into a court system that they view as impeding the realization of rights congressionally bestowed on workers”).


76. See id. Compare Alexander J.S. Colvin, Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration, reprinted in MANDATORY BINDING ARBITRATION: IS IT FAIR AND VOLUNTARY?, app. A (Cliff Palefsky, Esq., 2009), available at http://judiciary.house.gov/hearings/pdf/Palefsky090915.pdf (finding in a large data set of arbitration decisions disclosed under California law that, contrary to earlier studies, employee success rates were lower in arbitration than in litigation and awards for prevailing employees were five to ten times lower, and the data revealed a significant repeat-player bias in favor of employers) with Lewis L. Maltby, Private Justice: Employment
structural bias favoring employers, the strong employer preference for arbitration suggests that arbitration clauses in individual employment agreements reduce employer risks and costs. There are a number of reasons employers may prefer arbitral over judicial fora: arbitration often is cheaper, lowers the risk of aggregation of claims, and avoids uncertainty of jury trials. Moreover, employers have some ability to dictate how the process works and how arbitrators are chosen; judicial review of decisions is extremely limited, and proceedings are private and therefore lower the risk of negative publicity. In addition, because plaintiffs' counsel may be deterred from prosecuting claims in arbitration or may be willing to settle at a discount, the reduction in the costs of noncompliance may extend beyond the direct benefits such clauses offer.

Other litigation risk-management techniques that reduce noncompliance risks have become more common as well, including contractual forum-selection and choice-of-law clauses. Like arbitration clauses, these terms decrease enforcement risks by controlling or limiting downstream costs. Post-termination severance agreements—in which employees bargain away substantive claims in exchange for severance payments and other terms—also are now commonplace. Such agreements, if carefully crafted, usually survive later legal challenge, and departing

Arbitration and Civil Rights, 30 COLUM. HUM. RTS. L. REV. 29, 48 (1998) (finding that employees won in 63% of cases arbitrated from 1993-95 and 14.9% of cases decided in federal court); Estlund, Rebuilding, supra note 5, at 339-40 (studies suggest plaintiff awards are lower in arbitral than judicial proceedings but that they win more often); Samuel Estreicher, Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) (concluding that the little empirical evidence available on win-loss ratios, awards, and costs suggest that arbitration may be a better forum for employees).

77. Glynn, Interjurisdictional Competition, supra note 75, at 1401 n.83. But see Mark E. Budnitz, Mandatory Arbitration: The High Cost of Mandatory Consumer Arbitration, 67 LAW & CONTEMP. PROB. 133, 155-56 (2004) (arguing that fees in many state courts may be far less than arbitration fees for larger claims).

78. See Glynn, Interjurisdictional Competition, supra note 75, at 1401 n.83. Indeed, in the wake of the Supreme Court's recent decision upholding a consumer arbitration clause that prohibited class-wide arbitration, see Concepcion, 131 S. Ct. at 1740, employers may be able to eliminate virtually all risks of aggregation through the use of such clauses in employment agreements.

79. See, e.g., Estlund, Rebuilding, supra note 5, at 339.
81. See, e.g., Estlund, Rebuilding, supra note 5, at 339.
82. See id. at 338 (stating that "prospective plaintiffs and their attorneys bear the burden of uncertainty and may be deterred from proceeding at all").

83. Forum-selection and choice-of-law clauses have received less attention because arbitration is such a favorable employer risk-management tool and because the law governing enforcement of these terms is far less certain. See, e.g., Glynn, Interjurisdictional Competition, supra note 75, at 1384. Still, forum and governing law control strategies can be useful in some circumstances, such as when employers want to ensure noncompetition agreements are upheld even when departing employees find work in states far less likely to enforce such terms. See id.

84. There are some common-law and statutory limitations on enforceability of severance agreements, but care in drafting and negotiating can greatly reduce the probability that a court would
employees often agree to terms at a steep discount, given their economic circumstances and the costs of prosecuting even viable employment-related claims.

3. Disaggregated Enterprise Structures

Finally, in addition to all of the foregoing phenomena, firms are increasingly structuring their enterprises to avoid "employer" liability altogether. Nearly all statutory protections for workers—from the N.L.R.A. to the F.L.S.A. to Title VII to state regimes—protect only "employees" and impose duties only on their "employers." Although the existence of an employment relationship is a legal conclusion, rather than one left to private ordering, it normally hinges on whether the firm exercises "control" over the details of the job. Thus, in circumstances in which exacting control is not necessary—such as where job duties require few skills—or proving control is burdensome, firms can greatly reduce the probability that they will be liable for work-law violations by outsourcing to labor suppliers or through other contingent arrangements. This, in turn, creates additional obstacles for workers seeking recovery, since they must either demonstrate that the end-firm user is exercising sufficient control to create "employer" status or else they must seek relief against the labor supplier, which is less likely to be solvent. Moreover, because small operators are less visible, public and private oversight is more difficult.

Outsourcing therefore does more than shift legal responsibility from one firm to another: it allows end-user firms to avoid noncompliance risks while benefitting from labor at a price discounted by the lower probability of enforcement. Once limited to the margins, these kinds of structures find the agreement unenforceable. See generally GLYNN ET AL., supra note 2, at 922-32; Katherine A. Burkhart, Layering Administrative Law and Basic Contract Principles: Analyzing the Waiver of FMLA Claims in Severance Agreements, 33 J. CORP. L. 983 (2008); Jessica Snorgrass, Waiving the Effectiveness of the FMLA: The Anti-Waiver Approach to Enforceability of FMLA Severance Agreement Waivers, 45 SAN DIEGO L. REV. 163 (2008).

For a detailed discussion of the avoidance of work-law mandates through firm disaggregation, see Timothy P. Glynn, Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation, 15 EMP. RTS. & EMP. POL'Y J. 201 (2011).

See GLYNN ET AL., supra note 2, at 14-16.

See, e.g., Glynn, supra note 85, at 28-29; Zatz, supra note 3, at 34-35. This is true whether the "common law" or the "economic realities" approach is applied, although the latter, which is utilized to determine employment status for F.L.S.A. purposes, arguably is broader.

See id. at 47 (stating that while larger firms generally pay judgments, smaller firms often lack sufficient assets).

Cf. David Weil, Enforcing OSHA: The Role of Labor Unions, 30 INDUS. REL. 20, 20-23 (1991) (finding enforcement is more likely in larger firms that often have better compliance records than smaller ones).

See generally Glynn, supra note 85, at 211-212 (discussing this phenomenon); David Weil, Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage, 58 INDUS. & LAB. REL. REV. 238, 243 (2005) (discussing a study which—taking into account the
now are present in most large business enterprises, capturing many millions of workers at the low end of the labor market.91 A few states have sought to address this phenomenon; California’s “Brother’s Keeper” law, for example, holds end-user firms in certain industries accountable for employment-law violations committed by subcontractors where such violations were reasonably apparent from the financial and other terms of the contract.92 Moreover, a number of scholars (including me) have offered proposals extending responsibility to firms at the top of the enterprise structure.93 However, to date, there has been no such extension of liability beyond the traditional categories of “employer” and “joint employer” at the federal level.

D. Enforcement Risk and Employer Incentives

The foregoing developments, individually and in combination, can have a profound impact on firms’ incentives to comply with work law standards. Enterprises—or, more aptly, their decision-makers—do not have a default preference for legal compliance. On the contrary, charged with and compensated for maximizing the firm’s surplus, firm decision-makers have powerful incentives to abide by legal mandates only if the costs of noncompliance exceed the costs of compliance.94 This is a variation on Judge Posner’s observation regarding compliance incentives in his famous article on negligence: “When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments...
to the accident victims rather than incur the larger cost of avoiding liability.95 Simply substitute “employment-law violations” for “accidents.”

The decline in enforcement risks that have resulted from these developments reduce firm decision-makers’ incentives to ensure compliance with workplace laws. Less regulatory oversight means detection is more easily evaded. Even where detection or private enforcement is foreseeable, uncertain and inadequate sanctions make noncompliance worthwhile where compliance would be more expensive.96 This problem is particularly acute when “the cost of prevention” goes beyond monitoring costs and substantially decreases the firm’s surplus. The classic examples are avoiding wage and hour violations97 and making costly safety improvements.98 Although the bulk of the problem is at the bottom end of the labor market, similar incentives can exist with regard to more skilled and highly compensated workers. One prominent example is the cost savings achieved by misclassifying workers as exempt from overtime obligations under the “white collar” exemptions to the F.L.S.A.99 or as independent contractors and, hence, beyond the scope of employment-related statutory schemes.100

In addition, although workplace discrimination often is viewed as a product of rogue behavior by biased supervisors or co-employees (and, hence, a form of deviance rather than conduct beneficial to the enterprise), recent scholarship suggests that failures to diversify the workplace more

96. See Zatz, supra note 3, at 43 (suggesting two approaches to noncompliance are evasion and viewing periodic sanctions as an ordinary cost of doing business).
97. See, e.g., Estlund, Rebuilding, supra note 5, at 330 (“Whenever there are workers willing and able to work for less than the law requires, producers have a dauntingly predictable incentive to pay them less. Traditional enforcement mechanisms have often failed to raise the cost of noncompliance high enough to outweigh the immediate gains from noncompliance. Most enforcement actions secure only the back wages owed to employees (if that); that means opportunistic employers risk very little by underpaying employees and hoping—quite realistically—to avoid enforcement, either by inspection or complaint.”). Professor David Weil has addressed extensively problems with noncompliance with minimum wage laws. See generally Weil, Public Enforcement, supra note 90 at 238; David Weil, Regulating Noncompliance to Labor Standards: New Tools for an Old Problem, 45 CHALLENGE 47 (2002).
98. Estlund, Rebuilding, supra note 5, at 330 (“Occupational health and safety standards, too, have been chronically under-enforced, in part because of a lack of inspectors and enforcement resources. One study calculated that, on average, OSHA officers inspect a workplace once every 107 years. The combination of rare inspections and typically modest penalties creates a predictable incentive on the part of employers to ignore health and safety requirements that impose costs.”) (footnotes omitted).
99. Zatz, supra note 3, at 44-45 (discussing this phenomenon); see 29 U.S.C. § 213(a)(1); see 20 C.F.R. § 541; GLYNN ET AL., supra note 2, at 765-67 (discussing the exemptions); Lisa Belkin, O.T. Isn’t as Simple as Telling Time, N.Y. TIMES, Sept. 20, 2007, at G2 (discussing the increase in wage suits in which employees claim unpaid overtime).
100. See GLOVES OFF, supra note 1, at 11; see also DONAHUE ET AL., supra note 35; Steven Greenhouse, U.S. Cracks Down, supra note 33, at A1 (discussing misclassification and the Obama Administration’s enforcement efforts).
fully have important organizational causes. One cause relates to firm-level costs: the full-scale efforts needed to alter the make-up of the workplace would be costly upfront, requiring significant changes in the firm’s internal structures, reward systems, and culture. Moreover, at least according to some scholars, there would be downstream costs in terms of the challenges of maintaining a more diverse workforce. Firms therefore have cost-related reasons to resist profound institutional changes, particularly where, as discussed in the Part II, they can reduce legal risks by implementing less costly (but less effective) measures, such as promulgating anti-discrimination and anti-harassment policies and procedures.

And there are other, less obvious firm-level incentives to defy the law. Take noncompetition agreements (N.C.A.s). While state-law regarding N.C.A.s varies widely, all jurisdictions at least impose various “reasonableness” limitations on their enforceability. Yet the mere existence of a N.C.A. in an employment contract may have an *in terrorem* effect on workers. This is particularly true when the law of the jurisdiction does not render a clause clearly unenforceable or employees are unaware of enforceability limits—both of which are often the case. Moreover, there is little downside to having workers sign N.C.A.s, since there usually are no civil or other penalties for inclusion of such clauses, and, in most jurisdictions, courts will simply rewrite (rather than void) overly broad clauses. Employers therefore have powerful incentives to demand that their workers sign overly broad N.C.A.s, which will deter current and former employees from competing or demanding greater compensation to

101. For a detailed discussion of some of these causes and discrimination as a form of organizational misconduct, see Krawiec, *Organizational Misconduct*, supra note 12, at 604-09.

102. See, e.g., id. at 606-08; see generally Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615 (2004) (discussing how a firm’s approaches to rewards, performance evaluations, and promotions may result in more profit but also the exclusion of women and minorities from upper management).

103. See, e.g., Krawiec, *Organizational Misconduct*, supra note 12, at 605-09 (surveying the literature and discussing studies suggesting that show that a diverse workforce produces costs as well as benefits and may not lead to better firm performance); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1788 (2003) (discussing the transaction costs of managing a more diverse workforce).

104. See infra Part II.B.1; cf Krawiec, *Organizational Misconduct*, supra note 12, at 610-11 (“[A] legal regime that conditions or mitigates liability on the basis of internal compliance structures – while expensive and wasteful – is far less onerous than actually altering current business practices or paying damages for agent misconduct.”).


remain,108 even when the firm would likely lose in litigation if such a term were actually challenged.109 Over time, across a firm’s workforce, such a noncompliance strategy may be of great value.

Undoubtedly, this discussion of firm-level incentives is somewhat oversimplified because it does not account for other costs of noncompliance, including worker morale and reputational harm—matters I return to below.110 Moreover, for assorted reasons, many employers seek to comply with workplace laws even though a cost-benefit analysis might favor noncompliance.

Still, in light of all of the foregoing phenomena, noncompliance strategies can have a substantial, positive impact on the bottom line. That the balance has tilted more towards noncompliance is reflected in enterprise behavior in recent years. As has been discussed extensively elsewhere, noncompliance with workplace standards—that is, evasion or outright violations of labor and employment standards—is now common.111 Indeed, at least at the low end of the labor market, the result is a “widespread ethos of lawbreaking.”112

Significant changes in employment law doctrine and enforcement mechanisms would alter this balance. But, as the last thirty years have shown, it is doubtful that such reforms, on their own, will be sufficient and lasting. Leaving aside other challenges facing lawmakers attempting to design effective command-and-control and civil litigation regimes,113 reform that genuinely alters external enforcement risk would require more than fixing aspects of particular statutory regimes or the investment of somewhat greater resources in enforcement agencies. It would need to be multi-dimensional, comprehensive, and adequately funded on the front end.

108. See id. at 1151.
109. See id. at 1162.
111. See, e.g., ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS, VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICAN CITIES 5 (2009); GLOVES OFF, supra note 1, at 3, 7-8, 11; Estlund, Who Mops the Floors, supra note 37, at 680; see also ANNETTE BERNHARDT ET AL., UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR VIOLATIONS IN NEW YORK CITY (2010) (discussing the great prevalence and wide array of employment-law violations); Greenhouse, U.S. Cracks Down, supra note 33, at A1 (stating that up to 30 percent of employers engage in misclassification, resulting in lost tax and workers compensation revenue, as well as noncompliance with wage and hour requirements).
112. Estlund, Who Mops the Floors, supra note 37, at 680.
113. For a review of the skeptical views on the efficacy of the traditional command-and-control and civil litigation models of regulation, see, e.g., Estlund, Rebuilding, supra note 5, at 322; Estlund, Who Mops the Floors, supra note 37, at 682 (“There is a widespread conviction that traditional command-and-control regulation is losing its grip in our technologically supercharged global economy, and cannot keep up with the increasingly fragmented, fluid, and footloose organizations and networks through which goods and services are produced and distributed.”).
For instance, to the extent the reform relies heavily on private enforcement, it would need to address not just substantive impediments to establishing liability, but also procedural hurdles, employer litigation-risk management techniques, limitations on coverage and remedies, and the powerful social and economic disincentives for workers to challenge employer practices.

Perhaps even more dauntingly, the reform would have to be sufficiently resilient to withstand withering over time, given the budget constraints that will confront agencies in a post-Great Recession world; an often hostile federal judiciary; and employers' repeat player, risk management, and resource advantages.114 Similarly, while a recommitment to protecting workers' collective rights and a corresponding reversal of the decline of union density would offer a counterbalance against employer advantages, expanded unionization would be, at best, slow in coming (especially given the mounting siege unions must confront, as underscored by recent headlines). Expansion also is unlikely to extend evenly or broadly across labor sectors.115 This is not to say that various measures that increase external enforcement risks will not improve compliance. Rather, it is to suggest recent history combined with the numerous factors contributing to under-enforcement indicate that these approaches to reform are likely to be insufficient alone to achieve desired or even anticipated outcomes. This is particularly apparent when one considers the effects of time and persistent pushback by powerful employer-side interests.

II.

THE ASCENDENCY OF SELF-REGULATION AND GOVERNANCE STRATEGIES

As external enforcement risks and unionization have declined, an alternative set of approaches to facilitating firm legal compliance has gained prominence in both practice and the literature. The fall of command-and-control and other traditional forms of external regulatory enforcement has been accompanied by the rise of self-regulatory mechanisms for enhancing legal compliance.116 Given how robust this trend is, as well as the limited resources available for traditional command-and-control regulation, for better or worse, self-regulatory approaches to enhancing legal compliance are here to stay.117

114. Cf. Estlund, Rebuilding, supra note 5, at 355 (expressing skepticism of the efficacy of external, adversarial enforcement alone, noting that "there will never be enough inspectors to do the job").
115. See, e.g., id. at 324 (expressing doubt that collective bargaining can be expanded substantially).
116. Professors Cynthia Estlund and Orly Lobel have explored this phenomenon in detail in the employment context. See supra note 5 and accompanying text.
117. Estlund, Rebuilding, supra note 5, at 354-55.
Broadly speaking, these approaches seek to influence firm decision making either from within or from nongovernmental actors by promoting governance and monitoring practices designed to enhance compliance with external legal obligations (and further other societal norms). A key virtue of self-regulation—provided that it is effective—is that it is potentially cost efficient, not only because it reduces reliance on public resources, but also because it takes advantage of firms' own expertise, knowledge, and creativity. Self-regulation may also generate social norms favoring compliance, which create pressures on corporate actors to abide by the law and promote deterrence through internal sanctions for behaviors that may fall just short of crossing the line into illegality. A further aim of some self-regulatory models—so-called "New Governance"—is to move away from adversarial oversight by government agencies and private litigants towards more collaborative relationships that are more likely to foster firm practices and cultures that genuinely favor compliance over time.

Self-regulatory models come in many forms. I divide them into two broad categories: the first includes non-legal approaches; the other contains various legal incentive structures (utilizing some combination of legal carrots or sticks). I conclude that both kinds of models fall short in the work-law context, at least as currently constructed, for similar reasons. Given the basic incentives that drive firm decision making—making money for shareholders and managers—the first set of approaches almost inevitably will fail to promoting compliance on a wide scale, unless combined with regimes that provide legal bite. The existing legal approaches also are inadequate, because they too will not alter the incentives that drive firm decision-making as long as external legal risks are too low to ensure the noncompliance costs exceed compliance costs. Still, as I discuss in the next section, these approaches could produce greater compliance benefits if they were combined with legal reforms that altered decisional norms at the top of the firm hierarchy.

A. "Non-Legal" Models For Fostering Norms of Compliance

In recent years, there has been a proliferation of non-legal or superlegal approaches to steering for-profit corporations and their decision-makers towards more socially responsible behavior. For instance, we


119. Baer, supra note 12, at 960 (discussing Steven Shavell, Law Versus Morality as Regulators of Conduct, 4 AM. L. & ECON. REV. 227 (2002)).

120. Cf. Baer, supra note 12, at 954-56, 999-1015 (describing the features of "New Governance" approaches and distinguishing them from self-regulatory models that are responsive to regulatory demands and in which firm personnel and regulators remain primarily adversarial).
observe growing emphasis on business ethics and integrity-based strategies for building cultures of compliance with firms.\textsuperscript{121} There has been a corresponding rise of industry and firm-promulgated standards for behavior, such as statements of best practices and corporate ethical codes of conduct.\textsuperscript{122} As discussed in the next section, the avoidance of legal liability partially explains the rise of such approaches, but they are also driven by non-legal considerations (including public relations and reputation) and other commitments.

In addition, various market and reputation-based approaches to pressing firms to commit to certain standards of conduct have received much recent attention.\textsuperscript{123} One example related to work conditions is the efforts by nongovernmental organizations (N.G.O.s) and advocacy groups to pressure high-profile multinational firms to commit to norms of conduct within their supply chains and submit to outside monitoring.\textsuperscript{124} Consistent with these efforts, scholars have developed extra-legal models for improving workplace conditions. The "Ratcheting Labor Standards" strategy is perhaps the most well-known.\textsuperscript{125} Yet another approach comes from the other direction, aiming to influence firm behavior through socially conscious investing and other types of shareholder activism.\textsuperscript{126}

Success stories, both domestically and at the international level, suggest that extra-legal strategies can alter norms regarding the treatment of workers, at least in some circumstances. One frequently cited set of examples is consumer-focused pressure campaigns that punish firms in the products markets for utilizing sweatshop labor or other irresponsible conduct.\textsuperscript{127} A related, firm-specific effort is Nike's implementation, in conjunction with N.G.O.s, of a monitoring program to ensure minimally

\textsuperscript{121} See, e.g., Langevoort, Monitoring, supra, note 110, at 104 (describing the explosion of interest in ethics and integrity based systems as an alternative to costly internal monitoring); Lynn Sharp Paine, Managing for Organizational Integrity, HARV. BUS. REV. Mar-Apr. 1994.

\textsuperscript{122} See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 583 n.32 (discussing the proliferation of ethics and conduct codes in large corporations).

\textsuperscript{123} See, e.g., Estlund, Rebuilding, supra note 5, at 366-67.

\textsuperscript{124} See, e.g., id; see also KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? (2003) (discussing such approaches).

\textsuperscript{125} See Charles Sabel et al., Ratcheting Labor Standards: Regulating for Continuous Improvement in the Global Workplace (Kennedy Sch. of Gov't Faculty Research Working Papers Ser., Paper No. 00-010, 2000), available at http://papers.ssrn.com/paper.taf?abstract_id=262178 (arguing that, in an age of globalization, the establishment of minimum standards for the treatment of workers combined with monitoring by N.G.O.s and others, information sharing, and market pressure can create competition for social performance that will ratchet up workplace practices).


\textsuperscript{127} See, e.g., Zatz, supra note 3, at 53. Consumer-based strategies also may focus on rewarding firms for compliant or socially responsible practices. See id.
safe and decent working conditions in its international supply chains.\textsuperscript{128} Other high-profile firms, also responding to public pressure, have chosen to be proactive about developing internal policies and structures.\textsuperscript{129} Moreover, firm decision-makers often take business ethics and responsibility to constituents beyond equity stakeholders seriously, even without the coercive hammer of legal enforcement. And many such firms have done well while doing good.\textsuperscript{130} Finally, the burgeoning calls for rethinking how business schools train managers and reorienting managerial norms towards true professionalism (e.g., promoting values beyond profit maximization) may have a meaningful impact on tomorrow’s business leaders.\textsuperscript{131}

Still, there are compelling reasons to be skeptical of the long-term promise of relying on market forces and other strategies that lack genuine legal bite.\textsuperscript{132} Until recently, more permissive forms of self-regulation had been politically popular, in part because they tracked the prevailing narrative regarding the disciplining power of markets and private ordering.\textsuperscript{133} But claims that such forms of self-regulation can fill regulatory gaps now seem dubious, given the colossal failures of self-governance that contributed to the financial meltdown of 2008\textsuperscript{134} and the recent oil spill in the Gulf of Mexico.\textsuperscript{135} Indeed, some prominent former advocates of

\begin{itemize}
  \item \textsuperscript{128} See Rhys Jenkins, \textit{Corporate Codes of Conduct: Self-Regulation in a Global Economy}, \textit{United Nations Research Institute for Social Development Programme on Technology, Business, and Society}, Apr. 2001 at 20 (positing that the proliferation of corporate codes of conduct and increased emphasis on corporate responsibility has achieved moderate success in recent years since large firms are particularly vulnerable to bad publicity); Ans Kolk & Rob Van Tulder, \textit{The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour}, 20 \textit{European Management Journal}, 2002, at 263 (discussing how Nike has remained profitable after it revised its code of conduct to raise the minimum employee age to 16 without external pressure).
  \item \textsuperscript{130} See Estlund, \textit{Who Mops the Floors}, supra, note 37, at 691.
  \item \textsuperscript{131} See Estlund, \textit{Rebuilding}, supra, note 5, at 320, 352.
  \item \textsuperscript{132} For example, after facing growing opposition as well as numerous legal challenges, Walmart announced that it wanted to be a leader in employment practices. See Estlund, \textit{Rebuilding}, supra, note 5, at 320, 352.
  \item \textsuperscript{134} See generally Kimberly Krawiec, \textit{The Return of the Rogue}, 51 \textit{Ariz. L. Rev.} 127 (2009) (discussing the failures of self-regulation that contributed to the meltdown).
  \item \textsuperscript{135} See Clifford Krauss, \textit{BP Prepares for “Top Kill” Procedure}, N.Y. TIMES, May 25, 2010, at A1 (discussing how the Department of the Interior is seeking stricter regulation of environmental practices to replace the prior system which relied on oil industry self-regulation); Stephen Power et al.,
voluntary or market-driven self-regulation now doubt its premises. Most studies to date also cast doubt on the effectiveness of business ethics codes and compliance and training programs—even when promulgated in response to background legal incentives. For related reasons, we now see pushback against the corporate social responsibility ("C.S.R.") movement by those who share its objectives but favor more traditional forms of legal accountability. These critics argue that, in an environment in which share value is paramount, corporate decision making norms cannot be altered without the bite of legal sanctions for noncompliance.

With regard to work-law standards in particular, the fact that many of the foregoing non-legal strategies have arisen contemporaneously with the growth of noncompliance strongly supports the conclusion—at least as a default matter—that such strategies have not been successful on a wide scale. Indeed, I am unaware of studies showing that norm-altering models lacking corresponding legal consequences reduce legal violations across labor markets over time. This should come as no surprise, given the basic incentives that drive firm behavior and markets.

One problem is that genuine compliance efforts with work-law standards remain costly over time, while market conditions, consumer attentiveness, monitoring resources, reputational incentives, and firm leadership change. Thus, N.G.O.s and other outsiders performing monitoring functions may have difficulty sustaining their efforts to ensure ongoing adherence to work standards, and incentives within firms expressing a commitment to such standards can change. Even reputation-dependent firms, such as Nike, have had mixed results in maintaining compliance with their own codes of conduct involving international


137. See Krawiec, Rogue, supra note 134, at 146-47 (discussing studies of business ethics codes, diversity training programs, and other compliance structures); Krawiec, Organizational Misconduct, supra note 12, at 591-94 (discussing the many studies finding no significant relationship between ethics codes and employee conduct, as well as the lack of evidence that diversity and harassment training are effective).

138. E.g., ROBERT B. REICH, SUPERCAPITALISM 168-208 (2007) (criticizing approaches that favor CSR for diverting attention from the more difficult but more important task of establishing legal rules that protect the common good).

139. This is one reason why Professor Estlund argues that workers within firms must play a role in self-regulation—i.e., they fill inevitable gaps in monitoring by outsiders. See Estlund, Rebuilding, supra note 5, at 372.
suppliers. Walmart also has failed—infamously—to live up to its proclaimed commitment to be a model with regard to employment practices as well as its stated objectives regarding oversight of foreign suppliers. For firms not subject to persistent public scrutiny, basic incentives—lowering production costs to increase the surplus for shareholders and managers—cut even more decisively the other way when the risks of enforcement are low.

Further, when a firm attempts to maintain socially responsible practices, external competition and related internal performance objectives undercut such a strategy. As Professor Estlund and others have argued, a system of voluntary self-regulation invites opportunistic actors to cheat, putting competitive pressure on those who would abide by legal and other norms. Likewise, within individual firms, compliance initiatives often conflict directly with the basic incentives—performance goals—that drive firm decision-making. Actors within a firm genuinely committed to furthering ends beyond maximizing the surplus therefore must operate in an environment of mixed messages. As discussed below, Professor Donald Langevoort argues that such mixed signals themselves can stymie a culture of compliance or socially responsible behavior throughout the enterprise.

Thus, while reputation, integrity, and market-based efforts to alter decision making norms within firms may send the right message and may be successful in particular circumstances, it is doubtful that these models by themselves can ensure compliance with workplace law on a wider scale. Such strategies are worth pursuing alone where there is little prospect of


141. See generally Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. Cal. 2009) (upholding the dismissal of a complaint against Walmart by foreign workers alleging Walmart failed to monitor suppliers and adhere to standards); Debra Cohen Maryanov, Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain, 14 LEWIS & CLARK L. REV. 397, 434 (2010) (discussing the circumstances underlying the claims in Doe); see also Estlund, Who Mops the Floors, supra note 37, at 683 ("Consider Wal-Mart, Inc., whose proclaimed commitment to become ‘a corporate leader in employment practices’ might be viewed skeptically in light of the scores of legal actions charging Wal-Mart with demands for off-the-clock work and overtime violations, use of child labor and undocumented workers, illegal anti-union activity, and discrimination against women and older and disabled workers."). Tyson Foods likewise has failed to meet its stated commitments. See Estlund, Who Mops the Floors, supra note 37, at 683.

142. Estlund, Rebuilding, supra note 5, and 356-57; cf. Greenhouse, U.S. Cracks Down, supra note 33, at A1 (noting the Ohio Attorney General’s view that law-abiding firms are among the biggest fans of better enforcement).

143. Cf. Baer, supra note 12, at 1015 (discussing the conflict between compliance-oriented environments and market-based needs and firm performance goals).

144. Langevoort, Monitoring, supra note 110, at 89, 110.
traditional regulatory oversight, such as on the international level. But they are not an effective substitute for such oversight where it may otherwise exist.

B. Legal Incentives or Mechanisms for Developing Internal Monitoring and Compliance

A second broad category of self-regulatory approaches seeks to create incentives for legal compliance through linking internal structures to external law. They do so by offering some set of legal carrots or sticks for firms to engage in self-regulation to ensure compliant behavior. In other words, unlike those in the first category, these models are supposed to offer a blend of self-regulation and the coercive power of external legal enforcement.

Of course, the goal of sanctions for legal violations—whether imposed through command-and-control oversight or through private litigation—is to compel compliance. In theory, if the risk of such sanctions were great enough (again, the cost of noncompliance were greater than the cost of compliance), firm decision-makers would have adequate incentives to develop mechanisms for preventing, detecting, and correcting violations. Indeed, in the employment context, the threat of litigation along with the desire to avoid unionization helped spur the growth of internal grievance procedures in larger firms.

But, as discussed in Part I, regulatory resources have been too scarce alone to assure compliance in the employment area, and there is a broad consensus across regulatory fields that the law must do something more to induce good monitoring than impose firm-level vicarious liability for corporate wrongdoing. Recognizing this, scholars have offered various strategies that meld self-regulation where possible with more robust command-and-control oversight where needed. Arguably, self-regulation can enhance deterrence by expanding the pool of regulatory resources and enlisting enforcers (firm actors) who have greater knowledge than

145. See Estlund, Rebuilding, supra, note 5, at 370.
146. See id. (stating that private enforcement mechanisms are not a substitute for enforcement by a reasonably competent regulatory regime); Jodi Short, The Paranoid Style in Regulatory Reform, 63 HAST. L.J. (forthcoming 2012), available at http://scholarship.law.georgetown.edu/fwps_papers/102/ (arguing that voluntary self-regulation should be supplemented by coercive, deterrence-based legal enforcement).
147. See, e.g., Estlund, Who Mops the Floors, supra note 37 at 682-83 (discussing such carrots and sticks strategies).
148. See, e.g., Estlund, Rebuilding, supra note 5, at 335.
149. See, e.g., Langevoort, Monitoring, supra note 110, at 74; Estlund, Who Mops the Floors, supra note 37, at 681-82.
150. Estlund, Rebuilding, supra note 5, at 341.
government regulators and are better positioned to develop compliance norms within the firms.\(^{151}\)

Professors Ayres and Braithwaite offer perhaps the most well-known self-regulatory model. They propose a regulatory pyramid with the least interventionist form of self-regulation at the bottom for those with strong compliance records and the most punitive oversight and sanctions at the top for chronic offenders.\(^{152}\) There are many other self-regulatory approaches, employing a diverse range of policy, training, monitoring, and investigatory techniques.\(^{153}\)

Employment-law scholars, including Cynthia Estlund and Orly Lobel, recently have discussed the emergence of self-regulatory approaches in practice as well as the potential advantages they may offer.\(^{154}\) Yet, they also recognize that self-regulatory structures may fail as substitutes for external enforcement. Professor Estlund observed:

> The coordination of internal or self-regulatory compliance structures with the external law of the workplace has the potential to create new mechanisms for the enforcement of employee rights and labor standards—mechanisms that engage employees and revive the prospects for employee voice in the wake of declining unionization. But it also has the potential to divert crucial public resources from the task of securing compliance with public norms, and to enfeeble the few fearsome legal weapons that worker advocates have in their efforts to enforce basic employee rights and labor standards. It all depends.\(^{155}\)

As this note of caution suggests, there are critical variations between approaches. In my view, one important divide often overlooked is between those strategies that focus directly on pressing firms to engage in self-regulation and those that rely instead on altering individual’s incentives to report or prevent legal violations within firms.\(^{156}\)

1. **Firm-Focused Doctrinal and Quid Pro Quo Strategies**

A first set of law-based self-regulatory approaches includes various types of doctrinal (or duty-based) and *quid pro quo* strategies for incentivizing firms to develop internal compliance programs. The leading example of a doctrinal approach—which eliminates or limits firm liability

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\(^{151}\) See Arlen & Kraakman, *supra* note 118, at 692; Baer, *supra* note 12, at 959.

\(^{152}\) *AYRES & BRAITHWAITE, supra* note 118, at 35-40.


\(^{154}\) *See supra* note 5.

\(^{155}\) *See, e.g.*, Estlund, *Rebuilding, supra* note 5, at 321.

\(^{156}\) Others recognize the importance of distinguishing between the “firm” and its participants in assessing the effectiveness of self-regulatory structures. *See, e.g.*, Baer, *supra* note 12, at 985-90 (discussing the importance of dissecting the firm). My point is somewhat different: in assessing their potential for furthering compliance, it is useful to distinguish self-regulatory approaches according their principal targets – firms or individuals.
for agents' underlying misconduct where the organization has exercised due care to avoid the misconduct—is the federal Organizational Sentencing Guidelines (O.S.G.). The O.S.G. provide a reduction in criminal sentences for firms that have established appropriate internal controls. The idea is to steer corporate culture towards more compliance and less criminal conduct. The D.O.J.'s charging guidelines with regard to business entities, which take into account internal compliance practices in charging decisions guide prosecutors to insist on heightened internal controls in deferred prosecution agreements, also played a substantial role in incentivizing firms to put into place compliance regimes, particularly once potential criminal misconduct within the firm has been discovered.

Self-regulatory strategies somewhat akin to the O.S.G. approach have taken hold in many areas of corporate regulation. They have also spawned a vast literature in law and elsewhere, as well as a growing mass of studies and critical responses.

In various ways, employment discrimination doctrine offers similar incentives for firms. The affirmative defense the Supreme Court established in Ellerth and Faragher is the leading example. These decisions provide employers with a defense against strict liability for supervisor sexual (and other types of) harassment if the employer exercised reasonable care to prevent and correct harassing behavior and the plaintiff employee failed to take advantage of any employer-provided preventative or corrective opportunities. Such measures may be critical in co-worker harassment cases as well, since they may serve as evidence that the employer was not negligent in failing to discover or prevent violations.

In addition, in Kolstad v. American Dental Association, the Court extended this approach by holding that an employer's utilization of anti-discrimination policy procedures that constituted good faith efforts to

157. For a discussion of duty-based approaches, see Krawiec, Organizational Misconduct, supra note 12, at 579-91.
159. See, e.g., Baer, supra note 12, at 964-66 (discussing the guidelines).
160. For a detailed discussion of the history of the D.O.J. guidelines and their effect on corporate compliance regimes, as well as the underlying literature, see Baer, supra note 12, at 964-85.
161. Krawiec, Rogue, supra note 12, at 144 (noting self-regulation's role in "environmental, tort, securities, employment discrimination, corporate, organizational sentencing, and health care law").
162. See id. at 143, 144-48.
163. Cf. Arlen & Kraakman, supra note 117, at 726-30 (describing "composite" liability regimes in which strict liability penalties can be mitigated by compliance efforts); Estlund, Who Mops the Floors, supra note 37, at 682 (noting that if an employer maintains policies that are reasonably calculated to prevent discrimination in the workplace, the employer's liability for employment discrimination claims may be lessened).
165. Krawiec, Organizational Misconduct, supra note 12, at 588.
comply with Title VII would bar punitive damages for intentional discrimination within the enterprise. Even more broadly, parties can utilize anti-discrimination-related internal compliance structures—or the lack thereof—as circumstantial evidence in seeking to prove or disprove discriminatory intent.167

These doctrines offer powerful incentives for employers to put into place self-regulatory mechanisms, including anti-harassment and anti-discrimination policies, employee training regimes, monitoring systems, and harassment complaint and investigatory procedures.168 Such structures can—and often do—form a key component of the defense(s) against liability or damages in sexual harassment and other discrimination cases.169

Moreover, O.S.H.A. is among the agencies that have utilized quid pro quo programs whereby, in exchange for the firms’ developing a set of internal compliance procedures, the agency agrees to scale back the amount of direct command-and-control oversight.170 Under the George W. Bush Administration, O.S.H.A. expanded its self-regulatory approach, adopting a largely voluntary compliance system with regard to reducing ergonomic hazards, buttressed only by the threat of agency sanctions for firms that had high injury rates and made few attempts to reduce them.171 Several states, including California, have implemented workplace health and safety programs that reward covered employers (in California’s case, by avoiding penalties for first violations) for implementing internal monitoring and abatement programs.172

While these approaches have promoted compliance structures, internal codes of conduct, and training regimes, there exists little evidence such systems actually reduce or deter violations (at least ex ante) in the employment context.173 The Ellerth/Faragher defense is widely criticized as having produced, at best, ineffective compliance regimes.174 Likewise,


168. See Krawiec, Organizational Misconduct, supra note 12, at 588-89.

169. See id. at 590.

170. The most notable example is O.S.H.A.’s V.P.P. program, under which employers can receive relief from the ordinary inspection requirements and other concessions in exchange for demonstrating internal measures to ensure workplace safety. For further discussion of the V.P.P. program as an example of a substitute to traditional regulatory structures, see Estlund, Rebuilding, supra note 5, at 343-44; Lobel, Interlocking, supra note 5, at 1105-06.

171. Estlund, Rebuilding, supra note 5, at 346-47.

172. See id. at 345-46.

173. Krawiec, Rogue, supra note 12, at 144-48 (detailing the studies of the effects of such measures); Krawiec, Organizational Misconduct, supra note 12, at 591-97 (same); Estlund, Rebuilding, supra note 5, at 337-38; see also Locke, Qin & Brause, supra note 140, at 6 ("A 2003 World Bank study estimated that there were over 1,000 corporate codes of conduct in existence today.").

although O.S.H.A.'s V.P.P. program was once hailed as an effective public-private cooperative venture, there is now compelling evidence that it fell far short of this in more recent years.

Scholars offer a number of explanations for why such approaches fail to produce compliance gains, despite the emergence and growth of an entire corporate compliance industry. Some, including Professor Kimberly Krawiec, warn that firms may utilize compliance systems simply as window-dressing to reduce the probability of legal liability without addressing the underlying behavior. Krawiec, Professor Susan Bisom-Rapp, and others criticize the Ellerth/Faragher defense and related approaches in the employment discrimination area along these lines. They argue that courts may lack the information, expertise, or will to determine with accuracy ex post the effectiveness of such structures. Unless courts closely scrutinize the internal processes employers adopt, these approaches

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175. See supra note 29.

176. See GAO REPORT, supra note 30, at 15-18; Bisom-Rapp, What We Learn, supra note 13, at 1211-12, 1245-47 (discussing the G.A.O. report and criticizing O.S.H.A. for its failure to enforce penalties and collect sufficient data).

177. Krawiec, Rogue, supra note 134, at 146; Krawiec, Organizational Misconduct, supra note 12, at 574 (“Indeed, several large-scale empirical studies document a positive correlation between organizational misconduct and the types of internal compliance structures most frequently relied on by courts and regulators in assessing liability and sanctions, suggesting that some organizations may employ internal compliance structures primarily as a window-dressing mechanism that provides both market legitimacy and reduced organizational liability for agent misconduct.”); see also Langevoort, Monitoring, supra note 110, at 106 (“[T]he objective indicators of a values-based program are also easy to mimic, making it difficult to separate out the sincere programs from the fakes.”); Moberly, Structural Model, supra note 14, at 1137 (discussing the window-dressing phenomenon). Others doubt the window-dressing hypothesis, but still acknowledge that firms will choose compliance approaches that will please government officials and ratchet up the “amount” of compliance rather than seek to determine which compliance methods are the most effective at reducing violations. See, e.g., Baer, supra note 12, at 952-53, 999.

178. Krawiec, Organizational Misconduct, supra note 12, at 577; Susan Bisom-Rapp, Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice, 26 FLA. ST. U. L. REV. 959, 967-76 (1999); Hart, Possibility of Avoiding Discrimination, supra note 174 at 1642-46; see supra note 174 (same).

179. See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 572, 580 (arguing that courts lack sufficient information about the effectiveness of self-regulatory structures, which encourages cosmetic compliance).
may simply make external enforcement more difficult (by adding another hurdle for plaintiffs), rather than promote genuine compliance.\textsuperscript{180}

Moreover, because the end for the firm is limiting the costs of noncompliance rather than preventing the underlying misconduct, the goal becomes twisted: implementing minimally burdensome compliance practices sufficient to pass legal muster—i.e., cosmetic compliance—rather than putting into place truly effective but more costly measures.\textsuperscript{181} Indeed, firms may prefer such a regime where regulation is inevitable, because it reduces the probability of liability (relative to a strict liability regime) without imposing the costs of actually eliminating the underlying violations.\textsuperscript{182} Internal credibility problems may make matters worse when employees are aware of the firm’s desire to avoid liability rather than address underlying illegality.\textsuperscript{183}

Behavioral law and economics scholarship—drawing on lessons from social and cognitive psychology—offers further insights into why compliance systems, even if implemented in good faith, might fail to prevent violations. Some cognitive deficiencies that might contribute to the problem are well-known: bounded rationality and optimism bias might lead supervisory personnel to underestimate the probability of detection or ignore warning signs;\textsuperscript{184} bounded willpower might lead supervisors to engage in or tolerate violations when the benefits (e.g., higher earnings, promotions) are immediate, while the costs are delayed and uncertain.\textsuperscript{185}

As Krawiec discusses, the organizational environment within the firm—organizational culture, reward systems, and management’s genuine commitment to ethical conduct (or lack thereof)—also can play a key role

\textsuperscript{180} See id. at 572, 580; Estlund, Rebuilding, supra note 5, at 337.

\textsuperscript{181} Krawiec, Organizational Misconduct, supra note 12, at 574, 576 (arguing that although internal compliance structures are costly, they are far less costly than actually altering current business practices); Bisom-Rapp, Bulletproofing, supra note 178, at 967-76 (arguing that many employers adopt symbolic compliance measures that result in little change in the work environment).

\textsuperscript{182} Krawiec, Organizational Misconduct, supra note 12, at 574; id. at 610-11 ("[A] legal regime that conditions or mitigates liability on the basis of internal compliance structures—while expensive and wasteful— is far less onerous than actually altering current business practices or paying damages for agent misconduct."); see also Arlen & Kraakman, supra note 118, at 691 (discussing the distortion caused by a due care standard).

\textsuperscript{183} Krawiec, Organizational Misconduct, supra note 12, at 577.

\textsuperscript{184} For a general discussion of bounded rationality, see generally Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1477-78 (1998). For example, line supervisors who have not witnessed sanctions for violations or have seen violations being ignored might systematically underestimate the probability of sanctions. For a discussion of the potential influence of optimism bias on compliance, see Donald Langevoort, Leaving Corporate Executives, supra note 94, at 627-29, 635-36 (2007); Donald C. Langevoort, The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron, 70 GEO. WASH. L. REV. 968, 969-74 (2002).

\textsuperscript{185} For a general discussion of bounded willpower, see generally Jolls et al., supra note 184, at 1479.
in shaping agents’ behavior, and can even induce them to act contrary to the firm’s stated policies or compliance code.\(^{186}\) And behavioral influences within firms might have cross-cutting, complicating effects. For example, while firm cultures that promote optimism and place significant trust in employees and line supervisors might facilitate noncompliant behaviors, practices that go too far in dampening optimism or trust might hinder not only morale, but also efforts to ensure agents buy into senior management’s desire to promote ethics or integrity.\(^{187}\)

Although the behavioral literature is too vast to address comprehensively here, Professor Donald Langevoort, in his recent work on corporate compliance, has brought together various lessons from this literature to help explain some of the leakiness in self-regulatory approaches.\(^{188}\) As an initial matter, he agrees that firms have incentives to implement less-than-effective systems of internal controls when society under-enforces the law, and firm managers also have this incentive (or an even greater one), since they benefit from the profitability associated with undetected violations but suffer little when subordinates’ wrongdoing is detected.\(^{189}\) Yet he also observes how difficult it is for firms to design and maintain genuinely effective compliance systems. Line supervisor monitoring is subject to predictable breakdowns due to incentive conflicts (performance versus compliance goals) and various psychological constraints\(^{190}\); audit-style monitoring by compliance officials or others is expensive and difficult to design due to its morale and trust-dampening effects, which might make compliance rates worse.\(^{191}\) Similarly, integrity-centered approaches to promoting cultures of compliance, although offering potential benefits, can fail where internal messages are mixed—that is,

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186. Krawiec, Organizational Misconduct, supra note 12, at 599-601.


188. Along the way, he discusses a great deal of the underlying literature. See generally Langevoort, Monitoring, supra note 110, at 77-117. He has also explored these issues elsewhere. See supra notes 94 and 102 (citing articles).

189. Langevoort, Monitoring, supra note 110, at 80.

190. Id. at 86-89.

191. Id. at 86, 94-99, 101 (describing the various social and psychological phenomena audit-style monitoring produces that might limit its effectiveness). Langevoort’s discussion of the costs of zealous monitoring is consistent with the other scholars’ views of trust (and threats to trust caused by external incentives and punishments) as a key force in determining whether individuals defect from firm objectives. See, e.g., Blair & Stout, supra note 187, at 1804-05.
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when there is a disconnect between the emphasis on integrity and internal reward systems or senior management behavior.192

Cognitive, informational, and expertise deficiencies also make ex post assessments of good compliance difficult. Ex post judicial determinations of the effectiveness of compliance systems may suffer from hindsight and other biases, as well as from the challenge of finding objective indicators of good compliance.193 These deficiencies can lead to both types of errors: demanding excessively burdensome and costly forms of compliance structures or, conversely, tolerating ineffective or cosmetic compliance efforts.194

Langevoort’s conclusion is not that self-regulatory approaches should be abandoned, but rather, that they should be appropriately calibrated in terms of objectives (i.e. the standard set at a modest height—industry best practices), targets (supervisory personnel as well as firms), and sanctions, and care should be taken to ensure that ex post assessments are neither too forgiving nor too unforgiving.195 I return to these prescriptions in Part III.

It should be noted, however, that other scholars offer competing takeaways, arguing that self-regulatory approaches can create the wrong kind of dynamic between government and firm officials to produce effective compliance regimes. For example, Professor Miriam Baer observes that the model of compliance that has emerged as a result of the O.S.G. and the D.O.J.’s pre-charging practices has led to adversarial and costly battles between prosecutors and firm officials, as well as distrust between internal compliance officers and employees. She argues that this kind of interaction encourages ex post policing of employees rather than ex ante efforts to reduce noncompliance risks.196 Proponents of New Governance forms of self-regulation—including Ayres and Braithwaite, Lobel, and others—also suggest that purely adversarial approaches to (traditional or self) regulation employing punitive ex post sanctions for noncompliance do not create the conditions within which more effective compliance systems are likely to emerge.197 They advocate moving away from such approaches to the extent possible and towards ongoing front-end

192. Langevoort, Monitoring, supra note 110, at 107 (discussing how incentives can skew against the values message, and the centrality of “how the firm’s agents construe the legitimacy of what senior management says”).
193. Id. at 74, 113-14.
194. Id.
195. Id. at 111-17.
196. See Baer, supra note 12, at 999, 1016-17. Because ex post assessments of compliance structures are difficult, Baer contends that compliance officials are likely to err on the side of quantity rather than quality. See id. at 999.
197. See, e.g., Ayres & Braithwaite, supra note 118, at 54-68, 111-14; Amir & Lobel, supra note 5, at 2131 (pointing to behavioralism literature that suggests adversarialism reduces parties’ willingness to share information and engage in problem solving); Baer, supra note 12, at 1000-05 (surveying the New Governance literature).
collaborative efforts between regulators and firms, which foster compliance through problem solving, sharing information, and stakeholder participation.\(^{198}\)

The latter set of critiques of adversarial approaches offer precautionary insights on regulatory processes that designers of self-regulatory regimes ought to consider—some of which I will address again in Part III. Still, the window-dressing, or, at best, Langevoort’s mixed-signal and related behavioral explanations appear closer to the mark in elucidating why firm-focused self-regulation has not produced better outcomes. This is because self-regulatory regimes themselves do not create sufficient incentives for firms to maintain genuine compliance efforts. As detailed in Part I, in many areas of employment law, the risks of biting external sanctions for violations are too low to create incentives for meaningful self-regulation. In such circumstances, regardless of the particular form, the costs of genuine compliance (including the loss of the benefits of noncompliance) will almost invariably exceed the sanctions and other noncompliance costs discounted by the probability of enforcement. As New Governance proponents acknowledge, regulatory models that rely on firm-level compliance efforts will fall short if they are not backstopped by adequate sanctions for serious deviations.\(^{199}\)

Compliance first must make sense in terms of costs; the carrots and sticks of self-regulatory regimes matter only if there is a meaningful threat of significant external sanctions for violations.\(^{200}\) While such a threat exists in some corners of employment law, it is not present in many others. For example, because few work-law violations carry with them a risk of criminal charges, the O.S.G. and D.O.J. guidelines—rather than creating the risk of catastrophic sanctions on which Baer’s insightful critique is based—rarely entice firms to take costly steps to demonstrate good-faith efforts to comply.\(^{201}\)

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198. Ayres & Braithwaite, supra note 118, at 111-14; Amir & Lobel, supra note 5, at 2131. Of course, New Governance also has its critics, who question its potential effectiveness for various reasons. See, e.g., Baer, supra note 12, at 1001-02; Krawiec, Rogue, supra note 134, at 129-30; Krawiec, Cosmetic Compliance, supra note 12, at 490-92.

199. See, e.g., Ayres & Braithwaite, supra note 118, at 103; Lobel, Renew Deal, supra note 5, at 462 (“Always lurking in the background is the possibility that cooperative relations will become adversarial if one party believes it will be made better off from the change.”).

200. See Estlund, Rebuilding, supra note 5, at 361 (“The low rate of enforcement defies one of the key prescriptions of Responsive Regulation: The cost of noncooperation or ‘defection,’ primarily in the form of enforcement and sanctions, must be great enough to deter willful defectors and to protect cooperators against demoralizing and injurious competition from defectors.”).

201. Cf. Estlund, Rebuilding, supra note 5, at 347 (stating that a limited threat of enforcement gives regulators little leverage to promote self-regulatory innovation); Estlund, Who Mops the Floors, supra note 37, at 684-85 (“A growing body of research also supports the importance of maintaining a significant background threat of external enforcement to deter and punish those who defect from the self-regulatory regime.”).
The Ellerth/Faragher defense is different, since it provides a clear and direct incentive for firms to expend resources to establish anti-harassment practices and reporting procedures, firms often have reputational and other reasons to redress egregious conduct, and there is at least the threat of enforcement and civil liability under anti-discrimination laws. But the defense itself does not incentivize firms to take the more costly steps to eliminate the underlying conditions which might give rise to violations, given that enforcement and liability are uncertain; firm sanctions for such behavior are limited (and civil, not criminal); and, by and large, judges have found more limited measures sufficient.\textsuperscript{202}

Likewise, O.S.H.A.'s V.P.P. program did not fail because its structure was too adversarial or too dependent on punitive sanctions. On the contrary, this is a classic story of regulatory capture, insufficient regulatory resources, and basic firm incentives.\textsuperscript{203} Because firms were selected for the program based on their strong compliance records, the program itself did little to improve the compliance rates of the far larger universe of other firms.\textsuperscript{204} In addition, not only did O.S.H.A. lack the resources (and regulatory will) to be effective in monitoring the vast number of nonqualifying firms, but it also did not even engage in sufficient oversight to assure compliance by V.P.P. participants.\textsuperscript{205} And there is no private right of action under O.S.H.A. to fill the void in enforcement activity. In such an enforcement vacuum, far too few firms had incentives to cooperate meaningfully with the agency or engage in genuine compliance efforts.\textsuperscript{206}

To be clear, this is not intended to be a more general appraisal of the utility of New Governance or related approaches, although to date there is very little empirical evidence that these strategies produce positive

\textsuperscript{202} Cf. Krawiec, Organizational Misconduct, supra note 12, at 604-09, 610-11 (discussing how genuine promotion of diversity and addressing workplace biases can be costly and how implementing compliance structures that might satisfy courts may be far less onerous than actually altering business practices).

\textsuperscript{203} See supra note 176 and accompanying text; GLOVES OFF, supra note 1, at 13 (discussing O.S.H.A. budget cuts since 2001); GAO REPORT, supra note 30, at 15-18 (exploring O.S.H.A.'s lack of information gathering and reporting); Bisom-Rapp, What We Learn, supra note 13, at 1210 (“AFL-CIO Associate General Counsel Lynn Rhinehart recently noted that given its current level of resources, O.S.H.A. can conduct inspections of "each workplace under its jurisdiction on average once every 133 years."”); see also Orly Lobel, Interlocking, supra note 5, at 1080-81 (stating that O.S.H.A. is understaffed and overextended despite having a reputation for being overbearing).

\textsuperscript{204} See generally GAO REPORT, supra note 30, at 4-6 (describing criteria for becoming a V.P.P. site); Bisom-Rapp, What We Learn, supra note 13, at 1225-26.

\textsuperscript{205} GAO REPORT, supra note 30, at 12-15; Bisom-Rapp, What We Learn, supra note 13, at 1245-47.

\textsuperscript{206} Cf. Estlund, Rebuilding, supra note 5, at 385 (anticipating such an outcome under the VPP because of the "low background threat of public enforcement" and the lack of private enforcement, even for whistleblowers).
Again, scholars advocating these approaches recognize that a genuine risk of sanctions for violations is needed to make self-regulation work. Still, the V.P.P. story in particular casts doubt on these firm-based strategies as effective, cost-saving substitutes for more traditional, robust regulatory oversight where genuine compliance is very costly for firms—e.g., requiring expenditures for safety equipment or improvements that slow production—and norms of ongoing compliance are not otherwise established or adequately enforced.

Put another way, given that the firm’s bottom line usually is the bottom line, where the costs of compliance are high (as is the case with regard to various work-law mandates), legal sanctions for violations must be both stiff and probable. Only then will there be genuine incentives for firms to move beyond window dressing and collaborate with regulatory officials or other stakeholders on developing truly effective compliance systems.

2. “Deputization” Strategies

A second set of approaches seek to enhance legal compliance through incentivizing or empowering individual actors or groups of actors positioned to monitor firm activities and ensure firm compliance or report wrongdoing. These “deputization” strategies may operate independently or in combination with the foregoing doctrinal and quid pro quo approaches.

Deputization pervades S.O.X., which establishes a robust oversight role for independent auditors and the board’s audit committee, up-the-ladder reporting requirements for corporate counsel, and statutory protections for whistleblowers, as well as other structures to facilitate employee reporting. As discussed in more detail below, these vehicles for protecting or incentivizing firm actors to report wrongdoing are “capped off” by (criminally and civilly enforceable) duties imposed on high-ranking officers to certify firm compliance efforts.
These kinds of strategies now appear more and more frequently in the law—indeed, it is now standard practice to include whistleblower protections in new regulatory regimes. The Dodd-Frank Act goes further, providing not only whistleblower protections for employees, but also a "bounty" regime for those whose reports of wrongdoing lead to regulator sanctions.

Turning to the employment context, unions and union representatives historically have served this kind of gate-keeping function in firms in which they are present. Outside of unionized firms, individual employee whistleblowers—who are potentially protected by numerous statutory and common law anti-retaliation doctrines—can play such a role. Independently selected outside monitors also can perform this function, such as those appointed by the New York Attorney General to oversee compliance with the state’s Greengrocer program. And, where they exist, third parties—such as community organizations watchful of workers’ rights—can engage in ongoing monitoring.


215. See Estlund, Rebuilding, supra note 5, at 323, 360. Union attorneys also may play an important role in enforcing employment laws in non-union workplaces. See Catherine L. Fisk, Union Lawyers and Employment Law, 23 BERKELEY J. EMP. & LAB. L. 57 (2002) (outlining how unions help enforce employment law in non-union workplaces through outreach and litigation).

216. See Estlund, Rebuilding, supra note 5, at 373-75.

217. The Greengrocer program created a Code of Conduct that set forth minimum terms of employment for employees, including minimum wages, overtime requirements, and sick and vacation days. The program required greengrocers to attend a labor law seminar, post information about the Code, maintain payroll records, and allow the New York Attorney General’s office access to those records. The program also established and independent monitoring regime and reporting to the Attorney General’s office and a Code of Conduct Committee consisting of a greengrocer representative, an employee representative, and an Attorney General representative. A greengrocer that agreed to adhere to the Code would receive, in exchange, a promise from the state to refrain from investigating past violations of state employment laws, and compliant grocers would be provided with a Code of Conduct seal to display in their stores. For a discussion of the program’s history, monitoring and incentive structures, and successes, see generally Matthew T. Bodie, The Potential for State Labor Law: The New York Greengrocer Code of Conduct, 21 HOFSTRA LAB. & EMPL. L.J. 183, 185-86, 196-98 (2003); Estlund, Rebuilding, supra note 5, at 350-52.

218. See Estlund, Rebuilding, supra note 5, at 353-54, 389 (discussing the enforcement efforts of MCTF and other groups). So too could firms at the top of the supply chain, if they were properly incentivized to monitor compliance by suppliers as a result of broader enterprise liability or enforcement of the F.L.S.A.’s “hot goods” provision. See Weil, supra note 89, at 255; see also 29 U.S.C. § 217 (2010) (allowing district courts to enjoin the sale or transport of goods manufactured by individuals who were not legally compensated). While the “hot goods” provision has been utilized, limited enforcement resources hamper its effectiveness. Estlund, Rebuilding, supra note 5, at 348-50.
These deputization strategies can facilitate monitoring and oversight where they might otherwise be lacking. As a result, they have the potential to alter enterprise incentives by increasing the probability that wrongdoing within the enterprise is detected and reported, and, if uncorrected, leads to legal sanctions. Thus, building on these and other examples, Professor Estlund has made the case for "monitored self-regulation" of compliance with work-law standards, performed by independent tripartite monitors.

There are success stories here. For example, New York’s Greengrocer program is viewed by many as having been reasonably effective in reducing violations of workplace laws among participating grocers. But the effectiveness of such approaches may be limited or elusive, and particularly so in the employment-law context. First, outside monitors and gatekeepers engaged in oversight face informational disadvantages, at least without cooperation from firm decision-makers. Such monitoring also is costly, and, as a result, contingent upon public or third-party funding. Thus, for instance, the Greengrocer program was short-lived—largely disbanded in 2005 when external pressure subsided and grocers decided not to continue participating.

In addition, employee whistleblowers and various corporate gatekeepers whose livelihoods may be placed at risk have strong countervailing economic incentives to address wrongdoing, or at least not to make an external report once firm decision-makers refuse to correct the problem. They also may have to overcome powerful social and psychological constraints to acting against firm leaders and co-workers. Moreover, despite the continuing proliferation of statutory protections for whistleblowers and others who detect or report firm violations, the protection against retaliation is highly uncertain in individual cases. As suggested in Professor Lobel’s work and Professor Richard Moberly’s study of outcomes in S.O.X. whistleblower actions, there is both

219. See Estlund, Rebuilding, supra note 5, at 324-25, 379-80. Again, Ayres and Braithwaite also propose the use of independent, outside monitors. Ayres & Braithwaite, supra note 118, at 54-60.


221. See, e.g., Moberly, Structural Model, supra note 14, at 1114-15.

222. Cf Langevoort, Monitoring, supra note 110, at 92 (stating that audit-based compliance is very costly).

223. See Estlund, Regoverning, supra note 5, at 111-14.

224. Cf Moberly, Structural Model, supra note 14, at 1135-36 (discussing the shortcomings in internal reporting mechanisms prior to S.O.X.).

225. Cf Langevoort, Monitoring, supra note 110, at 94 ("[T]o the extent they find themselves in a position where it is professionally or financially costly to stand up to internal management because of pressures to generate additional income, a self-serving bias is introduced that makes auditors more inclined to rationalize management’s position."); Moberly, Structural Model, supra note 14, at 1120 (discussing employees’ failures to report wrongdoing).
ambivalence towards employee whistleblowing and very low rates of success for whistleblowers seeking relief.\textsuperscript{226}

Most importantly in the employment context, because current and proposed deputization strategies do not alter the basic incentives that frame firm decision-making, gatekeepers and monitors often will face internal resistance.\textsuperscript{227} Consider how this distinguishes existing deputization strategies in employment from those implemented in the securities context. The focus of securities law—including S.O.X.'s deputization structure—is manager-shareholder agency problems, not firm-level (i.e., aligned shareholder and manager) violations of external regulation. Hence, in the securities context, there is a significant possibility that some set of actors high in the firm hierarchy—including outside directors—will have an incentive or normative commitment to support such oversight.\textsuperscript{228} And these incentives are bolstered by the fact that the primary targets of securities regulation, high-ranking corporate insiders, are now subject to criminal and civil sanctions for knowingly failing to address noncompliant behavior.\textsuperscript{229} This does not mean that the reports of possible securities violations by whistleblowers or other gatekeepers will be welcomed by firm decision-makers. But at least those deputized to discover, report, and prevent violations under that regime are likely to have highly placed corporate actors with potentially overlapping interests or loyalty-based motivations. Indeed, although S.O.X.'s scheme for encouraging monitoring and

\begin{footnotesize}
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\item[226.] See supra note 14 and accompanying text. This is despite the fact that S.O.X.'s whistleblower protections were viewed originally as the "gold standard." See Estlund, Rebuilding, supra note 5, at 376; Estlund, Who Mops the Floors, supra note 37, at 684 (discussing the hurdles employees face in reporting violations, including collective action and free-rider problems as well as the threat or fear of reprisals).
\item[227.] See Moberly, Structural Model, supra note 14, at 1135-36. Moreover, when high-ranking decision-makers send mixed signals (or worse) about gatekeepers, they are also likely to be viewed as oppositional by lower-level corporate personnel. See supra notes 141-142 and accompanying text.
\item[228.] See Moberly, Structural Model, supra note 14, at 1138-50 (discussing the benefits of S.O.X.'s mandate that firms create a mechanism for anonymous reporting by employees to independent, outside directors).
\item[229.] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 302, 906, 116 Stat. 745 (2002). Of course, there is also enterprise liability in securities law. In private litigation and otherwise, the enterprise is frequently accountable for securities violations, either directly, as the issuer, or indirectly, through indemnification of senior managers. Indeed, this is a highly controversial and criticized aspect of our securities regime. See Langevoort, On Leaving Corporate Executives, supra note 94, at 627-29, 632. Nevertheless, the main aim of securities law is to address misbehavior by individuals within the firm that is contrary to interests of shareholders or other securities holders. See id. at 649 ("Corporate liability is a derivative of individual liability; by and large (with a few exceptions), courts have rejected the idea that there can be enterprise liability under Rule 10b-5 without a showing that at least one natural person acting within the scope of his or her authority was primarily liable. In that sense, individual executive liability is the starting point under federal law, and the key issues in private litigation focus on executive culpability.").
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whistleblowing has shortcomings, there is evidence that it has been successful at reducing the incidence of securities fraud.

Work law is different. As discussed in Part I, noncompliant behavior in work law, unlike securities law, frequently is not the result of shareholder-management or manager-employee agency problems, but, rather, aligned shareholder and manager incentives to reduce costs. Thus, while existing deputization strategies may introduce players with potential incentives to detect wrongdoing and foster compliance, they do not alter the countervailing incentive driving firm decision-makers—making money for shareholders and themselves.

Moreover, as addressed below, high-ranking firm decision-makers rarely owe individualized compliance obligations that might counter these firm-level incentives. Furthermore, to the extent decision-maker norms align with this incentive structure (and I would suggest, as a descriptive matter, that they usually do), behavioral norms such as cooperation, trust, and firm loyalty very well may cut the other way in the work-law context—that is, towards minimal or noncompliance. Firm decision-makers therefore may have largely unchecked incentives and behavioral and normative commitments to maximize the firm’s surplus by ignoring possible work-law violations.

As a result, the existing deputization strategies in the work-law context are unlikely to foster a genuine internal commitment to compliance. Their success is dependent upon either the continued availability of sufficient resources to support ongoing third-party monitoring, which, again, is very costly, or other kinds of lasting and robust enforcement-based support for

230. See Moberly, Structural Model, supra note 14, at 1126-31 and 1167-78; supra note 226 and accompanying text.


232. See Moberly, Structural Model, supra note 14, at 1160-61 (distinguishing anti-retaliation regimes in employment law from whistleblowing related to financial regulation because, in the former context, exposure of the wrongdoing may cost the firm money, while, in the latter, shareholder interests may differ from those of insiders). This is also consistent with Krawiec’s observation that an agency-cost model of organizational misconduct is incomplete, since misconduct may enhance profits. Krawiec, Organizational Misconduct, supra note 12, at 599.

233. See supra note 222 and accompanying text.
the efforts of internal gatekeepers—such as the consistent imposition of severe sanctions on firms that mistreat whistleblowers. As recent history shows, neither is assured. Indeed, it is largely because of the lack of stable and sufficient resources for independent monitoring and the uncertainty of privately enforceable protections for employees that there is an enforcement gap in the first place. Thus, unless bolstered by other changes affecting firm decision-makers’ incentives, such strategies are likely to succumb to the same pressures that hinder other regulatory approaches.

III. UNPACKING “EMPLOYER” TO FIND EFFECTIVE CORPORATE SELF-REGULATORS

Existing self-regulatory approaches to altering internal compliance norms fall short in the employment context because they fail to confront and counteract the enterprise-level incentives that continue to drive firm decision-making norms in the other direction. Absent changing the very purpose of the firm—that is, abandoning the shareholder wealth maximization norm—the only way to alter enterprise-level incentives to foster compliance is to make noncompliance more costly. But, again, both traditional external enforcement and existing self-regulatory strategies often fail to do so.

Missing from much of the discussion is the possibility of moving employment law away from near-exclusive reliance on enterprise—i.e., “employer”—liability. Where noncompliance incentives cannot be addressed adequately or reliably at the enterprise level, greater compliance still can be achieved by altering the incentives of the firm’s primary decision-makers.

This could be accomplished through a properly calibrated regime that focuses on high-ranking corporate officers—making them personally accountable for compliance failures. Here, I offer such a model: an administrative regime that imposes “professional-like” obligations on high-ranking corporate officers to ensure compliance with work-law mandates, enforced through civil sanctions for those who negligently fail to detect, prevent, and correct workplace-law violations within the enterprise. Such regime might be conceptualized as another deputization approach to enhancing compliance; for example, it creates a constituency within the

234. Cf. Estlund, Rebuilding, supra note 5, at 355 (stating that there will “simply never be enough inspectors to rely on public enforcement alone”).

235. There has been some scholarly discussion of whether supervisors ought to be personally liable for discrimination and discriminatory harassment. See, e.g., Rebecca Hanner White, Vicarious and Personal Liability for Employment Discrimination, 30 GA. L. REV. 509 (1996).
firm charged with promoting legal compliance. Yet a properly constructed officer-accountability regime has greater promise than other deputization strategies for a number of reasons. Most importantly, it directly incentivizes those best positioned within the enterprise to structure firm oversight efficiently and affect internal norms to promote compliance.

A. Work Law’s “Employer” Focus

At present, work-law doctrine largely overlooks primary corporate decision-makers. It focuses instead on enterprise liability: the employing firm, rather than individual decision-makers acting on behalf of the enterprise, is accountable for violations of labor and employment laws. For example, most statutory protections for workers impose legal obligations and liability for violations on “employers” instead of supervisory or controlling personnel.236

There are exceptions on the margins. A few statutory regimes—most notably O.S.H.A.,237 the F.L.S.A.,238 and state wage and hour laws239—impose criminal sanctions on firm decision-makers for egregious violations. But such sanctions are rarely utilized for various reasons, including that they require proof of willful conduct and the general reluctance to impose criminal sanctions on corporate officials except in the most egregious circumstances.240

Corporate decision-makers also may be subject to civil liability in certain instances. For example, as the tortfeasor, individual supervisors may be held liable for certain intentional torts that occur at work, such as defamation, intentional infliction of emotional distress, and, in some states, tortious interference with contract. Moreover, a few recent statutory regimes, including the F.M.L.A. and S.O.X.’s whistleblower provisions do provide for individualized liability.241 The F.L.S.A. does as well, providing that officers with supervisory control may be deemed “employers” under

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236. Glynn et al., supra note 2, at 39 (describing statutes that impose liability primarily on employers).
239. See, e.g., N.Y. LAB. LAW § 198-a (Consol. 2010) (“[The] officers and agents of any corporation . . . who knowingly permit the corporation . . . to violate this chapter by failing to pay the wages of any of its employees in accordance with the provisions thereof, shall be guilty of a misdemeanor . . . ”); CAL. LAB. CODE § 553 (Deering 2009) (“Any person who violates this chapter is guilty of a misdemeanor.”); Harsh Trivedi & Ilissa Brownstein, Employment-Related Crimes, 39 AM. CRIM. L. REV. 355, 369 (2002).
240. See Estlund, Rebuilding, supra note 5, at 360.
the statute and, hence, vicariously liable as if they were the employing enterprise.242

Yet in most of the foregoing circumstances, the availability of individual civil liability does not alter firm decision-making incentives because of employer-provided indemnification, which assures that enterprise will cover the individual’s liability in the run of cases. Indeed, as a practical matter, the F.L.S.A.’s supervisory liability regime addresses a different noncompliance problem: it functions as a kind of “veil piercing” doctrine that counteracts the moral hazard of limited liability by holding supervisors accountable for wage and hour violations when the firm is insolvent.243 This is of particular importance in the context of fly-by-night labor contractors and other undercapitalized firms, since recovery against such firms is unlikely. However, it has little or no effect on incentives in solvent firms, since the firm itself will almost always indemnify or insure supervisors against losses.244 For this reason, plaintiff employees often do not include officers as defendants, despite the availability of potential claims against them.245

Substantive corporate law also does not impose a meaningful duty on supervisory personnel to prevent, detect, or correct violations of work-law standards. Directors—elected by shareholders to manage the affairs of the corporation—have no independent duty to ensure firm compliance with work-law mandates. Although the directors’ duty to monitor, as articulated in the In re Caremark Derivative Litigation246 and Stone v. Ritter247 line of cases, has received much scholarly attention, and some have suggested that it could be used to enhance compliance with work law and other mandates,248 on its own, the duty is unlikely to be meaningful. First, Stone confirms that Delaware has set the bar exceedingly high: only the directors’


243. Several state wage laws seek to provide similar protection by piercing the corporate veil to hold shareholders accountable for unpaid wages. See N.Y. BUS. CORP. LAW § 630 (2010); Wis. STAT. § 180.0622 (2010).

244. See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 613 n.147 (stating that deterrence may be undermined by the fact that firms pay for insurance and provide indemnification).

245. For example, individual supervisors are named as defendants in only about five percent of S.O.X. whistleblower claims. Richard Moberly, Protecting Whistleblowers By Contract, 79 U. COLO. L. REV. 975, 1040-41 n.354 (2008).


247. 911 A.2d 362 (Del. 2006).

“utter failure” to monitor firm activities will constitute breach, and, thus, a fully deliberated board decision not to implement a more robust oversight system—for cost or other reasons—almost certainly would immunize directors from liability.

More fundamentally, the Caremark/Stone duty extends from directors to the firm, not to the employees or other stakeholders the external legal regime is designed to protect. As it is usually conceived in the American context, the primary aim of corporate law is to address management-shareholder agency problems by aligning director incentives with those of the firm acting for the benefit of shareholders. This is why shareholders enforce the duty (derivatively on behalf of the firm) rather than the third-party victims of the illegal activity. Thus, if the absence of monitoring or the failure to promote compliance does not adversely affect the firm’s surplus, there has been no breach or, at minimum, no harm to the firm.

Similarly, officers—those whom directors choose to manage the day-to-day affairs of the business—owe no independent duty to monitor for or prevent illegal conduct within the enterprise. Oddly enough, despite the fact that high-ranking officers frequently wield the most de facto power in a business enterprise and are viewed by shareholders and the public as the firm’s top leadership, they are usually overlooked in substantive corporate law. Securities law imposes robust disclosure obligations (with corresponding sanctions for violations) on officers and other insiders, but state corporate-law focuses almost exclusively on director obligations, largely ignoring officers and other supervisors, except in their capacity as directors or when they exert direct influence over board members.

Nevertheless, officers and other high-level employees owe fiduciary duties—including a duty of care—to the firm. Yet such duties, if actually enforced by the directors, run to the firm itself, not to third parties harmed by firm legal violations. As with directors then, if effective monitoring for work-law violations is not in the firm’s interest, officers violate no

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249. 911 A.2d at 370.
250. See Arlen & Kraakman, supra note 118, at 714-15, 752-54.
252. See Podolny, supra note 131.
253. Indeed, only in 2009 did the Delaware Supreme Court definitively state that officers owe fiduciary duties. Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009); see also Miller v. McDonald (In re World Health Alternatives, Inc.), 385 B.R. 576, 591 (Bankr. D. Del. 2008) (citing Lyman P.Q. Johnson & Mark A. Sides, Corporate Governance and the Sarbanes-Oxley Act: The Sarbanes-Oxley Act and Fiduciary Duties, 30 WM. MITCHELL L. REV. 1149, 1205-06 (2004) (“Although often overlooked, corporate officers, including senior officers such as the . . . and others are ‘agents’ of the corporation. . . . Even though senior officers of corporations typically have employment agreements, they still occupy a fiduciary status in relation to the corporate principal.”)).
254. See Gantler, 965 A.2d at 708.
corporate-law obligation by failing to engage in it. Thus, in solvent enterprises, neither employment nor corporate law creates independent incentives for firm decision-makers to prevent, detect, and correct violations of work-law standards.

Of course, corporate law is structured so that directors and officers have broad discretion in determining how they run the enterprise, and, for a host of reasons—public relations, a personal sense of ethics, risk aversion, etc.—firm decision-makers may seek to promote compliance to a greater extent than a cold cost-benefit analysis might predict. And many do. Still, while the guiding decisional norms that this regime produces might vary by circumstance, firm, and individual actor, the predominant norm framing decision-makers’ actions remains maximizing the firm’s surplus for the benefit of shareholders and, through performance-based compensation, themselves. Loyal and trustworthy behavior therefore usually means serving the interests of shareholders, not those of other stakeholders, at least when they are in conflict.

In other words, because officers and directors are largely immune from work-law-related liability and are compensated for increasing the firm’s surplus, their compliance incentives and decisional norms are closely (albeit not perfectly) tied to those of the enterprise—i.e., to shareholders’ incentives. Further, to the extent that they can escape the consequences of noncompliance—say, by exiting with their gains before the firm is adversely affected by liability—officers in some circumstances may have an even greater incentive to forgo compliance measures than the firm itself.

B. An Alternative Approach to Self-Regulation: Holding High-Ranking Officers Accountable for Work-Law Violations

In this section, I propose a model for counteracting enterprise-level disincentives to comply with work-law mandates: subjecting high-ranking corporate officers to nonshiftable civil sanctions for negligent failures to detect, correct, and prevent violations. Although this kind of independently enforceable, individualized duty to ensure adherence to work-law standards has no exact parallel in existing law, the obligations it would impose on officers would be akin to those that regulate professionals and others who owe supervisory duties. It is also builds on Professor Langevoort’s

255. Cf. Baer, supra note 12, at 1014 (noting that revising performance goals downward to reduce the probability of noncompliant conduct at lower levels to meet such goals is contrary to prevailing views about success).

256. I offer this as a descriptive matter, rather than a normative or prescriptive one. While, ironically, the law is not clear on the foundational question of the purpose of the firm, most firm decision-makers believe maximizing shareholder wealth is the primary objective. See Timothy P. Glynn, Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law, 58 CASE W. RES. L. REV. 1067 (2008).
suggestion for a bifurcated approach to corporate compliance—that is, supplementing vicarious firm-level liability for legal violations with civil penalties for individual supervisors who negligently fail to avoid or correct such violations by ignoring red flags.\footnote{257}

Supplementing enterprise ("employer") liability with an independently enforceable high-ranking officer duty would create powerful financial and reputational incentives for primary decision-makers to enhance compliance and compliance norms both within firms and across industries, despite otherwise inadequate enforcement risks. Such a regime would charge officers with the task of navigating and accommodating the conflicting interests of the enterprise and work-law mandates, and ensuring the workplace structures and cultures tend towards genuine compliance. At the same time, sanctions could be calibrated to avoid over-deterrence.\footnote{258}

A self-regulatory regime that would add yet another layer to existing internal compliance structures will be met with understandable skepticism. After all, one lesson from the foregoing discussion is that regulatory models that rely on internal compliance systems may add costs without reducing violations. Nevertheless, because the widely accepted purpose of the business firm—making money for shareholders—is unlikely to change, and external enforcement risks are likely to remain inadequate, it is worth experimenting with new approaches to self-regulation.

Obviously, important procedural and substantive components would have to be worked out with far greater specificity than I can address here. Still, this kind of regime could be structured in a variety of ways at either the state or federal level. For example, it could be adopted to further specific regulatory goals, such as enhancing compliance with wage or safety regulations, or the duty could be generalized to cover a broad range of workplace legal violations. In addition, the duty could be implemented using one of a variety of recognizable mechanisms: e.g., borrowing loosely from securities law, high-ranking officers could be obliged, as a condition of holding office in a firm operating within the jurisdiction, to certify periodically that they have taken reasonable steps to ensure enterprise compliance with work-law mandates.

Regardless of its scope and particular structure, a number of features are necessary to make such a regime effective in promoting compliance while limiting, to the extent possible, costs and unintended consequences for firm decision-makers and their enterprises. First, the duty ought to be imposed on high-ranking officers rather than either lower-level supervisors or directors. Second, negligence ought to be the operative standard (rather than strict liability or knowing conduct) and this duty ought to be enforced

\footnote{257} Langevoort, Monitoring, supra note 110, at 116-17.

\footnote{258} This is also consistent with Langevoort’s prescription. See id. at 116.
through an administrative regime and adjudicatory process before a tripartite body rather than through a private right of action. Finally, monetary and nonmonetary sanctions for breach ought to be designed to avoid both over-deterrence and risk-shifting (under-deterrence).

1. **Deputizing High Ranking Officers**

To date, deputization strategies in the work-law area have not focused on supervisory personnel. Intra-firm supervisor liability and accountability regimes that do so can impose responsibility at a number of levels in the decision-making hierarchy—on directors, high-ranking officers, or mid- and lower-level supervisory personnel. Among these, high-ranking officers are best positioned to balance the pursuit of profits with adhering to legal obligations and providing leadership that genuinely fosters compliance throughout the enterprise.

   a. **High-Level v. Low-Level Managers**

The centrality of senior management in the success or failure of firm self-regulation is self-evident. The incentives, compliance structures, and organizational climate that high-level managers maintain—while unable to prevent all deviations—have a profound impact on agent behavior within the enterprise.²⁵⁹

Mid- and lower-level managers (all supervisory personnel below high ranking officers) sometimes are better situated to detect unlawful conduct, and some employees, such as compliance department personnel, are able to devote a greater portion of their time and expertise to monitoring firm activities. Yet these types of employees are too low in the hierarchy to ensure ongoing compliance, at least on their own. Only decision-makers at a higher level, including directors and highest ranking officers—in particular C.E.O.s, but also perhaps other senior officers—have genuine authority to commit resources to compliance on an ongoing basis and, accordingly, to maintain adequate monitoring and corrective structures.²⁶⁰

In addition, only high-ranking decision-makers are able to balance business and compliance incentives, messages, and norms. Because they

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²⁵⁹. Krawiec, *Organizational Misconduct*, supra note 12, at 599 (stating that senior management "plays an important role in shaping agent conduct" and discussing various mechanisms through which such managers shape the organizational environment, including organizational culture, reward systems, and commitment to ethical conduct).

²⁶⁰. Although I do not draw a bright line between "high-ranking officers" and other officers and managers, the former includes only those at the very top of the firm hierarchy with ultimate executive authority over resource allocation, personnel, and compliance matters. In some firms, this would be limited to a single officer (the C.E.O. or other top executive), but, in other firms, it might include additional officers—e.g., C.O.O.s, C.F.O.s, or General Counsel—who exercise such ultimate authority over some subset of firm activities and deal directly with the board of directors.
exercise control over resources and rewards within the firm, including pay and promotion structures, high-ranking officials are uniquely positioned to ensure such practices place neither overt nor subtle pressure on lower-level managers and employees to forgo compliance contrary to the firm's stated policies. As Professor Langevoort and others have observed, avoiding such mixed signals is critical. A classic example of a performance regime undercutting stated compliance objectives is Walmart's now abandoned compensation structure for store managers, which, through its focus on improving each store's bottom line, drove managers to cheat on worker hours.

Moreover, because they are the actors that lower-level managers, employees, and the others perceive as the leaders of the firm, high-ranking managers are uniquely positioned to articulate (through words and actions) the principles and policies that frame behavior within the firm, including how the goals of profit and compliance are to be accommodated. Indeed, since they rank above both frontline managers and compliance personnel and other internal gatekeepers, their leadership is essential to ensure effective working relationships and interactions between these potentially competing constituencies within the firm.

For similar reasons, high-ranking corporate decision-makers are better positioned than others to develop and maintain lasting norms of compliance both within firms and across industries. Various other firm actors,

261. See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 599 ("[A] climate in which employees are encouraged to pursue or are rewarded for pursuing the bottom line even at the expense of breaking laws or the company's code of conduct is more likely to produce agents who violate laws and conduct codes."); id. at 600 (rewards and punishments that fail to account for the methods by which performance goals are achieved are more likely to produce legal violations than those that address such means); Langevoort, Monitoring, supra note 110, at 85 ("If the supervisor's contract compensates him based on, say, the sales of the agent without penalty for compliance deficiencies, the supervisor's incentives are skewed toward pressuring members of his team to perform with inadequate regard to legal compliance."); see also Baer, supra note 12, at 1008-09 ("After all, noncompliance often comes about not because an employee has some burning desire to violate the law, but because he needs noncompliance to substitute for some performance goal that has been previously set within the firm. Because he lacks sufficient voice to challenge the performance goal as unrealistic ex ante, he violates the law ex post in order to meet previously set expectations."); Jeff Allen & Duane Davis, Assessing Some Determinant Effects of Ethical Consulting Behavior: The Case of Personal and Professional Values, 12 J. BUS. ETHICS 449, 456 (1993) (finding that firm culture and reward systems trump ethics codes in determining employee behavior).

262. Langevoort, Monitoring, supra note 110, at 89, 110; see also Krawiec, Organizational Misconduct, supra note 12, at 599-600 (stating that agents who view management's commitment to legal compliance and organizational rules is symbolic rather than real are more likely to disregard such laws and rules).


265. See Langevoort, Monitoring, supra note 110, at 74 (discussing competing constituencies).
including lower-level supervisors, compliance personnel, and counsel, may have internalized compliance norms. But the common theme in the literature on ethics and integrity-based approaches to instilling norms of compliance within the enterprise, as well as the legal literature on why internal compliance systems succeed or fail, is that effective internal compliance requires genuine buy-in by managers at top levels. It requires leadership on the front end and diligent avoidance of inconsistent messages, particularly at times in which compliance and business objectives might appear most in conflict. In addition, although ensuring such norms penetrate all corners of the enterprise is a difficult task, particularly in large firms with layers of hierarchy and sub-units with differing cultures and incentives, only high-ranking officials are positioned to marshal the resources and wield the authority to undertake it.

Moreover, as firm leaders obliged to ensure compliance but also highly motivated to perform, high-ranking officials would be best situated to press for industry-wide norms that rebuke or shame others who might seek to undercut them in competitive markets by engaging in noncompliant behavior. Thus, the goal of fostering a culture of compliance is most likely to be achieved by ensuring those at the top of the firm hierarchy have powerful incentives to pursue it.

Finally, because it would be neither inconsistent with nor preclusive of other strategies to protect workers, a regime holding high-ranking decision-makers accountable would be a useful and perhaps necessary supplement to ensure effectiveness. Because it would facilitate buy-in at top levels, it would serve as a "capstone" for other self-regulatory structures. If provided with compelling reasons to detect and prevent violations in far corners of the enterprise, decision-makers would be far more inclined to foster compliance norms as well as support forms of gatekeeping (including internal whistleblowing). In addition, to the extent self-regulatory structures are premised in part on the efficiencies of cooperative arrangements between regulatory officials and firm decision-makers, the compliance incentives such accountability would foster may be critical,

266. Krawiec, Organizational Misconduct, supra note 12, at 577 (citing numerous studies); Langevoort, Monitoring, supra note 110, at 108-09, 110 (discussing agents' need to perceive senior management's commitment on integrity-based matters); see, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1997), available at http://www.eeoc.gov/eeoc/task_reports/best_practices.cfm (discussing how buy-in at top levels is essential for self-regulation to work).

267. See Langevoort, Monitoring, supra note 110, at 109-111 (discussing that successful firms will align employees' belief systems with the enduring values of the company and consistent actions and leadership of managers).

268. See, e.g., Baer, supra note 12, at 986-88. As Professor Baer notes, so too is striking the right balance between compliance officials' independence and their familiarity (closeness) with others within the enterprise. See id. at 988.
particularly where the probability of agency detection of violations in real time is low.

b. **High Ranking Officers v. Directors**

However, the duty to monitor should not extend to all high-ranking corporate managers. High-ranking officers (again, C.E.O.s and perhaps other senior officers), rather than directors, are the appropriate target of a duty to monitor for two different sets of reasons. First, although the board of directors is charged with managing the affairs of the corporation, in large enterprises, the role of (outside) directors is largely relegated to strategic oversight and the selection and monitoring of officers. Officers, on the other hand, are typically those that exert direct control over the daily affairs of the business.

Perhaps ironically, high-ranking officers rather than directors also are perceived by both internal and external constituencies as the firm’s principal leaders—i.e., those primarily responsible for success and failure, as well as establishing and maintaining policies and norms. Thus, they are better positioned to supervise lower-level managers and to draw on their superior information, expertise, and moral authority to implement optimal compliance structures.

In addition, placing such a duty on officers instead of directors will help facilitate the optimal balance of incentives to ensure compliance with work-law obligations and produce a surplus for shareholders. A principal “corporate-law” objection to imposing this kind of duty on firm managers might be that it will enhance the agency problem arising from the separation of ownership and control. Imposing a duty to consider other interests might exacerbate this problem by 1) deterring managers from taking risks beneficial to shareholders and 2) providing cover for managerial decisions contrary to shareholder interests. It is for this reason that many corporate-law commentators and shareholder advocates have favored strict adherence to the shareholder wealth maximization norm—rather than a norm accounting for other stakeholder interests—and, accordingly, insisted that managerial duties only flow “up” in the enterprise.

While this concern is legitimate, it is overstated and can be mitigated. First, it only applies to publicly traded or other firms in which there is a

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271. *See* Glynn, *Unlimiting*, supra note 270, at 400-03 (discussing why officers are in a better position than directors to control risks and monitor corporate activity).

272. *See* Glynn, *Communities*, supra note 256, at 1073-74 (discussing how American corporate law values almost exclusively the interests of managers and shareholders, not those of other stakeholders.).
separation of ownership and control. Absent such separation, managerial and shareholder interests usually are aligned. Moreover, although the obligation suggested here would expand corporate officers’ duties to comply with the law, the imposition of duties on officers that may conflict with shareholder interests is nothing new. Corporate insiders already are subject to criminal and civil liability for violations of various external legal mandates. And elsewhere in the law other kinds of fiduciaries have to navigate multiple, potentially conflicting legal or professional obligations. For example, as a practical matter, attorneys owe far more robust fiduciary duties to their clients than corporate managers owe to the firm (and its shareholders), yet attorneys are subject to professional obligations that may require them to act contrary to their clients’ interests to serve the ends of justice. This system, although far from perfect, has proven workable over time.

But potential agency problems also can be mitigated by treating different kinds of firm managers differently—that is, by imposing the duty on high-ranking officers but not directors. Such officers, serving their own interests and subject to the proposed duty to monitor, will have an incentive to bargain for sufficient resources and authority to put into place effective work-law compliance systems; directors, on the other hand, who will continue to be nominated by shareholders (or, at minimum, expected to act in their collective interest), can seek limits on such resources and authority as well as bargain for officer compensation structures that align their incentives with those of shareholders. By retaining the authority to hire and fire officers, as well as structure their compensation, directors can ensure—albeit imperfectly—that officers have powerful, countervailing incentives to serve shareholder interests. Indeed, since their compensation and tenure will remain tied to firm performance, officers will have genuine incentives to ensure that compliance structures are both effective and cost-efficient.²⁷³

The placement of the duty on high-ranking officers therefore is one way in which this regime would seek to strike a balance between shareholder and worker interests. The next two sections address the other ways in which would address these competing considerations.

²⁷³. This is one way to counteract the tendency of compliance officials to err on the side of too much compliance, rather than focusing on quality and cost-efficiency. See supra note 196 and accompanying text. It may also reduce the probability of rent-seeking by those in the compliance industry, since it creates the incentive for officers to purchase cost-efficient compliance services. Cf. Donald Langevoort, Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law’s “Duty of Care as Responsibility for Systems,” 31 J. CORP. L. 949, 950 (2006) (discussing such rent-seeking and probable excessive expenditures on compliance under S.O.X.).
2. A Negligence Standard Enforced By a Tri-Partite Panel of Experts

a. A Generalized Negligence Standard

In large enterprises, perfect legal compliance is unachievable. Thus, the aim of this high-ranking officer regime should be somewhat more modest: it should, as Professor Langevoort has argued, press firm decision-makers to put into place internal monitoring and prevention systems that, in terms of effectiveness and cost-efficiency, match or exceed “best practices” in the industry. This is best achieved by imposing a general negligence-based duty.

Although this type of regime would require establishment of an external enforcement mechanism (discussed below), a generalized due care standard is self-executing and cost-efficient in the sense that it lets high-ranking officers develop their own monitoring, reporting, and norm-generating systems. It would facilitate the migration towards industry best practices as officers, concerned about sanctions but incentivized to perform, would seek to follow industry leaders in developing genuinely effective but also cost-efficient internal controls and cultures. It also avoids the inefficiencies of an externally mandated internal control system—that is, one that dictates the specific types of structures to be implemented regardless of firm circumstances—and can account for changing workplace and organizational structures. At the same time, for the reasons discussed in the next section, it would reduce the danger of paper compliance practices created by pre-determined safe harbors.

With the potential for strict enterprise liability in the background, this negligence-based duty for officers is superior to both a regime requiring scienter for establishing breach and one imposing strict liability. Particularly when violations tend to occur at lower levels, establishing knowledge on the part of high-ranking officials is difficult. Indeed, requiring scienter might produce undesirable incentives, such as the creation of layers of bureaucracy to shield officers from knowledge of underlying violations. At a minimum, officers would be deterred from

274. See supra note 194 and accompanying text. Like Langevoort, by “best practices,” I mean monitoring, rewards, and other practices developed by industry leaders in compliance. See Langevoort, Monitoring, supra note 110, at 115 (“My candidate would be industry best practices. We would search for what firms at the high end of voluntary compliance practices have accepted.”). Thus, “best practices” does not refer to standard practices. Nor does it mean practices promulgated by regulatory bodies, which might freeze in place common approaches rather than promote innovation towards truly best practices. See generally David Zaring, Best Practices, 81 N.Y.U. L. REV. 294 (2006). Also, guidance on which approaches are worth emulating would not be left solely to industry groups, and, in determining whether particular practices constitute breach, the agency obviously would not need to defer to industry.

275. Cf. Langevoort, Monitoring, supra note 110, at 114 (discussing the risk that firms might gain credit for off-the-rack compliance procedures that may not be effective).
discovering violations hidden in far corners of the enterprise. A properly applied negligence standard, in contrast, would not have this effect, since high-ranking officers would be accountable for undiscovered violations that reasonable compliance measures would have detected. Moreover, assuming sufficient sanctions for breach (discussed below), both complicity and complacency strategies would pose serious risks, since establishing breach for the failure to find and prevent such violations would be straightforward if similar enterprises avoided such misconduct at relatively low cost. While lower-level corporate actors still might try to hide violations, higher-ranking officials would have strong incentives to try to prevent such conduct.

A strict liability regime also would not strike the right balance. The traditional resistance to imposing biting sanctions on individuals without fault might temper or nullify enforcement against non-negligent officers. Moreover, although holding officers strictly liable would induce them to prevent some misconduct within the enterprise, it would not induce them to find and correct existing violations. In other words, it might exacerbate the already existing firm-level incentive to hide violations ex post and might encourage some officers to shine less light ex ante on firm operations in which violations are likely but external detection is unlikely. A negligence regime would create more appropriate incentives and accompanying norms: it would reward officers that put into place reasonably effective mechanisms for preventing, discovering, and correcting violations. The risk of officers’ choosing not to bring to light violations difficult to detect would remain, but the protection a fault-based regime affords for detection and correction efforts at least would create a countervailing inducement.

The concern cutting decisively in favor of strict liability for firms—that fault-based limitations on enterprise liability do not force firms to bear the entire cost of their harmful conduct or fully compensate victims—is not present here, since the firm itself would remain vicariously liable for the underlying violations. Indeed, the point of this regime is to impose a separate duty on officers (independently inducing them to prevent and correct violations) that supplements firm-level liability for those violations.

276. See Arlen & Kraakman, supra note 118, at 714-15. Also, if lower-level employees are aware of officers’ resistance to discovering violations ex post, they may be more inclined to violate the law ex ante. See id.

277. See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 576 (discussing how vicarious liability creates an incentive to avoid compliance structures that increase detection); Arlen & Kraakman, supra note 118, at 708.

278. See Arlen and Kraakman, supra note 118, at 714-15.

279. See Krawiec, Organizational Misconduct, supra note 12, at 574, 579-80; see also Glynn, supra note 85, at 229 (arguing that extended enterprise liability in the wage and hour context ought to be strict rather than fault-based).
The benefits of this dual scheme are somewhat akin to those of "composite liability" regimes, which impose strict liability on firms but vary sanctions depending on compliance efforts. But the introduction of an independent target for sanctions is different in a critical respect: composite enterprise liability regimes depend on successful firm-level enforcement, which, for the reasons set forth in Part I, might be elusive; sanctions for breach of the officer duty proposed here do not. This would not solve the victim compensation problem, but it would reduce the probability of violations in the first place.

Of course, the flexibility inherent in a negligence inquiry also ensures some indeterminacy, and, as discussed in Part II, there is the risk of ex post errors in assessing due care—i.e., setting the bar too high or too low. The next two subsections address these concerns.

b. Applying and Enforcing the Standard: A Tripartite Adjudicatory Structure

The structure of the regime for enforcing this standard would be critical in determining its effectiveness. A potential criticism of a negligence-based model is that it adopts an adjudicatory approach—that is, it relies on uncertain ex post assessments of the reasonableness of compliance efforts (subject to hindsight bias) and punitive sanctions, rather than focusing on building better compliance systems through ex ante collaboration between regulators and firms. Such concerns are legitimate but can be addressed or minimized by the nature of the forum and enforcement scheme (administrative rather than private enforcement); the make-up of the adjudicatory body; and the regime’s non-exclusivity. At the same time, this approach would be less costly to maintain and more cost-efficient than one requiring ongoing monitoring.

First, the potential unwieldiness of a negligence standard would be alleviated by the fact that an administrative agency would enforce the duty and alleged breaches would be brought before an expert administrative tribunal. An administrative body devoted to addressing complaints about compliance practices and with institutional memory is better situated than courts to develop standards and provide guidance to firm decision-makers on what kinds of measures are both reasonable in terms of cost and

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280. For a discussion of the benefits of composite liability regimes, as compared to strict liability and duty-based regimes, see Arlen & Kraakman, supra note 118, at 726-30; Skeel, supra note 251, at 1830-31.

281. See supra notes 196-98 and accompanying text; Krawiec, Organizational Misconduct, supra note 12, at 580-81 (discussing the various reasons why judicial and agency determinations regarding whether internal compliance structures meet the due care standard might be faulty).
effective at preventing violations. Furthermore, while line drawing with regard to negligence can be difficult, charges and sanctions in very close cases are unlikely, since, as a practical matter, an administrative body probably only will have sufficient resources to pursue egregious or continuous violators.

Yet, at the same time, such a body is less likely to be appeased by compliance efforts that are cosmetic attempts to correct violations or to cover up misconduct. Over time, an administrative tribunal composed of repeat players is more likely than a judicial one to develop the expertise to view firm practices holistically—e.g., whether firm compensation and compliance structures create conflicting messages for downstream managers and how firm practices compare to evolving industry best practices—and pierce through stated compliance policies and procedures to determine actual effectiveness in preventing misconduct. Thus, both in terms of its knowledge base and the focus of its inquiry (determining the reasonableness and genuineness of an officer’s compliance efforts), this body’s posture would be very different from that of, say, a federal court attempting to determine whether an employer has established the Ellerth/Faragher affirmative defense in a lawsuit brought by a single employee.

An administrative tribunal charged with determining breaches of the duty and imposing sanctions would be most effective if it has balanced representation—consisting of representatives from government, management, and labor. Such a tripartite structure offers several benefits. It would ensure consideration of management’s perspective, which might make the relationship between the regulatory body and high-ranking officers as a class less adversarial—i.e., reducing some of the adversarialism that scholars have suggested stymies beneficial cooperation

282. Cf. Baer, supra note 12, at 953, 977-78 (criticizing ex post prosecutorial approaches to promoting self-regulation in part because prosecutors lack the expertise and interaction with regulated firms that administrative officials, and compliance is the type of contextual, fact-specific topic that should be in the province of experts).

283. Cf. Arlene & Kraakman, supra note 118, at 732-33 (suggesting that the negligence inquiry in the reasonable monitoring context often is not that difficult, since the optimal level of monitoring need not be determined, but rather, only whether additional monitoring was cost-justified).

284. Again, the ability of firms to mimic genuine compliance efforts and elude judicial and agency efforts to differentiate such systems from effective ones this is a principal concern of those critical of negligence and composite liability regimes. See, e.g., Krawiec, Organizational Misconduct, supra note 12, at 580, 582.

285. Cf. Estlund, Rebuilding, supra note 5 at 396 (questioning the ability of judges and arbitrators to make these kinds of judgments and stating that “[w]hat is needed is some actor or set of actors with enough independence, expertise, and accountability to employee interests to perform these functions”).

286. Although this kind of tribunal would be unique, other monitoring programs—including the Greengrocer program and the regime resulting from MCTF’s settlement with Global Building services—have been overseen by tripartite bodies. See Estlund, Rebuilding, supra note 5, at 388.
between corporate and regulatory authorities. At the same time, peer participation in the finding of breach could enhance the shaming function—i.e., the reputational bite—of sanctions.

This tripartite structure would also provide a vehicle, albeit a somewhat attenuated one, for worker interests to participate in oversight. As Cynthia Estlund has argued, such participation is an important ingredient in ensuring worker buy-in in oversight systems. Tripartism also reduces the risk of capture. Indeed, unlike some professional sanctioning bodies whose membership is limited to those within the profession, balanced representation would provide a check against capture by regulated parties and external legitimacy.

While much may depend on the particular scheme’s design, ideally, such a body would view its mission as shaping norms not just through monetary and reputational sanctions that deter and shame individual officers who act egregiously, but also through providing guidance for and interacting with industry and labor leaders. Likewise, assuming the body were open to stakeholder feedback, it might provide a much-needed vehicle for leaders in compliance and otherwise socially responsible corporate practices to help establish binding norms that reduce the risk of competitors who lack such a taste for compliance seeking to undercut their efforts.

The adjudicatory structure itself might draw from a number of models, including those in the professions. Thus, for example, the tripartite board heading the agency would appoint hearing committees or hearing officers and disciplinary counsel. Counsel would receive complaints about legal violations and information from other sources, and conduct an investigation to determine whether to bring charges against an officer for breach of the

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287. See, e.g., Amir & Lobel, supra note 5, at 2131 (contending adversarialism reduces parties’ willingness to share information and engage in problem solving).

288. Cf. Skeel, supra note 251, at 1826-35 (discussing how shaming sanctions work best when imposed by and within relevant communities and noting that it can work among corporate managers).

289. Estlund, Rebuilding, supra note 5, at 325. As Professor Estlund also discusses, genuine tripartism within nonunionized firms faces a number of impediments, including N.L.R.A. restrictions (to avoid “company unions”), employer aversion, and dynamic workplace structures and boundaries. See id. at 364-66.

290. See Ayres & Braithwaite, supra note 118, at 54-60 (arguing that tripartite third-party monitors independent of both regulators and the regulatory subjects can reduce capture risk); Estlund, Rebuilding, supra note 5, at 363 (arguing that tripartite structures reduce the risk of capture).

291. Although beyond the scope of this article, selection of independent worker-side representatives could be achieved in various ways, with the participation of labor and other worker advocacy organizations.

292. Such guidance could be provided informally or through some formal feedback mechanism.

293. Put another way, this structure would provide opportunities for high-road corporate actors to influence the norms that drive decision-making within their respective industries. Cf. Estlund, Rebuilding, supra note 5, at 381 (discussing, in support of her proposed monitoring regime, participation in norm development by high-road actors).

duty to exercise due care. Hearing officers or committees would make findings of fact and recommend sanctions, which would be subject to review by the full board. Some judicial review would be built into the model, but the board’s determinations would receive deference.\footnote{Cf. id. § 1:602 (providing for a similar regime).} To facilitate the scheme’s expressive, deterrence, and instructive functions, findings would be made public.\footnote{Id. §§ 1:801-1:803 (stating the reasons for publicizing findings of lawyer misconduct).}

As is apparent, this scheme would not create a private right of action against breaching officers. Akin to the oversight bodies and disciplinary proceedings in the professions, the purpose of this regime is to promote compliance through addressing officer failures to act reasonably in monitoring for and preventing violations.\footnote{Of course, the adjudicatory body in this proposal would be different than some professional disciplinary boards in that it would not be dominated by members of the regulated group.} And, as discussed below, the professional-like sanctions would be designed to deter future breaches, rather than to compensate. Thus, the regime would supplement existing enterprise-level enforcement regimes by enforcing an independent duty directly on officers and sanctioning them for breach rather than creating an alternative, private enforcement mechanism for work-law violations.

Yet, as discussed in the prior part, a finding of breach would not depend on establishment of civil liability against the firm for individual violations; an officer could be found to have breached the duty in circumstances in which individual workers were unsuccessful in seeking relief. This regime therefore would capture underlying violations or patterns of violations that—for any of the number of reasons described in Part I—might not have resulted in civil or criminal liability for the firm, providing a counterbalance against enterprise-level incentives that cut in favor of noncompliance due to chronic under-enforcement.

Finally, it is worth noting the other cost-efficiencies of such an approach. This regime would not be costless: firms, pressed by their officers to do so, would invest greater resources in compliance efforts, and agency enforcement would require public funding for investigation and adjudication once complaints or information regarding noncompliance were received. Yet, costs will increase most for those firms whose current practices are either inadequate to prevent noncompliant behavior or designed to avoid compliance—and, of course, internalization of these costs is the point. Also, because the regime would not mandate particular internal controls, and officers will have robust incentives to utilize cost-efficient compliance measures, firm practices and industry collaborative efforts would migrate towards more effective and cost-efficient systems. Further, as in other contexts, the cost of prevention would be a component of the negligence inquiry.
Moreover, an adjudicatory approach, while subject to the legitimate criticisms addressed above, undoubtedly would be cheaper to implement than regulatory regimes that rely on ongoing oversight.\textsuperscript{298} Assuring adequate resources for ongoing, effective monitoring is perhaps the greatest challenge for \textit{ex ante} self-regulatory approaches, including Professor Estlund's "monitored self-regulation." Indeed, while there is much to commend in Professor Estlund's critique of self-regulatory models, and while monitoring performed by independent tripartite gatekeepers would be welcome, her prescription is susceptible to one of the primary forces that has hamstrung traditional regulation: the lack of sufficient resources to ensure effectiveness over time.\textsuperscript{299} Far fewer resources would be needed to sustain a regime that is limited to investigating complaints and charging a relatively small number of offenders.\textsuperscript{300} And, critically, if reasonably effective, such a regime would prompt firm decision-makers to commit their firm's own resources to monitoring and to take other steps to ensure compliance. This is something monitoring models cannot achieve on their own unless, over time, they are able maintain a sufficient probability of firm-level sanctions to ensure the cost of noncompliance exceeds that of compliance—an unlikely outcome for the reasons discussed in Parts I and II above.

Of course, the \textit{ex post} approach I argue for will fall short if inadequate government and independent monitoring ensures too little information regarding legal violations trickles up to those charged with enforcing the duty. Still, because this regime would supplement rather than replace other enforcement mechanisms, officials could rely initially on detection and information gathered by others. These sources could include the findings of other agencies, filings and findings in employment-related private litigation and arbitration, worker complaints, referrals by judges and plaintiffs' counsel, and mandatory firm disclosures made pursuant to other regimes or to other agencies. The administrative body could also receive complaints and information directly from workers' rights groups, legal clinics, unions, and compliant competitors concerned about being undercut by unlawful practices. Moreover, to the extent other deputization models—such as monitored self-regulation—are implemented, they too could provide leads.

\textsuperscript{298} Cf. Estlund, Rebuilding, supra note 5, at 360-62 (expressing doubt that administrative agencies will ever have sufficient resources to engage in such ongoing, intensive monitoring).

\textsuperscript{299} For a skeptical view of self-regulatory models in work law, see Paul M. Secunda, Book Review, 64 INDUS. & LAB. REL. REV. 203 (2010) (reviewing CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010)).

\textsuperscript{300} Some of the hearings themselves also might be costly and time consuming, requiring significant fact-finding and multiple experts. This is particularly true when complex enterprises are at issue and when several issues are in serious dispute—e.g., whether and how many violations have occurred; whether better, cost-effective alternative compliance systems were available in the circumstances; and whether the officer breached in the circumstances. Nevertheless, such costs would be dwarfed by those costs that an effective, ongoing monitoring regime would entail.
Even if none of these are sufficient on its own, together, they offer a fairly robust set of information sources.

There are other ways to facilitate cost-efficient access to information. For example, firms operating within a jurisdiction could be required to report periodically all workplace complaints filed against them (in any forum), as well as the results of any adjudication or settlement. Even without implementing such mechanisms, however, by collecting and analyzing data from all of the above sources, agency officials could detect patterns and particularly troublesome practices, and then focus investigatory resources on egregious and repeat offenders.

c. Professional-Like Sanctions

If an officer is found to be in breach, the next issue is the level and type of sanctions that would be appropriate. Given the position and role of high-ranking officers in business enterprises, sanctions should be calibrated to address conflicting concerns. First, they should be limited to avoid over-deterrence and exacerbation of shareholder-management agency problems—the principal “corporate-law” concern. At the same time, they should be insulated from risk-shifting and sufficiently robust to prevent under-deterrence—the principal work-law concern. Thus, criminal sanctions as well as personal, nonshiftable civil liability enforced through private rights of action might go too far. Monetary sanctions that could simply be shifted to the enterprise (through indemnification) or to others would not go far enough.

Instead, a range of personal, “professional-like” disciplinary sanctions—with pecuniary and reputational consequences—could achieve the right balance. These might include the kinds of purely reputational sanctions we see in the legal and other professions, such as a censure or

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301. See Langevoort, *Monitoring*, supra note 110, at 116 n.98 (“[W]e do not want to force supervisors to be overly cautious or so fearful that they demand expensive risk premiums from the firm as part of their employment contract. I would not suggest tort-like joint and several liability (much less criminal prosecution), but rather a carefully moderated disciplinary structure where limited sanctions appropriate to the nature of the conduct can be imposed. The SEC broker-dealer structure does this fairly nicely.”); Krawiec, *Organizational Misconduct*, supra note 12, at 613 (noting that because severe forms of liability—including criminal liability—are rarely imposed on individuals who did not actively participate in or know about misconduct, legal decision-makers are likely to avoid imposing such liability except in the most egregious circumstances, such as when the individual knew about the misconduct).

302. For a discussion of how legal sanctions that may be shifted to the enterprise will fail to deter managers from engaging in unlawful conduct, see Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004). See also Krawiec, *Organizational Misconduct*, supra note 12, at 613 n.147 (stating that firms’ indemnifying and insuring directors and officers may undermine deterrence).
reprimand, for more minor breaches. Serious breaches of the obligation to monitor would justify more robust measures such as monetary penalties or disgorgement that mandates forfeiture of compensation during the period of noncompliance. Such breaches may also justify forward-looking sanctions such as bar or suspension from serving and being compensated as an officer in any firm. Again, these types of sanctions are akin to those available to disciplinary authorities for professionals; they also parallel the sanctions the SEC can impose, which include biting civil penalties and nonmonetary sanctions—suspension and bar—when corporate officers fail to correct or prevent securities violations.

Such sanctions are more limited in scope and severity than criminal liability or potentially crushing civil liability for employment-law violations, the magnitude of which might lead to excessive risk aversion on the part of officers as well as deter agency officials from prosecuting. Still, they would be sufficiently biting both monetarily and in terms of reputational consequences to provide robust incentives for high-ranking officers to seek to comply. Even if they are rare, the imposition of such sanctions may have a powerful effect on managerial behavior. Although there is much debate over when and how legal sanctions can alter decisional norms, the behavioral literature suggests that properly calibrated and targeted sanctions for improper conduct can have a much broader impact on boundedly rational corporate decision-makers. And particularly when they go beyond mere monetary penalties, rare sanctions imposed within a relevant community—here, high-ranking corporate officers—may have an even more powerful expressive (shaming) effect than those that are common.

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303. See, e.g., MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT 10.1 (2001) (providing a range of sanctions for breach of professional standards, including disbarment, suspension, reprimand, admonition, restitution, and the payment of costs).

304. If implemented at the federal level, this would be a complete bar; if implemented by a state, the bar could extend to any firm doing business within the jurisdiction.

305. See Langevoort, On Leaving Corporate Executives, supra note 94, at 653 (“The Commission’s remedial tools are extensive as well, including the ability to seek civil penalties with respect to the violation of any provision or rule, the ability to gain disgorgement of any gains or profits tainted by a violation, and a bar against officers from continued employment in that role at a public company if the violation demonstrates substantial unfitness to serve.”). See also 15 U.S.C. § 7243 (2006) (providing for forfeiture by the CEO and CFO of any bonuses, and other incentive compensation and profits when the issuer restates its financials because of material noncompliance). For a general discussion of the SEC’s remedial authority and tools, see generally JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 817-20 (5th ed. 2006).

306. Of course, such civil liability would only be crushing if the loss could not be shifted to the enterprise. As discussed in Part III.A., if it could be shifted (via indemnification or otherwise), and the enterprise remained solvent or was adequately insured, then such liability would under-deter, since the officer would suffer no loss at all.


308. See generally Skeel, supra note 251, at 1832-33 (discussing the potential effectiveness of shaming penalties in the corporate context); see also Donahue et al., supra note 34, at 14 (stating that
Moreover, like those applicable to professionals who violate their obligations, officer sanctions would have to be structured to ensure that offenders could not easily shift the risk of loss to others. An officer should be prohibited on public policy grounds from shifting any portion of these sanctions "up" to the firm itself—via indemnification, insurance, or otherwise. This is necessary to avoid officers' simply converting the risk of sanctions into another cost for the firm (and, thus, re-introducing the enterprise-level problem of the costs of compliance exceeding those of non-compliance). In addition, the availability of backward-looking monetary sanctions—disgorgement or forfeiture of compensation earned during periods of breach—would ensure exit would not result in avoidance and reduce the incentive to hide noncompliance.

Finally, this regime would be most effective if the duty were nondelegable, both within the enterprise (to subordinate officers and employees) and outside of the enterprise to subsidiaries or third-party labor suppliers. Again, nondelegability is a feature of professional obligations, which cannot be avoided through contracting out aspects of professional services. It is also important in this context since, if the duty could be easily avoided in this way, it would further enhance the incentives to outsource work (and employment-law-related risks) to others.

As discussed in Part I, there are already existing models for extending liability for work-law violations beyond the traditional boundaries of the employment relationship, and other scholars and I have offered proposals for holding end-user firm accountable for third-party labor providers' violations. Nevertheless, the duty proposed in this article would not, in-and-of-itself, eliminate the incentive to elude work-law mandates via outsourcing. While a broadened approach to firm accountability that makes


309. See, e.g., Skeel, supra note 251, at 1865-66 (noting the problems with allowing indemnification for violations by corporate actors of external legal regimes in which shareholders might benefit from violations).


311. See supra note 93 and accompanying text.
avoidance more difficult would be preferable, the duty proposed in this Article at least would extend as far as enterprise accountability does under existing law, including to circumstances in which workers are misclassified as nonemployees.

d. **Summary and Limits**

Taken as a whole, a negligence-based high-ranking officer duty (enforced through an administrative adjudicatory process in which breaches may result in monetary and nonmonetary sanctions) has no exact parallel elsewhere in the law. There are other regimes that impose sanctions on supervisors or managers for compliance failures. Again, the S.E.C. already wields the power to impose nonmonetary sanctions on corporate officials who fail to correct or prevent securities law violations. We also observe similar supervisory accountability regimes in the regulation of broker dealers, accountants, and attorneys.

Still, one could argue that the proposed duty would be more onerous than securities law and professional obligations. It treats high-ranking corporate officers somewhat like “professionals,” who must take reasonable steps to ensure their firms’ compliance with external legal mandates and are subject to sanctions for failing to do so. Yet some high-ranking officers manage far larger, more complex enterprises than most professionals and the duty described addresses matters potentially outside of the officers’ area of expertise. Also, if the duty is a far-reaching one (that is, extends beyond a single area of work law), it would impose compliance burdens on officers that are substantively far greater than the other regimes impose.

Nevertheless, the challenge of promoting effective compliance in large and complex enterprises does not make this regime unworkable. First, high-ranking officers in large firms have access to proportionately greater resources and expertise on how to maintain effective self-regulatory structures. And, as discussed earlier, best practices and successful models

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312. Elsewhere I make the case for extending liability for wage and hour violations throughout the productive enterprise in part to combat avoidance strategies. See generally Glynn, supra note 85, at 227-35. It is worth noting that existing approaches to ensuring compliance within supply chains would provide guidance for firms if such an extension of the duty were imposed. Nike’s regime is one example. See supra note 127 and accompanying text. In addition, firms at the top of an enterprise facing the threat of a shutdown under F.L.S.A.’s “hot goods” provisions have developed mechanisms for monitoring compliance. See, e.g., Weil, supra note 89, at 255.


314. See, e.g., 15 U.S.C. § 77s(b) (2006); id. § 7215 (establishing investigation and disciplinary responsibilities for the Public Company Accounting Oversight Board); see also IRS News Release, IR-2010-82 (July 6, 2010) (discussing the disbarring of a CPA from practicing before the IRS for failing to exercise due diligence in determining whether client data provided for tax returns was accurate).

315. See supra note 310.
in similar firms would provide reliable guideposts for officers’ selecting compliance strategies. Moreover, the negligence inquiry itself would take into account the size and character of the particular firm and the difficulties of ensuring compliance in the circumstances—e.g., a high-ranking officer in a large, multi-division enterprise would not be held to the same level of constructive knowledge as an attorney or small business owner managing a small team of assistants.

Despite its broad implications, this approach to regulatory reform has limits. It would not address shortcomings in the substance of employee rights, or, as discussed above, scope limitations that allow firms to elude some obligations. Nor would it ensure compensation to victims of work-law violations. Moreover, while it contemplates employee participation, it is not a substitute for collective bargaining or other direct forms of employee voice in firm decision-making. And, although a tripartite structure will reduce the risk of capture, like any administrative enforcement scheme, its success will depend on the competence and commitment of administrative officials.

Still, for the reasons discussed, this proposal offers a way to enhance legal compliance, even when firm-level enforcement risks are insufficient or uncertain, by altering the incentives of those within enterprise best positioned to ensure such compliance. And it does so cost-efficiently by placing the burden on high-ranking officers themselves to devise effective compliance systems and keep up with industry best practices.

CONCLUSION

Although once viewed as promising alternatives to more traditional regulatory structures, self-regulatory models for promoting compliance with work-law mandates have failed to fill the gaps left by the decades-old decline in government oversight, unionization, and effective private enforcement. The primary cause is both straightforward and ironic: these models have failed precisely because the holes left by receding oversight and enforcement risks render their inducements too weak to ensure firms engage in genuine self-regulation. But the principal decision-makers in these firms would approach compliance with far greater vigor if they were bound—personally—to do so by professional-like duties.

In an era in which the shortcomings in external firm-level enforcement are unlikely to be eliminated, shifting the focus to incentivizing firm decision-makers themselves offers a potentially effective and cost-efficient way to trigger greater firm-level commitment to norms of compliance. Indeed, such an approach would bring self-regulation full circle. Where both non-legal and legal self-regulatory strategies have failed to do so, this approach would press corporate decision-makers to shepherd their firm cultures towards compliance with legal and other societal norms, and away
from the single-minded pursuit of maximizing the firm’s surplus. Put another way, high-ranking officers would have to take self-regulation seriously.