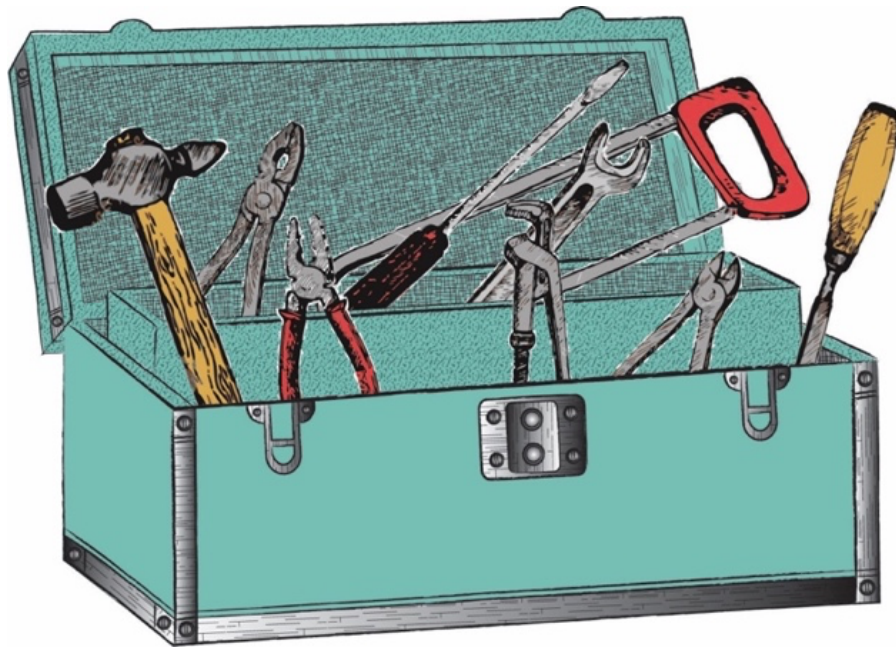


The Labor Standards Enforcement Toolbox



Tool 10: Managing for Strategic Enforcement: A Conceptual Toolkit

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EXECUTIVE SUMMARY

In this brief, directed at agency leaders and managers, we will examine: (1) how strategic enforcement helps agencies to better fulfill their missions; (2) suggestions for how the transition to strategic enforcement might be accomplished; (3) some examples of the kinds of changes in practice a focus on strategic enforcement can bring about; (4) the importance of recognizing that such changes in practice may trigger understandable resistance, the value of easing that resistance, and some examples of how to do it; (5) some ideas on how to adapt performance expectations and reviews consistent with the focus on strategic enforcement; (6) and a framework for sustaining the focus on strategic enforcement.

INTRODUCTION

The mission of worker protection agencies is grounded in the conviction that worker dignity, and worker rights that are guaranteed in the law, are to be respected. This includes ensuring a fair day's pay for a fair day's work, safe and healthy working conditions, and raising standards and improving job quality in historically exploitative, low-wage sectors of the economy.

Ensuring dignity and the fundamental right to legal protections for all workers remains a promise as yet unfulfilled. For worker protection agencies, it's an enormous challenge that constantly requires new and creative thinking. Doing the work as we always have done it – through “standard operating procedures” regarding what work to perform, how to perform it, and how to evaluate it -- is highly likely to enshrine a status quo that continues to fall short of the agency's goals.

Strategic enforcement offers a different, creative, adaptable path, that can take worker protection agencies significantly closer to fulfilling their promise to workers, to achieving the worthy mission of supporting worker dignity and enforcing worker rights.

Of course, when a new approach like strategic enforcement is chosen, agency leaders and their managers face the challenge of effectively adopting, guiding, and implementing the change. Managers who had historically overseen a program aimed at receiving individual complaints, responding to those complaints, and resolving them

– a worthy but limited approach – will be learning about and implementing a different, strategic, more systemically-targeted and impactful model for achieving the agency’s goals. Likewise, the agency personnel they supervise will be called upon to embark on a whole new enforcement journey. Piloting the ship effectively entails creativity and flexibility, and each agency’s trajectory will be unique. But, whichever strategic path is chosen, in this brief we offer examples, ideas, and templates to help agency leaders and managers get underway.

WHY STRATEGIC ENFORCEMENT?

Every organizational unit has a purpose, a reason for being, a mission. From that purpose, or objective, all activity flows. Ideally, the activities the organization undertakes are designed to most effectively achieve, or contribute to the achievement, of the objective.

The overall mission or objective of labor standards enforcement agencies is straightforward: to ensure full compliance with the laws the agency enforces, by all regulated entities. Even with ample resources, that’s a daunting task. With limited resources, it’s that much the harder. Which is why thoughtful, evidence-based decisions on how those limited resources can be deployed to most effectively promote achievement of the mission is so crucial. And that’s where [strategic enforcement](#) comes in. Strategic enforcement is all about leveraging the agency’s resources to maximize their impact in order to get as close as possible to the goal of universal compliance.

Key elements of strategic enforcement include the following:

- Identifying enforcement priorities, including targeting industries high in violations but low in complaints
- Triaging complaints – not treating them all alike – and conducting proactive investigations
- Using all enforcement tools, including surveillance and subpoenaed documents and testimony as appropriate
- Company-wide investigations, and joint employer and up-the-chain assertions of liability
- Maximizing legal penalties to deter violations, especially in cases of retaliation

- Strategic outreach and communications, including “naming and shaming” of serious violators
- Case resolutions that promote ongoing compliance, including compliance monitoring provisions
- Partnering with community stakeholders and other agencies
- Building a culture of planning, evaluation, and review

PLANNING FOR CHANGE

Identifying Opportunities to Reset

Organizational change, including change like the transition to strategic enforcement, begins by stepping back and assessing the agency’s activities with fresh eyes. In such an assessment, we might ask the following questions:

- What is the agency’s overall mission?
- Given its mission, what are the primary objectives and goals the agency seeks to accomplish in the year (or years) ahead?
- After reviewing the agency’s current activities, are the current activities designed to most effectively accomplish the goals the agency has identified for the year (or years) ahead?
- Should those activities be retained as is – because they use the agency’s limited resources as strategically and impactfully as possible – or should they be modified or even eliminated?
- What other activities should be considered, evaluated, and to more effectively reach goals selected?
- If new activities are selected using this process, what is the plan for managing the transition and implementing them effectively in the year ahead?

In many organizations, the end result of the process of identifying or re-affirming the mission and establishing broad goals and objectives over a period of years is

documented in a *strategic plan*. In conjunction with adoption of the strategic plan, organizations will also create an *operating plan* (or “operational plan”) that outlines the selected activities the organization will undertake to achieve the aims and objectives set out in the strategic plan. It provides the framework for an organization's day-to-day operations. The operating plan often covers a one-year period.

Create a Transition Plan

Having identified revised goals and a new set of activities to accomplish those goals, leadership should be prepared to encounter institutional, as well as individual, resistance to these alterations in previously-established practices. Hence, it’s important to also frame an action plan aimed at achieving buy-in and engaging players at all levels of the agency to implement the transition to strategic enforcement. The following are elements of what such a plan might look like:

Model Plan:

1. The agency head addresses all the “troops,” laying out the agency’s mission, and explaining why the new effort to evaluate current practice, toward the goal of enhancing agency impact, has been adopted.
2. Agency personnel receive training on the current activity analysis presented above, and on the options for change – including learning about the elements of strategic enforcement.
3. Teams are assembled, drawing from the experience of personnel at all levels of the agency, tasked with assessing current activities and considering, and ultimately recommending, new pilot activities intended and likely to enhance the agency’s impact.
4. Once leadership has adopted a new pilot strategy, all levels of the enforcement team – office leaders, supervisors, investigative staff, and enforcement attorneys – engage in further discussion on how best to implement it.
5. New implementation protocols are developed, reviewed, adopted, and clearly communicated.

6. Regular mechanisms for providing and evaluating feedback on the implementation of the protocols are established, so that adjustments, as appropriate, can be made.

AN EXAMPLE OF CHANGE: A NEW STRATEGIC ENFORCEMENT PRACTICE IS BORN

The federal Fair Labor Standards Act (FLSA), enforced by the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), provides that when employers violate the law's minimum wage or overtime requirements, they owe the affected workers the back wage amount they should have paid **and** an equal amount in liquidated (double) damages. Workers can sue for back wages and liquidated damages, and so can DOL. But the law also says that in "supervised settlements" DOL can get back wages, and that section doesn't mention liquidated damages.

As a result, for decades the FLSA had been interpreted as meaning that when WHD finishes its investigation and makes a demand to the violating employer, it can ask for back wages only. It was assumed that double damages came into play only if the case got filed in court. Since only a tiny percentage of WHD's investigations wound up in court, the vast majority were resolved for back wages only.

In effect, WHD's longstanding practice of requiring only payment of back wages actually rewarded wage theft by granting an interest-free loan to violators. This was the opposite of deterrence – instead, for recalcitrant employers it made sense not to comply, because if and when they got caught they weren't punished; they were simply required to pay the workers what they should have been paying all along.

From a strategic enforcement deterrence perspective, this was a problem that cried out for an answer. So, almost 15 years ago, DOL launched a new approach.

Under the "liquidated damages in lieu of litigation" ("LDLL") protocol, DOL began to give violating employers the option to pay double damages via a settlement, or face the prospect of paying double damages, plus other costs and expenses, in a lawsuit. Under this practice, employers aren't *obligated* to pay double at the close of an investigation that finds violations. But if they want to resolve the case without being sued for double damages, they can pay the double damages in settlement.

This protocol both provides workers the double damages the law says they're entitled to when they're paid improperly, and it offers far greater deterrence than case resolutions for back wages only.

Managing Change: The LDLL Strategy

The LDLL strategy is a good example of how a key strategic enforcement principle – identifying and implementing the most effective tools available to the agency – can work toward achieving the goal of widespread compliance. Implementing this change, however, required careful, concerted efforts on the part of DOL leadership.

First, DOL leadership recognized that none of its WHD investigators, some of whom had been enforcing the FLSA for 30+ years, had ever sought to recover liquidated damages as part of a settlement at the administrative level. Some of these investigators weren't just skeptical; they thought it was wrong to tell violating employers that they needed to pay back wages *and* liquidated damages.

DOL leadership acknowledged that the staff's accepting, and embracing, this significant – and strategic -- change in enforcement practice would require a shift in the agency's existing settlement culture. Effective execution of that shift included two key elements:

Messaging:

The shift was accomplished, first, through clear messaging by top leadership that this change had the potential to be far more effective than the agency's long-established practice. Leadership made this case to staff by communicating the following information:

1. **The legal case** - Leadership explained that workers who are victims of wage violations are **entitled by law** to both back wages and an equal amount in liquidated damages. Under the LDLL approach, it was explained that employers weren't being forced to pay double in settlement; they were free to take their chances in court. But if they didn't have a reasonable good faith basis for violating the law, and wanted to resolve the matter, they would have to pay double.

2. **The broader, undesirable consequences of the current practice** - Leadership made clear that seeking only back wages in effect rewarded violating employers with an interest-free loan, to the detriment of “high road” employers who pay their employees properly.
3. **Why the new approach was more effective** – Leadership emphasized that the long-standing practice of requiring employers to pay back wages only had no deterrent value at all, while the new protocol of requiring double back pay would cause recalcitrant employers, who might otherwise be inclined to short-change their employees, to think twice.

Transition Tools:

Leadership also recognized that new tools needed to be developed to facilitate the transition, which included:

- **A script** - The pilot team working on the transition plan – including WHD staff and lawyers in the Regional Solicitor’s office – drafted a script to help investigators make the demand for LDLL.
- **Legal on-site support** - in the first “piloted” cases using the LDLL approach, DOL lawyers accompanied the investigators during the negotiations. Because the lawyers had to be comfortable with filing suit for double damages if the employer refused to pay, cases were run by the lawyers before the demand was made. This also gave the investigators more confidence in making the demand.
- **Written guidance for frontline staff** - New internal guidance was developed in the National Office of WHD, with assistance from the Solicitor’s Office, spelling out the new policy and how it should be implemented.
- **Trainings** - Regional and local trainings were given, repeating the messaging on the strategic rationale for the change and the legal basis for it, and providing nuts-and-bolts instruction on how to implement it.
- **Communication with the public and the regulated community** - And very importantly, DOL publicized each LDLL settlement, to get the word out to the regulated community that it was doing this

Through the combination of effective messaging and practical transition tools, DOL was able to promote a cultural and operational shift in the Department. Accordingly, the LDLL protocol is alive and well today.¹ The result has been the recovery of many millions of dollars in back wages plus liquidated damages, for workers across the country. And, employers throughout the economy have been sent a clear message that they should no longer expect an interest-free loan when they violate the law.

ENGAGING AND EMPOWERING THE STAFF

To get closer to reaching the objective of universal compliance with worker protection laws, agency personnel need to regularly question whether the agency is doing its work as impactfully as possible. This includes examining whether the agency is using all obvious enforcement tools most effectively, and also whether other tools may be available, but hidden.

That examination is best accomplished by making frontline enforcement staff real partners in the endeavor. This includes:

- Encouraging staff to question how and why they agency is addressing the challenges it faces in the way it does
- Offering study and training opportunities to staff intended to broaden understanding of the immediate and longer-term compliance challenges the agency faces, and exploring possible solutions
- Creating regular forums for staff to offer ideas about how enforcement could be done differently to be more impactful
- Supporting staff to analyze and discuss whether the agency is using all obvious enforcement tools most effectively, and whether other tools may be available, but hidden;
- Assessing suggestions and proposals made by staff thoroughly and respectfully; and

¹ Midway through the Trump administration, the LDLL strategy was scaled back, but it was never repudiated. It has been revived to its pre-Trump era standing in the Biden Labor Department.

- Recognizing and appreciating notable staff efforts, both privately and through sharing with the staff.

Fostering Staff Engagement: An Example

Successful strategic enforcement demands an understanding of what factors drive non-compliance with worker protection laws, and what industries and workplaces are most likely to violate, because those factors are at play. Key among those factors is the breakdown of the traditional employee/employer relationship, on account of increased outsourcing of job tasks that were historically all performed under one “roof” but are now subcontracted or franchised or performed by employees misclassified as “independent contractors.” Several years ago, Professor David Weil shone a light on this problem, and its harsh impact on labor law compliance and on workers, in a seminal work, “The Fissured Workplace.”

When the book was published, its relevance to strategic enforcement was immediately recognized. That led one DOL regional solicitor’s office to initiate a Fissured Workplace reading group. Participation in the group was encouraged but voluntary, and once a week several attorneys met and discussed successive chapters of the book, with a different participant leading each session. The group completed the book, and decided amongst themselves to continue meeting as the “Fissured Workplace Committee.” With management’s blessing, they tasked themselves with reviewing how the laws they enforce might be applied to address the problems the Weil book presents. They then regularly met to examine whether any matters referred to the office for litigation, or ones still at the investigative stage, might be suitable as “fissured workplace” test cases: ones where companies that sought to avoid their legal obligations to their workers -- by improperly denying an employment relationship -- would be held responsible as employers under the applicable law.

These lawyers also developed trainings for the agencies to help them identify cases where this unlawful “fissuring” could be addressed. Their efforts were rewarded. In one case, a roofing worker fell several flights when a clearly deficient scaffolding plank broke under his weight. He had been hired by another roofer who worked for a building contractor. The contractor claimed the roofer was an independent contractor,

and that he wasn't responsible for the OSHA violation that was cited. But the OSHA inspectors had been trained to look carefully at this kind of case, to determine whether the higher-level contractor was responsible too. They could have just cited the small-operator roofer, but instead they dug deeper, and made the case that the building contractor really controlled the show, and should be held liable.

The lawyers concurred, tried the case, and made new law when the First Circuit Court of Appeals agreed with OSHA that its "single employer" theory applied on these facts. This was a strategic enforcement victory, a precedent applicable to other comparable contractor arrangements, due in no small part to the engagement and initiative of frontline lawyers and investigative staff in addressing a strategic enforcement challenge proactively, and, ultimately, highly impactfully.

REVISITING PERFORMANCE STANDARDS TO PROMOTE STRATEGIC ENFORCEMENT

In most employment settings, employees are given a set of standards that describe the expectations for the job, and the bases on which employee performance will be reviewed and evaluated. These standards may be qualitative or quantitative, or both. They may be developed with input from the employee. They are generally effective as of the beginning of the work year, and provide the framework for the employee's (usually) annual evaluation.

At least in part because workers' success in meeting or exceeding performance standards often determines discretionary employee benefits like pay raises, bonuses, recognition, and promotions, they tend to drive how work is done. In fact, that's the whole point of standards: to convey to the employee what work is valued by the organization, the performance of which will determine how they fare at their annual appraisal.

Consequently, agencies that have adopted the strategic enforcement approach need to make sure that performance standards, and any metrics that accompany them, encourage and reward activities that advance that approach. Conversely, agencies

need to be careful not to apply metrics or other evaluative methods that might inadvertently obstruct or disincentivize strategic activities.

Many agencies measure performance by numbers: how many investigations are opened and closed, how many days it took to close each investigation, number of violations found, amount of back wages assessed. But for agencies that have adopted a strategic enforcement approach, each of these measures needs to be assessed with an eye toward how they are promoting – or possibly undermining – the agency’s determination to achieve broad compliance with the laws it enforces, especially where serious violations are most likely to occur.

For example, metrics based on numbers of case closures and days it takes to close a case tend to incentivize closing cases as quickly as possible. This means that cases presenting difficult but important issues that could significantly enhance the agency’s strategic enforcement objectives may be overlooked in an effort to close the case expeditiously. Under a strategic enforcement model, in contrast, the focus isn’t solely or even primarily on increasing the number of cases closed or reducing the days per case, but rather on maximizing the type and number of enforcement actions that will have the most significant compliance impact, and allowing for whatever number of (effectively managed) work days are required to attain the desired result in the given matter.

The OSHA roofer case, briefly described above, is a good example. There, the OSHA inspector could have issued a citation to the lower-level “subcontractor” in relatively short order. Instead, however, he dug deeper, with the agency’s and the lawyers’ support, in an effort to determine whether the higher-level contractor should also be held responsible as the “employer” of the injured worker. Those efforts, and the extra time spent, proved to be well worth it. The higher-level contractor was found to be the employer of the worker and was held responsible for the violation, in a significant federal appeals court ruling that sent a powerful signal to other contractors who might try to improperly offload their legal obligations as an employer. This was an

unequivocal strategic enforcement success, for which the staff members who worked on it received well-deserved accolades.

What Should the Standards Look Like?

With its strategic enforcement goals and activities as a guide, the agency should:

- Review its current performance standards/metrics;
- Assess whether those standards/metrics support or undercut employees' incentive to undertake the specific activities the agency has identified as strategic; and
- As needed, articulate new standards/metrics that reflect and support accomplishment of the identified activities, and the goals associated with those activities.

The revised standards should follow from and complement the messaging from leadership, trainings, and interactive agency-wide discussions on strategic enforcement – its purposes and benefits – discussed above.

Example #1: U.S. Wage and Hour Division

WHD's enforcement practice had been historically based, for the most part, on responding to worker complaints, without focusing on those industry sectors where serious violations (and, frequently, paucity of complaints) were likely. In other words, resources weren't targeted to those workplaces where they could have the greatest systemic impact.

When the agency transitioned to strategic enforcement, with the objective of leveraging its impact, it adopted two agency-wide goals:

- (1) increase the number of investigations directed at high-violation industries, significantly reducing the number of random, complaint-based cases, such that 50% of all cases would be directed; and
- (2) reduce the proportion of directed investigation cases where no violations were found.

These changes reflected the agency's course correction to better utilize its limited resources to maximize compliance impact. The activities staff were directed to undertake, and the metrics associated with them, were adjusted accordingly, resulting in a higher proportion of strategically valuable cases, and a lower percentage of "check the box" investigations.

Example #2: U.S. OSHA

After OSHA recognized investigations at multiple worksites – as contrasted with its longstanding practice of conducting single establishment inspections – were more effective at achieving wide-ranging compliance, it developed the "enterprise-wide" strategic enforcement initiative.

Though such cases increased effectiveness, OSHA also recognized they often take much more time and effort to investigate. To account for this, OSHA initiated a "weighting" system that accords more credit to these cases, for metrics purposes, than more garden-variety or single establishment cases. In performance management systems like OSHA's, that include consideration of numbers of matters handled, according commensurately more weight to strategic, time-intensive cases mitigates what would otherwise dis-incentivize inspectors from taking on those more impactful, and usually more complex, matters.

Example #3: Agency Leadership: U.S. DOL's Regional Solicitors' Performance Agreements

As members of the Senior Executive Service, DOL's regional solicitors' annual performance agreements assess the following elements:

- 1) "leading change" (10%)
- 2) "leading people" (10%)
- 3) "business acumen" (10%)
- 4) "building coalitions" (10%)
- 5) "results driven" (60%)

The “results driven” section of the agreement/standards is how regional solicitors are held accountable to promote and implement SOL’s strategic enforcement priorities, which were drawn from SOL’s annual operating plan.

In recent years, the “results driven” standard was measured by the following elements:

- 1) “Enhanc[ing] worker protection enforcement by means of high quality litigation” (40%):
 - a. Examples of actions to meet this element:
 - i. “Pursue strategic litigation giving high priority to, for example, multiple workplaces, novel questions of law, and enhanced remedies.”
 - ii. Other listed actions are specific types of strategic litigation-related activities treated as priorities by the different enforcement agencies to which SOL provides services.
- 2) “Enhanc[ing] worker protection enforcement for all client agencies by providing high quality legal advice and early case development” (40%)
 - a. Examples of actions to meet this element:
 - i. “Become involved in the early stages of high-priority investigations to assist with strategic planning and ensure that client agency investigators fully understand the evidentiary requirements and investigative tools necessary to produce a litigation-worthy case.”
 - ii. “Provide opinions and advice that help our clients design, implement, and sustain strategic policies to achieve their goals.”
 - iii. Other listed actions include assisting one of DOL’s agencies to implement its “program for expanded use of statutory tools to achieve greater compliance,” and providing “advance legal advice and opinions, training, and case-specific guidance early in the investigative process to enable [another agency] to effectively implement new tools and strategies.”
- 3) “Enhanc[ing] worker protection enforcement by addressing client priorities with limited legal resources” (20%)
 - a. Examples of actions to meet this element:

- i. “Ensure that the resources of the Regional Office are being used strategically to advance the clients’ priorities and used to accomplish the Secretary’s goals in the most cost-effective manner.”
- ii. Regular (at least quarterly) meetings with the various DOL agencies, to assess, for example, whether the cases each agency was referring to SOL for legal action reflected its stated priorities, whether the strategies relied upon were accomplishing the intended results, and whether adjustments to those strategies were warranted.

The regional solicitors’ standards hold them accountable to the Office’s priorities, which in turn helped DOL achieve its objectives as articulated in its strategic plan.

Applying the Principles

The principles underlying the regional solicitors’ performance agreement described above -- including its emphasis on strategic enforcement-enhancing activities -- can be applied more generally.

The following are the types of components, drawn from various sources, that might be included in performance standards for investigative personnel (modifiable for supervisory personnel) in an agency focusing its resources on strategic enforcement. The first section includes competencies analogous to the first four “critical elements” listed above. The second section focuses on strategic activities, akin to the regional solicitors’ “results” section.

Performance Standards to Promote Strategic Enforcement: Sample Template

1. *General employee (investigators and managers) qualities/work skills to be evaluated, e.g.:*

- **Overall job-related expectations/performance**
 - Understands and embraces the agency's overall mission
 - Plans and organizes work effectively
 - Performs work responsibly, accurately, dependably
 - Prioritizes tasks, timely completes assignments
 - Adapts to changing circumstances and priorities, using alternate means to accomplish goals, emphasizing strategic enforcement principles
 - Exhibits problem-solving and analytical skills, including application of strategic enforcement analysis

- **Communication and Service to Stakeholders**
 - Communicates effectively, orally and in writing, internally, including assisting with public communications regarding strategic enforcement activities
 - Communicates effectively, orally and in writing, externally, including with strategic enforcement partners such as worker centers, community organizations, and other governmental agencies
 - Provides accurate and timely stakeholder service, including to workers and strategic enforcement partners

- **Initiative and Creativity**
 - Recognizes opportunities to improve programs and services and offers suggestions, including regarding strategic enforcement efforts
 - Supports innovation, particularly in service of the goal of more impactful enforcement

- **Teamwork and Relationship-Building**
 - Works effectively both independently and as a team member
 - Works cooperatively and respectfully with staff within the agency, and with strategic enforcement partners outside the agency
 - Effectively communicates and interacts with people across cultures and demonstrates respect for cultural differences, including with our strategic enforcement partners

2. *Strategic activities to be accomplished*

- **Identifies enforcement priorities**
 - Attends trainings addressing the rationale and criteria for selecting enforcement priorities
 - Participates in priority selection and targeting teams; assists in selection of priority industries and workplaces, based on strategic enforcement principles, and with assistance from external partner organizations

- **Conducts proactive investigations**
 - Conducts investigations selected in accordance with identified strategic enforcement priorities
 - Carefully plans and executes investigations, including thorough, targeted document examination and interviews, mindful of its potential use in litigation; conducts site visits and reconnaissance as appropriate; develops third party evidence, uses internet research as appropriate, and all other available research tools
 - Carefully documents and analyzes the evidence gathered to determine the nature and extent of violations, including appropriate calculations of damages available for maximum compliance impact
 - Consults with attorneys on ways to maximize the case's strategic impact, and as legal or evidentiary issues arise

- **Uses all enforcement tools**
 - Uses all available tools to obtain necessary evidence (e.g., subpoenas, depositions, etc.)
 - Is familiar with the legal tools available to impactfully address issues that arise, and recommends/seek their use as appropriate (e.g., court order barring immigration status-related threats or other retaliation for worker cooperation in the investigation)

- **Engages in strategic outreach and communications**
 - Engages in outreach to workers in targeted industries and their affiliated organizations (e.g., worker centers, community organizations, unions) in support of strategic enforcement objectives
 - Assists in preparing communications regarding outreach efforts, including public forums, and press releases publicizing strategic enforcement matters

- **Obtains case resolutions that promote ongoing compliance**

- Resolves cases by obtaining the result supported by the evidence, including all appropriate remedies available to the affected workers and all penalties or other punitive measures warranted by the violations
- Seeks and obtains case resolutions that will ensure compliance by the investigated employer and will promote compliance more broadly in the regulated community
- **Partners with community stakeholders and other agencies**
 - Conducts outreach, know-your-rights trainings, and other relationship-building activities with worker centers, unions, legal clinics and other community organizations
 - Fosters cooperation of community stakeholders, including by encouraging referrals, particularly in low-complaint/high violation industries, and by enlisting assistance in locating employees, facilitating interviews, and providing neutral interview locations
 - Encourages collaboration on investigations, sharing information and engaging in formal or informal agreements, as practicable
 - Develops and utilizes relationships with partner government agencies to maximize enforcement impact
- **Participates in review and assessment of strategic enforcement efforts**
 - Works collaboratively with agency staff in reviewing and assessing strengths and weaknesses of the office's strategic initiatives, with the goal of maximizing the agency's impact on the regulated landscape

OPERATIONALIZING A SUSTAINED FOCUS

The focus on strategic enforcement, needless to say, can't be limited to an employee's annual review. Once strategic initiatives and activities are selected and incorporated in the agency's operating plan, effective implementation of those initiatives and activities is necessarily an ongoing, every day process. A regular accountability system, like a monthly report, is a useful tool for keeping strategic enforcement front and center.

Sample Accountability System

- The investigator and supervisor together identify and document the investigator's inventory of strategic (and, to the extent necessary, non-strategic) matters; the bases for selecting and characterizing the matter(s) as strategic is also documented
- They discuss and agree on a work plan for the coming month, focusing especially on strategic matter(s) to the extent possible
- During the month, as issues arise, they are discussed and trouble-shot, with the goal of most effectively getting the planned work done
- At the end of the month, the work accomplished is documented and discussed, including whether any course corrections might be warranted, and summarized
- The monthly strategic work summary for each investigator is provided by the supervisors to the office's director, and compiled into the office's strategic enforcement monthly report
- Each supervisor meets with the director to discuss cases in their section of the report, to discuss progress and obstacles in each case, with an eye toward whether remaining on track or course-correcting is the best approach
- The focus is always on whether proceeding with the investigation as planned is the most effective and strategic use of the office's limited resources
- The process is repeated each month.

There are a number of benefits of consistent, ongoing review and assessment. First, from a performance review perspective, at-least monthly meetings between investigators and their supervisors – and between supervisors and their director – provide regular opportunities for updating the status of the work, feedback (in both directions), informal training, and quality control. Providing ongoing performance feedback throughout the year, including recommendations for improvement where merited, is a far superior means for delivering performance messages and making needed adjustments, than a once-a-year performance review “surprise.”

Moreover, from the strategic enforcement standpoint, ongoing review and assessment of each activity, through the lens of its value and effectiveness in advancing the

agency's strategic objectives, is crucial. An initiative implemented or an investigation begun because of its strategic promise needs to be regularly assessed, with an eye toward whether it continues to merit the resources the agency is devoting to it. Redirecting resources from an activity that was initiated following careful and appropriate consideration, but hasn't produced the results anticipated -- and, on review, is deemed not likely to -- is not a failure. It's an opportunity to learn how to do better with the next strategic initiative, or investigation, or case, selected for agency action.

Hence, at the beginning of each new performance review cycle, standards and expectations need to be adjusted, minimally or possibly significantly, based on the learning from previous years, and based on a thoughtful assessment -- embodied in the operating plan or its equivalent -- of which types of activities in the year ahead are most likely to have the greatest strategic impact. And with each newly tuned iteration of this process, the agency's achievement of the goal of maximizing the enforcement impact of its limited resources grows more likely.

CONCLUSION

The adoption and implementation of a strategic enforcement approach by worker protection agencies is well worth the effort. But it can also be challenging. It calls for new thinking about how the agency can be most effective, and new approaches and protocols that may seem foreign, especially for employees long accustomed to doing their jobs in a particular, different way. Leadership should recognize that some resistance to change may accompany the shift to strategic enforcement; it should be addressed openly and with understanding. But leadership can also foster engagement -- and excitement -- by being clear about why the change in approach is being adopted, and by inviting all staff to be part of the creative process of helping to make it work.

Managing the shift to strategic enforcement also entails effectively communicating how, and why, performance goals and expectations will change. This too should be an iterative and not a static process, involving ongoing feedback and assessment of how the newly-strategically-directed work is going, whether it's producing the intended results, and if not, why.

For agency leaders and supervisors, managing the shift to strategic enforcement is a challenging, creative, and dynamic process. Devoting time and effort to thoughtfully leading and managing the personnel who have the job of implementing this project is, like strategic enforcement itself, an investment wisely made.

ABOUT THE AUTHOR

Michael Felsen serves as a Strategic Enforcement Advisor with Rutgers' Workplace Justice Lab. In 2018, he concluded a 39-year career enforcing federal worker protection laws as an attorney with the Solicitor's Office of the U.S. Department of Labor. For the last eight years of his federal career, Michael served in the Senior Executive Service as New England Regional Solicitor, responsible for overseeing a 25-lawyer office that enforces wage, safety and health, pension, whistleblower, and other laws in the six New England states. During that period, he was an appointed member of the Secretary of Labor's Performance Review Board (responsible for monitoring and advising regarding DOL's senior executives' performance reviews), and served on various Solicitor's Office national committees, including its Strategic Management committee (where strategic priorities and measures were developed). Since leaving the Labor Department, Michael has consulted for the International Labor Organization on strategic enforcement, serves as a National Coalition on Occupational Safety and Health Advisor and co-chair of MassCOSH's legal committee, and as a member of the Massachusetts Attorney General's Labor Advisory Council. He also supports strategic collaborations between state and federal labor agencies and worker centers in Boston and elsewhere, as a member of the Low Wage Worker Legal Network and an Access to Justice Fellow with Justice at Work in Boston. He writes frequently on labor and worker protection issues, particularly for The Hill and The Progressive, and is an active member of International Lawyers Assisting Workers. More about Michael at www.michaelfelsen.com.

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