Examing the Role of AGs in a Just Transition

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ABSTRACT

Tackling the climate crisis requires transitioning from fossil fuel to clean energy, which will necessarily have a significant impact on jobs and the economy overall. The impact of this shift has sometimes been feared as a development that will be harmful to workers and the economy. Fossil fuel jobs are seen as good jobs—well-paid jobs with good benefits and protections—while the emerging clean energy industry has not yet uniformly embraced a high-road employment model. But workers’ rights and environmental concerns are not fundamentally incompatible. There are many policies and tools that can be and are being harnessed to bring about a “just transition,” ensuring that the emerging clean energy sector provides high quality jobs and that needs of current fossil fuel workers are also adequately addressed. These policies exist at the intersection of workers’ rights and environmental policy.
As the top lawyers in a state with a great deal of discretion for engagement and a wide range of tools at their disposal, attorneys general are in a unique position to engage at this intersection. To promote a just transition, AGs can enforce labor standards and worker protection laws in the emerging clean energy industry, in order to nip any nascent bad practices in the bud and establish a baseline industry norm and expectation of widespread compliance. They can advocate for the creation of quality jobs in the clean energy industry. They can take action to protect workers and the environment in bankruptcy proceedings. They can defend and promote state or federal-level rules protecting workers from dangerous heat. They can counsel their client agencies on clean energy projects so that there are strong worker protections in place. And they can critically examine the impact that any new project might have on communities that have been overburdened by pollution—among many more possibilities. This Article analyzes the factors that could lead AGs to decide to work to promote a just transition. The Article then surveys the many tools AGs have at hand for that work and provides a number of ideas for engagement for AGs in this space.
INTRODUCTION

Scholars of federalism have observed that the United States is undergoing an “era of state renaissance,” in which states have become propellers of national policy.\(^1\) States have been leaders on issues when federal action is limited or inadequate, or when federal policy is seen as unacceptable.\(^2\)

In exploring federalism, scholars have identified state Attorneys General (AGs) as key actors on the national stage, as well as within their states. AGs have played this role through the lawsuits and investigations that they bring, often driving more enforcement than the federal government does or exposing abusive practices when federal agencies have failed to act.\(^3\) AG lawsuits can have significant impacts on policy and industry practices. AGs have been described as “acting as de facto national policymakers,” with their lawsuits changing “the rules of the game.”\(^4\) When AGs begin to engage

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2. *Id.* at 489.
in a certain area or industry, they may continue their actions even if federal regulators also begin, or they may increase their focus, leading to the possibility of simultaneous enforcement from state and federal governments.\(^5\) In addition, AG prosecution can entail sizeable penalties and have the potential to cause a lasting impact across an industry.\(^6\)

In years past, coalitions of AGs have faced off against the tobacco industry when no lawsuit had succeeded against the industry,\(^7\) garnered an 83% success rate against the Trump administration’s vast flow of regulatory rollbacks and other policies,\(^8\) and pursued liability on the part of those responsible for the opioids crisis.\(^9\) States engaged on these varied issues for a number of reasons, including deep harms affecting constituents; insufficient or unlawful federal action; limitations constraining other actors that might seek to address the harm (such as private litigants, private industry, or other state actors); the multi-jurisdictional nature of the issues; and the unique ability of AGs, with broad powers and multi-faceted roles, to affect the issues and bring about lasting change.

Right now, one of the most significant challenges facing the nation and the world is the climate crisis. In a recent report, the Intergovernmental Panel on Climate Change and the United Nations reconfirmed that greenhouse gas concentrations in the atmosphere continue to rise, leading in recent decades to surface temperatures that are among the warmest on record and extreme weather events that have already caused catastrophic damage and unsafe working conditions.\(^10\)

Regulators and lawmakers at the local, state, and federal levels are working to address the climate crisis by cutting greenhouse gas emissions, moving toward electrification and promoting clean transportation, and supporting new, cleaner electric generation, with the recently-passed Inflation Reduction Act of 2022 as a centerpiece of national efforts.\(^11\) This work will


\(^6\) See generally Taylor & Carlson, supra note 5.


\(^10\) INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], SIXTH ASSESSMENT REPORT, WORKING GROUP III, CLIMATE CHANGE 2022: MITIGATION OF CLIMATE CHANGE 9 (2022).

\(^11\) Inflation Reduction Act of 2022 (P.L. 117-169). See also, e.g., Adnan Durakovic, New York to Hold 2+ GW Offshore Wind Auction in 2022, Invest USD 500 Million in Infrastructure,
necessarily have a significant impact on jobs, as investment is moved from industry models that rely on fossil fuels (gas-powered cars, for example, or coal-power power plants) to new renewable-based models. This has led to concerns about the impact of the transition on workers: Many existing fossil fuel jobs provide employment with unionized workforces, family-sustaining wages, health insurance, and other benefits. Meanwhile, the emerging clean energy industry is not uniformly embracing a high-road employment model, for a variety of reasons, including overall poor working conditions and the general anti-union position of corporations in the United States, as well as concerns about the higher cost of well-paying jobs. Legislation proposed in Congress, the Protecting the Right to Organize Act, known as the PRO Act, would make it easier for workers to unionize and thereby greatly improve working conditions, but congressional gridlock and the persistence of the Senate filibuster have prevented federal action on that bill.

At the same time, concerns about workers have the potential to undermine efforts to address the climate crisis. Labor advocate Amanda Novello of The Century Foundation has argued that “the strength of the climate movement is tied directly to the strength of the labor movement: without strong workers’ rights and protections, it will be highly unlikely that a green transition will be as aggressive and wide-reaching as needed, in the time we have.” From a social and economic justice perspective, a transition to clean energy that replaces family-sustaining unionized jobs with low-road, exploitative ones would be deeply problematic. From a strategic perspective, both the labor and environmental movements stand to benefit by grappling with ways to join together in pursuit of common goals. Workers have an interest in continuing to have a habitable planet and in addressing climate change, especially as a growing number of workers are already devastatingly affected by rising temperatures and other climate-related events.

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12. See infra text accompanying notes 159–161.


Similarly, environmental advocates have an interest in building a broad-based and justice-oriented coalition that pushes the changes needed in an expeditious way.

This Article explores the potential role of AGs in helping drive a just transition from fossil fuels to clean energy sources. It analyzes the factors that generally lead to AG involvement in public advocacy issues, describes the tools available to AGs, and analyzes why and how state AGs could play a key role in just transition issues. The overall transition that will occur in response to climate change is likely to affect much more than just the energy sector. But this Article focuses on the energy sector as a way to examine the broader issues raised in this space where environmental and labor law intersect with state interests.

Many states have shown that they have a strong interest in addressing the climate crisis, as evidenced by numerous state commitments to reduce greenhouse gases and statutes that codify those commitments.15 Many of the statutes also set out goals for addressing the needs of workers in the fossil fuel sector.16 AGs serve as the top lawyer in each state and they have a wide range of powers and tools to address these issues: they advise and defend state agencies, pursue both labor and environmental policies that are in the best interests of the state’s residents, file civil lawsuits and sometimes criminal charges to bring wrongdoers to account again in both the labor and environmental spheres among many others, and advocate for their constituents at the state and federal level.17 With these powers, AGs have the potential to have a marked impact in relation to an energy transition – addressing the climate crisis through advocacy for more protective state and federal policies, while also enforcing worker protections.

Given the power that AGs can potentially wield, it is useful to understand the factors that contribute to state AG intervention, and to understand the role that state AGs could play in relation to a just transition.

This Article proceeds as follows. Part I situates the role of AGs within the broader political system and explains the factors that have often contributed to their decisions to engage on a particular issue. Part II describes the tools that AGs possess, with an emphasis on the tools that could be most

16. See, e.g., Colo. Rev. Stat. Ann. § 8-83 pt. 5 (West, 2022) (creating the created a Just Transition Office and a fund to implement the statute’s provisions); 50 Ill. Comp. Stat. Ann. 65 (West, 2022) (creating several programs to protect and support displaced workers); N.Y. Envt’l Conserv. Law § 75-0103 (McKinney, 2022) (establishing a working group to study employment impacts and develop a plan to meet the law’s just transition goals).
17. See infra notes 59–109 and accompanying text.
useful in protecting worker’s rights during a transition. Part III applies those factors to the needs of a just transition in order to examine the rationale for AGs to engage in pushing for stronger and more just workplace policies as the energy economy shifts. Part III concludes with a number of recommendations for doing just that.

I. FACTORS FOR ATTORNEY GENERAL ACTION

AGs have a range of roles; they pursue litigation on behalf of their states and represent their states in litigation, issue legal opinions to clarify the law, provide legal advice to governors and state agencies. AGs also bring their own independent civil litigation and many also have authority to bring criminal prosecutions.

Because of the powers that AGs wield and their position within the political system, they are often able to fill gaps where there is otherwise insufficient attention or resources to hold people, institutions, and corporations accountable. This ability has been especially relevant and pronounced when industries like the tobacco and opioid industries evaded accountability for massive, nation-wide harms. In those cases, several specific factors were at play, salient local harm to constituents, inaction at the federal level, and harms affecting more than one state. This Section discusses these factors, and outlines their role in leading to AG action.

A. Harm to Constituents

The primary factor that leads to AG involvement is when the problem affects or has the potential to adversely affect people living in their states, particularly in an ongoing way. AGs are state-level actors, and so their offices and resources are attuned to state-level harms, including the harms experienced by “their state’s most vulnerable residents.” Additionally, a group that is in the minority nationally might constitute a majority or larger constituency in a particular state, incentivizing state-level actors like AGs to represent those groups’ interests more forcefully at the national level.

AGs also have duties to enforce state-level protections and statutes that are considered a priority for their states. For example, some AG offices

21. Young, supra note 3, at 429.
in the west, such as Colorado\textsuperscript{22} and Utah,\textsuperscript{23} have sections that focus extensively on water rights; the California AG’s office has an Office of Immigrant Assistance and Immigrant Rights\textsuperscript{24}; and the Minnesota AG in 2021 initiated a “Fairness for Farmers” initiative.\textsuperscript{25}

AGs may also be more capable of identifying and prosecuting state-level actors. For example Michigan state AG Dana Nessel recently warned residents of Benton Harbor, Michigan about price gouging of bottled water; while price gouging and lead poisoning are salient for regulators and legislators at the federal level, they were particularly relevant in this instance because of specific localized concerns over lead-contaminated drinking water.\textsuperscript{26} AGs regularly identify “scam alerts of the month” and they are often the primary actors in redressing consumer complaints.\textsuperscript{27} For example, when a real estate company convinced New Yorkers to invest thousands of dollars in property located in the Dominican Republic but never gave the investors title to the property, the New York AG filed suit and secured more than $500,000 for dozens of victims who lost money.\textsuperscript{28}

Action to secure access for people with disabilities is another example of AG enforcement to protect state residents. New York’s AG secured agreements with theatre companies to ensure accessible seating, and with stores to ensure that consumers reliant on service animals could enter without hassle.\textsuperscript{30} The AG also pushed the Allegany County Board of Elections to ensure that its polling places were accessible to people with disabilities and

\begin{itemize}
  \item \textsuperscript{22} Natural Resources & Environment, ATT’Y GEN. STATE OF COL., https://coag.gov/office-sections/natural-resources-environment/ [https://perma.cc/BEV4-UMBD].
  \item \textsuperscript{23} Natural Resources, OFF. OF THE ATT’Y GEN. STATE OF UTAH, https://www.attorneygeneral.utah.gov/about/dept/civil/nr/ [https://perma.cc/BEGU-QMD8].
  \item \textsuperscript{24} Office of Immigrant Assistance and Immigrant Rights, STATE OF CALI. DEP’T OF JUST., https://oag.ca.gov/civil/sections/imm_assist [https://perma.cc/WX5N-VZ25].
  \item \textsuperscript{27} See generally Consumer Protection, NAT’L ASS’N OF ATT’YS GEN., https://www.naag.org/issues/consumer-protection/ [https://perma.cc/C9PT-ESTM] (“[t]he attorneys general are a leading consumer protection force in the country . . . .”).
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Press Release, Office of the Attorney General, A.G. Schneiderman Announces Victories for Disability Rights On 23rd Anniversary Of Americans With Disabilities Act (July 26,
led public education seminars to spread awareness about the importance of following accessibility guidelines in various industries.31

As these examples demonstrate, AGs often take action when a harm is particularly salient within their states, adversely affecting constituents

B. Federal Inaction

Lack of federal action to address an urgent and dire issue can also lead to AG involvement. The “tyranny of the status quo” as Roderick Hill described it,32 can make federal policy change slow-going, even when fast-evolving circumstances demand fast-paced policy responses. Because of the Senate filibuster, a Senate rule which requires a super-majority of senators to pass most major laws, groups smaller than a majority can block federal legislation.33 As a result, federal policies are unlikely to be able to keep up with the justice-focused demands of an energy transition.

Attorneys general are not similarly beholden to the tyranny of the status quo. Although forty-six attorneys general are elected,34 and that brings its own electoral pressures, AG decisions to bring or decline to bring civil enforcement actions, to issue legal opinions, and to defend a state policy or agency in court are not reviewable by any other official (absent a court challenge).35 In the states where an AG is elected,36 the AG can generally take many actions independent of the governor, and when enforcing federal

31. Id.
33. See e.g., id. at 53.
35. See Attorney General’s Brief at 16, In re John W. Hickenlooper, No. 2015 SA 296 (Colo., Nov. 20, 2015) (arguing that the AG should have the power to sue the Governor and rebutting the assertion that checks on the AG would be missing by citing the possibility for judicial review).
36. See NAT’L ASS’N OF ATTORNEYS GEN., supra note 34.
statutes, the AG in most cases also acts independently from the state legislature.\textsuperscript{37} Furthermore, in some instances, AGs “can enforce federal laws that the state legislature may not enact.”\textsuperscript{38}

To be sure, inaction at the federal level, whether because the executive refuses or fails to enforce federal laws or Congress refuses to pass them or fund enforcement, can put AGs “in a bind.”\textsuperscript{39} Preemption may stand in the way of new state laws or restrict regulations, whether or not Congress has enacted a statute addressing the specific issue.\textsuperscript{40} And while AGs can propose legislation in many states, either directly or by working closely with legislators, they cannot pass legislation. But AGs can enforce their states’ laws, which can be stricter than those at the national level, and they can interpret existing federal and state laws to support their enforcement actions often without coordination with any other government actor (contingent on acceptance of that interpretation by a federal or state judge, of course).\textsuperscript{41}

When an issue urgently needs to be addressed and the federal government is not acting, there are numerous examples of instances when AGs have used their powers to enter the fray. Under President Reagan, for example, the number of staff at the Federal Trade Commission was reduced by half and the agency brought fewer than half of the cases it had under Reagan’s predecessor President Carter; in response, AGs began to increase their own enforcement of anti-trust and consumer protection laws.\textsuperscript{42} Another example: prior to the 1990s, the tobacco industry was considered untouchable and “wield[ed] significant clout in Congress.”\textsuperscript{43} A bipartisan coalition of AGs took the industry on and in 1998, secured a $206 billion

\begin{itemize}


\item \textsuperscript{39} Id.

\item \textsuperscript{40} See id.

\item \textsuperscript{41} Id.

\item \textsuperscript{42} Lynch, supra note 7, at 2005.

\item \textsuperscript{43} Id. at 2006.
\end{itemize}
settlement against tobacco companies.\textsuperscript{44} Forty-six AGs were part of the settlement agreement in that case.\textsuperscript{45}

\textbf{C. Issues Affecting the Interests of Multiple States}

An issue that has state-specific impact might also have impacts across states. In those circumstances, the incentives for an AG to become involved can rise, as states can partner with each other to magnify their influence and the scope of the change they can create, while also leveraging the economies of scale that collaboration and pooled resources can bring.

Multistate litigation began to grow in the 1980s as a way to tackle cases involving massive, well-resourced corporations that individual state AG offices could not readily handle solo.\textsuperscript{46} By sharing resources and litigation costs, AG offices can exert more pressure on the businesses and entities they investigate and sue, together taking action that other offices, acting alone, might not be able to bring to bear.

For example, the AG victory against the tobacco industry “underscored how powerful state attorneys general had become when they worked together and drew national attention to their activities.”\textsuperscript{47} States also banded together to address the opioid crisis. On July 21, 2021, attorneys general reached a $26 million settlement with pharmaceutical distributors Amerisource Bergen, Cardinal Health, and McKesson, and manufacturer of prescription opioids Johnson & Johnson.\textsuperscript{48} Forty-four states joined this settlement agreement.\textsuperscript{49} In addition, in February 2021, forty-seven state attorneys general, along with Washington, D.C. and five territories, reached a $573 million settlement with McKinsey & Company, a consulting firm that advised opioid companies and helped them promote the sale of opioids.\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} See Lynch, supra note 7, at 2003–04.
  \item \textsuperscript{47} Id. at 2006.
  \item \textsuperscript{48} Opioids, NAT’L ASS’N OF ATT’YS GEN., https://www.naag.org/issues/opioids/ [https://perma.cc/6S26-4EWL].
  \item \textsuperscript{50} Opioids, supra note 48.
\end{itemize}
The funds recovered from both of these actions will primarily be used for opioid treatment and prevention.\textsuperscript{51} The opioids cases show AGs joining together to force accountability on corporations that have otherwise generally not faced sufficient regulatory or congressional pressure from the federal government.\textsuperscript{52}

D. Additional Factors

In addition to the above three factors, many other considerations drive AG decisions to engage on a given topic. In practice, determinations often result from an informal and not necessarily systematic mapping of multiple factors that together can point toward action. Other factors affecting these decisions include, for example, whether there are alternative means for re-dress by private litigants or other state agencies, and whether there is sustained advocacy by state-level stakeholders.

As with any government agency, AGs consider their own jurisdictional limitations and available resources. However, often AGs have broad jurisdictional authority under multiple different statutes that can be harnessed to protect their constituents. For example, the Illinois AG used legal theories such as fraud and discrimination to address worker exploitation. The California Attorney General brings labor-related cases under an unfair competition law. Other AGs have organized and drawn on resources within the private and public interest bars to address issues of importance; then-California AG Kamala Harris’s office in 2015 convened a roundtable of law firms, immigrants’ rights advocates, and others about the need for resources and legal aid for unaccompanied minors fleeing Central America. These efforts led to the legal representation of more children in immigration cases, as well as stronger relationships between immigrant-focused non-profit organizations and law firms able to take on pro bono cases.\textsuperscript{53} Along similar lines, the Massachusetts AG’s office holds a monthly wage theft clinic for cases it cannot handle, with nonprofit organizations, pro bono lawyers,

\begin{itemize}
\item \textsuperscript{51} Id.
\end{itemize}
legal services offices, lawyers who can take contingency cases, and more.\textsuperscript{54} Faced with limited jurisdiction and resources, some AGs have sought additional jurisdiction and funding from the legislature in order to be able to address issues of importance to them. For example, Minnesota AG Keith Ellison sought and obtained both jurisdiction and resources for his office to address wage theft in his state.\textsuperscript{55}

In some cases, AGs may be motivated to act not just by federal inaction, but rather by federal action they understand to be adverse to their state’s interest. When President Trump rolled back a slew of environmental rules, different coalitions of AGs sued the administration more than 40 times, ultimately garnering an 83\% success rate.\textsuperscript{56} (Conservative AGs also have taken this approach: When he was Oklahoma AG, Scott Pruitt sued EPA fourteen times, challenging its air emissions rules among other measures.)\textsuperscript{57}

In making decisions, an individual office-holder’s values and risk tolerance also come into play, as well as their conception of the office (as careful steward or changemaker).

Moreover, in some instances, such as ensuring clean water or air, problems are inherently multi-jurisdictional and can ultimately be comprehensively solved only through federal action. In those circumstances, AGs will be incentivized to sue the administration for failing to promulgate strong rules or enforce them. In some areas, such as in relation to the minimum wage, even strong enforcement of federal laws would not obviate the need for state action, because many states have enacted minimum wages higher than the federal requirement.\textsuperscript{58}

Finally, and importantly, AGs often consider whether their involvement in an issue has the potential to lead to lasting impact in terms of industry practices and the future well-being of the people of their states.

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\textsuperscript{54} Free Wage Theft Legal Clinic, COMMW. OF MASS., https://www.mass.gov/service-details/free-wage-theft-legal-clinic [https://perma.cc/XWE2-5VXE].

\textsuperscript{55} Minn. Stat. §§ 177.45, 181.1721 (2022).


\textsuperscript{58} State Minimum Wages, NAT’L CONF. OF STATE LEGISLATURES (Mar. 9, 2022), https://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx [https://perma.cc/QR3U-6Q29] (showing that 30 states and D.C. have minimum wages higher than the federal rate).
In summary, there are a range of considerations at play in relation to what drives AG decisions to engage on a particular issue. In all cases, existing or potential harm to constituents is generally the most reliable touchstone without which action is highly unlikely.

II. AG TOOLS

If a number of the above factors are present, the next question is whether AGs have the tools to engage. In the context of worker protections, many AGs have those tools. They have enforced existing law, including wage theft, misclassification and other worker protection laws, all of which could be enforced in the new clean energy economy. In addition, some AGs have worked to improve worker protection standards in the face of risks exacerbated by a changing climate, by for example pushing for improved safety standards at chemical plants that face higher risk of accidents due to extreme weather. As the economic transition towards clean energy intensifies, there will be more opportunities to advocate for stronger environmental protections and labor protections in new projects. To provide background on AG tools relevant to just transition advocacy, this Part provides an overview of AG actions in the area of worker protection as well as in areas where environmental and worker protection overlap.

A. Enforcing Worker Protections

There has been “a significant uptick in the involvement of state attorneys general” in workers’ rights matters in recent years. As the new clean energy economy begins ramping up and fossil fuels are phased out, AGs can play a key role in ensuring that companies in industries both new and old comply with worker protection laws.

Environmental Harms Related to Workplaces: Attorneys general have used their enforcement and investigatory powers to pursue employers for wrongdoing that causes harm in both the environmental and worker sec-


tors, as shown by several examples from the past several years. For example, then-Kentucky Attorney General Andy Beshear investigated a mining company that had entered bankruptcy to examine whether the company complied with bond requirements designed to protect the environment and the workers.61 Illinois Attorney General Lisa Madigan filed a complaint against ExxonMobil for hydrogen sulfide emissions that endangered workers at a refinery outside of Chicago.62 In April 2021, the Illinois Attorney General’s Office, along with the U.S. Department of Justice and the U.S. Environmental Protection Agency, signed a consent decree (building on a 2005 consent decree) with ExxonMobil Oil Corporation to resolve violations in a different Illinois location.63 Pennsylvania Attorney General Josh Shapiro conducted an extensive investigation into the risks to neighbors, workers, and first responders posed by the fracking boom in the state64 and published a lengthy grand jury report with recommendations.65 The recommendations included a call to require disclosure of the chemicals used in the industry before drilling happens, in order to protect workers and first responders from the hazards of addressing a spill or accident without knowing the chemical at issue.66 In at least one case, the investigation also led to charges against an oil and gas company that allowed methane emissions to

61. Gerstein, supra note 60, at 18.
66. Id. at 18.
contaminate neighbors’ wells.\textsuperscript{67} Wisconsin Attorney General Josh Kaul won a judgment against multiple construction companies for mishandling asbestos when building a new U-Haul site, although the resolution did not require notification of, or attain specific relief for, potentially exposed workers.\textsuperscript{68} And North Carolina Attorney General Josh Stein recently sued manufacturers of firefighting foam arguing that the foam contains PFAS chemicals that are harmful to the firefighters and other first responders who use the material.\textsuperscript{69}

\textit{Enforcement in wage theft, misclassification, and related cases:} A number of AGs have sued or criminally prosecuted employers for wage theft, misclassification, payroll fraud, committing fraud in relation to minority and women owned business certifications for public projects, and more.\textsuperscript{70} Such investigations and actions have been brought in California, the District of Columbia, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and West Virginia.\textsuperscript{71}
Misclassification: Improperly labeling workers as independent contractors when they should be treated as employees allows companies to deprive the workers of a host of rights. AGs have been active in pursuing claims against companies that illegally misclassify their workers. Some provide workers with information about misclassification and a number to call if the worker thinks they have been misclassified. Others have brought lawsuits.

California Attorney General Bonta (along with three cities) sued Uber and Lyft for misclassification. Massachusetts Attorney General Maura Healey has a similar case against these two companies; her office recently defeated their motion to dismiss. The attorneys general of the District of Columbia, Massachusetts, New York, and Pennsylvania have pursued other actions against companies for misclassification of workers.
B. Policy and Advocacy

AGs have other tools in addition to enforcement. These activities fall into the broad categories of representing and advising client agencies, educating the public, conducting investigations and deploying other soft powers, advocating on policy at the federal and state levels, and litigating against the federal government.

1. Representing and Advising State Agencies

Attorneys general have a role in advising state agencies on implementing programs and laws. For example, New York Attorney General James has been advising state agencies as they implement the state’s Climate Leadership and Community Protection Act “to ensure it meets its goal of cutting greenhouse gas emissions and fostering a just and equitable transition to a green economy in New York.”76 In some states, AGs serve as general counsel for state agencies, while in others, they may have a more informal advisory role. AGs are also usually state agencies’ litigation counsels, defending state laws and state-level regulatory policies that flow from those policies.77 And AGs can issue advisories to state and municipal agencies, providing them with guidance about how to proceed in light of new legal developments. For example, a number of AGs issued advisories about how state and municipal agencies should proceed with regard to union members after the Supreme Court decided Janus v. AFSCME, Council 31 concerning public employees who were not union members.78

77. See, e.g., Allco Finance Ltd. v. Klee, 861 F.3d 82 (2d Cir. 2017) (rejecting a challenge to Connecticut’s program promoting renewable energy). See also GERSTEIN, supra note 60, at 24–25.
2. Public Education

Attorney general advocacy can also take the form of community outreach and awareness campaigns. For example, California AG Bonta recently issued a report highlighting ten rights that workers should be aware of, including “the right to organize and join a union” and the right to a minimum wage, along with other wage-and-hour protections.79 There are many other examples of this public education work, including AGs who worked to bring attention to COVID-related policies and guidance,80 and AGs that held worker’s rights events and initiatives.81 In New York, AG James issued a press release supporting the unionizing rights of Starbucks’ employees in Buffalo.82 Washington D.C. Attorney General Racine testified in Congress before the Education & Labor Committee,83 and he published a report about worker misclassification and hosted an event to highlight worker rights.84

These public education activities include work related to addressing the climate crisis. For example, in August 2021, Oregon Attorney General Ellen F. Rosenblum ordered the release of the names of people who died of hyperthermia during the heat wave that hit the state in June 2021, several of whom suffered from unsafe exposure to heat at work.85 AG Rosenblum took this step to “inform the public about the impact of this historic event...
on affected communities, help the public assess the government’s preparedness and responsiveness, and facilitate the development of appropriate public policies that anticipate future extreme climate events.”

3. Investigations and Other Soft Powers

AGs also have the ability to use advisories, opinion letters, or other vehicles such as investigatory letters, to influence policy and company behavior. For example, in 2017, after receiving complaints from workers unable to use certain job search websites because of built-in age cutoffs, the Illinois AG sent letters to Beyond.com, CareerBuilder, Indeed Inc., Ladders Inc., Monster Worldwide Inc. and Vault requesting information about their practices. After receiving the letters, several of the companies addressed the issue.

In 2016, nine state attorneys general sent joint letters to a number of large national retailers asking for information about the use of “on-call shifts,” a practice that required workers to report to their jobs (in person or by phone or text), in order to learn whether they would actually be working (and therefore paid for) that “on call” shift. The practice was harmful to workers because they had to be available for work (arranging child or elder care and foregoing other work or educational opportunities), with no guarantee of actually working or being paid for the shift. Ultimately, the retailers in question agreed to stop using on-call shifts. Also, fourteen state AG offices settled with several fast-food franchisors for including “no-poech” or “no-hire” agreements in their franchise contracts between 2019 and 2020;


87. GERSTEIN, supra note 60, at 3 (explaining that beyond their core work, AGs “issue opinion letters and advisories, propose legislation, issue reports, educate the public about important rights, file amicus briefs, submit comments and provide testimony on state and federal legislation, and author op-eds.”).


90. Flanagan, supra note 18, at 122.

91. Id.
these agreements prevented workers from getting a job with a different franchisee in the same chain.\textsuperscript{92}

4. Legislative Advocacy and Litigation on Policy Issues

Attorneys general have also played a significant role in advocating for policy goals in Congress, at federal agencies and at the state level.\textsuperscript{93} For example, AGs successfully opposed a harmful methane rule in 2017, successfully fought off the steepest of the proposed budget cuts for EPA, and successfully advocated for legislation to address hydrofluorocarbons.\textsuperscript{94} Another example: in August 2021, a coalition of 17 AGs sent a letter urging the Senate to pass federal legislation known as the “PRO Act,” which proposes to strengthen and expand employees’ union and organizing rights in the workplace.\textsuperscript{95} And in July 2019, AGs urged Congress to “[p]rohibit the use and storage of a firefighting foam containing PFAS” because of the serious risks that PFAS contamination poses to human health and the environment.\textsuperscript{96}

AGs have also engaged in advocacy in relation to state-level legislation. Minnesota AG Keith Ellison recently urged a number of state-level policy changes in relation to women’s economic security.\textsuperscript{97} Rhode Island AG Peter Neronha has spearheaded efforts to pass a bill increasing penalties for wage theft.\textsuperscript{98} And Washington AG Bob Ferguson proposed a bill recently signed into law to provide stipends and reimburse some expenses so that people with lived experiences can participate in state-wide stakeholder groups, councils, commissions, boards and other similar groups set up to assess and

\textsuperscript{92} See Gerstein, supra note 60, at 17.

\textsuperscript{93} Id. at 19; see also Gerstein, Workplace Abuses, supra note 70 (explaining that states should strengthen statutes that protect workers).


make recommendations to address problems like those raised by the energy transition.\textsuperscript{99}

Attorneys general have also frequently engaged in advocacy to improve federal environmental standards. For example, a coalition of AGs recently provided testimony to EPA urging it to improve its safety rules for chemical plants that deal in hazardous air pollutants. AG recommendations included, for example, requiring facilities to consider safer alternative technologies, conducting real-time air-monitoring, and improving emergency communications with fenceline communities bordering plants that emit hazardous waste.\textsuperscript{100}

Attorneys general have also used notice and comment procedures during the rulemaking process to advocate for stronger federal protections in areas from pesticide use to wages and benefits. Coalitions of AGs have filed comments addressing a range of work-related issues, including child labor, overtime coverage, joint employment, misclassification, and non-compete provisions in employment contracts.\textsuperscript{101}

Attorneys general have also actively litigated or filed amicus briefs with the goal of changing federal policy. When the Trump administration finalized a rule that depressed wages for farmworkers, the California Attorney General’s Office filed an amicus brief supporting a challenge to the rule, explaining that the rule harmed farmworkers, exacerbated the farmworker housing crisis, and undermined California enforcement of worker protection laws.\textsuperscript{102} In December 2020, a federal district court in California enjoined the rule.\textsuperscript{103} AGs sued and helped obtain an order blocking enforcement of a Trump-era rule that loosened restrictions on pesticide use and put workers at risk.\textsuperscript{104} AGs engaged on numerous other federal rules during the Trump era, including advocating for regulations of ethylene oxide (a carcinogen


\textsuperscript{100} Mirman-Heslin, \textit{supra} note 59.

\textsuperscript{101} GERSTEIN, \textit{supra} note 60, at 22–23.

\textsuperscript{102} Brief for the State of Cal. as Amicus Curiae Supporting Plaintiffs, United Farm Workers v. United States Dep’t of Labor, 509 F. Supp. 3d 1225 (E.D. Cal. 2020) (No. 1:20-CV-1690-DAD-JLT).

\textsuperscript{103} United Farm Workers v. United States Dep’t of Labor, 509 F. Supp. 3d 1225, 1255 (E.D. Cal. 2020).

emitted at commercial sterilization and fumigation operations which endan-
gers workers), and methylene chloride, a solvent that endangers work-
ners and fenceline communities. Since the transition to the Biden administra-
tion, they continue to advocate with the relevant agencies.

Finally, AGs have played an important role in educating constituents
about their rights, alerting them to potential scams, and highlighting
pressing issues by authoring op-eds, issuing statements, public appear-
ances, and more.

As these examples show, AGs have numerous tools at their disposal to
use in pursuit of workers’ rights, environmental protection, and a just tran-
sition.

III. POTENTIAL FOR AG ACTION IN THE JUST TRANSITION SPACE

When it comes to addressing the climate crisis, environmental and la-
bor issues intersect in multiple ways. Increasing heat and other extreme
weather caused by climate change are already harming and endangering
many workers. Policies that shift the economy away from one source of

105. Attorneys Gen. of Ill. et al., Comment Letter on Proposed Rulemaking of National
Emissions Standards for Hazardous Air Pollutants: Ethylene Oxide Commercial Sterilization
https://ago.vermont.gov/wp-content/uploads/2020/02/20200210-Attorneys-General-EtO-
Sterilizer-ANPRM-Comment.pdf.

106. Petition for Review, New York v. Wheeler, No. 20-2729 (2d Cir. Aug. 18, 2020); see
also GERSTEIN, supra note 60, at 22–23 (describing additional AG advocacy efforts).

107. See, e.g., Press Release, Off. of Att’y Gen. Maura Healey, AG Healey Co-Leads Mult-
testate Coalition in Support of Federal Effort to Prioritize Workplace Rights and Safety in Im-
migration Enforcement (Nov. 15, 2021), https://www.mass.gov/news/ag-healey-co-
leadsmultistate-coalition-in-support-of-federal-effort-to-prioritize-workplace-rights-and-
safety-in-immigration-enforcement [https://perma.cc/BSNY-XCS3]; see also Press Release,
Wash. State Off. of the Att’y Gen., AG Ferguson blasts Biden administration’s “cruel effort”
to eliminate protections for Hanford workers (Sept. 14, 2021),
ag-ferguson-blasts-biden-administration-s-cruel-effort-eliminate-protections
[https://perma.cc/HGD3-YQ7A].

108. See, e.g., Michigan AG Nessel’s Scam Prevention Commercial, CLICKONDETROIT:
LOCAL NEWS (Feb. 3, 2022, 7:47AM), https://www.clickondetroit.com/video/local-
news/2022/02/03/michigan-ag-nessels-scam-prevention-commercial/
[https://perma.cc/WX4U-KCV2].

109. See, e.g., Maura Healey, Opinion: The Justice Department Failed to Do Its Job in
Settling with the Sackler Family, WASH. POST (Oct. 23, 2020), https://www.washing-
tonpost.com/opinions/2020/10/23/justice-department-failed-to-do-its-job-settling-with-sack-
lер-family/ [https://perma.cc/ZNL6-WT3K].

110. See Impact of Climate on Workers, CDC: NAT’L INST. FOR OCCUPATIONAL SAFETY AND
HEALTH (NIOSH) (Dec. 6, 2016), https://www.cdc.gov/niosh/topics/climate/how.html
[https://perma.cc/J9JR-WZ42].
energy to others mean that jobs will be shifting too and whole segments of U.S. society have borne, and will continue to bear, the brunt of reliance on fossil fuels in an inequitable manner. These concerns together have led to the emergence of the concept known as a “just transition,” specifically focused on protecting workers and righting historic wrongs in the economy.

AGs are likely to be incentivized to engage on these issues. First, the issues at this intersection are intensely felt at the state and local level—from stronger and more dangerous heat waves that kill workers to flooding that threatens the safety of workers at chemical plants and neighboring communities. Second, the climate crisis and attendant concerns over the affected workers has been subject to the “tyranny of the status quo” at the federal level. This problem was recently exacerbated by the Supreme Court’s decision in West Virginia v. EPA, curbing EPA’s ability to take timely needed action to protect the environment. Third, many states have been experiencing these issues, creating an opportunity to collaborate or combine forces to take action.

This Part begins by setting forth a definition for a “just transition,” to guide the discussion. It then examines, through the factors motivating AG action, the concerns at play in bringing about a just transition. Finally, given that the incentive for AG action is likely present, this Part concludes by surveying the tools that are indeed available for AGs to engage in the just transition space.

A. Defining “Just Transition”

Broadly speaking, the term “just transition” has been defined as “[a]n approach to energy transition that includes protections for workers and communities . . . .” As such, a “plan for just transition provides and guar-
Advocates have used three different lenses, all relevant to the present discussion, to examine the concept of a just transition. First, a just transition means ensuring that new clean energy jobs are good jobs. Workforce development and other experts have come up with varied definitions of what a quality job looks like, but they generally share the same elements: a living wage, decent benefits, safe working conditions, a predictable work schedule, job security, potential for advancement, and a voice on the job, ideally through collective bargaining. A just transition would require, as an initial baseline, aggressive enforcement of existing worker protection laws. It would also require policies to strengthen workers’ rights, including high-road employment practices and promotion of and ready access to unionization in the clean energy sector.

Second, a just transition means humane support and assistance for workers currently in the fossil fuel sector, so that “policies which are environmentally beneficial do not cause undue harm to the social or economic well-being of those who are, or have traditionally been, dependent on the fossil fuel sector.” Along these lines, the Just Transition Fund was set up by a coalition of funders to “create economic opportunity for the frontline communities and workers hardest hit by the transition away from coal.”

Third, a just transition refers to the need to direct new jobs and opportunities toward marginalized communities and populations that have been disproportionately burdened by pollution. As a post by the Natural Resources Defense Council (“NRDC”) puts it: “A just transition should also account for the well-being of community members who never worked for the

120. EDOUARD MORENA ET AL., JUST TRANSITION RSCH. COLLABORATIVE, MAPPING JUST TRANSITION(S) TO A LOW-CARBON WORLD 4–5 (2018) (discussing that the concept of a just transition has its roots in “social and environmental justice.”); see also Irina Velicu & Stefania Barca, The Just Transition and its work of inequality, 16 SUSTAINABILITY SCI., PRAC. & POL’Y 263, 266 (2020).
plant but breathed the polluted air and saw very little benefit from the facility. To focus entirely on displaced workers and leave historically marginalized people out of the just transition picture would be, well, unjust.”¹²¹

Similarly, Peggy Shepard, co-founder and Executive Director of WE ACT for Environmental Justice explained that planning around the economic transformation brought about by the move to clean energy should include the needs of frontline communities.¹²²

The three lenses intersect in important ways here because the new jobs that are directed towards communities that have been marginalized or disproportionately burdened by pollution should also be jobs that come with the features that make them good jobs, such as benefits, union representation, and strong enforcement of worker protections.

B. Are the Incentives for AG Action Present?

Currently, the attorneys general in nine states and the District of Columbia have announced formation of units dedicated to working on labor issues in a proactive manner;¹²³ moreover, a new law in Colorado requires creation of a Worker and Employee Protection Unit in the AG’s office there.¹²⁴ Offices with dedicated labor units have brought many investigations and prosecutions into varied types of workplace violations in a number of industries. Some AGs also took a leading role in ensuring worker protections during the COVID-19 pandemic, including by investigating workplace safety practices and urging corporations to conform with COVID-19 safety regulations.¹²⁵

Despite this growing involvement of state AGs, there is still a great need for more workplace enforcement. A 2018 report by Politico found a stark lack of investigators available to address issues as serious as minimum-


¹²³. See GERSTEIN, supra note 60, at 4 (explaining that the AG offices of California, Massachusetts, New York, Illinois, Michigan, Minnesota, New Jersey, Pennsylvania have all established units dedicated to labor issues).


¹²⁵. See GERSTEIN, supra note 60, at 5–6.
wage violations. Public labor enforcement agencies are underfunded. This gap exists despite high rates of violations: researchers in 2017 estimated that employers in the ten most populous states steal $8 billion annually through minimum wage violations alone. When employers are found to have violated the law, often the money owed is not ultimately collected, according to the Politico report. In addition, workplace discrimination remains a serious issue that has likely been exacerbated by the COVID-19 crisis, and other workplace issues disproportionately affect workers of color: for example, “Black workers are twice as likely as white workers to report that they or someone at work may have been punished or fired for raising safety concerns about COVID-19.”

With this backdrop, the question is whether states and their AGs can or will engage in the climate and labor space, given the emerging crisis. This Section discusses some of the limits on AGs acting on these issues and then assesses whether the incentives are there to engage.

1. Limits and Opportunities

An important limit to AGs’ ability to play a gap-filling role in the labor space is federal preemption, which forbids states from legislating or taking action in areas in which the federal government intends to occupy the field. The National Labor Relations Act provides workers with the right to join a union, collectively bargain, and engage in concerted activity to improve working conditions. Broad preemption under the NLRA constrains what states may do in relation to organizing activities.


129. Levine, supra note 126 (“41 percent of the wages that employers are ordered to pay back to their workers aren’t recovered, according to a POLITICO survey of 15 states”).


Nonetheless, there is still significant leeway for AG action under the exceptions to preemption, including in relation to state’s police powers and powers left untouched by the NLRA or preemptive federal laws. Preemption does not apply in areas determined to be so important to state interests that Congress has to speak clearly to remove state authority. Many regulations have survived preemption challenges based on this local interest exception.

2. Applying the Factors leading to AG involvement

The various factors that generally spark AG action—harm to constituents, insufficient federal action, limitations on other actors who might address the problem, and multi-jurisdictional harm—are all present in the labor context as the energy sector moves from fossil fuel-fired generation to clean energy. There is an enormous gap in the enforcement of workers’ rights, that will only deepen with coming changes to the environmental sector. And with the exception of the (significant) monetary incentives for clean energy development in the Inflation Reduction Act of 2020, the U.S. Congress had consistently been unwilling to enact federal climate policy despite both President Obama and President Biden’s attempts to make it a priority; even with the new law, there is much state-level and regulatory work that must still be done to ensure that the country meets its climate

133. Mack et al., supra note 132.
134. See id. at 7.
goals. Given the history of AGs’ work in the labor space as well as their abilities to fill gaps that other actors cannot, they are uniquely positioned to help ensure a just transition. This Section examines how the key factors that generally lead to AG action are present in the context of the clean energy transition and worker’s rights.

a. Labor and Climate Issues Are Salient at the State Level

When an issue has a particularly state-level impact, it increases the likelihood that AGs will engage, as discussed above. AGs have been characterized as lawyers of the people, with a primary duty of enforcing and defending state laws and protecting the legal rights of the people in their state. State AGs “often interpret this role to include representation of their state’s most vulnerable residents.”

Some labor issues are genuinely state-oriented or local in scope, and hence will draw the attention of AGs. There are myriad instances of this; some specific examples provide a sense of the overall picture. One highly localized violation: in 2004, the New York AG office investigated a practice involving immigrant bathroom attendants working at high-end Manhattan restaurants and night clubs via a placement agency. The workers received only tips, in violation of law, and the placement agency even took a portion of workers’ tips. The AG office obtained a settlement resulting in restitution to the workers and improved business practices.

Another example of a local issue which triggered action by New York’s AG involved systemic labor law violations committed by two interrelated car wash chains with shared ownership. The companies had a practice of underpaying workers, underreporting employees on state unemployment in-

138. See supra note 20–31 and accompanying text.
139. Flanagan, supra note 18, at 104–05.
insurance returns, and failing to carry required workers’ compensation insurance for all employees.\textsuperscript{143} The AG obtained a settlement of nearly $4 million in penalties and restitution, almost half of which was used to compensate the estimated 1,000 affected workers.\textsuperscript{144} The companies were also required to pay for independent monitoring of their labor practices for up to three years.\textsuperscript{145}

The Massachusetts AG has investigated extensive child labor violations by several fast-food restaurant chains. Though state law has limitations on the hours minors can work, these restaurants were keeping young teenagers at work until midnight or even later on school nights.\textsuperscript{146} Through the investigation, the AG’s office uncovered thousands of violations at Chipotle, Wendy’s and Qdoba, resulting in significant fines.\textsuperscript{147}

In another case, Illinois’ AG Kwame Raoul filed suit against two meat processing companies, after those companies engaged in discriminatory practices against Black applicants and workers.\textsuperscript{148} As a result of the lawsuit, the two companies agreed to pay civil penalties and to implement anti-bias procedures.\textsuperscript{149} Meanwhile, the Minnesota AG office has an ongoing investigation of downtown St. Paul’s largest landowner for failing to pay overtime to security guards.\textsuperscript{150}

A case in Washington illustrates a state acting to protect workers, even when the workers are at a federal facility. In 2018, Washington state passed a state law designed to make it easier for Hanford Nuclear Reservation workers exposed to radioactive waste to be compensated if they develop certain illnesses.\textsuperscript{151} The federal government challenged the law citing the

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{147} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Press Release, Attorney General Ellison prevails at Supreme Court in effort to investigate wage theft allegations against downtown Saint Paul’s largest landowner (December 22, 2021), https://www.ag.state.mn.us/Office/Communications/2021/12/22_MadisonEquities.asp#:~:text=The%20Attorney%20General%20first%20received,40%20hours%20in%20a%20week [https://perma.cc/36ES-B8YA].
“intergovernmental immunity” doctrine, a doctrine which prohibits states from regulating federal operations.\textsuperscript{152} The Washington state AG defended the law, arguing that states exercise broad discretion in applying their workers’ compensation schemes to federal projects. (The Supreme Court ultimately ruled against the state law,\textsuperscript{153} although the state passed updated and similar legislation which has not been challenged.)\textsuperscript{154}

b. Federal Inaction in the Labor Space

As explained above, federal inaction on a particular issue heightens the likelihood that AGs will play a gap-filling role in that space.\textsuperscript{155} In Congress, overall, research indicates that legislative deadlock has increased steadily. In 2014, reports showed that a stalemate had reached “three-quarters of the salient issues on Washington’s agenda.”\textsuperscript{156}

In the labor and environmental space, a congressional stalemate and insufficient federal enforcement resources are taking their toll. In terms of statutory protection of workers’ rights, Congress has been slow to act. The federal minimum wage is $7.25 an hour even though 62% of Americans support raising the federal minimum wage to $15 an hour.\textsuperscript{157} Thirty states and Washington, D.C., as well as dozens of localities, already partially fill this gap by providing a higher minimum wage than the federal one.\textsuperscript{158}

\textsuperscript{152} Washington-Attorney General's Office Defends Hanford Workers' Comp Law [https://perma.cc/7F8C-3PFM].


\textsuperscript{156} Sarah A. Binder, Polarized We Govern?, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS 17 (May 27, 2014), https://www.brookings.edu/research/polarized-we-govern/ [https://perma.cc/637G-ZL6V].


\textsuperscript{158} Minimum Wage Tracker (illustration), ECON. POL’Y INST. (Jan. 1, 2022), https://www.epi.org/minimum-wage-tracker/ [https://perma.cc/RB3U-G8L3].
Another example of Congress’s inability to legislate in the labor space in a timely fashion is its lack of movement on the PRO Act, which is currently awaiting passage by the Senate.\footnote{159} The PRO Act would amend the National Labor Relations Act to address many of the shortcomings of current labor law.\footnote{160} Polls showed that 59% of likely voters support the PRO Act.\footnote{161} Despite the need for changes to the law to address these new circumstances, Congress has been unable to move this legislation. In addition to the failure to update the law, staffing for federal labor agencies is insufficient. The staff and resources of the National Labor Relations Board, which enforces union-related laws, have declined despite an expanding national workforce, and the NLRB’s funding has been effectively cut by 20% because of inflation in just the last decade, although a recent infusion will help stem the losses.\footnote{162}

Reduced enforcement on the federal front is another feature of the gap. The U.S. Equal Employment Opportunity Commission (EEOC) investigates and files lawsuits to enforce laws against discrimination in the workplace.\footnote{163} Yet its staff and resources have also declined significantly over time, while, again, the workforce has grown.\footnote{164} In the U.S. Department of Labor, which enforces federal labor standards laws,\footnote{165} the number of investigators dedicated to wage-theft cases has declined to less than the number in place in the middle of the 20th century, although the country has seven times as many workers now as it did then.\footnote{166}
Another hole in federal legislation concerns Title VII of the Civil Rights Act, which prohibits discrimination based on race, color, national origin, sex, or religion. Title VII only covers employers with fifteen or more employees, leaving employees of small employers without federal protection from discrimination. This is a significant number: “[a]s of 2017, over 12 million workers worked for firms with fewer than 10 employees. Across all industries in the United States, Title VII consistently excludes about 14% of the workforce from its protections.”167 In contrast, thirty-seven states and Washington, D.C., as well as many cities, have adopted legislation that applies their state anti-discrimination laws to employers with fewer than fifteen employees.168 State and local anti-discrimination laws are also in many instances more expansive, protecting groups excluded by federal law. More protective anti-discrimination, wage and hour, and other state worker protection laws, then, create an opportunity for AG action.

c. Limitations on Other Actors Who Might Address the Harm

Typically, unions help improve working conditions for members as well as non-members, leading to increased wages in industries where they are present and advocating for strong workplace protections. Unions also serve as on-site monitors of working conditions and labor compliance. Unions ordinarily might help “resolve wage and hour violations through private grievances and arbitration.”169 But limitations in labor law and strong anti-union corporate campaigns have diminished membership in recent decades. As of 2019, only 6.2% of private sector workers were union members,170 and the overall percentage of unionized workers (public and private sector) has fallen from 20% in 1983 to 10.3% in 2021.171

In addition, the rise of forced arbitration prevents many workers from bringing their cases to court. Non-governmental enforcement of workplace rights by private and non-profit attorneys has long been a pillar of employ-

\begin{thebibliography}{99}

167. Yang & Liu, supra note 130, at 23.
168. Id. at 25.
169. Romer-Friedman, supra note 140, at 507.
\end{thebibliography}
ment protections and enforcement; however, as a result of numerous extremely pro-arbitration Supreme Court cases, over half of all workers are currently covered by forced arbitration clauses, a number which is projected to reach 80% by 2024.\footnote{Hamaji et al., supra note 127, at 3.} The practices force cases out of court and make it less likely that private and non-profit attorneys will be able to play their longstanding private enforcement role,\footnote{David L. Noll, Arbitration Conflicts, 103 Minn. L. Rev. 665, 682 (2018).} creating an urgent need for greater public enforcement by state AGs and other government actors.

d. The Issues Affect Multiple States

The ability of AGs to band together in multistate actions is another factor that may contribute to a decision to take a role in filling the current gaps in labor protections. Labor issues often affect multiple states at once, whether that takes the form of employers that operate across state lines or working conditions that exist in several states.

Climate change is also affecting multiple states. In California, for example, climate change is increasing heat-related deaths, damaging coastlines, and increasing the risk of wildfires, just to name a few environmental and health concerns.\footnote{Complaint for Declaratory and Injunctive Relief at 10:2-10:7, State of California et al v. U.S. Postal Service et al, Docket No. 3:22-cv-02583 (N.D. Cal. Apr 28, 2022).} In Massachusetts, climate change is causing loss of coastlines among other concerns.\footnote{Massachusetts v. E.P.A., 549 U.S. 497, 524 (2007).} As a result, states have banded together on numerous occasions to bring lawsuits pushing the federal government to take stronger steps to address climate change. For example, just recently, AGs in California, New York, Pennsylvania, and thirteen other states, as well as local entities, sued the U.S. Postal Service after it refused to consider replacing its aging delivery fleet with electric vehicles.\footnote{Complaint for Declaratory and Injunctive Relief at 2:23, State of California et al v. U.S. Postal Service et al, Docket No. 3:22-cv-02583 (N.D. Cal. Apr. 28, 2022). The Biden administration recently announced that the Postal Service will buy 66,000 electric vehicles. See Jacob Bogage, Postal Service will electrify trucks by 2026 in climate win for Biden, WASH. POST (Dec. 20, 2022), available at https://www.washingtonpost.com/business/2022/12/20/usps-ev-vehicles/ [https://perma.cc/MLV2-RGDZ].}

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172. Hamaji et al., supra note 127, at 3.
Additionally, California’s AG led a coalition of 23 AGs to help defend EPA’s car emission standards, after they were challenged by a different coalition of states. EPA’s rule is predicted to prevent 3 billion tons of greenhouse gas emissions from 2023 to 2026 by light-duty vehicles.

### e. Opportunity for Lasting Impact

Involvement in just transition issues at this particular moment presents a unique opportunity for AGs to have impact. The climate crisis is inherently an issue of lasting impact; engaging workers, unions, and affected communities in a constructive manner will help ensure develop broad public support for the needed transition.

Moreover, the clean energy industry is currently still developing and is in its very early stages. Labor practices established now are likely to set the tone for years to come. If industries begin on a low-road path, with low wages, pay violations, misclassification, and unsafe workplaces, it will be more difficult to change this trajectory in the future once these practices are entrenched. For example, electronic vehicle manufacturer Tesla has been sued multiple times for violations of anti-discrimination laws and it has an extensive record of workplace safety violations. Permitting such low-road practices to proliferate creates a bad precedent for the emerging industry. Conversely, if AGs are able to intervene at this key moment to help create high-road and law-abiding jobs in the industry, the future impact of such action would likely be long-lasting and far-reaching. There is a present opportunity to nip any low-road practices in the bud and set a new industry on a positive trajectory going forward.

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178. Id.


C. Possibilities for AG Engagement

A just transition in the clean energy sector holds the promise of more and better jobs, policies and court decisions that protect the public fisc and environment, policies that begin to right the wrongs wrought by a history of racial injustice, and policies that tackle climate change forcefully and with an urgency that matches the severity of the problem. But that type of transition is not guaranteed. Instead, climate and labor policy will need to coalesce around these goals and advocates will need to ensure that policies are enacted to accomplish both climate and labor priorities.\(^{181}\)

With their many and varied tools, attorneys general have a potentially impactful role to play in this area. This Section addresses several recommendations that have been made for a just transition and describes opportunities for AG involvement. Depending upon the particular just transition issue, AGs may be able to enforce the law, provide guidance, advocate publicly, convene players, or simply use their bully pulpit to press for just transition goals.

Given that incentives for AG involvement are present, as discussed above, the goal of this Section is to offer a vision of how AGs can engage in the labor space to address this national issue, by surveying AG tools available to promote a just transition. The Section also offers possible areas for protecting workers generally from the already-existing impact of climate change.

1. Pushing for Good Jobs in the Clean Energy Sector

A number of recommendations have been made about how to improve conditions and prevent employer abuses in the growing clean energy sector, including increasing union density, promoting the use of project labor agreements, enforcing prevailing wage laws, and enforcing labor, safety and anti-discrimination protections. In addition, there are statutes that have been enacted in some states that contain provisions designed to promote a just transition. For each of these recommendations, there are clear opportunities for AGs to engage, within the boundaries created by preemption.\(^{182}\)

a. Unions

A primary recommendation for improving the quality of clean energy jobs is to increase unionization rates. Unions have significantly improved


\(^{182}\) See *supra* text accompanying notes 132–135.
wages, benefits, workplace safety, and other working conditions for members and for all workers in the country.\textsuperscript{183} Research shows that they can also help reduce gender and race inequities.\textsuperscript{184} Moreover, without unions, workers have no clear avenue to effectively negotiate the conditions of their employment.\textsuperscript{185} During the COVID-19 pandemic, for example, workers in unions were able to advocate for additional protections, including personal protective equipment and paid sick leave, while many nonunion workers who advocated for themselves risked retaliation or termination.\textsuperscript{186} The ability to collectively negotiate over terms and conditions of employment will likely become more important as rising temperatures and other features of the climate crisis lead to uncertainty and hazardous working conditions in many industries.\textsuperscript{187} Unions also help employers attract and retain higher-skilled workers, which improves the quality of work and makes it more efficient.\textsuperscript{188} These benefits for employers can outweigh any potential increase in wages.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{185} See McNicholas et al., supra note 160.
\item \textsuperscript{186} See Celine McNicholas et al., \textit{Union Workers Had More Job Security During the Pandemic, but Unionization Remains Historically Low}, ECON. POL’S INST. 2 (Jan 22, 2021), https://files.epi.org/pdf/218638.pdf [https://perma.cc/QAH4-54P7].
\item \textsuperscript{189} Id.
\end{itemize}
Outdated labor laws though, most notably the National Labor Relations Act (NLRA), have led to a significant decline in national union density.\(^{190}\) Although there is strong support for unionization,\(^{191}\) there are serious obstacles to workers forming unions under current law; in addition, illegal retaliation and interference by employers are common during union campaigns.\(^{192}\) As explained, there are constraints on what AGs can do to directly enforce the laws governing unionization in the private sector, because the NLRA has broad preemption, limiting what states and localities can do in this area.\(^{193}\)

Nonetheless, there are actions that AGs can take in this area that do not raise concerns about NLRA preemption.

- AGs can conduct know-your-rights campaigns to educate workers, including those in green economy jobs, about their NLRA rights to organize and form a union. The White House Task Force on Worker Organizing and Empowerment issued its first report in February 2022, and it recommended an extensive outreach and public education campaign to make sure that workers throughout the country know about their organizing and union rights. The U.S. Department of Labor has already begun to undertake such a campaign, launching a “Unions 101” website. AGs generally have a high public profile in their states; they are in close touch with constituents, and they often have effective intergovernmental, communications, and outreach teams. Even though they do not enforce the NLRA, AGs are

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190. See supra text accompanying notes 131–135.
well suited to help inform workers within their states about their rights to form a union, and AGs could consider focusing such efforts on clean energy industry workforces generally. Although NLRA preemption is broad, it is highly unlikely that a general know-your-rights education program, unrelated to any particular union campaign, would be preempted.

- AGs can develop relationships with unions, and can respond promptly when unions refer cases involving violations of minimum wage, prevailing wage, or other provisions of state law. For example, New York AG Letitia James recently obtained restitution and reinstatement for workers unlawfully fired during the pandemic, in a case referred by a union. 194

- AGs can use their public presence to show solidarity with workers trying to unionize, as New York AG James did recently in a statement supporting Starbucks employees who had successfully unionized in Buffalo and are trying to do so elsewhere in the state. 195

- To the extent that there are discussions among state policymakers about creating public (government) jobs within clean energy industries or the green economy, state AGs can support this position. And to the extent that a given state does not permit unionizing by public employees working for state or local government, AGs can support labor reform allowing them to organize, given the benefits that collective bargaining offers public employers as well as public employees. 196

- AGs can advocate for labor law reform at the federal level. For example, seventeen AGs formed a coalition to push Congress to enact the PRO Act, explaining that the new statute would have restored the “original purpose of encouraging unionization.” 197


196. Brief for the State of Ca. as Amicus Curiae Supporting Affirmance at 11, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466) (explaining that collective bargaining “facilitates the effective identification and resolution or mitigation of issues that could otherwise generate dissatisfaction in the workplace.”).

b. Project Labor Agreements

Another tool for ensuring high-road working conditions, as well as facilitating union density in clean energy jobs and jobsites, is the use of project labor agreements (PLAs). PLAs are a type of contract used in the construction industry to set the terms and conditions of employment on large projects of long duration and design complexity. They are generally negotiated between the owner or managing entity of a construction project and a building and construction trades council (a grouping of local construction unions). They operate a lot like a “job-site constitution,” establishing worksite conditions, project execution and protocol to resolve labor disputes without resorting to strikes and lockouts. Many PLAs include community workforce goals that increase access to construction jobs for veterans, local residents, disadvantaged workers, and/or small businesses. PLAs govern the terms and conditions of employment for all workers—union and nonunion—on a given project. They can be used to protect taxpayers by eliminating costly delays due to labor conflicts or shortages of skilled workers. Sometimes PLAs require exclusive use of union labor, while other times they require a set percentage of labor to be conducted by union workers. For example, the developers of Vineyard Wind—a recently-permitted utility-scale offshore wind project that will be the first of its kind in the United States—signed a PLA with a coalition of Massachusetts unions and agreed to hire union workers for fifty percent of the jobs created by the project. In New York and New Jersey, a recently-announced federal offshore wind lease includes stipulations that encourage PLAs, in addition to incentivizing local employment and requiring input for affected communities.

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199. See id. (defining PLAs).

200. Id. (discussing PLAs incorporating community workforce provisions).


Many states have policies promoting the use of PLAs in state-funded projects, but some restrict their use.\(^{203}\) AGs can encourage use of project labor agreements in their states, and they can also conduct any enforcement that is appropriate under such agreements. Some states do not allow PLAs; in such cases, AGs can advocate for changing the law to permit them.\(^{204}\) If PLAs are allowed, but not favored, AGs can advocate for policies that favor them. And to the extent PLAs include an enforcement role for AGs, AGs can respond to any complaints about the implementation of the agreements. Overall, AGs can urge use of PLAs in relation to clean energy projects.

c. Prevailing Wage

Another mechanism for ensuring good clean-energy jobs is requiring payment of prevailing wages for the work.\(^{205}\) Prevailing wage laws require government contractors to pay a wage and benefit rate based on similarly employed employees in a given geographic region.\(^{206}\) These laws ensure that contractors cannot gain an unfair advantage in bidding for government contracts by paying sub-par wages or using low-road employment practices.\(^{207}\) Studies have found that prevailing wage laws have a positive economic impact.\(^{208}\)


\(^{204}\) See id.


\(^{208}\) Frank Manzo IV, Minnesota Wins with Prevailing Wage, MIDWEST ECON. POL’Y INST. (Jul. 19, 2018), https://midwestepi.org/2018/07/19/minnesota-wins-with-prevailing-wage/amp/ [https://perma.cc/P4EM-B7BG]; see also Frank Manzo IV, NEW STUDY: Wisconsin Prevailing Wage Repeal Reduced Wages, Exported Jobs and Tax Dollars Out of State,
AGs can encourage the designation of clean energy jobs as public work subject to prevailing wage requirements, and where this occurs, AGs can prioritize civil and criminal enforcement of prevailing wage laws in these industries. AGs can also urge client agencies and state courts to expansively interpret the definition of public work. Again, as discussed below, AGs can also bring enforcement actions that make use of the maximum available statutory authority.

d. Labor and Safety Protections

Another policy priority for ensuring a just transition is enforcing worker protections and ensuring workplace safety in the emerging jobs.209

AGs can prioritize enforcement of basic labor standards in clean energy industry, including minimum wage and overtime. AGs can also enforce state-level paid sick leave, prevailing wage, and anti-retaliation laws where they exist.

As the climate crisis accelerates, impacts such as deadly heat,210 unhealthy air quality,211 and dangerous flooding212 will become more severe; many industries, including the clean energy industry, will have to adapt to changing conditions. Not only are these extreme conditions a workplace hazard in and of themselves, but they also exacerbate other hazards by increasing the likelihood of accidents and error.213 In response to these developments, AGs can also enforce workplace safety laws, subject to the limitations of OSHA preemption.214


210. See Sengupta, supra note 111.


Many companies attempt to avoid compliance with labor laws by wrongly classifying workers who should be employees as independent contractors. By misclassifying employees as independent contractors, workers are “denied [access] to critical benefits and labor standards protections they are entitled to by law,” such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Such employer practices profoundly harm the quality of jobs in an industry.

AGs have a role in these areas as well. They can prioritize civil and, where applicable, criminal enforcement of misclassification, payroll fraud, and basic labor standards laws in the green industry. AGs can also push for and defend stronger statutes related to misclassification. Several AGs have been extremely active in enforcing workers’ rights laws and combating misclassification in a number of industries. This can be made a priority in the clean energy space as well. Ensuring compliance with minimum wage, overtime, misclassification, and other basic labor standard laws could be particularly impactful in the clean energy industry, since this industry is still nascent.

And in line with a general renewed focus among anti-trust enforcers on labor market competition, AG offices’ anti-trust bureaus can monitor and prioritize any potential labor-related anti-trust violations in the emerging renewable energy industries, such as employer collusion regarding worker wages, mergers that lead to monopsony or otherwise adversely impact employees’ working conditions, and employer abuse of no-poach or non-compete agreements.

AGs can also enforce anti-discrimination and civil rights laws in relation to renewable energy employers. Racial equity considerations are an important part of a just transition; this includes ensuring that past patterns of workplace discrimination do not persist and that communities adversely af-

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216. Misclassification of Employees as Independent Contractors, U.S. DEP’T OF LABOR, https://www.dol.gov/agencies/whd/flsa/misclassification [https://perma.cc/28L4-XBUA]; see also supra text accompanying notes 72–75 (describing misclassification further and providing examples of cases that AGs have brought against employers for engaging in this illegal practice).

217. See supra text accompanying notes 72–75 (describing examples of actions AGs have brought in response to these types of violations).

fected by climate change and past environmental injustices benefit from opportunities in the new green energy industries. Many AGs have brought cases to address employment discrimination. For example, the New York AG in 2020 reached a $1.5 million settlement involving a construction company with a pattern of “severe sexual harassment” against women, mostly women of color; the settlement also required the company to hire an outside monitor for three years. The Illinois AG obtained consent decrees to end “a brazen pattern of discrimination” based on race by a meat processing company and a temporary staffing agency it used. And New Jersey’s AG in 2021 announced a set of broad initiatives to promote racial justice.

As with wage theft, misclassification, and other abusive labor practices, AGs can work to ensure racial equity in the clean energy sector.

e. Defending State Agencies

Illinois, Maryland, and New York have all recently passed legislation focused on reducing greenhouse gas emissions and on protecting workers in the affected industries. State agencies have already started implementing these laws and AGs can play a role in advising their agencies on that implementation. New York, for example, recently denied two permits under its new climate law and has already defeated a lawsuit challenging one of those denials. New York’s AG will now have the job of defending

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224. See N.Y. ENV’T CONSERV. LAW § 75-0107 (McKinney 2020).


its agencies’ decisions. When it comes to implementation of the worker protections, such as the prevailing wage and project labor agreement requirements in several projects recently announced by New York, AGs will be on the frontlines to handle any complaints about the implementation of those programs as well and to defend state policies promoting a just transition.

2. A Just Transition Away from Fossil Fuel

Recommendations have also been made to address the needs of a different set of workers: those in the fossil fuel industry, who are facing potential unemployment and dislocation as the economy changes. With regard to this challenge, AGs can advocate on behalf of laid-off workers in a bankruptcy and use their bully pulpit to push for more robust and protective state-level and federal programs, as well as monitoring spending on programs meant to help workers in this area.

a. Law Enforcement

Many worker protections are relevant to the fossil fuel industry as well as to the clean energy industry, such as wage protection laws, laws curbing worker misclassification, environmental and workplace safety statutes, and more. AGs can prioritize civil and, where applicable, criminal enforcement of these laws in the fossil fuel industry, just like in the renewable energy industry.

Where there are layoffs or closures, additional protections for workers can be enforced. The federal WARN Act requires employers with more than 100 employees to give sixty days’ notice before a plant closure or mass layoff. Some states have comparable laws that go further. For example, New York’s WARN Act requires employers with fifty or more employees to


provide 90 days’ notice before a mass layoff or closure. Though there is at least some case law finding that states may not enforce the federal statute, states can enforce their own state-level WARN Acts; AGs can either directly bring such cases or represent enforcement agencies in court, depending on their jurisdiction. For example, New York’s WARN Act authorizes the state Department of Labor to enforce it and the agency has done so.

AGs can educate workers in the fossil fuel industry specifically about their rights, respond to complaints from workers, and work with the state legislature and agencies to improve enforcement and worker protection standards.

b. Policy Advocacy and Public Education

Advocates have developed policy recommendations to address the needs of fossil fuel industry workers. AGs can advocate at the state and federal level for these policies, such as programs to assist workers and communities dependent on the coal industry.

AGs can also educate workers, the public and business community about existing programs available to them, and advocate for such programs where they do not exist. These include grant opportunities or funding for training, workforce development, job search support, local business and economic development, and environmental remediation, among other programs. To the extent that public funds are allocated to address the needs of transitioning away from fossil fuel, AGs can ensure that these funds are properly spent and enforce False Claims Act or other laws, where available and appropriate, to ensure proper use. AGs have a long history of enforcing

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their states’ False Claims Acts and can use their authority to root out any fraud in the expenditures of public money in this area.235

c. Bankruptcy-Related Advocacy

In the fossil fuel sector, protections during a bankruptcy can be a significant issue both for workers and the environment. In mid-2019, Blackjewel, a company with coal mines in Kentucky, Virginia, and West Virginia filed for bankruptcy in the U.S. District Court for the Southern District of West Virginia.236 The company also failed to pay the wages of hundreds of coal miners, leading to a two-month standoff in which workers camped out on the train tracks to block the last shipment of coal offsite.237 The approved bankruptcy liquidation plan authorizes the company to abandon hundreds of mines without having restored the landscape, remediated unsafe conditions, or set aside funding to ensure that cleanup is possible.238 To help avoid the devastating impacts resulting from a poorly executed bankruptcy, state AGs and their client agencies can learn lessons from the Blackjewel example, and take steps to protect workers and the environment at multiple stages of the bankruptcy proceedings, including before the proceedings even start.

As an initial matter, states and AGs are likely to be able to play an important role in bankruptcy proceedings. Parties must show a pecuniary interest in order to have a say in the bankruptcy proceeding,239 and state government should be, and would almost certainly be, afforded a formal role as a party.240 State government, including agencies represented by their attorneys general, will likely shoulder significant financial burdens as a result.


of the company closing. Without an adequate cleanup plan, states can be left with the liability for cleanup, demonstrating a pecuniary interest in the proceeding. In addition, during bankruptcy, all other cases involving the company are automatically stayed\(^\text{241}\) except cases where regulators are exercising their enforcement and regulatory powers.\(^\text{242}\) Though the regulator or enforcer will likely not be able to obtain damages in those other, non-bankruptcy proceedings, the regulator or enforcer could get injunctive relief, which provides another basis for giving the government a seat at the table in the bankruptcy.

Once a company has filed for bankruptcy protection, there are several stages where an AG can advocate for workers and the environment, as follows:

- Must the company liquidate its holdings or can it reorganize? To reorganize, a company must show that it can comply with non-bankruptcy law including wage laws and environmental laws. An AG with concerns about such compliance could press this issue in bankruptcy court.\(^\text{243}\) In 2019, for example, the Kentucky and Virginia AGs urged the U.S. Trustee\(^\text{244}\) to pay Blackjewel’s workers when the company


\(^{242}\) 11 U.S.C. § 362(b)(4) (2020); see, e.g., In re SCBA Liquidation, Inc., 489 B.R. 666, 682 (Bankr. W.D. Mich. 2013) (“Under these standards, an action will only be exempt from the automatic stay as an exercise of police or regulatory powers if the action has been instituted to effectuate the public policy goals of the governmental entity, as opposed to actions instituted to protect the entity’s pecuniary interest in the debtor’s property or to adjudicate private rights . . . . [A]n action will be regarded as outside the police power exception when it incidentally serves public interests but more substantially adjudicates private rights.”); see Lockyer v. Mirant Corp., 398 F.3d 1098, 1109 (9th Cir. 2005); see also In re Iams Funeral Home, Inc., No. 07–1397, 2007 WL 4358291, at *4 (Bankr. N.D. W.Va. 2007) (holding that the Attorney General of West Virginia’s claims were exempted from the automatic stay).


went bankrupt. Kentucky AG Beshear opened his own investigation as well. Eventually, the U.S. Department of Labor got involved and Blackjewel paid its workers over $5 million in backpay.

- If the company must liquidate, can it abandon its properties? What must be done to ensure that any abandonment does not damage the public’s health and safety? An AG can advocate in bankruptcy court for adequate environmental protections as a condition of abandonment, and also for protection of workers’ pensions. For example, a bipartisan coalition of attorneys general recently filed an amicus brief in the Supreme Court in support of certiorari to address the decision by Delphi Corporation, an auto parts manufacturer and supplier, to deny pension benefits to its employees after entering bankruptcy. They argued that the company had violated employees’ rights. Ultimately, the Supreme Court denied the writ of certiorari.

- What priority should various claims be accorded? In bankruptcy proceedings, secured claims are paid first, then administrative claims, and finally unsecured claims. A debtor’s assets may be exhausted before any unsecured claims are paid. AGs may have an opportunity to argue that pension, retirement, healthcare-related, or environmental claims are administrative rather than unsecured in order to

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245. See Letter from Mark R. Herring, Att’y Gen. of Va., & Andy Beshear, Att’y Gen. of Ky., to Debra A. Wertman, Assistant U.S. Tr. (July 16, 2019).


248. See generally Midlantic Nat’l Bank v. New Jersey Dep’t of Env’t Prot., 474 U.S. 494, 507 (1986) (holding that Bankruptcy Court “does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety.”). But see in re Smith-Douglass, Inc., 856 F.2d 12, 17 (4th Cir. 1988) (allowing abandonment where cleanup needs were unclear and there were insufficient assets to fund a cleanup).


make it more likely that such claims would ultimately be paid.\textsuperscript{252} To make such arguments, AGs may need to develop detailed information and legal arguments. For example, in relation to environmental concerns, an AG advocate may need to obtain an assessment of the future cleanup expenses, as well as an assessment and valuation of any health concerns related to site conditions.\textsuperscript{253} During liquidation negotiations, AGs could advocate for a trust to address foreseeable future cleanup or health-related costs, retiree health benefits, or pensions that must be paid. Such advocacy is particularly crucial in an industry like coal mining, in which employees are routinely exposed to disease-causing materials.\textsuperscript{254} Without strong advocacy by state AGs or others, bankruptcy negotiations can end in agreements that leave workers’ interests unprotected. In 2019, for example, a bankruptcy judge prioritized\textsuperscript{255} a mine’s restructuring plans over employee benefits, in a move criticized by experts and activists.\textsuperscript{256} This example highlights how crucial advocacy on behalf of workers is in bankruptcy court.

- Are there any inappropriate attempts to skirt liability through transfers? In reviewing a bankruptcy reorganization or liquidation plan, an AG can monitor any auctions in which permits are transferred to a new entity, which may itself be a polluter, and which may lack the resources to satisfy all assumed obligations. An AG can also monitor for potential fraudulent creation of subsidiaries: a reorganization could involve placing all of the environmental, labor, and other liabilities into an underfunded new company, to the detriment of workers and the environment. For example, in 2007, Peabody Energy, already facing market pressure, transferred its pension liabilities to a spinoff.

\begin{footnotesize}

\textsuperscript{252} Macey & Salovaara, supra note 2400, at 903 (explaining that “[i]n a Chapter 11 reorganization, the parties can agree to whatever new arrangement they wish.”).

\textsuperscript{253} See id. at 904–05 (describing bankruptcy’s impact on health-related claims).


\end{footnotesize}
named Patriot Coal. A few years after the spin-off, Patriot Coal filed for bankruptcy protection and began shedding its pension obligations, ultimately leading to the termination of retiree benefits.

- Outside of the formal bankruptcy process, there are multiple avenues for AGs to advocate on behalf of environmental and worker concerns. While a bankruptcy proceeding is ongoing, the company is required to follow non-bankruptcy laws, including environmental and workers’ rights laws, and the bankruptcy court will seek information from the AG or relevant regulator to confirm such compliance. Paying close attention to such issues could help ensure that these laws are followed. Meanwhile, an AG may have environmental or workers’ rights claims against the company outside of the bankruptcy proceeding. The AG can argue that the automatic stay does not apply to those claims and continue to pursue the claims outside of the bankruptcy.

- Finally, enforcement efforts before a bankruptcy may also affect the bankruptcy itself. For example, a Kentucky law required coal mines to secure a bond to cover workers’ wages, which would have helped the Blackjewel miners who lost their paychecks, but that law had not been enforced and the company lacked the requisite bond at the time of its bankruptcy. Similarly, when the bankruptcy court ruled on Kentucky’s motion to compel Blackjewel to bring its permits into compliance with environmental laws, the court sided with the company after finding that the state had for years neglected the company’s environmental violations.

In sum, strict enforcement of existing bankruptcy and other laws can help protect workers’ and retirees’ rights to payment, pensions, and health

benefits [https://perma.cc/ACN3-MGZB].


259. Macey & Salovaara, supra note 2400, at 915–16.

260. KY. REV. STAT. ANN. § 337.200 (West 2010).


262. Transcript from Motion Hearings at 2:09:00-2:17:30, Blackjewel L.L.C. and Cumber-
benefits in the context of a closure or reorganization. AGs can play a unique and important role to protect those rights.

3. Protecting Workers Across Sectors

Workers in both the emerging clean energy and the fossil fuel sectors are also experiencing many of the devastating impacts from climate change that workers throughout our economy face, including excessive heat at work, financial risk that threatens their pensions, and more. Below are some approaches that AGs can take or have taken to help protect a range of workers already adversely affected by rising temperatures and climate-induced disasters.

Under section 112 of the Clean Air Act, EPA is tasked with issuing safety rules for chemical plants that handle hazardous air pollutants. The Obama administration updated the safety rules after an explosion in a west Texas fertilizer plant, which demonstrated that first responders and neighboring communities needed better information about the chemicals that were being stored at the plants and that the plants needed better procedures to avoid future accidents. The Trump administration delayed and ultimately rolled those regulations back. AGs successfully challenged the delay but the challenge to the rollback remains pending as the Biden administration reconsiders the issue. Climate change is increasing the risks to chemical plants as they may be affected by increased risks of flooding and other weather disasters. AGs are engaged in pushing EPA to finalize a rescission of the Trump-era rollback and restore the urgently needed safety measures.

Heat standards are rules requiring employers to take precautions to avoid worker harm when the heat becomes unsafe or dangerous. They generally include such common-sense measures as rest, shade, water, and gradual acclimatization to the heat. These protections are more and more necessary as the climate changes and heat waves intensify.

Both the labor and environmental lawyers at AG offices have a role to play in pushing states and the federal government to adopt and implement strong heat standards to protect workers nationally. At the federal level, OSHA recently issued a request for information about the impact of climate change on occupational heat exposure; in January 2022, a multi-state coalition of states submitted comments in response. The coalition urged OSHA to adopt a federal heat standard, which would create specific temperature thresholds at which different limits on work are imposed, in addition to expanding reporting requirements, increasing its workplace inspection program, and requiring employers to implement measures that prevent workers from overheating. AGs can continue to monitor the development of OSHA’s proposed heat standard, including filing an amicus brief or intervening in support if the ultimate standard is challenged in court after being adopted.

AGs in states with state-level heat standards can educate the public about such laws and either enforce them directly or represent state agencies in their heat standard enforcement. In states without heat standards, AGs can advocate for enactment of such rules at the state level, or issue

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reports that demonstrate the need for such a standard.\textsuperscript{272} Finally, even without a heat standard, AGs with criminal jurisdiction might in the face of particularly compelling facts assess whether charges may be appropriate in cases of easily preventable and predictable heat-induced workplace fatalities.\textsuperscript{273}

AGs can closely monitor cleanup operations after climate-related disasters such as hurricanes, reach out to worker organizations, and enforce relevant workers’ rights laws to protect cleanup workers, who are a workforce particularly susceptible to violations. Workers performing cleanup after hurricanes, floods, or other climate-related disasters often experience serious exploitation and workplace violations.\textsuperscript{274} In addition to enforcing worker protection laws in the clean energy and fossil fuel sectors, AGs can also ensure compliance in relation to any new industries that arise to address the damages caused by climate-related disasters.

As the White House recently stated in a report focused on climate-related financial risk, “[c]limate change poses serious and systemic risks to the U.S. economy and financial system.”\textsuperscript{275} There are several rules currently under consideration to address this. For example, the Employee Benefits Security Administration of the U.S. Department of Labor is currently accepting comments on steps it can take to “protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.”\textsuperscript{276}

\textsuperscript{272} See, e.g., FLANAGAN ET AL., supra note 214, at 1 (illustrating that so long as there is no final OSHA standard in effect, non-state-plan states would not be preempted from passing their own laws to protect workers from heat risk).


AGs can advocate for strong action, for example, requiring administrators of retirement plans governed by the Employee Retirement Income Security Act to disclose the steps they have taken to mitigate climate-related risks and how well those mitigation efforts worked.

A number of news stories report instances of workers being discharged or threatened with discharge or discipline for evacuating or taking other action to remain safe during an impending hurricane. Similar concerns exist in relation to other climate-related disasters. For example, eight workers at a Kentucky candle factory and six workers in an Illinois Amazon warehouse were killed at work by a tornado; news reports indicated that the Kentucky workers were threatened with discharge if they left, and that the Amazon workers were told to remain at work. Currently, if workers do not have a union contract, there are typically no prohibitions on terminations for departing under such circumstances. At least one example of this kind of law exists, at the local level: in 2018, the Miami-Dade Board of County Commissioners passed an ordinance prohibiting employers from retaliating or threatening to retaliate against non-essential employees for complying with County evacuation orders during a state of emergency. AGs could advocate for the passage of such laws at the state level.

CONCLUSION

Addressing the climate crisis will require remodeling the economy so that sources of harmful greenhouse gases are no longer at its center. The current inflection point presents an enormous opportunity to construct a sector that provides good family-sustaining jobs with robust worker protections in place. It also offers the opportunity to examine and correct the dis-


278. Hamilton Nolan, They were forced to stay at work as a tornado bore down. Would a union have saved them?, THE GUARDIAN (Dec. 16, 2021), https://www.theguardian.com/commentisfree/2021/dec/16/tornado-amazon-kentucky-candle-factory-workers-died [https://perma.cc/M5MX-46GL].

proportionate and inequitable impact the energy sector has had and continues to have on low-income populations and communities of color. AGs are the top lawyers in their states and they have a wide range of tools, as well as significant flexibility for addressing a crisis that affects their constituents. The factors that generally lead to AG engagement—state-level harm, federal inaction, lack of effective alternative avenues for redress, interested state-level stakeholders, and the potential for multi-state action—are present in relation to the climate crisis and the needs of workers affected by that crisis. There are numerous opportunities for AGs to engage on these issues. This Article is designed to spark conversations about using those tools at AG offices, as lawyers in these offices consider avenues for action, and also in the advocacy community, as advocates seek ways to engage government officials in pursuing a just transition.