

CONNECTICUT LAW REVIEW

VOLUME 48

NOVEMBER 2015

NUMBER 1

Essay

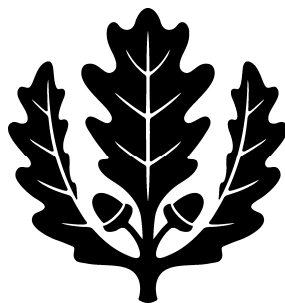
Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems

CHARLOTTE S. ALEXANDER

This Essay develops a comprehensive theory of the role of information in regulatory and market responses to workplace problems. Existing legal and economic scholarship has focused narrowly on transparency mandates that reveal facts about the hidden conditions of work—for example, the health risks to which workers are exposed without their knowledge, or undisclosed pay differentials between men and women. Scholars and policymakers assume that when employers are required to reveal this information, regulators, outside interest groups, and workers themselves will penalize bad actor employers via the market, regulation, or rights-enforcing litigation. However, information about the hidden conditions of work is not self-actuating. Regulatory and market responses depend on additional layers of information—information about context, process, incentives, and the probability and magnitude of other actors' regulatory and market responses—all of which have been largely ignored in the literature. Accordingly, this Essay offers a typology of the information that may support rights-enforcing and market responses to workplace problems. It then surveys existing transparency mandates to determine the extent to which each type of information is currently made available in the workplace. The Essay concludes by mapping out topics for further research, including the First Amendment implications of drafting employers into the role of information transmitters and the empirical question of how best to design workplace transparency mandates to accomplish their goals.

ESSAY CONTENTS

I. INTRODUCTION	179
II. DEVELOPING A TYPOLOGY OF WORKPLACE ACTORS AND INFORMATION	184
A. EXISTING LEGAL AND ECONOMIC SCHOLARSHIP ON WORKPLACE INFORMATION	184
B. ADDITIONAL NECESSARY WORKPLACE INFORMATION: WORKERS	187
C. ADDITIONAL NECESSARY WORKPLACE INFORMATION: REGULATORS AND OUTSIDE INTEREST GROUPS	193
III. A SURVEY OF EXISTING TRANSPARENCY MANDATES	195
A. EXISTING TYPE A DISCLOSURES	195
B. EXISTING TYPE B, C, AND D DISCLOSURES	197
C. NONEXISTENT TYPE E DISCLOSURES	205
IV. FIRST AMENDMENT AND LOGISTICAL CHALLENGES: A BRIEF INTRODUCTION	205
A. THE CONSTITUTIONALITY OF WORKPLACE TRANSPARENCY MANDATES	206
B. BUT DOES ANY OF THIS ACTUALLY WORK?	212
V. CONCLUSION	215
APPENDIX	216



Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems

CHARLOTTE S. ALEXANDER*

I. INTRODUCTION

For thirty years, Geraldine Matthew worked on the muck farms around Lake Apopka, Florida, hand-harvesting the vegetables that grew in the rich, black lakeshore soil.¹ As she worked, crop dusters flew overhead, coating everything below—fields and workers alike—with “strong chemicals that you could smell on your skin at the end of the work day.”² Ms. Matthew now suffers from a host of debilitating medical conditions that she attributes to pesticide exposure.³ Though the Apopka muck farms have long been closed, visitors today are barred from entering the fields by signs that warn about the presence of “agricultural chemicals, some of which, such as DDT . . . may present a risk to human health.”⁴ When Ms. Matthew and her fellow farmworkers were in the fields, however, they received no such warning, and had no information about what, exactly, was being dumped on them from above, and what it was doing to their health.⁵

Many states away and several decades later, Kelly Contreras began work in Wisconsin as a store manager for the country's largest retail

* Assistant Professor of Legal Studies, Department of Risk Management and Insurance, J. Mack Robinson College of Business, Georgia State University; secondary appointment, Georgia State University College of Law. Thanks to the participants in the 2014 Labor and Employment Law Colloquium, University of Colorado Law School at Boulder and the 2014 *American Business Law Journal* Invited Scholars Colloquium. Thanks also to Helen Norton and Stephen Shore for their helpful feedback.

¹ Christopher Balogh, *Apopka Farmworkers Say Pesticide Exposure Caused Illnesses*, ORLANDO WEEKLY (June 1, 2011), <http://www.orlandoweekly.com/orlando/apopka-farmworkers-say-pesticide-exposure-caused-illnesses/Content?oid=2248681> [<http://perma.cc/K5BT-7LV3>]; see generally BARRY ESTABROOK, TOMATOLAND: HOW MODERN INDUSTRIAL AGRICULTURE DESTROYED OUR MOST ALLURING FRUIT 48 (2012) (“In 1941, as part of the wartime effort to produce more fruits and vegetables, nineteen thousand acres of swamp on the lake’s north shore were drained to make way for ‘muck farms’ in the rich soil.”).

² Balogh, *supra* note 1.

³ DALE FINLEY SLOWWHITE, FED UP: THE HIGH COSTS OF CHEAP FOOD 36–39 (2014).

⁴ ESTABROOK, *supra* note 1, at 49; see also Balogh, *supra* note 1.

⁵ Balogh, *supra* note 1 (quoting a former Apopka farmworker as saying that she and other workers “are lost in a ‘chemical soup,’” lacking “evidence that they’ve been hurt by pesticides”).

jewelry chain.⁶ She was paid approximately \$35,000 per year.⁷ Her husband, who had similar industry experience, was also a store manager at the same company.⁸ His annual salary was \$55,000.⁹ After three years, Ms. Contreras had amassed multiple company awards and was promoted to district manager.¹⁰ Her husband, who had been promoted to district manager the year before, continued to out-earn her by \$10,000.¹¹ Ms. Contreras knew about this salary discrepancy by the happenstance of her marriage; company rules prohibited workers from sharing information about their pay.¹²

Information is crucial to workplace rights enforcement. If Ms. Contreras had not known her husband's salary, she may never have discovered that she was subject to sex-based pay discrimination,¹³ and may never have engaged in corrective action. She could not have complained internally to her employer, made a report to a government enforcement agency, or filed a lawsuit—as she eventually did—under the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

Information is equally central to market-based solutions to workplace problems. If a worker like Ms. Matthew does not know about her health risks at work, she cannot “shop around” for a better job and penalize her unsafe employer by quitting; she cannot call the media; she cannot organize a consumer boycott or incite investor or advocacy group pressure. Nor can regulators or outside interest groups take affirmative action to address workplace problems if they do not know that problems exist.

As a result, scholars and policymakers have long advocated for rules that would force employers to reveal information about the hidden

⁶ Plaintiffs' First Amended Class Arbitration Complaint ¶¶ 103–05, *Jock v. Sterling Jewelers, Inc.*, AAA Case No. 11 160 00655 08 (Jan. 3, 2008), <http://www.cohenmilstein.com/media/pnc/7/media.187.pdf> [<http://perma.cc/JX8V-Q3E9>] [hereinafter *Jock*, First Amended Complaint].

⁷ *Id.* ¶ 113.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* ¶¶ 107–08, 111.

¹¹ *Id.* ¶ 114.

¹² *Id.* ¶ 34.

¹³ This account assumes for the sake of illustration that the pay gap can be explained only by the workers' gender and sets aside other possible explanations for the difference or general market-based objections to the prohibition of sex discrimination in pay. *See, e.g.*, Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 *GEO. J. GENDER & L.* 159, 162–63 (2011) (discussing “market excuses” for pay discrimination such as the belief that women fail to negotiate their salaries at the time of hire and that downstream differences in salaries between men and women can therefore be explained by women's and men's different negotiating choices rather than employer bias). In fact, a store manager explained to another female plaintiff in the case that a male worker was paid more than his more experienced female counterparts “because he had a child to support.” *Jock*, First Amended Complaint, *supra* note 6, ¶ 72.

conditions of work, focusing primarily on hazard warnings¹⁴ and pay transparency rules.¹⁵ In a pair of recent articles, Professor Cynthia Estlund proposes a dramatically expanded workplace transparency regime, in which employers would be required to reveal information about wages, scheduling, hazards, job security, work-life policies, covenants not to compete, arbitration agreements, and workplace demographics.¹⁶ In Estlund's view, this information would enable workers to make better choices about whether to take or keep a job; enable regulators to identify employer scofflaws and enhance legal compliance; and allow do-gooder firms to enhance their reputation by advertising their "beyond compliance" policies and practices.¹⁷ Similarly, as Professor Kip Viscusi explains in his extensive writing on workplace safety, workers armed with hazard information can exact a price from their employers either by quitting or by demanding a wage surplus to compensate for their health and safety risks—eventually, either result can pressure the employer to correct the

¹⁴ Since the late 1970s, Professor Kip Viscusi has studied hazard warnings that inform workers of toxin exposure. See generally W. KIP VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* (1983) [hereinafter VISCUSI, *RISK BY CHOICE*]; W. KIP VISCUSI, *EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE* (1979) [hereinafter VISCUSI, *EMPLOYMENT HAZARDS*]; W. KIP VISCUSI & WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 125–26 (1987) (reporting findings that "provide support for the efficacy of information policies to control the hazards from dangerous products"); see also Ronnie Greene, *Farmworkers Plagued by Pesticides, Red Tape*, CTR. FOR PUB. INTEGRITY (June 25, 2012), <http://www.publicintegrity.org/2012/06/25/9159/farmworkers-plagued-pesticides-red-tape> [http://perma.cc/5EHZ-25ZD] (quoting an Environmental Protection Agency document as noting that, even for a government agency, the lack of information surrounding the number of occupational pesticide incidents per year "inhibits clear problem identification").

¹⁵ Many scholars have championed pay transparency rules, which would force employers to publicize their wage and salary schedules and prohibit bans on workers' discussions of pay. See Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011) [hereinafter Estlund, *Just the Facts*]; see also Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 783 n.7 (2014) [hereinafter Estlund, *Extending the Case*] (citing Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 169–70 (2004); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 53 (2005); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 1008 (2011); Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 419–35 (2013); Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1047–48 (2012)); Jeremy Blasi, Note, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95 (2012) (discussing wage transparency proposal). See generally Estlund, *Just the Facts*, *supra*, at 784 n.13 (noting that seasonal and agricultural workers' wages must be disclosed under federal law and that New York, Iowa, and Nebraska have all enacted some form of pay transparency requirement).

¹⁶ See Estlund, *Extending the Case*, *supra* note 15; Estlund, *Just the Facts*, *supra* note 15. Part III, *infra*, identifies additional types of workplace transparency mandates.

¹⁷ Estlund, *Just the Facts*, *supra* note 15, at 369–79 (discussing disclosure in aid of contract, disclosure in aid of compliance, and disclosure in aid of reputational rewards and sanctions).

underlying hazard.¹⁸ Information is thus instrumental: transparency mandates are designed with the first-order goal of revealing the true conditions under which workers are employed, but also with the second-order goal of prompting regulatory or market responses to improve those conditions.

However, this view of information's triggering role is incomplete. While information about the hidden conditions of work is necessary for market discipline and rights enforcement, it is far from sufficient. The key insight here is that factual information about the hidden conditions of work *is not self-actuating*. In other words, arming workers like Ms. Matthew with the name, concentration, and health risks of the chemicals with which she was sprayed and allowing Ms. Contreras freely to discuss her salary cannot trigger a regulatory or market response on its own. These workers must have additional layers of information before they can even identify their chemical exposure or pay disparity as a sub-market practice or potential violation of the law and decide what to do about it.

Accordingly, this Essay develops a comprehensive theory of information's role in the enforcement of labor and employment laws, and in the broader project of improving workplace conditions. This contribution is important, as it enables assessment of the sorts of information-centric regulatory strategies that are increasingly popular across the political spectrum as a less onerous, almost "magic" alternative to command-and-control substantive regulation.¹⁹ If such strategies focus on only one type of information and neglect the others, then they cannot harness the market and facilitate law enforcement in the way that proponents envision.

First, this Essay identifies the three sets of actors who might engage in rights-enforcing or market responses to a workplace problem: workers

¹⁸ VISCUSI, *RISK BY CHOICE*, *supra* note 14, at 73 ("Providing workers with additional information about job risks will sharpen their assessment of the risks, which will tend to increase the wages the firm must pay."); VISCUSI & MAGAT, *supra* note 14, at 129 (noting findings that disclosure of information about "higher [job hazard] risks led to both a demand for more risk compensation and higher intended quit rates").

¹⁹ Estlund, *Just the Facts*, *supra* note 15, at 353, 354 (observing that "mandatory disclosure has become a growing part of the modern state's regulatory repertoire" and that mandated disclosures about "risks, returns, costs, [and] benefits" are central features of securities, consumer finance, health, environmental, education, and food and drug safety regulation); *id.* at 354 (describing disclosure mandates as "sometimes appear[ing] as a kind of magical minimalism that delivers significant rewards at little cost"); *see also* VISCUSI & MAGAT, *supra* note 14, at 2 ("From an economic standpoint, the potential role of labels and other forms of information transfer is identical: all of them influence perceptions of risk and, ultimately, individual behavior."); David J. Doorey, *A Model of Responsive Workplace Law*, 50 OSGOODE HALL L.J. 47, 67 (2012) ("Information disclosure regulation is another preferred tool in the decentred regulation arsenal . . ."); *cf.* VISCUSI, *RISK BY CHOICE*, *supra* note 14, at 72–73 ("Information directed at improving safety, such as safety training procedures, has two types of effects. First, it may alter workplace safety levels. . . . Second, providing safety information has purely informational aspects . . .").

themselves, regulators, and outside interest groups, defined here as consumers, investors, and advocates.²⁰ It also identifies the circumstances under which an employer might take affirmative steps to correct a problem even in the absence of prompting by one of those three.

For each actor, the Essay then identifies the types of information that may support regulatory or market responses. Here, this Essay complements and extends the existing literature by hypothesizing a layered set of five types of workplace information: Estlund- and Viscusi-style firm-specific information about the hidden conditions of work (Type A); context information that allows comparison to conditions at other firms or to the substantive requirements of the law (Type B); process information that sets out the necessary steps for engaging in market discipline or rights enforcement (Type C); incentives information that reveals the benefits of market or regulatory action (Type D); and information on the probability and magnitude of other actors' responses to the workplace problem (Type E).²¹

After establishing this theory, the Essay surveys labor and employment law and identifies existing transparency rules that force or incentivize transmission of information of each of the five types. At present, the law requires disclosure of some information types in certain circumstances, but never the full complement at the same time.

Finally, this Essay catalogs some challenges to and complications with workplace transparency mandates, including the First Amendment implications of drafting employers into the role of information provider and the empirical question of whether transparency mandates actually achieve their first- and second-order goals. These questions are raised here in brief, but deferred for complete examination in a second, companion article.²²

Thus, the Essay proceeds as follows. Part II elaborates on the typology of workplace actors and information introduced above, building on previous legal and economic scholarship on the functions of information in the workplace. Part III surveys existing workplace transparency mandates—those already identified in the literature and those that have been left out—and maps them onto the typology. Part IV briefly catalogs the First Amendment questions and logistical complications raised by workplace transparency mandates. Part V concludes.

²⁰ This configuration borrows heavily from Estlund's description of the three outcomes of employer disclosure mandates and the actors who would drive those outcomes, particularly her discussion of the role of intermediaries. Estlund, *Just the Facts*, *supra* note 15, at 369–76.

²¹ FIGURE 2 in Part II.B, *infra*, illustrates these types of information.

²² Charlotte S. Alexander, *Workplace Information Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. (forthcoming 2016).

II. DEVELOPING A TYPOLOGY OF WORKPLACE ACTORS AND INFORMATION

A. *Existing Legal and Economic Scholarship on Workplace Information*

The existing legal scholarship on information in the workplace has focused narrowly on forcing the transmission of firm-specific facts about the hidden conditions of work—referred to here as “Type A” information—to facilitate the enforcement of labor and employment laws.²³ In this view, rights violations can be obscured when the underlying facts are held exclusively or actively hidden by the employer, with no real opportunity for independent discovery.²⁴ When employers are required to reveal Type A information, the assumption is that workers and regulators can then engage in rights enforcement: Ms. Contreras files suit; Ms. Matthew files a workers’ compensation claim or complains to a government agency; agencies take independent enforcement action even in the absence of worker complaints.²⁵ Outside interest groups, including advocacy organizations, consumers, and investors, might also penalize firms that engage in unlawful workplace practices by filing lawsuits or making government complaints of their own (assuming they have standing). The disclosure of Type A information about rights violations might also prompt outside interest groups to engage in market discipline by boycotting the firms’ goods and services, impugning their reputation, or divesting from their companies.²⁶ In addition, employers themselves might be prompted to correct legal problems affirmatively if transparency mandates force them to identify and disclose underlying Type A facts.²⁷

²³ See, e.g., Estlund, *Just the Facts*, *supra* note 15, at 365–67 (proposing a variety of Type A employer-disclosure mandates).

²⁴ Of course, this information might become available during the discovery phase of litigation, but this opportunity for information transmission necessarily comes *after* a workplace problem has been identified.

²⁵ See Doorey, *supra* note 19, at 67 (“Information disclosure regulation is another preferred tool in the decentred regulation arsenal [T]here is also a long history of using information regulation to influence firm behaviour in such areas as environmental and human rights practices It can clarify the expectations of contracting parties, which can reduce the possibility of the more powerful contracting party taking advantage of the weaker party. Disclosure regulation can also empower private actors in their engagements with the disclosing firms. By providing information about firm behaviour to private watchdogs, it can alter the relative balance of power between the firms and the watchdogs and thereby alter the dynamic of the negotiations.” (footnote omitted)).

²⁶ See *id.* (“If disclosing information about some aspect of firm performance could potentially influence sales or increase public appetite for more formal government oversight, then it can encourage corporate leaders to take a more personal interest in the firm’s performance, and perhaps to introduce more effective systems to ensure that the firm’s performance improves relative to other similarly situated firms.”).

²⁷ See *id.* (“Disclosure can lead to better-informed actors. It facilitates self-learning or self-referential fact-finding; a firm that does not know it is engaging in harmful behaviour is unlikely to take steps to alter that behaviour.”).

The economics literature presents a different view of the function of workplace transparency: even if Type A information reveals no specific violations of labor and employment laws, transparency mandates may still allow workers and firms to match to one another more precisely.²⁸ Here, the goal of transparency is to enhance market efficiency rather than to facilitate law enforcement—that is, to allow a worker to seek out a firm with characteristics that fit her preferences.²⁹ In the absence of Type A information, uncertainty about the true conditions of work may dissuade workers from entering the labor market at all, or may result in their accepting a job that is a bad match.³⁰ On the other hand, for example, when workers are aware of toxins at work and know their own and their co-workers' wage rates, they can assess the fit of their current or potential job with their preferences. In the case of a mis-fit, workers might quit or forgo a job opportunity, or might demand a wage premium or other concession from the employer as compensation.³¹ This information-driven matching

²⁸ See, e.g., VISCUSI, RISK BY CHOICE, *supra* note 14, at 73 (“[W]orkers could improve their job choices if they knew of the risks posed by different positions . . .”).

²⁹ See Doorey, *supra* note 19, at 67 (“Disclosure regulation is usually justified as market-correcting: it corrects information asymmetries that impede the efficient clearing of markets.”); John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 846 (2006) (“Many of the prominent examples of penalty default rules in the contractual area serve the purpose of information-forcing in the service of efficiency.”).

³⁰ For an archetypal discussion of the ability of information transmission mandates to correct market failures caused by information asymmetry in a sales contract setting, see George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) (“An asymmetry in available information has developed: for the sellers now have more knowledge about the quality of a car than the buyers. But good cars and bad cars must still sell at the same price—since it is impossible for a buyer to tell the difference between a good car and a bad car.”). Examples of information asymmetry and information forcing in other contexts include toxicity information held exclusively by polluters and private information held by a party to litigation. See Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 874 (2006) (describing state regulation that “gives toxic polluters in California an unusual incentive to cooperate with state regulators in setting, justifying, and defending numerical regulatory standards and to produce and disclose as much credible toxicity and exposure information necessary to enable regulators to implement these regulatory standards”); Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND J. ECON. 183, 183 (1989) (developing a model of information asymmetry in which “one party [to litigation] possesses ‘private’ information [that] pertains to the expected judgment he would obtain from trial—to the likelihood of prevailing at trial or to the size of the judgment he would receive in that event”). In the alternative to a mandate, information might be transmitted in response to incentives. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (introducing the concept of “penalty defaults” used to fill gaps in contracts, the avoidance of which incentivizes better-informed parties to disclose information); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 916 (2015) (“[A] legal-information-forcing rule would force the comparatively better informed party to choose between revealing the relevant . . . information or accepting a default rule that favors the less informed party.”).

³¹ Kip Viscusi and his co-authors have written extensively about this process in the context of hazard labeling and workers' risk assessments. See, e.g., VISCUSI & MAGAT, *supra* note 14, at 100–01 (“[W]orkers are engaged in a continuous experimentation process in which they learn about the risks

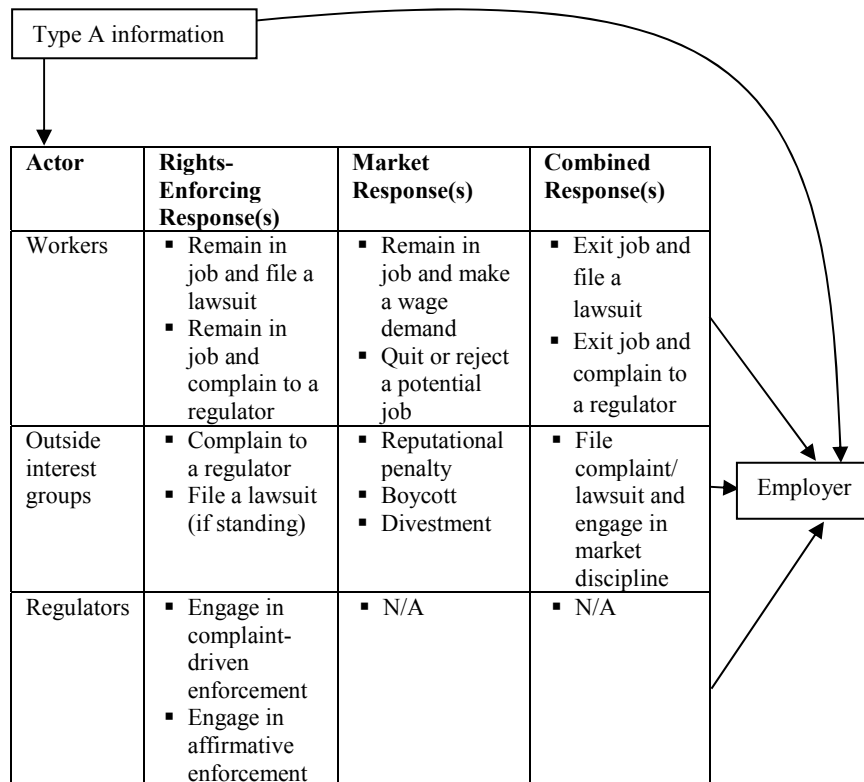
process not only improves the functioning of the labor market, but may also, over time, prod employers who experience high job vacancy or quit rates, or who have to meet workers' repeated compensatory wage demands, to correct the underlying workplace problems.³²

Thus, taken together, the legal and economics literatures identify three actors who might respond to a workplace problem that is disclosed via Type A information: workers, regulators, and outside interest groups. Each of these actors, in turn, is assumed to engage in a rights-enforcing and/or market response, and the employer itself might also take affirmative, corrective action upon receiving Type A information. FIGURE 1 below maps out these three actors, plus the employer, and their assumed regulatory and/or market responses to workplace problems that are revealed by the disclosure of Type A information.

posed by their job and quit once the position becomes sufficiently unattractive.”). The threat of quitting, or the employer’s inability to fill a job with a given risk profile, may then produce higher wages that include a wage differential that compensates workers for taking on that job’s health and safety risks. *Id.* at 129 (“[H]igher risks led to both a demand for more risk compensation and higher intended quit rates.”).

³² In addition to Viscusi, Estlund also builds on this literature by characterizing one of the goals of employer disclosure mandates as “disclosure in aid of contract.” Estlund, *Just the Facts*, *supra* note 15, at 371 (“[E]conomic theory suggests that employees armed with better information about terms and conditions of employment will be more likely to find jobs that suit them at wages that reflect the actual features of the job, and employers will be more likely to deliver job features that meet employee preferences.”).

FIGURE 1: Actors' Assumed Regulatory and Market Responses to the Disclosure of Type A Information



However, contrary to the assumptions embedded in the legal and economics literatures, Type A information alone is not self-actuating. One or more of four additional types of information may be necessary to support the rights-enforcing and market responses summarized in FIGURE 1.³³

B. Additional Necessary Workplace Information: Workers

Another story illustrates the necessary but insufficient nature of Type A information. In 2006, after Hurricane Katrina, a shipyard with locations

³³ To be clear, this Essay does not argue that even a full complement of all five information types would in all cases be sufficient to trigger action to correct workplace problems. This is discussed further in Part IV.B, *infra*. Instead, the claim here is that Type A information alone is insufficient. At minimum, more information of different types is needed. At maximum, more information of different types plus a different substantive and procedural law regime, different market conditions, and different incentive structure around workplace rights enforcement and market discipline may be sufficient.

in Mississippi and Texas imported almost 600 men from India with temporary H-2B guestworker visas to repair oil rigs and other equipment that was damaged by the storm.³⁴ The workers were kept in “guarded, overcrowded, and isolated labor camps,” where visitors were rarely allowed.³⁵ They were subject to threats, “psychological abuse, and coercion.”³⁶ They were paid less than the minimum wage,³⁷ and exorbitant fees for their squalid housing were deducted from their paychecks.³⁸

These workers were well aware of the conditions under which they were working; there was no need for a transparency mandate to reveal the desperate, obvious facts of their jobs.³⁹ Unlike Ms. Matthew, who knew that she was being exposed to *something* but did not know its name or its health risks, and unlike Ms. Contreras, who but for her marriage could not have discovered that she was paid less than her male counterparts, there was nothing hidden about the circumstances under which the H-2B workers were employed.

However, the H-2B workers’ Type A knowledge of the conditions of their jobs could not, in and of itself, trigger them to take action. In their isolation, these workers had no access to other information that would enable them to engage in a rights-enforcing or market response to the workplace problems they encountered. They could not give meaning to and contextualize their experiences by comparing their jobs to available jobs at other firms⁴⁰ or to the substantive requirements of U.S. labor and employment laws. They did not know the process by which they might seek out other jobs or seek to enforce their labor and employment rights.⁴¹ They could not accurately assess the potential costs and benefits of rights-enforcing or market action; they had no sense of whether other regulatory or market actors might come to their figurative rescue by independently

³⁴ Sixth Amended Complaint ¶ 1, *David v. Signal Int’l*, No. 08-1220-SM-DEK (E.D. La. Aug. 5, 2014); see also *Federal Jury in SPLC Case Awards \$14 Million to Indian Guest Workers Victimized in Labor Trafficking Scheme by Signal International and Its Agents*, S. POVERTY L. CTR. (Feb. 18, 2015) [hereinafter *SPLC Award*], <http://www.splcenter.org/get-informed/news/federal-jury-in-splc-case-awards-14-million-to-indian-guest-workers-victimized-in-> [https://perma.cc/74YQ-GVK8].

³⁵ Sixth Amended Complaint, *supra* note 34, ¶¶ 6, 209.

³⁶ *Id.* ¶ 6.

³⁷ *Id.* ¶ 216.

³⁸ *Id.* ¶ 534–40.

³⁹ Viscusi has pointed out that express warnings about the conditions of work may not be necessary once a worker engages in a process of on-the-job learning, which is often sufficient to alert a worker of the true conditions of work. VISCUSI & MAGAT, *supra* note 14, at 100 (describing a process of Bayesian updating in which “workers begin jobs with imperfect information . . . [and] [a]fter acquiring risk information, most workers display the capacity to update their probabilistic beliefs”).

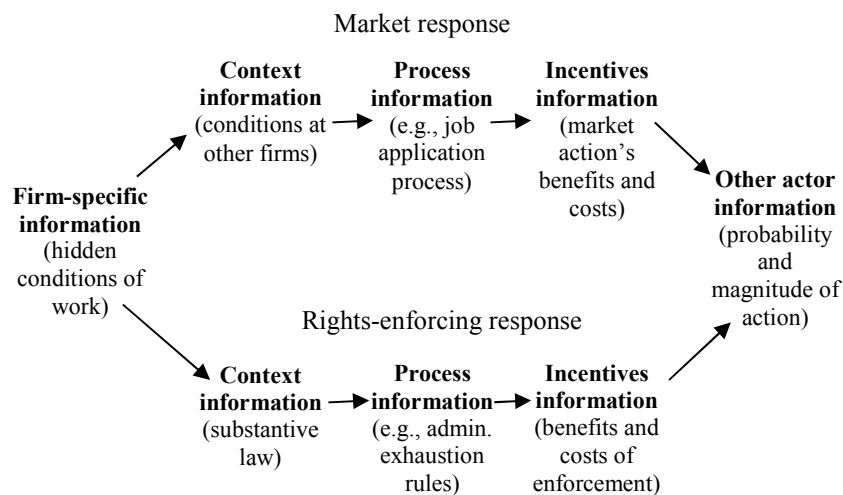
⁴⁰ Indeed, the terms of the H-2B visas prohibited workers from changing jobs; if they left their job at Signal International, they were required to return to India rather than take a new job in the United States. Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12.

⁴¹ Sixth Amended Complaint, *supra* note 34, ¶ 9 (describing the plaintiffs as “[d]eeply indebted, fearful, isolated, disoriented, and unfamiliar with their rights under United States law”).

forcing change at their workplace.

Thus, if information is going to trigger the sorts of outcomes envisioned by Estlund and Viscusi, transparency mandates cannot stop at Type A information alone. Type A information is merely the raw material of workplace problems, describing what is actually happening on the job. Ms. Matthew and Ms. Contreras needed access to that raw material, which otherwise would have been hidden from them by the policies and structures of their workplaces. The H-2B workers did not need such access, as they lived their workplace problems every day. Regardless, for any of those three sets of workers, Type A information alone is insufficient. Focusing here on *workers* as the relevant actors, then, five total types of information are necessary, differing in content depending on whether workers engage in a rights-enforcing or market action. (The information necessary for regulator and outside interest group action is discussed further in the section that follows.) FIGURE 2 illustrates these five information types.

FIGURE 2: Information Necessary for Market and Rights-Enforcing Responses to Workplace Problems



As explained above, Type A information consists of facts about the on-the-ground conditions of work that are held exclusively by the employer or to which the employer blocks access. Type B is information about context. This information provides a point of comparison and framework for understanding Type A information. The context could be the conditions of work at other firms, or it could be the requirements of substantive labor and employment law. Either way, Type B information gives meaning to Type A information and allows workers to assess how bad, as a relative

matter, their conditions of work actually are.

Type C information concerns process, or the steps that a worker must take to engage in a rights-enforcing or market response to the problem exposed at the Type A stage. Here, a worker might need to know about administrative presentment or exhaustion rules, e.g., the requirement of filing a discrimination charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of a discriminatory event.⁴² If the worker is contemplating a market response, he or she would need to know about the availability of job openings at other firms, their qualification requirements, and the process by which he or she could apply.⁴³

Type D information, in turn, reveals to workers the costs and benefits of taking either market or regulatory action. On the rights-enforcing track, this would include what I have called in other work “operational rights,” or the set of protections and incentives built into labor and employment laws that are designed to encourage worker lawsuits.⁴⁴ These include protections against retaliation, liquidated (double) damages, and attorneys’ fees and costs for prevailing plaintiffs. On the market side, Type D information would include the full range of transaction and opportunity costs incurred by switching jobs.

Finally, Type E information consists of the probability and magnitude of other actors’ responses to disclosed information about workplace

⁴² 42 U.S.C. § 2000e-5(e) (2012).

⁴³ Worker’s rights-enforcing and market responses to a workplace problem may in some sense be interchangeable. In other words, when opportunities to switch jobs are slim, a worker might instead stay at her current job and file a lawsuit or complain to a government agency. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) (defining a worker’s choices when faced with a problem within her organization as exit, voice, and loyalty: “Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs”); *see also* John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 710 (1993) (“[A] strong economy is a powerful ally for victims of discrimination. Indeed, many such individuals have deemed this market remedy to be preferable to the legal remedies for discrimination that have been in place for the past twenty-five years. When the economy is healthy, victims of discrimination can more easily find new jobs without suffering an extended period of unemployment. Many potential litigants bypass their legal remedies when they believe that adequate market opportunities exist. Conversely, a recessionary economy, and the excess supply of labor that attends it, creates an opportunity for employers to indulge discriminatory preferences and choose workers on the basis of irrational prejudice or tastes.”).

⁴⁴ Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 386 (2012) (coining the term “operational rights” to describe the set of incentives and protections that “encourage statutory enforcement through private lawsuits by directly influencing potential plaintiffs’ decision-making; they put substantive rights into operation. . . . [and] are designed to increase the benefits of taking legal action and decrease the costs, acting as a thumb on a worker’s cost-benefit scale and tipping it in the direction of exercising ‘voice’ on the job”); Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1102 (2014) (further explaining the concept of “operational rights”); *see also* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 783 (2011) (discussing “suit boosters” or incentives offered to plaintiffs and their attorneys to bring private litigation).

problems. In some sense, Type E information is a subset of Type D information, in that Type D reveals to workers the costs and benefits of taking action. If workers are assured that another actor is going to address, effectively, workplace problems—if OSHA is going to inspect and clean up an unsafe workplace, for example, or if the U.S. Department of Labor is going to file a wage and hour suit against an employer—then the benefits of a worker’s taking independent enforcement action or leaving the firm would be slight. However, this Essay treats Type E information as a separate category because of its importance to actors’ decision-making. As explained further below, employers in particular may be especially sensitive to the likelihood and probable magnitude of other actors’ responses in deciding whether to take affirmative steps to address disclosed workplace problems.

Returning to the earlier stories, the H-2B workers described above were eventually able to make contact with workers’ rights advocates, who equipped them with the information necessary for a group of plaintiffs to file suit under a variety of federal employment and anti-trafficking laws. In February 2015, five of those workers won a jury verdict of \$14 million.⁴⁵ Ms. Contreras, too, ultimately filed suit against her employer, alleging that she was subject to pay discrimination in violation of federal employment law.⁴⁶ She likely gathered the context, process, incentives, and other actor information necessary for her claims from fellow workers who had already joined the lawsuit, or perhaps from information provided by the plaintiffs’ class action attorneys.⁴⁷

Ms. Matthew’s story provides a sobering counter-example, however, of the importance of Type B–E information in triggering worker action. Ms. Matthew now suffers from the autoimmune disease lupus, which she attributes to her decades-long pesticide exposure.⁴⁸ She says that, “[a]s far

⁴⁵ *SPLC Award*, *supra* note 34 (describing jury award).

⁴⁶ Jock, First Amended Complaint, *supra* note 6, ¶¶ 1–3. In February 2015, an arbitrator granted class certification in the suit to a class of 44,000 current and former women to proceed with their pay discrimination claims. Class Determination Award at 2, 118, *Jock v. Sterling Jewelers, Inc.*, No. 11 20 0800 0655 (Feb. 2, 2015), <http://www.cohenmilstein.com/media/pnc/0/media.1710.pdf> [<http://perma.cc/R7TT-J9B2>] (Part 1) and <http://www.cohenmilstein.com/media/pnc/1/media.1711.pdf> [<http://perma.cc/K87Y-VBAH>] (Part 2); *Sterling Jewelers*, COHEN MILSTEIN, <http://www.cohenmilstein.com/cases/97/sterling-jeweler> [<http://perma.cc/3X8A-SPN8>] (last visited Sept. 28, 2015).

⁴⁷ For example, class counsel for the plaintiffs have the following notice on their website: “It is very important that anyone, female or male, who has information about these discrimination allegations or more generally about how Sterling has treated its women employees please call the lawyers . . . providing your contact information and where you worked for Sterling . [sic] You may also contact our co-counsel . . . We are interested in speaking with former or current employees, both male and female. (Please note that we are not ethically permitted to discuss the case with current managers unless they believe they have experienced or are experiencing gender discrimination at Sterling).” *Sterling Jewelers*, *supra* note 46.

⁴⁸ SLONGWHITE, *supra* note 3, at 55 (discussing Ms. Matthew’s lupus diagnosis); *id.* at 104 (discussing links between pesticide exposure and lupus).

back as 1974, we [farmworkers] talk[ed] among ourselves because we knew that when we go home at night there was something going on with our bodies.”⁴⁹

However, Ms. Matthew did not engage in a rights-enforcing response: she did not file a workers’ compensation claim, sue her employer, or complain to a regulatory agency. Though she clearly lacked complete Type A information about her chemical exposure, she attributes her and her fellow workers’ silence to two additional information deficits: lack of legal rights information (Type B) and lack of information about the incentives for rights-enforcing action (Type D). She describes many farmworkers as lacking information about their legal rights; as she says, “Why should [employers] recruit a person who is educated and smart and know[s] the law?”⁵⁰ She also describes the costs of engaging in rights-enforcing behavior:

In the fields, if you go talkin’ about you got sick because of the pesticides, there was a hush mouth, because if you didn’t keep your mouth closed, they would retaliate against you. They would tell you, ‘Well, you don’t come back.’ And then you wouldn’t have a job, so you had to take a lot of stuff.⁵¹

Ms. Matthew received no countervailing information describing the potential benefits of rights enforcement—paid medical costs and other compensatory damages, attorneys’ fees, or changes in farms’ use of hazardous chemicals—to weigh against this retaliation risk.⁵²

Nor did Apopka farmworkers penalize their employers via the labor market by quitting en masse. Indeed, the growers in the area may have actively blocked workers from receiving information on other available jobs (Type B) and the requirements and process for a job switch (Type C). As one journalist commented, after the State of Florida shut down the Apopka muck farms due to pesticide-related mass bird deaths (*not*, importantly, due to harmful effects on workers’ health), “[workers] were not retrained for new jobs because the powerful farmers feared that educated workers would abandon the fields before the last carrot or tomato was picked.”⁵³

⁴⁹ *Id.* at 39.

⁵⁰ *Id.* at 48.

⁵¹ *Id.* at 39.

⁵² As discussed further in Part IV, *infra*, even if Ms. Matthew did know about the potential benefits of rights enforcement, they may not have outweighed the risks associated with filing a lawsuit. See Alexander & Prasad, *supra* note 44, at 1106 (“Against these costs, the benefits of claiming appear paltry. Though back pay may be available to a plaintiff at the end of a lawsuit, if that amount is insufficiently large—and for plaintiffs who sue because they were paid less than the minimum wage, back pay awards will, by definition, be quite small—then enduring the uncertain, stressful, drawn-out process of litigation may not be worth it.”).

⁵³ ESTABROOK, *supra* note 1, at 49.

Thus, the differing outcomes in these three worker stories illustrate the need to consider the full complement of information that is necessary for market or regulatory action by workers themselves, rather than assuming, as much of legal and economic literature does, that mandating the transmission of Type A information alone is sufficient.

C. *Additional Necessary Workplace Information: Regulators and Outside Interest Groups*

Workers are only one possible actor who might address workplace problems. Regulators and outside interest groups may also take market or rights-enforcing action, and employers might take affirmative action themselves upon learning Type A information about workplace problems. Yet these actors, too, need a full complement of context, process, incentives, and other actor information, in addition to and on top of Type A disclosures.

As an initial matter, Type A disclosures will often be more important to regulators and outside interest groups than to workers and employers, who are “insiders” to the employment relationship and thus already know about the on-the-ground conditions of the work. To be sure, as discussed above, Type A information may be necessary even to insiders when aspects of work are *hidden*, and the very act of making those disclosures might also “inform” an employer who previously overlooked or ignored those facts.⁵⁴ But Type A information will have the most importance for regulators and outside interest groups, who otherwise will be uninformed about most aspects of a job. Here, Estlund’s work on the ways in which publically disclosed workplace facts can aid in compliance efforts and reputational rewards and sanctions is instructive: she notes that government agencies that learn about workplace problems (Type A) can take appropriate rights-enforcing action, and that firms can suffer market-based reputational (and resulting financial) harm when workplace problems are exposed to the public.⁵⁵

⁵⁴ Doorey, *supra* note 19, at 67 (“Disclosure can lead to better-informed actors. It facilitates self-learning or self-referential fact-finding; a firm that does not know it is engaging in harmful behaviour is unlikely to take steps to alter that behaviour.”).

⁵⁵ Estlund, *Just the Facts*, *supra* note 15, at 373–74 (“Public disclosure of compliance-related information would help to promote compliance by making noncompliance more visible and enforcement more likely.”); *see also id.* at 376–77 (“The aspiration behind these schemes is not merely to promote informed consumer decisions, but to improve producers’ performance. For example, the point of disclosing fat and calorie content on food labels is not only to inform health-conscious consumers but also to shift nutritional demand and supply toward healthier foods. The point of disclosing the energy efficiency of appliances and vehicles is not only to inform environmentally and economically conscious buyers but also to improve energy efficiency. Similarly, the point of requiring firms that emit toxic substances to disclose their emissions is not only to inform communities but also to induce firms to reduce emissions.”).

Yet, again, Type A information is not enough; other types of information are important to regulators and outside interest groups as well. Turning first to regulators: government enforcement agencies can be assumed to know the substantive law they are charged with enforcing (Type B), as well as the process for and costs and benefits of enforcement (Types C and D). Type E information then becomes critical, as regulators decide how to spend their limited enforcement dollars. If, for example, workers themselves have been successfully filing and winning their own lawsuits against a group of lawbreaking employers, a regulator might be disinclined to engage in enforcement in that particular industry. David Weil, Director of the U.S. Department of Labor's Wage and Hour Division, has recommended this very strategy, advocating that regulators focus their investigatory and enforcement efforts on "'fissured' industries[] in which businesses employ high numbers of subcontractors and other contingent workers and disclaim any legal responsibility for wages and working conditions."⁵⁶ Because workers in these industries would face significant legal barriers in holding their employers responsible for wage and hour violations, Weil has exhorted regulators to step in to fill the enforcement void.⁵⁷ This is an example of Type E information's spurring a rights-enforcing response, where a regulator calibrates its approach to a workplace problem according to the independent responses (or lack thereof) of other potential enforcement actors.

Turning next to outside interest groups: consumers, investors, and advocacy organizations might engage in their own market or regulatory actions, and a different suite of information is necessary for each response. On the rights-enforcement track, investors might file suit against a corporation's directors and officers for breach of fiduciary duty if the company is revealed to be engaging in a pattern and practice of violating labor or employment laws. To do so, the investors need to know something about the substantive law and legal process as well as the benefits that might accrue as a result of such a suit. Likewise, consumers might engage in a boycott of a company's products or services upon revelation of damaging Type A information. Again, to do so, they would need contextual Type B information to determine whether conditions at the target company are atypical, and therefore perhaps vulnerable to public pressure, or whether conditions are merely the norm across an industry as a whole.

Finally, as discussed above, employers themselves might be prompted

⁵⁶ Alexander & Prasad, *supra* note 44, at 1117–18 (discussing DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 18–26 (2010), <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<http://perma.cc/BH73-UBFD>]).

⁵⁷ WEIL, *supra* note 56, at 75–95.

by the revelation of Type A information to take affirmative steps to correct workplace problems, even in the absence of litigation, regulation, or outside group pressure. Again, however, additional information is likely necessary to trigger an affirmative employer response. Like all other actors, employers need to know something about context (Type B) to gauge the relative severity and importance of the disclosed problem. In addition, Type E information may be the most influential for employer decision-making. If an employer knows that the likelihood of regulator enforcement action, a worker lawsuit, mass exodus of workers, a boycott, reputational harm, and/or divestment are near nil, then the likelihood of an affirmative employer response is also likely to be near nil. Put another way, if maintaining sub-legal or sub-market working conditions is currently profitable for an employer, and Type E information reveals no threat of enforcement or market discipline, then the profit-maximizing employer is highly unlikely to make changes on its own. Thus, whether the information types described here would result in market or rights-enforcing action by any actor is in some ways circular, as any one actor's response to workplace problems depends on its knowledge and prediction of other actors' responses.⁵⁸

Therefore, for each actor and each market and rights-enforcing response, it is clear that Type A information must be disclosed, but that Type A is merely the first of multiple kinds of necessary information. The following Part surveys existing workplace transparency mandates in labor and employment law—those already identified in the literature and those left out—and maps them onto the typology developed in FIGURE 2.

III. A SURVEY OF EXISTING TRANSPARENCY MANDATES

A. *Existing Type A Disclosures*

In her work on employer disclosure mandates, Cynthia Estlund characterizes “mandatory disclosure [as] a largely unexplored concept in the employment field.”⁵⁹ The three transparency mandates that she does identify all require transmission of Type A information: the Hazard Communication Standard issued pursuant to the Occupational Safety and Health Act (OSHA), under which employers must inform workers about toxins on the job;⁶⁰ the Employee Retirement Income Security Act

⁵⁸ Unscrupulous employers may in fact manipulate other actors' likelihood of engaging in a rights-enforcing or market response. See, e.g., Sixth Amended Complaint, *supra* note 34, ¶¶ 7–9, (detailing instances of employer threats to prevent worker protests and actions to block workers from leaving their jobs). See generally Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779 (2013) (discussing employer threats as mechanisms for silencing worker claims).

⁵⁹ Estlund, *Just the Facts*, *supra* note 15, at 352.

⁶⁰ *Id.* at 377 (citing 29 C.F.R. § 1910.1200(a)(1) (2010)).

(ERISA), under which “[e]mployers must disclose the terms of health and benefit plans;”⁶¹ and pay transparency rules in some areas of federal and state employment law that require disclosure of the employer’s wage schedule and prohibit retaliation against workers who share information about their pay.⁶²

Professor J.H. Verkerke provides another example of Type A information transmission: where an employer’s statements about loyalty and job tenure create an expectation of job security, courts in some states create a good cause exemption to the doctrine of at-will employment.⁶³ As Verkerke explains, the threat that a court might apply this exemption in a worker’s wrongful discharge lawsuit can prompt employers to clearly disclose employees’ at-will status.⁶⁴ The threat of the good cause exemption acts as a transparency mandate, forcing the employer to reveal Type A information about the true extent of the worker’s job security.

To this list, this Essay adds two more transparency mandates, both of which also prompt employers to inform workers of their status and security at work. First, the U.S. Department of Labor has proposed a “Right to Know” initiative, which would require employers to tell workers whether they are classified as employees or independent contractors under the Fair Labor Standards Act (FLSA).⁶⁵ This information is often hidden from workers unless and until an employer challenges a worker’s employee status as a defense in an FLSA lawsuit. Second, the Worker Adjustment

⁶¹ *Id.* at 352 n.1.

⁶² Estlund, *Extending the Case*, *supra* note 15, at 784 & n.13 (citing the Migrant and Seasonal Agricultural Worker Act, 29 U.S.C. §§ 1821, 1831 (2012), as well as pay transparency laws enacted in New York, N.Y. LAB. LAW § 195(1)(a) (McKinney 2009 & Supp. 2014), Iowa, IOWA CODE ANN. §§ 91E.1–E.6 (West, Westlaw through 2014 Reg. Sess.), and Nebraska, NEB. REV. STAT. ANN. §§ 48-2209, -2214 (West, Westlaw through 2014 Reg. Sess.)). President Obama also issued a notice of proposed rulemaking in September 2014 that would require pay transparency for federal contractors by prohibiting retaliation against those workers who share information about their pay. OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP’T OF LABOR, FACT SHEET: NOTICE OF PROPOSED RULEMAKING: GOVERNMENT CONTRACTORS, PROHIBITIONS AGAINST PAY SECRECY AND ACTIONS 1 (n.d.), http://www.dol.gov/ofccp/PayTransparencyFactSheet_JRF_QA_508c.pdf [<http://perma.cc/H8B9-8DGN>]. This anti-retaliation approach creates “space” for worker sharing of information about their wages and working conditions and mirrors in some ways the NLRA’s concerted activity provision, which has been interpreted to protect that space for worker discussion and peer information transmission. *See* 29 U.S.C. § 157 (2012) (protecting workers’ rights to engage in concerted activity); *see also* Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI-KENT L. REV. 901, 929 (2012) (“[A] different kind of protection—protection from monitoring and surveillance—may be necessary *before* the employee speaks. Employees may need some space to seek information, to explore ideas and discuss concerns with others before they are ready to speak in the ways that the law most values If employees are unable to communicate about shared workplace concerns without employer scrutiny, collective speech is unlikely ever to emerge.”).

⁶³ Verkerke, *supra* note 30, at 925.

⁶⁴ *Id.* at 937.

⁶⁵ *Right to Know Under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR (2010), <http://www.dol.gov/whd/regs/unifiedagenda/fall2010/1235-AA04.htm> [<http://perma.cc/C2KW-AVZQ>].

and Retraining Notification Act (WARN) requires that employers provide sixty days' advance notice to workers of impending mass layoffs or plant closings.⁶⁶ Again, a firm might otherwise shield this information from discovery in order to maintain investor confidence as long as possible. The WARN Act forces disclosure of this Type A information to workers.

Thus, there are examples of Type A disclosure rules scattered throughout employment law that prompt the transmission of information about employees' occupational health risks, pay and benefits, employee status, and job security. Each of these disclosures transmits facts that are known solely, and sometimes actively hidden, by the employer, and that workers are unable to discover independently.

B. *Existing Type B, C, and D Disclosures*

If Estlund is correct that scholars have left Type A workplace transparency mandates "largely unexplored," then they have left the other types completely off the scholarly map.⁶⁷ However, one need only scan the walls of break rooms and office kitchens across America to discover multiple mandated disclosures about Type B, C, and D information: posters and notices that inform workers of their substantive rights under various labor and employment laws, the process for making a claim, and protections against retaliation. Many employers also provide anti-harassment materials to workers (Type B) and create and disseminate information about internal complaint procedures (Type C).

Almost no scholarly attention has been paid to these ubiquitous examples of workplace information transmission, despite their essential role, as explained in Part II, in building on Type A information to trigger rights-enforcing or market responses to workplace problems. Accordingly, this Part presents an in-depth examination of three instances of Type B–D workplace information transmission: the FLSA break room poster, the National Labor Relations Board (NLRB) remedial notice, and employers' anti-harassment policies and complaint procedures. Each of these informs workers of their substantive legal rights, rights-enforcement procedures, and incentives for rights-enforcement action, and also puts employers themselves on notice.⁶⁸ The end of this Part turns from the regulatory to the market track, briefly examining the forms that Type B–D information

⁶⁶ 29 U.S.C. § 2102(a) (2012).

⁶⁷ Indeed, Estlund acknowledges the problem that "[e]mployees may also lack important information about the law of the workplace," but "set[s] that problem aside." Estlund, *Just the Facts*, *supra* note 15, at 363 n.42.

⁶⁸ This Part focuses exclusively on workers and, to a lesser extent, employers, leaving out a discussion of disclosure of Type B–D information to regulators and outside interest groups. As discussed above, these actors are less likely to be in need of Type B–D disclosures, as they already have access to those sets of information.

might take in the context of a market response to the disclosure of a workplace problem.

1. *The FLSA Break Room Poster*

The U.S. Department of Labor (DOL) requires employers to display up to eleven different posters covering a range of topics from polygraph protection to migrant farmworkers' rights; other federal and state agencies require additional or different disclosures.⁶⁹ This Part focuses on one of the eleven: the FLSA poster concerning workers' rights under the statute, the current version of which is included as FIGURE 3 in the Appendix.

All employers covered by the FLSA have been required to display a poster describing workers' wage and hour rights since 1949.⁷⁰ The poster

⁶⁹ *Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers*, U.S. DEP'T OF LABOR [hereinafter *Poster Page*], <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm> [<http://perma.cc/X6A2-Z6ZV>] (last visited July 27, 2015); see also Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433 (1995) (discussing federal and state agency poster requirements); Joseph H. McFarlane, Note, *Poster Wars: The NLRB and the Controversy over an 11-by-17-Inch Piece of Paper*, 38 J. CORP. L. 421, 429 (2013) (discussing federal and state agency poster requirements). Notably, there is no requirement that employers hang a poster describing workers' rights under the NLRA; this omission, and the NLRB's attempt to rectify it, is discussed at length in Part IV, *infra*.

⁷⁰ 29 C.F.R. § 516.4 (2014) ("Every employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not apply because of an exemption of broad application to an establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply. For example: Overtime Provisions Not Applicable to Taxicab Drivers (section 13(b)(17))."). The FLSA poster requirement had its genesis in Industry Wage Orders, which under the original 1938 version of the FLSA were used to set minimum wages on a per-industry basis "to phase low-wage industries into the minimum statutory wage." Wage and Hour Division Economic Report for American Samoa Industry Committee No. 26, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/as/sec1.htm> [<http://perma.cc/Q6FU-ZF5D>] (last visited July 27, 2015). These orders often "included a requirement that employers post appropriate notices [of the FLSA's requirements] in conspicuous places where covered employees are working." Posting of Notices, 14 Fed. Reg. 7516, 7516 (Dec. 16, 1949). In 1949, drawing on "the accumulated experience of the [DOL's Wage and Hour] Division over a period of more than 11 years," the DOL issued a uniform workplace poster rule that required every employer covered by the FLSA to "post and keep posted such notices pertaining to the applicability of the Fair Labor Standards Act as shall be prescribed by the Division, in conspicuous places in every establishment where such employees are employed so as to permit them to readily observe a copy on the way to or from their place of employment." *Id.* Curiously, DOL regulations establish no "citation or penalty for failure to post," *Poster Page*, *supra* note 69, but some courts have held that an employer's failure to display the poster can warrant tolling of the FLSA's statute of limitations, see, e.g., *Asp v. Milardo Photography*, 573 F. Supp. 2d 677, 698 (D. Conn. 2008) (collecting cases and concluding that "the trend regarding the failure to post FLSA notices . . . permits equitable tolling where the plaintiff did not consult with counsel during his employment and the employer's failure to post notice is not in dispute"); *Cortez v. Medina's Landscaping*, No. 00 C 6320, 2002 WL 31175471, at *6 (N.D. Ill. Sept. 30, 2002) ("Accordingly, this court holds that an employer's failure to post the notice required by 29

states the applicable federal minimum wage in large type at the top, and in smaller type below describes workers' rights concerning overtime pay, child labor, and proper payment methods for tipped employees (Type B information). The poster also discusses the process for enforcing the FLSA, but, oddly, focuses primarily on the DOL's ability to bring FLSA lawsuits, leaving out information about workers' own ability to file lawsuits (Type C information) and the double damages and attorneys' fees they might collect if victorious (Type D).⁷¹ In addition, the poster contains a single line discussing protections against retaliation, another Type D fact that might influence a worker's assessment of her incentives to engage in rights enforcement: "The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act."⁷²

The DOL's original justification for the poster explicitly linked greater worker knowledge of their substantive legal rights to better enforcement of the law:

It has been found that effective enforcement of the act depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, and *a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law.*⁷³

The DOL went on to describe well-informed workers as a "necessary adjunct to proper enforcement of the statutory provisions."⁷⁴

Thus, break room posters appear to be designed to function prophylactically, to provide Type B–D information to workers and simultaneously remind employers of their legal obligations.⁷⁵ Remedial notices ordered by the NLRB, explored next, are more of an antidote than a prophylactic, designed as an ex post corrective for employer misbehavior. Despite this difference, however, the NLRB remedial notice also transmits context, process, and incentives information to both workers and employers.

C.F.R. § 516.4 tolls the limitations period until the employee acquires a general awareness of his rights under the FLSA.").

⁷¹ Employee Rights Under the Fair Labor Standards Act Poster, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/posters/minwagebwp.pdf> [http://perma.cc/46GD-K3KQ] (last visited Oct. 17, 2015).

⁷² *Id.*

⁷³ Posting of Notices, 14 Fed. Reg. 7516, 7516 (Dec. 16, 1949) (emphasis added).

⁷⁴ *Id.*

⁷⁵ *Id.*

2. *The NLRB Remedial Notice*

Though there is presently no universal requirement that employers display a break room poster describing workers' labor rights, a subject revisited in Part IV below, employers who commit unfair labor practices are routinely ordered by the National Labor Relations Board to post a remedial notice.⁷⁶ This notice, a sample of which appears as FIGURE 4 in the Appendix, informs workers of their substantive rights to organize into a union and bargain collectively (Type B information), the contact information for the local NLRB compliance officer (Type C), and the employer's promise not to retaliate against any worker who exercises her labor rights (Type D).⁷⁷ Similar remedial notices are required by the Occupational Safety and Health Administration in the event of OSHA violations.⁷⁸

From the early days of their usage, NLRB remedial notices have been described as a corrective for workers' lack of knowledge about their labor

⁷⁶ *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (affirming the NLRB's power to require remedial notice posting); *In re J & R Flooring*, 356 N.L.R.B. No. 9, 2010 WL 4318372, at *2 (Oct. 22, 2010) ("The requirement that respondents post a notice informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the [National Labor Relations] Act."); Leonard R. Page, *NLRB Remedies: Where Are They Going?*, LAWMEMO (Apr. 10, 2000), <http://www.lawmemo.com/nlr/remedies.htm> [<http://perma.cc/V7MP-ZYKF>] ("The Board's practice of including notice postings in its remedial orders dates back to the Board's inception.").

⁷⁷ A typical NLRB remedial notice, such as the one shown in the Appendix, must be posted conspicuously for sixty days, both physically in the workplace and electronically by email and posting on internet and intranet sites. *J & R Flooring*, 356 N.L.R.B. No. 9, 2010 WL 4318372, at *4 ("In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means."). In some circumstances, courts also require employers to read the notice aloud to their workforce and mail a copy to each worker. *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929–30 (D.C. Cir. 2005) (discussing the "particularized need" standard for compelling the public reading of a NLRB remedial order). Remedial notices must be signed by a representative of the employer and customarily state workers' rights under the NLRA, as well as the employer's pledge to respect those rights in the future and cease any wrongdoing. *J & R Flooring*, 356 N.L.R.B. No. 9, 2010 WL 4318372, at *4 (discussing remedial "notices to employees concerning the violations found by the Board, the remedies ordered, and the underlying rights of the employees"); *id.* at *6 (requiring an "indication that the notice has been duly signed").

⁷⁸ 29 C.F.R. § 1903.16(a) (2013) ("Upon receipt of any citation under the Act, the employer shall immediately post such citation, or a copy thereof, unedited, at or near each place an alleged violation referred to in the citation occurred . . ."); *see also, e.g.*, Citation and Notification of Penalty, Bostik, Inc., Inspection No. 315298307 (Dep't of Labor Sept. 12, 2011) (on file with author) (describing citations, penalties, posting requirements, and workers' rights: "The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the U.S. Department of Labor Area Office at the address shown above.").

rights (Type B information) and protections against retaliation (Type D). In 1940, for example, the U.S. Supreme Court described the NLRB's "purpose" in requiring a remedial notice as increasing workers' "knowledge of a guarantee of an unhampered right in the future to determine their own labor affiliation."⁷⁹ The Court went on to expound on the role of information in the project of enforcing workers' labor rights:

Knowledge on the part of the men that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent . . . was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor.⁸⁰

Lower courts have similarly noted the ability of the remedial notice to educate workers about their substantive labor rights and especially to correct employer-created misinformation. The Seventh Circuit has commented, for example, that "requiring an employer to post a notice will carry significant impact in informing employees of their rights and effectuating the policies of the Act,"⁸¹ while the Fifth Circuit has described forced notice-posting as "let[ting] . . . a warming wind of information and, more important, reassurance" into a workplace that has been "chilled" by employers' unfair labor practices.⁸² Remedial notices, like break room posters, are therefore rooted in the concept that forcing the transmission of Type B–D information—informing workers of their labor rights, the process for enforcement, and their protections against retaliation—will result in greater enforcement of and compliance with labor law.

3. *Anti-Harassment Policies and Complaint Procedures*

Many employers inform workers about their firms' anti-harassment policies, including the rights and prohibitions of employment law (Type B information); many have also devised internal complaint procedures for workers to report instances of discrimination or harassment (Type C). Some states, such as California,⁸³ affirmatively require these forms of information transmission. Even in the absence of a mandate, employers

⁷⁹ NLRB v. Falk Corp., 308 U.S. 453, 462 (1940).

⁸⁰ *Id.*

⁸¹ NLRB v. Methodist Hosp. of Gary, 733 F.2d 43, 48 (7th Cir. 1984); *see also* NLRB v. Gen. Thermodynamics, 670 F.2d 719, 722 (7th Cir. 1982) ("The Board could reasonably conclude that requiring respondent to post a notice regarding the change in its solicitation and distribution rule will carry more impact in informing employees of their rights and effectuating the policies of the Act than the respondent's muted removal of the rules from the bulletin boards.").

⁸² J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969). A former NLRB General Counsel has stated similarly, "The Board notice serves an important purpose: it describes their rights to employees and reassures them that these rights will be vindicated." Page, *supra* note 76.

⁸³ *See generally* CAL. GOV'T CODE § 12950 (West, Westlaw through Ch. 322 of 2015 Reg. Sess.) (describing what information employers must provide their employees).

may be strongly incentivized to engage in information disclosure in order to gain access to a defense to certain types of Title VII hostile work environment claims: the *Ellerth/ Faragher* defense.⁸⁴

The *Ellerth/ Faragher* defense takes its name from two Supreme Court decisions that were issued on the same day in 1998.⁸⁵ Both involved hostile work environment sexual harassment claims, in which a supervisor committed harassment and the plaintiff sought to hold the employer itself vicariously liable under Title VII.⁸⁶ The Court held that employers in these circumstances can defend themselves by showing that they “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and, additionally, that the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.”⁸⁷ The Court noted further that “an antiharassment policy with complaint procedure” is one form that the employer’s preventative efforts might take.⁸⁸

Taking this language as their starting point, lower courts have considered what might count as a sufficient antiharassment policy for *Ellerth/ Faragher* purposes. Courts tend to ask two questions. First, what is the substance of the employer’s policy?⁸⁹ Second, how is the policy disseminated?⁹⁰ With respect to substance, courts look favorably on policies that “define[] sexual harassment, [give] specific examples of sexual harassment, and set forth a statement that retaliation would not be tolerated.”⁹¹ Though courts do not require antiharassment policies to be

⁸⁴ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Indeed, the line between mandated and incentivized behavior may be blurrier than it first appears. One is never truly *required* to comply with the law, only incentivized to avoid the consequences of law-breaking.

⁸⁵ Both cases were decided on June 26, 1998. *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.

⁸⁶ *Ellerth*, 524 U.S. at 746–47 (“We decide whether, under Title VII of the Civil Rights Act of 1964 an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions.” (citation omitted)); *Faragher*, 524 U.S. at 780 (“This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination.” (citation omitted)).

⁸⁷ *Ellerth*, 524 U.S. at 765.

⁸⁸ *Id.* at 765, 773.

⁸⁹ *See id.* at 765 (“[T]he need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.”).

⁹⁰ *See Faragher*, 524 U.S. at 808 (stating that the employer city was unable to raise an affirmative defense because it failed to disseminate its sexual harassment policy).

⁹¹ *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1304 (M.D. Ala. 2006); *see also McGriff v. Am. Airlines*, 431 F. Supp. 2d 1145, 1155 (N.D. Okla. 2006) (stating with approval that “American has offered as evidence a copy of its Policy Statement, which expresses American’s commitment to providing a workplace free of unlawful harassment and which provides a listing of protected traits as well as a non-exhaustive list of the forms unlawful harassment might take.”).

couched in terms of workers' legal rights as such, many policies appear to use the language of law and rights. For example, a policy described by the U.S. District Court for the Southern District of Mississippi stated the employer's goal of providing "a working environment in which employees are free from discomfort or pressure resulting from jokes, ridicule, slurs, threats and harassment relating to race, color, gender, sexual orientation, gender identity, religion, national origin, age, disability, veteran status or *other legally protected characteristics*."⁹² Similarly, the Equal Employment Opportunity Commission's (EEOC) guidance on the content of antiharassment policies recommends that employers "inform[] employees of their *right to raise* and *how to raise* the issue of harassment under [T]itle VII."⁹³ Thus, policies developed in reaction to *Ellerth* and *Faragher* often become vehicles for transmission of Type B information about workers' legal rights.

With respect to the dissemination of antiharassment policies, courts favor policies that may be accessed easily by employees in places where they congregate, such as a "crew room" and on a company's intranet and "employee bulletin boards."⁹⁴ If a policy is contained in a lengthy employee handbook, then it must be clearly identified and easily locatable via a table of contents.⁹⁵ And in *Faragher* itself, the Supreme Court noted the district court's finding that, while the defendant had an antiharassment policy, it was functionally ineffective because it was never disseminated to employees.⁹⁶

Taken as a whole, then, courts' interpretations of *Ellerth* and *Faragher*, along with EEOC guidance, signal to employers that a robust antiharassment policy, with a clear explanation of prohibited conduct (Type B information), procedural instructions for claims-making (Type C), and protections against retaliation (Type D), effectively publicized to workers, is the best way to gain access to an affirmative defense to

⁹² *Davis v. River Region Health Sys.*, 903 F. Supp. 2d 424, 427 (S.D. Miss. 2012) (emphasis added).

⁹³ 29 C.F.R. § 1604.11(f) (2013) (emphasis added).

⁹⁴ See *Atwell v. Smart Ala., LLC*, 546 F. Supp. 2d 1250, 1265 (M.D. Ala. 2008) ("The Court finds sufficient evidence from which a reasonable jury could conclude that Defendant's sexual harassment policy was effective and was disseminated. The policy was in the employee handbook, which was distributed to all employees during training. Managers were also given annual training in the policy. The policy was posted on employee bulletin boards."); *Taylor*, 418 F. Supp. 2d at 1304–05 (discussing posting in a crew room).

⁹⁵ *Bush v. Penske Truck Leasing Co.*, No. 06-1110 (RHK/AJB), 2007 WL 1321853, at *5 (D. Minn. May 4, 2007) ("More importantly, however, the Handbook's table of contents provides the specific page where Penske's policy on harassment may be found.").

⁹⁶ *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like [the ones in this instance].").

vicarious liability. Though the Supreme Court did not rely on a transparency rationale for its decisions in *Ellerth* and *Faragher*, the availability of the affirmative defense nevertheless has information-transmitting effects, as employers opt to create and disseminate anti-harassment policies rather than suffer the alternative of proceeding defenseless through litigation.⁹⁷

4. *Type B, C, and D Information on the Market Track*

Thus far, this Part has surveyed existing transparency mandates that force the transmission of Type B–D information in the context of a worker’s rights-enforcing response to a disclosed workplace problem. Turning to the market track, it is more difficult to identify requirements that force employers to disclose job openings (Type B information), job qualifications and the process for applying (Type C), and the range of transaction and opportunity costs involved with job switching (Type D). Certain employer-sponsored visa programs, such as the H-2A visa for temporary agricultural workers and the H-2B visa for other foreign workers, do require that employers advertise their job openings locally before filling the positions with foreign visa-holders.⁹⁸ Likewise, federal law requires that housing developers who receive funds from the U.S. Department of Housing and Urban Development (HUD) advertise their jobs to members of the communities in which the housing is being constructed.⁹⁹

Each of these mandates forces employers to disclose Type B and C information about job availability and processes, which could then enable workers at other firms to identify and assess alternative jobs that may prove to be a better match than their current employment. However, these mandates are limited in scope, applying only to visa-sponsoring employers and those who receive HUD funding. Indeed, there is no labor market-wide job bank that a worker might consult upon learning Type A information that would supply all layers of information necessary for her to engage in a job-switching market response to a workplace problem.

⁹⁷ Nor has the law review literature identified the information-transmitting nature of *Ellerth* and *Faragher*, focusing in large part instead on whether the antiharassment policies prompted by those two decisions are effective in enabling workers’ complaints and reducing workplace harassment. See, e.g., Tanya Kateri Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2006) (“The statistical analysis of survey responses from a group of 120 female sexual harassment victims suggests that White women and Women of Color may differ in their uses of internal complaint procedures.”); Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2715–21 (2008) (providing an example of collective action attempts after incidents of harassment). This Essay considers these same questions of effectiveness—as applied to all forms of workplace transparency mandates—in Part IV.B, *infra*.

⁹⁸ See 20 C.F.R. §§ 655.150–.158 (2010) (describing job advertisement requirements for the H-2A visa program); 20 C.F.R. § 655.10 (2015) (same for H-2B visa program).

⁹⁹ 12 U.S.C. § 1701u(c)(2) (2012).

C. *Nonexistent Type E Disclosures*

Finally, what about Type E information about the probability and magnitude of other actors' rights-enforcing and market responses to an employer's sub-legal or sub-market practices? As discussed above, this information type is likely the most important for spurring employers to take affirmative steps to correct workplace problems, even prior to or in the absence of regulation or market discipline by other actors. In other words, an employer who has accurate Type A–D information about a workplace problem might correctly gauge her exposure to legal liability or to a mass departure of workers. She might then be motivated to make changes even before a lawsuit is filed or workers walk out. If, however, the employer is secure in the Type E knowledge that her workers lack the information and incentives to sue, or that regulatory action or outside interest group pressure is highly unlikely, then even the most well-informed and knowledgeable employers may allow workplace problems to persist.

Yet there is no existing transparency mandate that requires the various actors identified by this Essay to reveal their own intentions to engage in rights-enforcing or market activity to address disclosed workplace problems. In fact, regulatory agencies may desire to keep that information quiet, so as to catch scofflaw employers off guard rather than tip them off to impending investigations and enforcement actions. Thus, because of its contingent nature, this information type may not be susceptible to transmission. It is nevertheless a key component of the typology of workplace information, as, in the end, an employer's knowledge of the likelihood of rights enforcement or market discipline may be a significant predictor of whether change occurs at that workplace.

IV. FIRST AMENDMENT AND LOGISTICAL CHALLENGES: A BRIEF INTRODUCTION

This Part turns from the theoretical briefly to the practical, cataloging some challenges and questions associated with workplace transparency mandates. If each of the five types of information identified by this Essay were to be made available to workers, regulators, and outside interest groups, what would that look like? Who would be required to provide the information, to whom, in what form, and under what legal authority? Moreover, what questions should we ask to determine whether workplace transparency mandates actually accomplish their first-order goals of transmitting information and their second-order goals of triggering rights-enforcing and market responses? This Part begins to sketch out these

questions. A subsequent article attempts to answer them.¹⁰⁰

A. *The Constitutionality of Workplace Transparency Mandates*

The first, and perhaps most important, set of threshold questions associated with workplace transparency mandates concerns their constitutionality. Indeed, the First Amendment may be implicated whenever the government compels a private entity to speak, or to adopt or display the speech of another (e.g., the hazard warnings, pay transparency rules, and workplace posters and notices described above).¹⁰¹

Historically, the constitutionality of break room posters and remedial notices—transmissions of Type B–D information—seems simply to have been assumed by courts. In the only case that decided a First Amendment challenge to a break room poster, *Lake Butler Apparel v. Secretary of Labor*,¹⁰² an employer refused, on free speech grounds, “to post the standard [Occupational Safety and Health Act] poster informing the employees of their safety rights under the Act.”¹⁰³ The Fifth Circuit dismissed the employer’s argument as out of hand, calling it “seemingly nonsensical” and concluding that “if the government has a right to promulgate these regulations it seems obvious that they have a right to statutorily require that they be posted in a place that would be obvious to the intended beneficiaries of the statute.”¹⁰⁴ The court further held:

The posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer. It merely states what the law requires. The employer may differ with the wisdom of the law and this requirement even to the point as done here, of challenging its validity. . . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice Congress thought to be essential.¹⁰⁵

¹⁰⁰ Alexander, *supra* note 22.

¹⁰¹ See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object.” (citations omitted)); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 797 (1988) (“In reaching our conclusion, we relied on the principle that ‘[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind’” (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977))).

¹⁰² 519 F.2d 84 (5th Cir. 1975); see also *McFarlane*, *supra* note 69, at 430 (“The NLRB notes that it ‘is unaware of any challenge to the Labor Department’s authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years.’”).

¹⁰³ *Lake Butler Apparel*, 519 F.2d at 85.

¹⁰⁴ *Id.* at 89.

¹⁰⁵ *Id.*

With respect to NLRB remedial notices, it is clear that the NLRA has extremely broad remedial powers to correct past employer misfeasance, and in that connection may force employers to post the sorts of remedial notices examined in this Essay. The NLRB may even force employers personally to read such notices to their assembled workforce, in order to “dispel the atmosphere of intimidation created in large part by [the employer’s] own statements and actions.”¹⁰⁶ Moreover, in the only roughly similar case to have considered a challenge to OSHA’s remedial notice-posting requirement, the Tenth Circuit rejected an employer’s argument that such a notice violated its constitutional rights by “forc[ing] it to vilify and publish at its own expense the respondent’s unproved accusations.”¹⁰⁷

Finally, in a case that did not take on First Amendment questions directly, the D.C. Circuit nevertheless observed that “an employer’s [First Amendment] right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks.”¹⁰⁸ The Second Circuit has elaborated on this point, noting with respect to the NLRA in particular that “the employer’s entitlement to free speech is not categorical, but limited by the NLRA concept of coercion; to avoid [anti-union] coercion[,] . . . the NLRB can limit the content of employer speech more severely than would be permissible if the NLRA rights of the employees were not simultaneously affected.”¹⁰⁹

Despite this seemingly settled precedent, the constitutionality of the break room poster was thrown back into contention recently in a 2013 D.C. Circuit decision that struck down the NLRB’s attempt to institute a workplace poster requirement.¹¹⁰ Previously, the NLRA had been almost unique among federal workplace rights statutes in its lack of a poster requirement.¹¹¹ In enacting a new poster rule, the NLRB referred to

¹⁰⁶ *United Food & Commercial Workers Int’l Union v. NLRB*, 852 F.2d 1344, 1348 (D.C. Cir. 1988) (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1386–87 (D.C. Cir. 1983)); *see also* *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005) (describing the strong anti-union campaign by the corporation).

¹⁰⁷ *Stockwell Mfg. v. Usery*, 536 F.2d 1306, 1309–10 (10th Cir. 1976); *cf.* *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–16 (2d Cir. 2001) (upholding OSHA hazard labeling requirements of the sort examined by Viscusi and in Part II, *supra*, in the face of a First Amendment challenge).

¹⁰⁸ *UAW-Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003).

¹⁰⁹ *Healthcare Ass’n of N.Y. State v. Pataki*, 471 F.3d 87, 98 (2d Cir. 2006).

¹¹⁰ *See Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part by* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014). Another employers’ group sued the NLRB in the Fourth Circuit, which also invalidated the poster rule, but on the ground that the NLRB had exceeded its authority in issuing the rule. *See Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013). For a discussion of both cases, see Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking and the Upcoming Backfire*, 67 RUTGERS L. REV. (forthcoming 2015), <http://ssrn.com/abstract=2529699>.

¹¹¹ *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,018 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (explaining new rule requiring employers subject to the NLRA to post notices informing their employees of their rights under the

workers' lack of Type B information about their labor rights and the necessity of addressing this information deficit in order to spur rights enforcement.¹¹² In *National Association of Manufacturers v. NLRB* (*NAM I*), however, the D.C. Circuit blocked the poster rule.¹¹³ The decision is a statutory one—interpreting a provision of the NLRA—but with strong constitutional overtones and heavy reliance on First Amendment case law. The remainder of this Part explains the *NAM I* opinion and begins to map out its significance for the constitutionality of other workplace transparency mandates.

The crux of the D.C. Circuit's analysis in *NAM I* is the protection provided to employers by section 8(c) of the NLRA. That section reads in its entirety:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.¹¹⁴

Thus, under this section, an employer's speech may not be deemed an unfair labor practice in violation of the NLRA unless the speech is coercive.¹¹⁵ The NLRB's new poster rule, however, rendered an employer's failure to display the poster an unfair labor practice in two ways: the failure itself could be judged an unfair labor practice,¹¹⁶ and the failure could also be used as evidence of an employer's anti-union animus to bolster charges of other, separate unfair labor practices.¹¹⁷

The interpretive task for the D.C. Circuit, then, was to determine whether an employer's refusal to display the NLRB's poster amounted to speech that was protected by section 8(c) against penalty as an unfair labor practice. *NAM I* is therefore not a true First Amendment case, as the

NLRA).

¹¹² *Id.* at 54,018 n.96 (“[E]ven if only 10 percent of workers were unaware of those rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights. The Board believes that there is no question that at least a similar percentage of employees are unaware of the rights explained in the notice. In the Board's view, that justifies issuing the rule.”).

¹¹³ *NAM I*, 717 F.3d at 959.

¹¹⁴ 29 U.S.C. § 158(c) (2012).

¹¹⁵ See *NLRB v. Gissel Packing*, 395 U.S. 575, 579 (1969) (defining coercive and noncoercive speech for purposes of the NLRA).

¹¹⁶ 29 C.F.R. § 104.210 (2014) (“Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).”).

¹¹⁷ *Id.* § 104.214(b) (“The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.”).

plaintiffs did not claim that the poster requirement infringed directly on their free speech rights guaranteed by the Constitution; employers' obligations to hang government-provided and required posters had, after all, been affirmed uncontroversially in cases like *Lake Butler*.

However, the D.C. Circuit's guidance in determining whether an employer's non-compliance with the poster requirement was an act of expression protected by section 8(c) came wholly from First Amendment case law. The court determined that the First Amendment protects against compelled speech, and that section 8(c) does as well: "Like the freedom of speech guaranteed in the First Amendment, § 8(c) necessarily protects—as against the Board—the right of employers . . . not to speak."¹¹⁸ Because the NLRB, by virtue of its poster requirement, "selected the message and ordered its citizens to convey that message,"¹¹⁹ the poster amounted to compelled speech. The fact that the poster "merely recites" workers' rights under established statutory law to organize into a union and bargain collectively did not save the poster regulation; the court appeared to credit the plaintiffs' contention that the poster presented a "one-sided," employee-friendly depiction of labor law that interfered with employers' right to express their own anti-union opinions.¹²⁰ On these grounds, the D.C. Circuit struck down the poster requirement.

Notwithstanding the explicitly statutory nature of the *NAM I* opinion,¹²¹ subsequent cases have cited it for the proposition that break room poster requirements infringe on employers' free speech rights generally, without restriction to the specific protections offered by section 8(c).¹²² In fact, after *NAM I*, the National Association of Manufacturers filed a copycat suit (*NAM II*) against the Department of Labor, making a direct First Amendment challenge to an Obama Administration Executive Order requiring federal contractors to post substantially the same labor rights poster that was at issue in *NAM I*.¹²³ The *NAM II* court held that the poster requirement did not amount to compelled speech in violation of the employers' First Amendment rights, distinguishing *NAM I*'s statutory

¹¹⁸ *NAM I*, 717 F.3d at 959.

¹¹⁹ *Id.* at 957.

¹²⁰ *Id.* at 957–58.

¹²¹ See *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1073 (D.C. Cir. 2014) ("*NAM I* [I]n fact did not apply the First Amendment at all, but rested instead on 29 U.S.C. § 158(c), which, it carefully explained, goes significantly beyond merely incorporating the First Amendment.>").

¹²² E.g., *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 23–24 (D.D.C. 2013) (describing *NAM I* as "concluding that ordering companies themselves to display certain information on their premises violates '[t]he right against compelled speech' even if that information is non-ideological" (quoting *NAM I*, 717 F.3d at 957)).

¹²³ *Nat'l Ass'n of Mfrs. v. Perez*, No. 1:13-CV-01998 (APM), 2015 WL 2148230 (D.D.C. May 7, 2015).

holding.¹²⁴ Nevertheless, as employment and constitutional law scholar Helen Norton points out, “The [*NAM I*] court’s broad view of employers’ speech rights suggests a willingness to find other employer disclosure requirements—including other statutory notice-posting requirements—to violate the First Amendment.”¹²⁵

A separate article engages in a full constitutional analysis of these questions.¹²⁶ However, some preliminary observations are in order. In a settled line of cases stemming from the U.S. Supreme Court’s decision in *Zauderer v. Office of Disciplinary Counsel*,¹²⁷ courts have applied rational basis review and upheld a range of government regulations requiring companies to disclose “purely factual and uncontroversial” information about their products and services.¹²⁸ Because these regulations concern non-ideological commercial speech, they do not warrant the strict scrutiny normally applied in First Amendment cases, and because the agencies that promulgated the regulations can typically advance a rational state interest for forcing this information, the regulations usually withstand First Amendment challenge.¹²⁹ The labeling and disclosure requirements at issue in this line of cases provide classic Type A information to consumers about the contents and quality of products and services.¹³⁰ The information at issue in *NAM I* and *NAM II*, however, was Type B–D information about workers’ substantive legal rights and the processes and incentives for enforcement.

In *NAM I*, the NLRB attempted to analogize its poster requirement with the purely factual Type A labeling and disclosure requirements upheld

¹²⁴ *Id.* at *5 (“Plaintiffs argue that *NAM*’s discussion of the First Amendment inexorably leads to the conclusion that the Posting Rule at issue here abridges their members’ First Amendment speech rights. But *NAM* does not carry the constitutional weight that Plaintiffs ascribe to it. As Plaintiffs conceded at oral argument, *NAM* did not announce a First Amendment holding.”).

¹²⁵ Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment* 15 (Aug. 4, 2015) (unpublished manuscript) (on file with author).

¹²⁶ Alexander, *supra* note 22.

¹²⁷ 471 U.S. 626 (1985).

¹²⁸ *Id.* at 651.

¹²⁹ See Blasi, *supra* note 15, at 126–29 (detailing cases in which courts found that agencies sufficiently advanced rational state interests to justify regulations concerning non-ideological commercial speech). In *Zauderer* itself, the regulation at issue was designed to provide information to prevent consumer deception by a commercial speaker. 471 U.S. at 651. Lower courts, however, have expanded *Zauderer*’s application of rational basis review beyond contexts involving deception only. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (“To the extent that other cases in this circuit may be read as . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”).

¹³⁰ Blasi, *supra* note 15, at 128–29 (collecting cases upholding rules “requiring disclosure of mercury in products or packaging, caloric content information in restaurant menus and menu boards, fee arrangements in advertising for legal services, information concerning the public impact of storm water discharges by municipal storm operators, and notice of a preliminary injunction to be posted on the website of a company engaged in suspect tax advice” (internal footnotes omitted)).

in the *Zauderer* line of cases.¹³¹ The plaintiffs objected to this contention, arguing that the NLRB's description of workers' labor rights was slanted and inherently ideological.¹³² Though the D.C. Circuit appeared to credit the plaintiffs' argument,¹³³ it offered no explanation or guidance about where to draw the line between ideological and "purely factual and uncontroversial" statements of the law.

Indeed, the position adopted by the plaintiffs in the *NAM I* case and tacitly endorsed by the D.C. Circuit raises more questions than it answers. Taken to its logical conclusion, one might imagine that in the *NAM I* plaintiffs' view, there can never be a "factual" Type B statement of the law that is completely neutral, short of a verbatim recitation of statutory or regulatory text. The process of summarizing necessarily involves editorial judgment about which provisions are more and less important, which is, of course, guided by the editor's ideological beliefs. Similarly, the act of paraphrasing to make legal language accessible to more readers might be an ideological act in and of itself, as it presupposes a belief that legal knowledge should be available even to those who do not have access to a lawyer to translate and interpret.

Given these implications of the *NAM I* plaintiffs' position, then, the constitutional status of the existing statements of employment law contained in the numerous posters that hang on break room walls around the country may be called into question. In a bright spot for workplace transparency mandates, however, the *NAM II* court rejected the plaintiffs' contention that the poster's "slanted" characterization of labor law constituted a First Amendment violation.¹³⁴ According to the *NAM II* court, "when the State is the speaker, it may make content-based choices;"¹³⁵ thus, "even if the [labor rights] Notice is incomplete, the decision to omit certain rights to effectuate a presidential policy decision does not offend the First Amendment."¹³⁶

¹³¹ *NAM I*, 717 F.3d 947, 957 (D.C. Cir. 2013) ("The poster, the Board's acting general counsel tells us, merely recites the employee rights set forth in the National Labor Relations Act (and in court and Board interpretations of the Act). And so, the argument goes, this case is unlike *Barnette* or *Wooley* because the Board's message is 'non-ideological.'"); *id.* at 959 n.18 (describing NLRB's citation to *Zauderer*).

¹³² *Id.* at 958 (describing plaintiffs' portrayal of the poster as "one-sided, as favoring unionization").

¹³³ *Id.* (raising concern that plaintiffs' accommodation of the NLRB's poster would affect the plaintiffs' own expression of their message).

¹³⁴ *NAM II*, No. 1:13-CV-01998 (APM), 2015 WL 2148230, at *8 (D.D.C. May 7, 2015).

¹³⁵ *Id.* (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

¹³⁶ *Id.*

B. *But Does Any of This Actually Work?*

Beyond constitutionality, there is another set of basic, unanswered threshold questions about workplace transparency mandates: Do they actually *work*? Specifically, do transparency mandates accomplish their first-order task of transmitting information to their target audiences? Do they accomplish their second-order task of triggering regulatory and market responses to correct workplace problems?¹³⁷ If not, how might they be revised to better accomplish their goals?

With respect to the first-order goal of achieving information transmission, scholars in many disciplines have written extensively about the problems associated with cognitive bias, which can prevent people from fully understanding and appreciating disclosed information.¹³⁸ Moreover, if a worker does not take sufficient notice of an information disclosure,¹³⁹ or does not read or understand the language in which the workplace information is delivered, then the information may never reach its intended audience. For example, though farmworkers are now required by the Worker Protection Standard of the Environmental Protection Act to be informed about occupational exposure to pesticides, worker advocates report that hazard warnings are often available only in English and Spanish, while farmworkers increasingly speak only the indigenous languages of Mexico and Central America.¹⁴⁰

Moreover, anecdotal accounts abound about the ineffectiveness of break room posters: their very ubiquity may mean that they tend to fade into the background of the workplace. For example, in the rulemaking process concerning the NLRB's now-defeated break room poster

¹³⁷ As Viscusi and Magat put it, “[T]he relevant question for evaluating information programs such as hazard warnings is whether they induce behavioral changes in the desired direction and of sufficient magnitude to remedy the information problem.” VISCUSI & MAGAT, *supra* note 14, at 9.

¹³⁸ See Estlund, *Just the Facts*, *supra* note 15, at 391 (“Of course, information may not be useful given its complexity, its sheer quantity, its presentation, or because of cognitive biases.”); see also VISCUSI & MAGAT, *supra* note 14, at 1–41 (discussing “[i]nformation [p]rocessing and [i]ndividual [d]ecisions” and “[c]ognitive [c]onsiderations in [p]resenting [r]isk [i]nformation”).

¹³⁹ Viscusi and his collaborators, in addition to other scholars, have conducted experiments to determine the best form and format for workplace hazard warnings. See, e.g., Mamdough I. Farid & Sidney I. Lirtzman, *Effects of Hazard Warnings on Workers’ Attitudes and Risk-Taking Behavior*, 68 PSYCHOL. REP. 659, 670 (1991) (“The data also support that workers are capable of perceiving changes in job hazards and changing their job-related attitudes, intentions, and demands accordingly.”). See generally VISCUSI, EMPLOYMENT HAZARDS, *supra* note 14, at 197–205 (presenting data to “explore the impact of individuals’ job hazard perceptions on their quit intentions”); VISCUSI & MAGAT, *supra* note 14, at 98–124 (discussing experiments and results).

¹⁴⁰ Linda McCauley et al., *Oregon Indigenous Farmworkers: Results of Promotor Intervention on Pesticide Knowledge and Organophosphate Metabolite Levels*, 55 J. OCCUPATIONAL & ENVTL. MED. 1164, 1164 (2013) (“Most frequently the [pesticide] training is conducted in either English or Spanish. There are no state- or federal-specified guidelines on how to provide culturally and linguistically appropriate training of the increasing numbers of farmworkers whose primary language is indigenous, who speak neither English nor Spanish, or who understand very rudimentary Spanish at best.”).

requirement, the agency received comments from employers that “[p]osters are an ineffective means of educating workers and are rarely read by employees,”¹⁴¹ and that “adding one more notice to the many that are already mandated under other statutes will simply create more ‘visual clutter’ that contributes to employees’ disinclination to pay attention to posted notices.”¹⁴² Another employer stated in a comment that, “My bulletin boards are filled with required notifications that nobody reads. In the past 15 years, not one of our 200 employees has ever asked about any of these required postings. I have never seen anyone ever read one of them.”¹⁴³

In addition, as I have pointed out in previous work, in an analysis of surveys of over 4300 low-wage workers, “approximately 59% of low-wage, front-line workers did not know their minimum wage and overtime rights and 78% did not know how to file a government complaint.”¹⁴⁴ Because both subjects are addressed explicitly on the required FLSA poster discussed above, this lack of Type B legal knowledge may be evidence of the shortcomings of this method of information dissemination.

Research by Pauline Kim also suggests that, even in the face of explicit statements about the lack of job security in at-will jobs, many workers continue to believe that they can be fired only for good cause.¹⁴⁵ Kim hypothesizes that powerful social norms about fair treatment may trump even the most clear statements of the limits of the law.¹⁴⁶ In order for the transmission of information to “take,” therefore, the mechanisms for information transmission that are currently in place in the workplace may be too limited, passive, and unobtrusive.

Even assuming perfect and complete transmission of all necessary information, however, workers, regulators, and outside interest groups may still be unmoved to address a disclosed workplace problem. This is because

¹⁴¹ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,017 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Alexander & Prasad, *supra* note 44, at 1110.

¹⁴⁵ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110, 133 (1998) (quizzing over 330 unemployed workers on knowledge of at-will employment legal rules and finding that workers gave correct answers only 51% of the time on average); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 458 (1999) [hereinafter Kim, *Norms, Learning, and Law*] (administering the same survey in multiple additional states and finding corresponding correct answer rates ranging from 25.2% to 40%); see also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 63 (2005) (“There is little reason to believe that workers uniformly exercise rights granted them under labor policies.”).

¹⁴⁶ Kim, *Norms, Learning, and Law*, *supra* note 145, at 448 (“[I]t appears that workers do not readily distinguish between informal norms and enforceable legal rights, between what they believe the law should be and what it actually is.”).

the *content* of the information transmitted may be inimical to rights-enforcing and market action. For example, Ms. Matthew worked at numerous farms beginning when she was six years old, all of which she believes made indiscriminate use of extremely toxic agricultural pesticides.¹⁴⁷ Even perfect Type B context information about the other jobs available to her as a farmworker might not have prompted her to change jobs, as no other, better job existed. Likewise, if the H-2B workers in Mississippi had sought to change jobs, they, too, would not have been helped even by perfect Type B information, as the rules of their visas prohibited them from working for any other employer.¹⁴⁸ Similarly, perfect Type C information about the process for engaging in a rights-enforcing response to a workplace problem may not actually trigger rights-enforcing activity if that process is too burdensome or complex.¹⁴⁹ Finally, if a worker learns through Type D information that retaliation for a workplace complaint is a virtual certainty, then she will be unlikely to take action. Here, information transmission may in fact have a silencing, rather than action-triggering, effect.

Indeed, my previous study of low-wage workers' actions in the face of disclosed workplace problems revealed a drop-off of more than forty percent between problem identification and legal claims, meaning that almost half of workers who *knew* that their rights had been violated did not pursue legal redress.¹⁵⁰ Similarly, scholars have criticized the *Ellerth/Faragher* structure precisely because many survivors of workplace harassment choose not to make complaints despite the availability of—and their knowledge of—anti-harassment law, policies, and complaint procedures.¹⁵¹ Thus, even if workplace transparency mandates were completely effective in transmitting complete information to workers, whether workers do in fact become the “adjunct[s] to proper enforcement of the statutory provisions”¹⁵² envisioned by the proponents of information-centric strategies, and whether regulators and outside interest groups engage in rights-enforcing or market responses of their own, remain open empirical questions in need of further study.

¹⁴⁷ SLONGWHITE, *supra* note 3, at 38–39.

¹⁴⁸ Preston, *supra* note 40.

¹⁴⁹ See, e.g., Greene, *supra* note 14 (describing the months-long, highly burdensome process under the Environmental Protection Act's Worker Protection Standard of requesting and ultimately gaining access to the name of pesticides to which a worker was exposed).

¹⁵⁰ Alexander & Prasad, *supra* note 44, at 1089.

¹⁵¹ Hernández, *supra* note 97, at 1239 (“The statistical analysis of survey responses from a group of 120 female sexual harassment victims suggests that White women and Women of Color may differ in their uses of internal complaint procedures.”); Sachs, *supra* note 97, at 2744–45 (“[R]esearch suggests that the number of complaints filed dramatically under-represents the extent of statutory violations.”).

¹⁵² Wage and Hour Division, Department of Labor, 14 Fed. Reg. 7516 (Dec. 16, 1949).

V. CONCLUSION

This Essay has presented a comprehensive theory of information's role in the enforcement of labor and employment laws, and in the broader project of improving workplace conditions. It has identified three sets of actors, as consumers of workplace information, who might engage in rights-enforcing or market responses to workplace problems, and examined the different types of information necessary to each actor for each type of response.

The typology of workplace information developed here is an important extension of the existing literature, which has tended to confine its examination of transparency mandates to those that force the disclosure of information about the hidden conditions of work. As shown here, those disclosures may be necessary but not sufficient to trigger action to address workplace problems. Moreover, this Essay provides an important framework for assessing calls, such as Estlund's, for greater transparency in the workplace.¹⁵³ If such proposals focus only on revealing firm-specific information about the hidden conditions of work, then they will be unable to harness the market and facilitate law enforcement in the way that proponents envision.

A second, companion article takes up these questions on a more practical level,¹⁵⁴ investigating whether and in what circumstances workplace transparency mandates might raise First Amendment issues, and how mandates might best be structured to better accomplish their first-order goal of informing their target audiences and their second-order goal of improving the conditions of work.

¹⁵³ Estlund, *Just the Facts*, *supra* note 15, at 364–66 (listing categories of information that might be disclosed via workplace transparency mandates).

¹⁵⁴ Alexander, *supra* note 22.

APPENDIX

FIGURE 3: FLSA Poster¹⁵⁵

EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

\$7.25

PER HOUR

BEGINNING JULY 24, 2009



OVERTIME PAY	At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.
CHILD LABOR	<p>An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor.</p> <p>Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:</p> <p>No more than</p> <ul style="list-style-type: none"> • 3 hours on a school day or 18 hours in a school week; • 8 hours on a non-school day or 40 hours in a non-school week. <p>Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.</p>
TIP CREDIT	Employers of "tipped employees" must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.
ENFORCEMENT	<p>The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.</p> <p>Employers may be assessed civil money penalties of up to \$1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to \$11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to \$50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to \$100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.</p>
ADDITIONAL INFORMATION	<ul style="list-style-type: none"> • Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions. • Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands. • Some state laws provide greater employee protections; employers must comply with both. • The law requires employers to display this poster where employees can readily see it. • Employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment with an employer. • Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division

WHD Publication 1088 (Revised July 2009)

¹⁵⁵ Employee Rights Under the Fair Labor Standards Act Poster, *supra* note 71.

FIGURE 4: Sample NLRB Remedial Notice¹⁵⁶

Case 2:12-cv-01934-SM-JCW Document 28-2 Filed 01/24/13 Page 33 of 33

JD(ATL)-01-13

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 100, United Labor Unions, as the exclusive representative of our full-time and part-time hoppers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL grant immediate and full recognition to Local 100, United Labor Unions, as the exclusive representative of all hoppers we employ in the Greater New Orleans area, and will bargain in good faith with that labor organization.

CREATIVE VISION RESOURCES, LLC
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Street, Hebert Federal Building, 7th Floor, New Orleans, LA 70130-3408
(504-589-6361, House: 9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389

¹⁵⁶ McKinney v. Creative Vision Res., No. 12-cv-1934, Ex. B at 33 (E.D. La. Jan. 24, 2013) (order denying motion to strike).

