In partnership

Policy Brief | November 2024

Quick Fixes to Lock in Wins for Workers: How States Can Preserve New Federal Protections

Executive Summary

The Biden administration adopted a range of key protections for US workers – from safeguards against extreme heat, to broader overtime pay coverage, to new measures protecting organizing rights. With the upcoming change in the federal administration and pending challenges in the courts, state policymakers who want to preserve these important policies should move quickly to enact recent federal worker wins at the state level in order to protect working families against losing these safeguards. This document is not a comprehensive list of all pro-worker policies that states can pursue in the coming years; rather, it summarizes several key measures that states can quickly lock in to preserve recent progress at the federal level. The authors of this document are available to help adapt these and other recommendations to state-specific contexts.

Our recommendations include:

1. Ensuring broad overtime coverage by adopting a sufficiently high salary threshold for the "white collar exemption," as the US Department of Labor (US DOL) did by regulation (currently in litigation);
2. Enacting workplace protections against extreme heat, as the US DOL proposed (currently in comment period);
3. Curbing non-competes and other employment contract provisions that trap workers in jobs and suppress wages, as the Federal Trade Commission (FTC) did by regulation (currently in litigation);
4. Within the limits of state authority, taking steps to safeguard workers' right to organize, as the National Labor Relations Board (NLRB) has done in various ways;

5. Fighting labor monopolies and anticompetitive practices in the labor market by adopting certain antitrust enforcement guidelines such as those considering the labor market impact of proposed mergers, as the FTC and US Department of Justice (US DOJ) have done; and
6. Creating online tools disclosing employer violations and enforcement data, as the US DOL has done.

Recommendations

1. Ensure Adequate Overtime Coverage by Adopting a Sufficiently High Salary Threshold for the "White Collar Exemption"

Issue background

Federal and state overtime laws exempt from coverage executive, administrative, and professional employees (often referred to as the "white collar exemption"). Federal regulations define the responsibilities that make workers exempt, but also contain a salary threshold, below which workers are automatically entitled to overtime no matter what their stated duties or job titles are. As a practical matter, that threshold determines whether millions of workers like assistant managers at fast food chains or dollar stores get overtime pay when they are forced to work long hours. The US DOL expanded overtime pay protections to more than 4 million such workers by raising the salary threshold from $35,568 to $58,656, with triennial increases in future years. A Trump-appointed federal judge recently blocked the increase. If the rule is permanently blocked from going into effect by the courts or the new administration, workers earning between $35,568 and $58,656 will lose these overtime protections.

What states can do

States can stave off this roll-back by enacting – by statute or regulation – their own salary thresholds for state overtime white collar exemptions and setting them at least as high as the Biden-proposed level of $58,656, with automatic adjustments in future years. California has done this by statute (with a 2025 salary threshold of $68,640), and New York uses a hybrid combination of statute and regulation (2025 threshold is $64,350 downstate, and $60,405 upstate), while Colorado and Washington State have done so through regulations (with 2025 salary thresholds of $56,485 in Colorado, and $77,968.80

in Washington State for large employers and $69,305.60 for small), with annual upward adjustments for all in the coming years. California and Washington both set the salary threshold as a multiple of the state minimum wage, which may offer welcome simplicity and clarity to employers and workers.

Recommended policy models

- The Biden Administration US DOL overtime salary threshold rule
- Statutes in California, and regulations in Colorado, New York, and Washington

2. Enact Workplace Protections Against Extreme Heat

Issue background

Extreme heat is a severe workplace hazard, for outdoor workers like construction and farmworkers, as well as indoor workers like those who work in warehouses or kitchens. In 2022 alone, at least 43 people died from exposure to extreme heat while working, according to the U.S. Bureau of Labor Statistics – and experts believe that figure is an undercount. The prevalence of other work-related injuries also increases during extreme heat. All the while, climate change is resulting in more frequent and severe heat waves nationwide. To protect workers from extreme heat, the Biden DOL proposed a workplace heat standard requiring common sense measures – ensuring adequate shade, water, and rest breaks, and requiring employers to have a heat plan and train employees on it – when workplace temperatures reach certain levels. The rule is currently in the comment period, but its long-term prospects are uncertain in the face of changing administrations.

What states can do

States can enact, by statute or regulation, their own heat protection standards for both indoor and outdoor workers. California, Oregon, and Maryland have done this for both types of workers. Washington State covers all outdoor workers, and Colorado and Minnesota have more limited heat protections.

Recommended policy models

- US DOL Proposed Heat Standard Rule
- The twenty-two states that operate their own private sector Occupational Safety and Health Administration (OSHA)-approved programs (so-called "State Plan" states) can in most cases adopt heat standards through agency administrative action. Both Oregon and Maryland provide strong models for how to do so. If the agencies in these states do not act to promulgate such rules, state legislators can

enact heat standards by statute or can mandate by statute that the state agency must do so.

- The remaining states can adopt heat protections by statute – New Jersey's proposed heat standard statute is a good model. Note that there is no OSHA preemption of state heat or other standards until OSHA finalizes its own standard – which is unlikely to happen soon, given the federal transition.

3. Curb Non-Competes & Stay-or-Pay Contracts like TRAPs

Issue background

Non-compete restrictions strip workers of one of the foundations of their bargaining power: the threat that they will pursue other employment where they will be paid more or treated better. Not only have non-compete provisions been shown to suppress wages (because employers don't need to improve working conditions to retain workers), but they can also trap people in abusive work situations, and reduce entrepreneurialism and innovation. They are typically imposed on workers as a take-it-or-leave-it job requirement. Nearly one in five workers are bound by a non-compete. A proposed FTC ban – which has been paused by federal courts – would cover almost all workers, and the FTC estimates that its rule would raise wages across the economy by more than $400 billion over the next decade.

Importantly, the FTC's non-compete ban also reaches "functional non-competes" like "stay-or-pay" contracts and Training Repayment Agreement Provisions (TRAPs) – which trap workers in their jobs by demanding that they repay thousands of dollars in supposed training or other costs if they leave. The NLRB and US DOL have also issued guidance and pursued enforcement actions pointing out how such stay-or-pay provisions can violate federal law by stripping workers of bargaining power, and by amounting to an illegal kickback against wages. Almost two-thirds of voters support banning non-competes.

What states can do

Several states, including most recently Minnesota in 2023, have banned or severely curbed the use of non-compete provisions. State legislators can adopt a statute modeled on the FTC ban – informed too by the NLRB and US DOL guidance on stay-or-pay contracts – to free workers who are currently bound by non-compete restrictions, and to eliminate their use going forward.

Recommended policy models

- Federal Trade Commission final non-compete ban

- NLRB guidance on stay-or-pay contracts
- Minnesota's non-compete ban, which protects all workers and has no salary cap, is a strong model – however, state laws should clarify, as the Biden administration efforts did, that such bans should apply retroactively in order to protect workers currently covered by such restrictions.

4. Protect the Right to Organize

Issue background

The Biden administration and its NLRB appointees have implemented a wide range of policies to bolster workers' ability to form and join unions. Given its prior track record, the incoming administration is likely to reverse that progress and leave workers unprotected when employers punish them for organizing. While states can't directly regulate collective bargaining for most workers in the private sector, there are key steps states can take and are taking to protect workers' right to organize in the face of these attacks.

What states can do

1. Allow striking workers to receive unemployment insurance (UI) benefits. Like other people temporarily out of work, striking workers and their families face serious economic hardship. The Supreme Court has ruled that states may allow strikers to receive UI. Nine states make striking workers eligible for UI benefits if the strike was the result of the employer breaking either labor law or a union contract (or both). New York and New Jersey have expanded those protections to allow striking workers to receive UI benefits regardless of the strike's cause – which is the best approach for safeguarding the right to strike.

2. Adopt "worker freedom of conscience" laws, which prohibit employers from forcing workers to attend political, religious, or union-related meetings. Political and religious coercion in the workplace is a serious problem. For example, one in four workers report having been contacted by their employer about politics. While the NLRB recently ruled that forced anti-union meetings are illegal, that ruling may be at risk in the Trump courts and when Trump appointees take control of the NLRB. At least ten states, including most recently Alaska, have adopted "worker freedom of conscience" laws to ban such forced meetings and prohibit firings or other retaliation against workers for not attending.

3. Eradicate so-called "right to work" schemes from state law. To support collective bargaining, states should repeal state laws that prevent unions from requiring all

workers to pay for the services they receive from union representation. These laws let some workers free-ride and reap the benefits unions deliver without sharing in the costs, passing the buck to coworkers to foot the bill. In this way, right-to-work laws seriously impede the ability of unions to stand up for workers and pit workers against each other. In 2023, Michigan took the important step of repealing its right-to-work law. But more than 25 states maintain some form of right-to-work policy, including some states that generally have decent worker protections, such as Colorado, Nevada, and Virginia.

4. Add union and organizing rights-related information to existing state labor agency know-your-rights websites. Many workers and employers don't know about their rights to form a union or to join with other workers to seek to improve their conditions – both of which are guaranteed under the National Labor Relations Act and various state laws. US DOL created a worker education website, Workcenter.gov, to educate workers about these rights. States should download materials from the current federal website to ensure the availability of this content regardless of what happens to the federal website, and should add this material to their existing state labor agency know-your-rights websites.

Recommended policy models

- UI for Strikers – New Jersey's law is a strong model
- Worker Freedom of Conscience – Maine's law provides a good example
- Repeal Right to Work – Michigan's action doing so is the model for other states
- Worker Know-Your-Rights Education – US DOL's Workcenter.gov site provides good content for states to copy and disseminate

5. Protect Workers Against Labor Monopolies and Unfair Competition

Issue background

The FTC and the US DOJ proposed new merger guidelines that outline the harms caused to workers by modern mergers and acquisitions, and that specifically explain how dominant employers often use their wage-setting power to lower pay. A 2022 US Treasury Department report concluded that employer dominance reduces wages by about 20 percent economy-wide, and more in certain industries. Studies have shown that dominant employers in retail, e-commerce, telecommunications, and health care lower wages not just for their own employees, but across local economies, and that mergers play a significant role in reducing worker pay at both merging firms and at their competitors.

Workers in highly concentrated industries also experience more labor law violations. The FTC has also explained how certain coercive or abusive behavior that often harms workers may amount to an unfair method of competition.

What states can do

States can codify protections like those in the updated FTC-US DOJ merger guidelines into their state antitrust laws, giving state attorneys general more comprehensive powers to block harmful mergers, either across the economy or for specific industries, when they expect disproportionate harm to workers. (In some states, attorneys general may already have some of these powers under existing state law.) For example, several states have proposed – and Minnesota has adopted – enhanced merger reviews for hospitals, applying scrutiny to hospital corporations' ability to, among other things, unilaterally lower wages or lock workers into harmful contracts. They can also clarify that persistent violation of labor laws is evidence of market power. Finally, states can update their consumer and competition laws to expressly prohibit "unfair methods of competition," which would provide broader tools for attacking unfair competition in the labor market, as the FTC recently explained.

Recommended policy models

- FTC-US DOJ updated merger guidelines
- FTC policy statement on unfair methods of competition
- Minnesota hospital merger law

6. Provide Public Access to Enforcement and Violations Data

Issue background

The US DOL makes publicly available certain enforcement data about closed cases. This disclosure and transparency in relation to taxpayer-funded government enforcement helps policymakers, job seekers, workers, scholars, the media, and the general public have information about the extent and severity of violations and about the practices of particular employers. It can also help make other government programs more effective. For example, procurement officers can use such information to avoid contracting with known willful or repeat violators, while enforcement agencies can use it to more effectively identify employers for their own compliance efforts.

What states can do

The US DOL enforcement data website is searchable by state. States should start by downloading this federal enforcement data for violations within their jurisdictions in order

to preserve its public availability in the event that the new administration removes it. States should then supplement it by publishing their own detailed enforcement data about closed cases on their own state labor agency website.

Recommended policy models

- US DOL enforcement data page
- State examples: Texas, Massachusetts
- Locality examples: San Diego County dashboard and NYC Comptroller dashboard

A Final Note: Enforcing New Protections

Many state enforcement agencies may not currently have sufficient resources to launch broad new enforcement efforts around the new protections recommended in this brief. That said, even without extensive enforcement, basic public education about these new standards combined with a few strategic, well-publicized enforcement actions – supported and amplified by workers and advocates – can still make a real difference in the lives of the most vulnerable workers. States can also facilitate enforcement by including in such protections private rights of action that enable workers to enforce their own rights in court (as workers can already do under state overtime laws, as the Minnesota non-compete ban authorizes, and as the proposed New Jersey heat standard would do) and should also consider authorizing qui tam-like whistleblower models of enforcement to ensure access to justice. The bottom line is that ongoing challenges with enforcement are longstanding and should not deter states from enacting protections against serious workplace harms.

For more information, please contact:

Paul Sonn, National Employment Law Project, psonn@nelp.org
Terri Gerstein, NYU Wagner Labor Initiative, terri.gerstein@nyu.edu