WORKPLACE INFORMATION FORCING

By

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A variety of statutory, regulatory, and court-made rules force or strongly incentivize employers to provide information about workers' labor and employment rights in the form of break room posters, worksite notices, and employee policies and procedures. This "workplace information forcing" is designed to increase workers' legal knowledge and in turn to enable them to become enforcers of their own workplace rights. However, drafting the employer into the role of rights-informer and designating the workplace as the site of information transmission raises a number of economic, constitutional, and policy questions. Despite these questions, this Article concludes that workplace information forcing should be preserved, and even expanded, as one necessary component of a robust workplace rights enforcement regime.

INTRODUCTION

By and large, workers do not know their legal rights. Studies have shown that across demographic, income, and job categories, many workers are misinformed about their legal protections at work.[1] Workers have been found, for example, consistently to overestimate their job security and to underestimate their wage and hour rights and protections against retaliation, discrimination, and harassment.[2] Likewise, undocumented workers have been found to hold broad misconceptions about labor and employment law, believing, inaccurately, that their immigration status renders them completely unprotected on the job.[3]

This lack of legal knowledge is troubling for at least two reasons. First, workers' ignorance may be exploited by unscrupulous employers who create and maintain unlawful working conditions with little fear of challenge by workers. In this view, workers themselves are harmed by receiving sub-minimum wages or being subjected to unchecked harassment, discrimination, or retaliation. Other businesses in the same market may be harmed as well, as those that attempt to comply with the law may be undercut by their law-breaking competitors. Second, workers' lack of legal knowledge undermines the rule of law in the workplace. Our system of labor and employment laws relies heavily on workers themselves to act as rights enforcers, to bring lawsuits and make complaints to government agencies.[4] Some level of legal

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knowledge is a necessary condition for worker rights enforcement, as workers cannot complain about a violation if they do not know their rights in the first place. Workers' legal ignorance thus has the effect of removing a key enforcement component from our labor and employment law regime and hollowing out the laws' protections. The harm here is intangible: it is a harm to the notion that legal protections mean something; that no employer is above the law; and that labor and employment laws can establish a set of basic requirements, rights, and guarantees that stabilize and equalize the employment relationship.

How then, might workers become more informed about their legal rights at work? One solution is what this Article calls "workplace information forcing," when government requires or strongly incentivizes employers to inform workers about their legal rights through posters, notices, and employee policies and procedures. These rights-informing mechanisms can act as a sort of workplace *Miranda* warning, an employer-provided *ex ante* prophylactic designed to protect workers from future rights violations.[5] They can also function as an *ex post* antidote to remedy existing misunderstandings about the law, which workers may have brought with them to the job or picked up from employers themselves.

Yet drafting the employer into the role of rights-informer and designating the workplace as the site of information transmission raises a number of economic, constitutional, and policy questions. First, in economics, information-forcing rules exist to avoid inefficient outcomes, usually in contract negotiations, where one party has important information that the other lacks.[6] Workplace information-forcing rules adopt this sort of information asymmetry as their justification, often referring explicitly to workers' lack of awareness of their legal rights.[7] However, *workplace* information forcing does not fit squarely into the classic, *contract*-based economic model: the nature of the revealed information is different and the underlying purpose of the information-forcing rule is different. As a result, as a matter of theory, the efficiency-based economic rationale for placing employers in the role of rights-informer may fall short.

Second, some forms of workplace information forcing may be vulnerable to constitutional challenge. In a 2013 decision, the U.S. Court of Appeals for the D.C. Circuit struck down a requirement by the National Labor Relations Board (NLRB) that private employers display a poster informing workers of their rights under the National Labor Relations Act (NLRA).[8] Relying heavily on First Amendment principles, the court held that the poster violated an NLRA provision protecting employers' right to express anti-union opinions.[9] Though previous courts had uniformly rejected constitutional challenges to other statutes' workplace poster requirements, the D.C. Circuit ruling may nevertheless give ammunition to opponents of workplace information forcing, and has, in fact, spurred at least one copycat First Amendment challenge.

Third, one might question from a policy perspective whether workplace information forcing achieves its goals of creating a better informed workforce and then enabling those workers to act as rights-enforcers. Though empirical study of the effects of workplace posters, notices, and employee policies and procedures is scant, anecdotal accounts suggest that they have little impact on worker knowledge.[10] Moreover, though legal knowledge is a necessary prerequisite for workers to take action to vindicate their rights, it is insufficient alone to spur rights enforcement. This is because even the best informed workers still must have the right incentives to file a lawsuit or complain to a government agency; the benefits of legal action must outweigh its costs.

In the end, however, despite economic, constitutional, and policy questions, this Article does not advocate abandoning workplace information forcing. Rights-informing mechanisms

like the break room poster and worksite notice likely play a role (even if small) in increasing workers' legal knowledge, and legal knowledge is one necessary component of a robust workplace rights enforcement regime. However, legal knowledge alone is insufficient, and law- and policy-makers should consider a variety of ways of informing and empowering workers to become enforcers of their own workplace rights.

The Article proceeds as follows. Part I uses three examples to define workplace information-forcing rules, explore their legal authority, and assess the ways in which the rules' promoters draw on the language and imagery of information asymmetry as justification. Part II reviews the economics and law and economics literatures on the information asymmetry/ information forcing model springing from contract law and examines the extent to which workplace information forcing fits that model. Part III addresses the First Amendment ramifications of workplace information forcing. Part IV compares workplace information forcing with other policy tools for increasing workers' legal knowledge and examines its efficacy in spurring legal action by workers. Part V concludes.

I. DEFINITION, AUTHORITY, AND RATIONALE: THREE EXAMPLES

This Article defines workplace information-forcing rules as those that require or strongly incentivize employers to give workers information about their substantive and/or procedural labor and employment rights. Though workplace information forcing can take a variety of forms, this Part focuses on three representative examples: (1) a requirement by the U.S. Department of Labor (DOL) that employers display a poster describing federal wage and hour law ("the break room poster"); (2) orders by courts and the NLRA requiring law-breaking employers to post remedial notices concerning unionization and collective bargaining ("the remedial notice"); and (3) case law under Title VII of the Civil Rights Act of 1964 (Title VII) that creates a defense to some types of hostile work environment harassment claims for employers who develop and disseminate antiharassment policies and complaint procedures ("the *Ellerth/ Faragher* defense"). This Part examines each of these three methods of delivering rights information in the workplace, traces the source of their legal authority, and investigates the extent to which their promoters adopt the language and imagery of information asymmetry as justification. The subsequent Parts examine these workplace information forcing examples through economic, constitutional, and policy lenses.

Initially, however, it is important to note another type of workplace information forcing that has been studied elsewhere in the legal and law and economics literatures, but does not fit this Article's definition. Kip Viscusi and others have written extensively about occupational safety and health labeling mandates that force employers to provide information to workers about workplace hazards.[11] Federal or state regulations require employers to generate their own information about the health risks posed by a particular chemical used in a manufacturing process, for example, or to pass along hazard information provided by the chemical's manufacturer.[12] These sorts of labels – while certainly an example of forced information in the workplace – differ from the workplace information forcing at issue in this Article, in that they provide hazard information that is known exclusively to the employer and/ or manufacturer. In contrast, the forms of workplace information forcing studied here require employers to transmit generally available, public information about workers' legal rights.[13]

In addition, hazard labels operate on a further level of remove from the rights enforcement actions that workplace information forcing rules are designed to encourage.

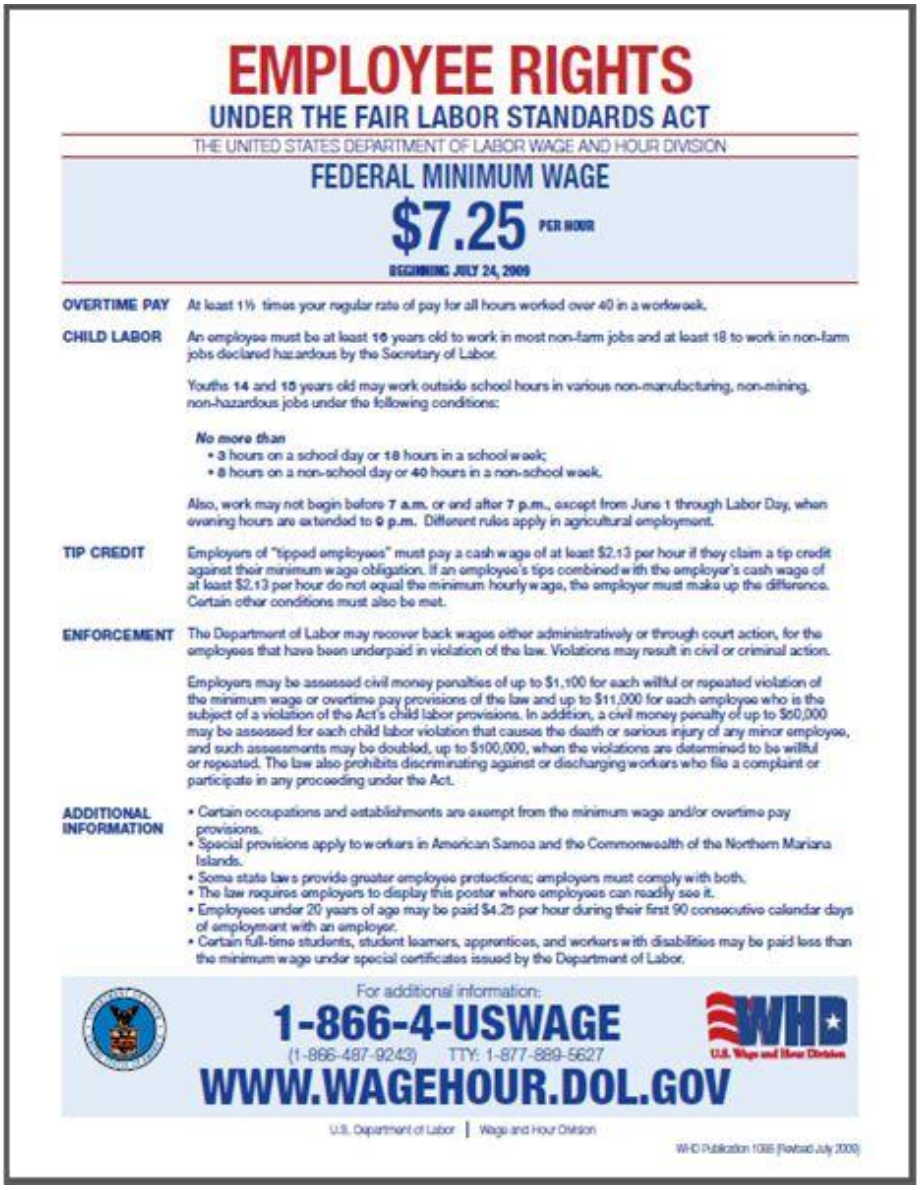
Workers, once informed about health and safety hazards, might want to make a complaint to a government agency or file a lawsuit, but to do so they would still need information about their legal rights. Hazard labels inform workers about the conditions under which they are working, but not about their rights with respect to those conditions. By forcing employers to transmit rights information, the workplace information-forcing rules examined by this Article operationalize the facts provided by hazard labels and allow workers to transform those facts into legal action. An analog in another context is the NRLA's protection of workers' conversations about their pay.[14] These conversations allow the sharing of factual "raw material," permitting workers collectively to discover the conditions under which they are working. Again, however, an additional type of information is necessary before rights enforcement action can take place: information about workers' substantive and procedural workplace rights, the tools with which the "raw material" of pay data may be transformed into the finished product of a unionization drive or legal claim.

The remainder of this Part examines three examples of workplace information forcing that *do* fall within this Article's definition: the break room poster, the remedial notice, and the *Ellerth/ Faragher* defense.

A. The Break Room Poster

Break room posters – so-called because they are often found in employee break rooms, kitchens, locker rooms, and similar areas in the workplace – are ubiquitous. The U.S. Department of Labor's website lists eleven different workplace posters, covering a range of topics from polygraph protection to migrant farmworkers' rights, that may be required by federal law; other federal and state agencies may require more or different posters as well.[15] Private human resources companies offer "poster compliance" packages with automatic updates, and one company offers an eight-step online "labor law poster finder" quiz to help employers identify which posters they might be obligated to display.[16] This Part focuses on one of these posters, required by Department of Labor regulations and entitled, "Employee Rights Under the Fair Labor Standards Act" (FLSA).

Figure 1: FLSA Poster



EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

$7.25 PER HOUR

BEGINNING JULY 24, 2009

OVERTIME PAY At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor.

Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than
- 3 hours on a school day or 18 hours in a school week;
- 8 hours on a non-school day or 40 hours in a non-school week.

Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.

TIP CREDIT Employers of "tipped employees" must pay a cash wage of at least $2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least $2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.

ENFORCEMENT The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to $11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to $50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to $100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.

ADDITIONAL INFORMATION
- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
- Some state laws provide greater employee protections; employers must comply with both.
- The law requires employers to display this poster where employees can readily see it.
- Employees under 20 years of age may be paid $4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

For additional information:

1-866-4-USWAGE

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

WWW.WAGEHOUR.DOL.GOV

WHD U.S. Wage and Hour Division

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

WH Publication 1088 (Revised July 2009)

Figure 1 shows the most current version of the FLSA poster.[17] The poster states the applicable federal minimum wage in large type at the top and in smaller type below describes workers' rights concerning overtime pay, child labor, and proper payment methods for tipped employees.[18] The poster also discusses enforcement of the FLSA and exceptions and exemptions from the FLSA's requirements. The poster is available free of charge from the DOL, and must be displayed in "conspicuous places in every establishment where . . . employees are employed so as to permit them to observe readily a copy."[19] Employers may not alter the poster except in certain circumstances, to note that some parts of the employer's workforce (such as taxi drivers or agricultural workers) are exempt from the overtime pay requirement.[20] Curiously, DOL regulations establish no "citation or penalty for failure to post,"[21] but some courts have held

that an employer's failure to display the poster can warrant tolling of the FLSA's statute of limitations.[22]

The FLSA poster is a creature of regulation, not statute, as the FLSA itself contains no poster requirement, nor any other provision that obligates employers to inform workers about their wage and hour rights. Instead, the poster requirement had its genesis in Industry Wage Orders, which under the original 1938 version of the FLSA were used to set minimum wages on a per-industry basis, "to phase low-wage industries into the minimum statutory wage."[23] These orders often "included a requirement that employers post appropriate notices [of the FLSA's requirements] in conspicuous places where covered employees are working."[24]

In 1949, drawing on "the accumulated experience of the [DOL's Wage and Hour] Division over a period of more than 11 years," the DOL issued a uniform workplace poster rule that required every employer covered by the FLSA to "post and keep posted such notices pertaining to the applicability of the Fair Labor Standards Act as shall be prescribed by the Division, in conspicuous places in every establishment where such employees are employed so as to permit them to readily observe a copy on the way to or from their place of employment."[25]

This new poster requirement was justified explicitly on information asymmetry grounds, linking greater worker legal knowledge to better enforcement of the law:

> It has been found that effective enforcement of the act depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them, and *a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law*.[26]

Thus, relying on an information asymmetry rationale – the finding that workers' legal knowledge needed to be enhanced as a "necessary adjunct to proper enforcement of the statutory provisions"[27] – the DOL enacted a workplace information-forcing rule in the form of the mandated FLSA poster. The 1949 poster requirement persists in much the same form today,[28] resulting in FLSA posters (along with posters concerning discrimination, workplace safety, family and medical leave, veterans' employment, polygraph usage, and farmworker rights[29]) hung in factory break rooms and office kitchens, outside human resources offices, and on employee bulletin boards in workplaces across the United States.

B. The Remedial Notice

The break room poster rules described above are prophylactic in nature, designed, much like the *Miranda* warning in the criminal context, to increase workers' knowledge of their employment rights and simultaneously to remind employers of their obligations under that same set of laws.[30] Remedial notices serve a different role, acting instead as an *ex post* antidote to remedy employer misbehavior. This method of workplace information forcing is ordered by courts or administrative bodies, and informs workers of their legal rights at work and the fact that their employer has violated those rights. Despite this difference, however, the remedial notice shares an information asymmetry justification with the break room poster: the notices are designed to correct workers' legal ignorance, which may be particularly ripe for exploitation by an employer who already has a history of violating workers' rights.

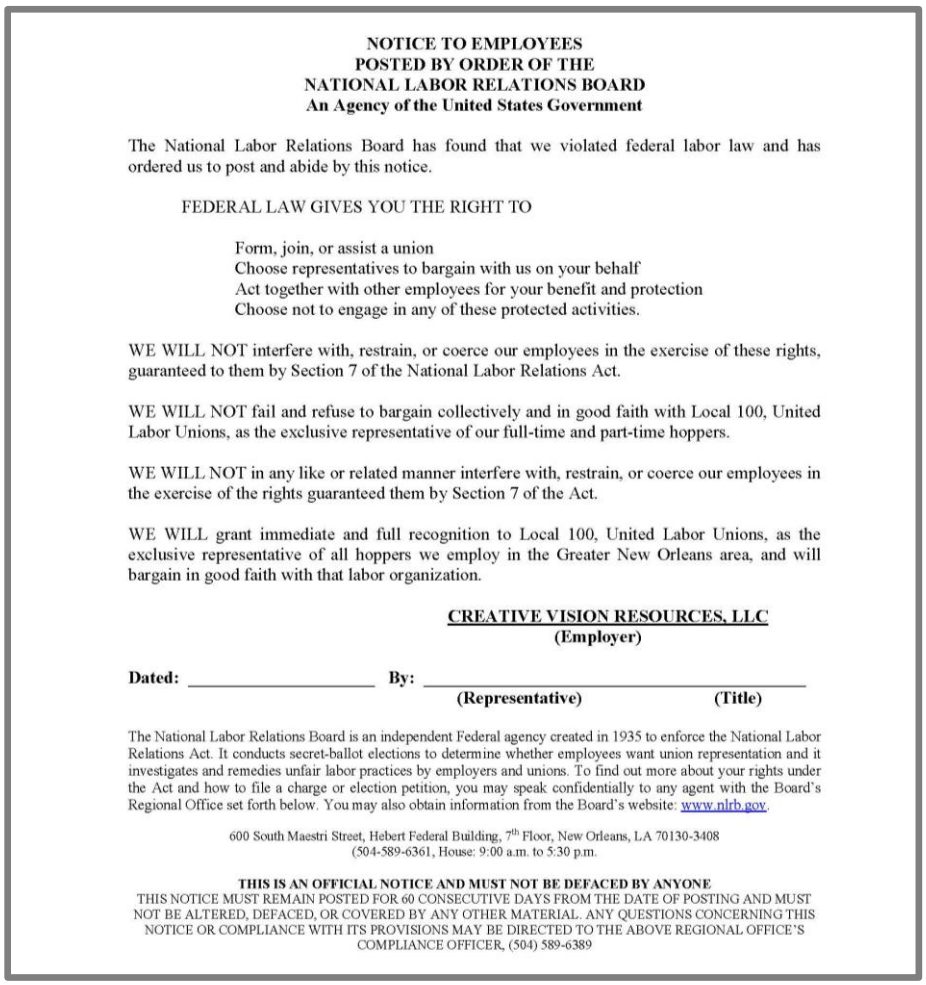
The remedial notice has long been a standard tool in the NLRB's kit for fixing an employer's unfair labor practices.[31] (Similar remedial notices are required by the Occupational Safety and Health Administration in the event of OSHA violations.[32]) In the words of the NLRB:

> The requirement that respondents post a notice informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the [National Labor Relations] Act.[33]

The U.S. Supreme Court recognized the NLRB's power to engage in remedial workplace information forcing as early as 1938,[34] and, in a 1940 decision, even struck down a remedial notice on the ground that it was not effective *enough* in "conveying 'to the employees the knowledge of a guarantee of an unhampered right in the future to determine their labor affiliations.'"[35]

A typical NLRB remedial notice, such as the one shown in Figure 2, must be posted conspicuously for sixty days, both physically in the workplace and electronically by email and posting on internet and intranet sites.[36] In some circumstances, courts also require employers to read the notice aloud to their workforce and mail a copy to each worker.[37] Remedial notices must be signed by a representative of the employer, and customarily state workers' rights under the NLRA, as well as the employer's pledge to respect those rights in the future and cease any past wrongdoing.

Figure 2: Sample NLRA Remedial Notice[38]



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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

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

CREATIVE VISION RESOURCES, LLC
(Employer)

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

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

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

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

From the early days of their usage, NLRA remedial notices have been described as a corrective for workers' lack of knowledge about their rights – an information-forcing solution to the problem of workplace information asymmetry. In 1940, for example, the Supreme Court described the NLRB's "purpose" in requiring a remedial notice as increasing workers' "knowledge of a guarantee of an unhampered right in the future to determine their own labor affiliation."[39] The Court went on to expound on the role of knowledge in the project of enforcing workers' NLRA rights:

> Knowledge on the part of the men that the company would cease and desist from hampering, interfering with and coercing them in selection of a bargaining agent . . . was essential if the employees were to feel free to exercise their rights without incurring the company's disfavor.[40]

Lower courts have similarly noted the ability of the remedial notice to educate workers about their labor rights and especially to correct employer-created misinformation. The Seventh Circuit has commented, for example, that "requiring an employer to post a notice will carry significant impact in informing employees of their rights and effectuating the policies of the

Act,"[41] while the Fifth Circuit has described forced notice-posting as "let[ting] . . . a warming wind of information and, more important, reassurance" into a workplace that has been "chilled" by employers' unfair labor practices.[42] Remedial notices, like break room posters, are therefore rooted in the concept of information asymmetry, and the related concept that forcing the transmission of rights information, via the "warming wind" of a worksite notice, will result in greater enforcement of and compliance with labor law.

C. The *Ellerth/ Faragher* Defense

The two previous examples of workplace information forcing – the break room poster and the remedial notice – differ in their relationship to workers' legal knowledge in that one is a prophylactic and one is an antidote. Nevertheless, both types of workplace information forcing are mandatory, whether required by federal regulation or decisions by courts or administrative bodies. The third example of workplace information forcing examined in this Part, the *Ellerth/ Faragher* defense, falls into the prophylactic camp, but is not mandatory. As explained below, employers may gain access to this defense by providing workers with rights information via antiharassment policies and procedures. If an employer chooses not to do so, she is not penalized directly; instead, she foregoes a defense to certain types of Title VII hostile work environment harassment claims.[43]

The *Ellerth/ Faragher* defense takes its name from two Supreme Court decisions that were issued on the same day in 1998: *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*.[44] Both cases involved hostile work environment sexual harassment claims, where the harassment was committed by a supervisor and the plaintiff sought to hold the employer itself vicariously liable under Title VII.[45] The Court held that employers in these circumstances can defend themselves by showing that they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and, additionally, that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer . . . ."[46] The Court noted further that "an antiharassment policy with complaint procedure" is one form that the employer's preventative efforts might take.[47]

Taking this language as their starting point, lower courts have considered what might count as a sufficient antiharassment policy for *Ellerth/ Faragher* purposes. Courts tend to ask two questions. First, what is the substance of the employer's policy? Second, how is the policy disseminated? With respect to substance, courts look favorably on policies that "define[] sexual harassment, [give] specific examples of sexual harassment, and set forth a statement that retaliation would not be tolerated."[48] Though courts do not require antiharassment policies to be couched in terms of workers' legal rights as such, many policies appear to use the language of law and rights. For example, a policy described by the U.S. District Court for the Southern District of Mississippi stated the employer's goal of providing "a working environment in which employees are free from discomfort or pressure resulting from jokes, ridicule, slurs, threats and harassment relating to race, color, gender, sexual orientation, gender identity, religion, national origin, age, disability, veteran status or *other legally protected characteristics*."[49] Similarly, the Equal Employment Opportunity Commission's (EEOC) guidance on the content of antiharassment policies recommends that employers "inform[] employees of their *right to raise* and *how to raise* the issue of harassment under [T]itle VII. . . ."[50] Thus, policies developed in reaction to *Ellerth* and *Faragher* often become vehicles for transmission of information about workers' legal rights.

With respect to the dissemination of antiharassment policies, courts favor policies that may be accessed easily by employees in places where they congregate, such as a "crew room" and on a company's intranet and "employee bulletin boards."[51] If a policy is contained in a lengthy employee handbook, then it must be clearly identified and easily locatable via a table of contents.[52] And in *Faragher* itself, the Supreme Court noted the district court's finding that, while the defendant had an antiharassment policy, it was functionally ineffective because it was never disseminated to the employees.[53]

Taken as a whole, then, courts' interpretations of *Ellerth* and *Faragher*, along with EEOC guidance, signal to employers that a robust antiharassment policy, with a clear explanation of prohibited conduct, protections against retaliation, and procedural instructions for claims-making, effectively publicized to workers, is the best way to gain access to an affirmative defense to vicarious liability. Though the Supreme Court did not rely on an information asymmetry rationale for its decisions in *Ellerth* and *Faragher*, the availability of the affirmative defense nevertheless has workplace information-forcing effects, as employers opt to create and disseminate antiharassment policies rather than suffer the alternative of proceeding defenseless through litigation.[54]

Using the three examples of the break room poster, remedial notice, and *Ellerth/ Faragher* defense, the subsequent Parts examine the extent to which workplace information forcing fits with the contract-based economic theory behind information-forcing rules; the constitutional implications of workplace information forcing; and, from a policy perspective, the efficacy of workplace information-forcing methods in encouraging workplace law enforcement.

II. WORKPLACE INFORMATION FORCING'S FIT WITH THE CONTRACT-BASED ECONOMIC MODEL

The concept of information forcing as a corrective for asymmetric information has its roots in the economics of contracts.[55] In an archetypal example from the economics and law and economics literatures, the seller of a used car has exclusive information about the car's quality.[56] Because only the seller knows whether the car is a low-quality "lemon," the buyer might be induced to pay more than she would prefer, and more than is socially optimal, if she knew the car's true quality. One solution is to force the seller to provide an accurate accounting of the car's quality and let the transaction proceed to an efficient result on a level informational playing field.

This information transmission can be achieved via mandates or incentives. In the lemon scenario, the car's seller might be required by statute, regulation, or court order to reveal the car's true condition. The break room poster and remedial notice fall into this category of mandated information forcing.

In the alternative, information might be forced via incentives, such as in the *Ellerth/ Faragher* defense example, where employers who transmit rights information to workers are rewarded with an affirmative defense. In the contracts literature, information-forcing incentives take the form of gap-filling "penalty default" rules that courts employ when interpreting incomplete contracts.[57] As Ian Ayres and Robert Gertner have observed, one party to a contract might withhold information strategically, purposefully leaving out a key contract term in order to gain an advantage.[58] The contract that results can be inefficient, because the informed party has withheld "information that would increase the total gains [to the parties, collectively] from contracting (the 'size of the pie') in order to increase her private share of the gains from

contracting (her 'share of the pie')."[59] However, if the information-withholding party knows that a court might later fill the information gap she has strategically created with a default term that is unfavorable to her, she might choose instead "to reveal information by contracting around the default penalty."[60] The threat that a court might impose a default penalty in the future thus creates an incentive for information transmission.

Applied to the lemon scenario, if information about the car's true condition is missing from the contracting process, a court might impose a penalty default rule that sets the car's value at the lowest reasonable amount. Seeking to avoid this outcome, the car's seller might choose instead to reveal the car's true condition and negotiate to an efficient outcome. The size of the pie would be optimized and the incentive for strategic information-withholding minimized.[61]

In this classic contract-based model, regardless of whether the information-forcing "fix" is mandated or incentivized, two things are true: the information conveyed is held exclusively by the information-withholding party, with no real opportunity for independent discovery by the uninformed party, and the underlying purpose of the information-forcing rule is to maximize efficiency. Indeed, the efficiency rationale for forcing one party to give up valuable information to another, often to the informed party's own detriment, is a powerful one, as efficiency has been labeled "the Holy Grail" of much of economic thought.[62]

Yet in the case of *workplace* information forcing, both mandated and incentivized, the nature of the forced information and the rationale for the information-forcing rules differ from the classic, contract-based theory. These differences, as discussed further below, are important for at least two reasons. First, a mismatch between information forcing in economic theory and information forcing in the workplace may mean that proponents of workplace information forcing cannot lay claim to the powerful efficiency rationale as the theoretical underpinning for their policies. Second, even if there are information asymmetries in the workplace that are similar to those in contract negotiations,[63] the differences between the two settings may raise the question of why the employer, as opposed to other parties, should be forced to remedy the asymmetry.

A. Nature of Forced Information

In the classic "lemon" example, the existence of an information asymmetry creates an efficiency problem, and the particular nature of the asymmetric information suggests that forcing the seller to come clean will be an appropriate and effective solution. In other words, the characteristics of the withheld information determine the appropriate solution to the information asymmetry problem.

In the negotiation over the lemon, forcing the seller to inform the buyer about the car's true condition makes sense: the seller is the exclusive holder of the information, and even if the buyer were to attempt to appraise the car independently, she would need permission and access granted by the buyer. For all intents and purposes, therefore, the seller is the exclusive source of car quality information, and so the only effective remedy for the information asymmetry problem is to force a transfer of information from buyer to seller.

With respect to the workplace, however, though workers may be misinformed about their legal rights, employers do not have a monopoly on legal rights information; they have neither generated the rights information themselves nor do workers have to "go through" their employers in order to access rights information. Therefore, in contrast to the classic "lemon" example, the simple fact of workers' ignorance does not answer the question of *who* among a

variety of possibly better-informed parties (employers? government agencies? legal services attorneys? advocacy groups? unions? other workers?) should remedy that ignorance.[64]

Indeed, critics of workplace information forcing have adopted this very line of reasoning in attacking a recent attempt by the NLRB to require private employers to display a break room poster describing workers' rights under the NLRA to organize into a union and bargain collectively. In a pair of cases decided by the D.C. and Fourth Circuits in 2013,[65] discussed in detail in Part III below, the courts struck down the NLRB's poster requirement for a variety of reasons. Significantly, judges on both courts questioned why "the burden of filling" workers' "knowledge gap" with respect to their labor rights "should fall on the employer's shoulders."[66] In her concurrence with the majority's invalidation of the poster rule, Judge Karen LeCraft Henderson of the D.C. Circuit observed further that "Unions and the NLRB are at least as qualified to disseminate appropriate information—easily and cheaply in this information technology age—and in fact already do so. . . The NLRA . . . simply does not authorize the Board to impose on an employer a freestanding obligation to educate its employees on the fine points of labor relations law."[67]

While it is true that the existence of an information asymmetry in the workplace may not *ipso facto* require that the *employer* be coerced into providing rights information, the attack mounted by Judge Henderson and her colleagues goes too far. There are compelling reasons to draft the employer into the role of rights-informer, even though the employer is not the creator or exclusive holder of rights information, and even though a worker could find other ways to acquire legal knowledge.

In the case of the break room poster (the particular form of workplace information forcing criticized by the Fourth and D.C. Circuits), the courts' outrage at the idea of the employer as rights-informer is puzzling, given the long and unremarkable history of employers' posting information about workers' rights under other federal and state employment statutes. In the case of the FLSA poster discussed in Part I.A, *supra*, employers appear to hang these posters even in the absence of any statutory or regulatory penalty for failing to do so. This history suggests that making space in a break room or on a bulletin board for required posters, which are available free of charge from government agencies, may not in fact impose the sort of "burden" on employers that preoccupies Judge Henderson.

However, the low cost of required posters still does not answer the question of "Why the employer?" Here, it is useful to distinguish among the three types of workplace information forcing examined by this Article: the break room poster, the remedial notice, and the *Ellerth/ Faragher* defense. In the case of remedial notices, the employer is forced to provide rights information because he or she has violated those rights in the past, and because workers may therefore be dissuaded from exercising those rights in the future. Workplace information forcing is an antidote, not a prophylactic, a "warming wind" (to mix metaphors) directed at workers who have been chilled from engaging in rights enforcement.[68] Moreover, the information conveyed by a remedial notice is in a sense exclusive to the employer: the employer states the rights violations that he or she has committed in the past and pledges not to repeat course. This assurance can only come from the employer, and so forcing the employer to reveal this information is appropriate.

In the case of *Ellerth* and *Faragher*, the Supreme Court had no problem drafting the employer into the role of rights-informer when it created the affirmative defense. As an initial matter, whether to develop and disseminate an antiharassment policy is a choice left up to the employer, so Judge Henderson's concern about burdening the employer is inapplicable.

However, the Supreme Court in its two cases found ample reasons for the employer to be the one to take on such a burden: the supervisors committing the harassment were able to do so by virtue of their employer-provided and -derived access to and authority over the harassed workers. Because the employers functionally enabled the harassment, it was appropriate to expect them to create mechanisms for preventing harassment (including providing rights information), incentivized by the availability of the affirmative defense.[69]

Finally, even in the case of break room posters that provide information that workers could arguably obtain elsewhere, there are both practical and theoretical answers to the question of "Why the employer?" From a practical standpoint, no other entity likely has the level and consistency of access to workers than does the employer. If the goal of informing workers about their rights is, as the Fourth Circuit says, "laudable,"[70] then the most effective way of doing so may be at the site where the rights are most relevant: the workplace. In addition, employers tend to have a "comparative advantage" with respect to legal knowledge: they are repeat players in the employment game and often have access to legal counsel, human resources staff, and other advisors.[71] Workplace information-forcing rules may rightly target the employer *because* of this superior knowledge and access to information. It is likely more efficient for the employer to transfer its knowledge to the worker, or to be the conduit for the government's provision of knowledge via a break room poster, than for the less informed party to expend the resources to inform herself.

Beyond these practical considerations, there is in fact room in the theory for forcing the relatively better-informed party to pass along legal rights information, even if that party is not the exclusive source or holder of the information. The key here is acknowledging the protective nature of information-forcing rules. Indeed, Ayres and Gertner describe one purpose of penalty default contract terms as "*protecting* the relatively uninformed."[72] This characterization of information forcing does not support a *caveat emptor* view of the workplace, in which people proceed with whatever information they bring with them or are able to gather on their own.[73] Instead, the protective character of information-forcing rules attends to the nature of the relationship between the parties. Workplace information forcing, like information forcing in a contracts context, seeks to equalize not only an information asymmetry but also, in some sense, the power asymmetry that is inherent in employment relationships[74] by forcing a transfer of knowledge between the parties themselves.

B. Underlying Purpose

In addition to the difference between the types of information at issue, workplace information forcing serves a different underlying purpose from information forcing in the contract setting. As Ayres and Gertner explain it, information-forcing contract default rules are designed to prevent the sort of strategic behavior by a well-informed party that would maximize that party's own "share of the pie," or "private gains from contracting," at the expense of maximizing the overall "size of the pie," or the "total gains from contracting."[75] By exploiting an information asymmetry, the informed party causes an outcome that is inefficient; information-forcing rules are designed to push parties to share information to enable them to negotiate to an efficient outcome.[76]

Workplace information-forcing rules may share some of these efficiency goals. Indeed, if the "pie" is a workplace that is free from discrimination, harassment, sub-legal wages, and unfair labor practices, then forcing or incentivizing employers to educate workers about their

rights in those arenas would seem to maximize the parties' collective well-being in the workplace. Indeed, as one commentator has observed, "Businesses and employers who clamor for laissez-faire labor markets are effectively seeking to benefit from . . . market failure when workers lack basic information about their legal rights."[77] In this view, employers who resist transferring legal knowledge to workers are seeking to maximize their personal slice of the pie at the expense of a more efficient collective outcome.

However, the three examples of workplace information forcing addressed in this Article serve an additional, explicit purpose in their attempts to address information asymmetry: to draft workers into the role of rights-enforcers as a "necessary adjunct to proper enforcement of the statutory provisions" of labor and employment law.[78] As Charlotte Alexander and Arthi Prasad have explored in their work on the structure of workplace law:

> With few exceptions, labor and employment laws contain private rights of action that enable workers themselves to bring lawsuits when their rights are violated. These private lawsuits vastly outnumber government enforcement actions against law-breaking employers. Even what seems to be top-down government enforcement is often bottom-up enforcement in disguise, as government agencies depend in large part on worker complaints to direct their enforcement activity. Workplace law enforcement therefore depends significantly on worker "voice," with workers themselves identifying violations of their rights and making claims to enforce them.[79]

Yet workers are unable to serve as the catalysts for bottom-up workplace law enforcement if they are unaware of their rights. Workplace information forcing thus serves an institutional goal, in addition to an efficiency goal – it seeks to supplement the efforts of government enforcement agencies and to strengthen the rule of law in the workplace by deputizing the individual worker as the guardian of his or her rights.

The existence of this second purpose for workplace information forcing may complicate the efficiency-based economic justification that springs from the theory's roots in contracts. However, the efficiency purpose and the law enforcement purpose might be seen as two parts of a single larger goal: a concern with protecting the relatively weaker parties in a relationship from the strategic behavior of the stronger, whether the setting is a contract negotiation over a used car or an employment relationship between a worker and employer.

Thus, workplace information-forcing mechanisms such as the break room poster, remedial notice, and *Ellerth/ Faragher* defense transmit a different sort of information and serve a different set of purposes from the sets of rules, such as those studied by Ayers and Gertner, that catalyze information transfer between contracting parties. However, this misalignment is not fatal, as workplace information-forcing can stand on its own as both a practical and theoretical matter, with its own set of rationales and internal logic.

III. WORKPLACE INFORMATION FORCING AS COMPELLED SPEECH

This Part turns to an additional set of questions prompted by workplace information-forcing rules: the First Amendment questions that arise whenever government compels a private entity to speak, or to adopt or display the speech of another. Historically, the constitutionality of

the three methods of workplace information forcing examined here seems to have been assumed by courts. In the only case to have decided a challenge to a break room poster on First Amendment grounds, *Lake Butler Apparel Co. v. Sec'y of Labor*,[80] an employer refused "to post the standard [Occupational Safety and Health Act] poster informing the employees of their safety rights under the Act."[81] The Fifth Circuit dismissed the employer's argument out of hand, calling it "seemingly nonsensical" and concluding that "if the government has a right to promulgate these regulations it seems obvious that they have a right to statutorily require that they be posted in a place that would be obvious to the intended beneficiaries of the statute. . . ."[82] The court held further:

> The posting of the notice does not by any stretch of the imagination reflect one way or the other on the views of the employer. It merely states what the law requires. The employer may differ with the wisdom of the law and this requirement even to the point as done here, of challenging its validity. . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice Congress thought to be essential.[83]

Research has located no First Amendment challenge to remedial notices or to the *Ellerth/ Faragher* defense's inducement of employers to develop and disseminate antiharassment policies. Indeed, the *Ellerth/ Faragher* construct is not even mandatory, making it quite difficult for an employer to argue that his or her speech was compelled in violation of the Constitution. With respect to remedial notices, it is clear that the NLRA has extremely broad remedial powers to correct past employer misfeasance, and in that connection may force employers to post the sorts of remedial notices examined in this Article, and even force employers personally to read such notices to their assembled workforce, in order to "dispel the atmosphere of intimidation created in large part by [the employer's] own statements and actions . . ."[84] Moreover, in the only roughly similar case to have considered a challenge to OSHA's remedial notice-posting requirement, the Tenth Circuit concluded that an employer's constitutional rights were not "violated by what petitioner terms it was forced to vilify and publish at its own expense the respondent's unproved accusations [about violations of workplace safety and health regulations]."[85]

Finally, the D.C. Circuit has observed that "an employer's [First Amendment] right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks."[86] The Second Circuit has elaborated on this point, noting with respect to the NLRA in particular that "the employer's entitlement to free speech is not categorical, but limited by the NLRA concept of coercion; to avoid [anti-union] coercion . . . the NLRB can limit the content of employer speech more severely than would be permissible if the NLRA rights of the employees were not simultaneously affected."[87]

Despite this seemingly settled precedent, the constitutionality of the break room poster has been thrown back into contention recently due to the D.C. and Fourth Circuit decisions, discussed briefly above, that struck down the NLRB's attempt to institute a workplace poster requirement. In 2011, the NLRB issued a rule requiring private employers to display a poster informing workers of their NLRA rights. Previously, the NLRA had been almost unique among federal statutes concerning the workplace in its lack of a poster requirement,[88] and like the DOL with respect to the FLSA poster, the NLRB justified its new poster rule with reference to information asymmetry. Indeed, the NLRB relied explicitly on what it called a "knowledge gap"

among workers about their NLRA rights, preventing them from exercising and enforcing those rights:

> [T]he Board found that the notice posting rule is needed because it believes that many employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights. The Board based this finding on several factors: the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights.
>
> [E]ven if only 10 percent of workers were unaware of those rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights. The Board believes that there is no question that at least a similar percentage of employees are unaware of the rights explained in the notice. In the Board's view, that justifies issuing the rule.[89]

Objections to the NLRB's new poster rule began even before it was finalized, and after the final rule was issued, the National Association of Manufacturers and the U.S. Chamber of Commerce, accompanied by other employer-side entities, filed suit almost immediately in federal courts in the District of Columbia and South Carolina, respectively, to block the rule. The NLRB stayed the effective date of the rule until the outcome of the litigation.

Both lawsuits challenged the NLRB's proactive authority to issue the rule at all, rather than merely adjudicating, in a reactive posture, complaints about unfair labor practices. The lawsuits also challenged the poster as a violation of employers' rights against compelled speech, guaranteed by the First Amendment, and their rights to express noncoercive anti-union opinions, guaranteed by Section 8(c) of the NLRA.

When the two lawsuits reached the appeals level, the circuit courts took different tacks. In May 2013, the D.C. Circuit decided the *National Association of Manufacturers* (*NAM*) case, holding that the poster rule trod on employers' Section 8(c) rights.[90] As explained further below, the decision is a statutory one – interpreting a provision of the NLRA – but with strong constitutional overtones and heavy reliance on First Amendment case law. One month later, the Fourth Circuit issued what is essentially an administrative law decision in *Chamber of Commerce of U.S. v. N.L.R.B.*, siding with the Chamber of Commerce and striking down the rule as issued beyond the NLRB's authority.[91] In January 2014, the NLRB announced that it would not appeal either decision, but that employers were encouraged voluntarily to display the poster, which was available on the NLRA's website and via mobile app.[92] This announcement effectively rescinded the poster rule, which had never actually gone into effect since its introduction in 2011. The remainder of this Part examines the *NAM* opinion, its significance for the constitutionality of other forms of workplace information forcing, and the ways in which it is already being used in copycat First Amendment challenges to workplace poster requirements.

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

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[93]

Thus, under this section, an employer's speech may not be deemed an unfair labor practice in violation of the NLRA as long as the speech is noncoercive.[94] The NLRB's new poster rule, however, rendered an employer's failure or refusal to display the poster an unfair labor practice in two ways: the failure itself could be adjudicated an unfair labor practice,[95] and the failure could also be used as evidence of an employer's anti-union animus to bolster charges of other, separate unfair labor practices.[96]

The interpretive task for the court, then, was to determine whether an employer's refusal to display the NLRB's poster amounted to speech that was protected by Section 8(c) against penalty as an unfair labor practice. *NAM* is therefore not a true First Amendment case, as the plaintiffs did not claim that the poster requirement infringed directly on their free speech rights guaranteed by the Constitution; employers' obligations to hang government-provided and required posters had, after all, been affirmed uncontroversially in cases like *Lake Butler*, discussed above.

However, the D.C. Circuit's guidance in determining whether an employer's non-compliance with the poster requirement is an act of expression protected by Section 8(c) came wholly from First Amendment case law. The court determined that the First Amendment protects against compelled speech, and that Section 8(c) does as well: "Like the freedom of speech guaranteed in the First Amendment, § 8(c) necessarily protects—as against the Board — the right of employers . . . not to speak."[97] Because in the NLRB's poster requirement, "the government selected the message and ordered its citizens to convey that message,"[98] the poster amounted to compelled speech. The fact that the poster "merely recites" workers' rights under established statutory law to organize into a union and bargain collectively did not save the poster regulation; the Court appeared to credit the plaintiffs' contention that the poster presented a "one-sided," employee-friendly depiction of labor law that interfered with employers' right to express their own anti-union opinions.[99] On these grounds, the D.C. Circuit struck down the poster requirement.

Notwithstanding the explicitly statutory nature of the *NAM* opinion,[100] subsequent cases have cited it for the proposition that break room poster requirements infringe on employers' speech rights generally, without restriction to the specific protections offered by Section 8(c).[101] In fact, the National Association of Manufacturers has filed a copycat suit (*NAM II*) against the Department of Labor, challenging an Executive Order by President Obama, which predated the NLRB poster rule addressed in *NAM*, that requires federal contractors to post substantially the same labor rights poster. In its summary judgment brief in *NAM II*, citing *NAM* heavily, NAM argues that the poster rule "plainly constitutes compelled speech in violation of the First Amendment."[102] In *NAM II*, NAM elides the distinction between First Amendment violations and Section 8(c) violations made by the *NAM* court, stating, for example, that "the D.C. Circuit unanimously held that the NLRB Rule infringed on the First Amendment, and thus violated § 8(c) of the NLRA."[103] Of course, the *NAM* court did not issue a First Amendment holding, only

a statutory one. This becomes clear if one considers what the NLRB might to do rewrite its poster rule to avoid a Section 8(c) violation under *NAM*: it need only change the penalty associated with a failure to post. This is because the *NAM* analysis hinged on the unfair labor practice penalty attached to the poster requirement, which is the specific penalty prohibited by Section 8(c). In other words, the *NAM* decision did not hinge on the fact that the poster was required, but rather on the penalty triggered by noncompliance.

In contrast, *NAM II* makes a direct First Amendment challenge to the federal contractor poster requirement, and the court in that case will have to grapple fully with the question dealt with perfunctorily by *Lake Butler*, which held workplace information forcing in the form of break room posters to be constitutional. The *NAM II* court will therefore have to determine whether such requirements should be subject to strict scrutiny, as typical free speech claims are, or, due to the posters' merely "factual" content about workers' rights, some lower scrutiny level, and then whether the government can advance a sufficient interest to withstand the challenge.[104]

A full constitutional analysis of this question could occupy an entire separate article. Nevertheless, some observations are in order. In a settled line of cases stemming from the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, courts have applied rational basis review and upheld a range of government regulations requiring companies to disclose "purely factual and uncontroversial" information about their products and services.[105] Because these information-forcing regulations concern non-ideological commercial speech, they do not warrant the strict scrutiny normally applied in First Amendment cases, and because the agencies that promulgated the regulations can typically advance a rational state interest for forcing this information, the regulations usually withstand First Amendment challenges.[106] The labeling and disclosure requirements at issue in this line of cases, like the hazard labels studied by Viscusi and described in Part I above, provide factual "raw material" information to consumers about the contents and quality of products and services.[107] As Part I explained, however, the workplace information-forcing rules examined in this Article and challenged in *NAM* and *NAM II* provide a different sort of information: legal rights information that can be used to operationalize the underlying facts.

In *NAM*, the NLRB attempted to analogize its poster requirement with the purely factual labeling and disclosure requirements upheld in the *Zauderer* line of cases. The plaintiffs objected to this contention, arguing that the NLRB's description of workers' labor rights was slanted and inherently ideological. Though the D.C. Circuit appeared to credit the plaintiffs' argument, it offered no explanation or guidance about where the line between ideological and non-ideological, "purely factual and uncontroversial" speech might lie.

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

Given these implications of the *NAM* plaintiffs' position, then, what is the constitutional status of the existing statements of employment law contained in the numerous posters that hang on break room walls around the country? In the end, the answer might ultimately be found in

administrative procedure, not constitutional law. If all stakeholders who have an interest in the wording of a break room poster are given fair and ample notice and opportunity to comment during the rulemaking process that produces the poster's language – much as in the process that produces jury instructions in a trial – then perhaps the result might be deemed sufficiently "factual and uncontroversial" to merit rational basis review under *Zauderer*. The progress of the *NAM II* case through the court, as well as any additional follow-on break room poster First Amendment challenges that emerge, will shed light on these questions and on the constitutional implications of workplace information forcing as a whole.

IV. WORKPLACE INFORMATION FORCING AS GOOD POLICY

Apart from questions about fit with economic theory and constitutional validity, however, there remains a very basic question about workplace information forcing: Does it work? More specifically, does it work both to increase workers' knowledge about their legal rights, and to catalyze worker action in enforcing those rights?

The answers are far from clear. Anecdotal accounts abound about the ineffectiveness of break room posters: their very ubiquity may mean that they tend to fade into the background of the workplace. For example, in the rulemaking process concerning the NLRB's new break room poster requirement, the agency received comments from employers that "[p]osters are an ineffective means of educating workers and are rarely read by employees,"[108] and that "adding one more notice to the many that are already mandated under other statutes will simply create more 'visual clutter' that contributes to employees' disinclination to pay attention to posted notices."[109] Another employer stated in a comment that, "My bulletin boards are filled with required notifications that nobody reads. In the past 15 years, not one of our 200 employees has ever asked about any of these required postings. I have never seen anyone ever read one of them."[110] Moreover, as Alexander and Prasad point out, based on their analysis of surveys of over 4,300 low-wage workers, "approximately 59% of low-wage, front-line workers did not know their minimum wage and overtime rights and 78% did not know how to file a government complaint. . . ."[111] Because both subjects are addressed explicitly on the required FLSA posters in Figure 1 above, this lack of legal knowledge may be evidence of the shortcomings of this method of disseminating legal knowledge.

In addition, research by Pauline Kim suggests that, even in the face of explicit statements about the lack of job security in at-will jobs, many workers continue to believe that they can be fired only for good cause.[112] Kim hypothesizes that powerful social norms about fair treatment may trump even the most clear statements of the limits of the law.[113] In order for the transmission of rights information to "take," therefore, and for workers to truly understand their rights, protections, and obligations under labor and employment law, the mechanisms for information forcing that are currently in place in the workplace might be too limited, passive, and unobtrusive.

Even if the break room poster, remedial notice, and *Ellerth/ Faragher* policies and procedures were effective in educating workers about their rights, however, the leap between legal knowledge and enforcement action – organizing into a union, filing a lawsuit, or lodging a government complaint – is a large one. A worker who is completely knowledgeable about his or her workplace rights may still decide not to take action, out of fear of retaliation, lack of time and resources, lack of access to an affordable attorney, or a belief that legal action would be ineffective. Indeed, Alexander and Prasad's study of low-wage survey respondents' actions in

the face of legal problems on the job revealed a drop-off of more than forty percent, meaning that almost half of workers who *knew* that their rights had been violated did not pursue legal redress.[114] Similarly, legal scholars have criticized the *Ellerth/ Faragher* structure precisely because many survivors of workplace harassment choose not to make complaints despite the availability of – and their knowledge of – antiharassment policies and complaint procedures.[115] Thus, even if workplace information forcing were completely effective in transmitting rights information to workers, whether workers do in fact become the "adjunct[s] to proper enforcement of the statutory provisions"[116] envisioned by the information-forcing rules is an entirely different matter.

However, legal knowledge is still a necessary component of a robust workplace law enforcement regime, and workplace information forcing remains good, if incomplete, policy. The question, then, is how to make it better, and to ensure that workplace information forcing alone is not doing all of the "work" in the project of catalyzing workplace law enforcement from the bottom up. Here, lessons from other fields such as public health are instructive. For decades, researchers in the fields of health communication and health informatics have studied the most effective ways to convey information about health risks and benefits to the public.[117] Best practices might be distilled from this work to help improve the content of and dissemination methods for workplace information forcing. For example, a campaign in Southern California to educate primarily immigrant carwash workers about their exposure to chemicals and other health hazards on the job included labels for workers' water bottles with information about their legal rights and illness and injury prevention strategies, an educational comic book about workplace safety, and a skit about the three requirements of "*agua, sombra y descansa*" ("water, shade, and rest") performed by fellow carwash workers as peer educators.[118] These strategies provide information to workers in easily accessible, engaging, and simple formats, and have resulted in a series of complaints by workers and their representatives to California's occupational health and safety agency and enforcement against noncompliant employers.[119]

While this particular health and safety campaign may not be scalable in its entirety, it does suggest alternative methods for workplace information forcing. For example, the remedial notice concerning unionization rights in Figure 2 might be changed to incorporate illustrations and graphics, fonts of differing sizes and colors, and much simpler wording, perhaps in multiple languages, depending on the language abilities of the relevant workforce. It might be distributed in hard copy and via email and text message, made available on a company website, and made part of an interactive training. Indeed, even within the existing workplace information forcing models, courts and agencies have engaged in variation and experimentation. Some NLRB remedial orders are accompanied by a public reading requirement and a mandate that the employer send copies of the notice to each worker's home.[120] The NLRB has proposed that this reading requirement be automatic for all remedial notices.[121] The NLRB has also begun requiring transmission of its workplace poster to workers electronically, acknowledging, in today's world of telecommuting and work flexibility, the growing obsolescence of the concept of a physical space at a worksite where workers congregate.[122] Thus, through a critical and creative assessment of both the content of and dissemination methods for workplace information forcing, those mechanisms might be improved so that more workers would be more effectively informed of their rights at work.

V. CONCLUSION

Using the examples of the break room poster, the remedial notice, and the *Ellerth/ Faragher* defense, this Article has considered workplace information forcing – defined here as rules that require or strongly incentivize employers to give workers information about their substantive and/or procedural labor and employment rights – through the lenses of economic theory, constitutional law, and policy analysis. The Article has explored the use of information-forcing rules in the workplace to remedy workers' "knowledge gap"[123] about their rights, examining the ways in which the three example information-forcing mechanisms depart from the contract-based economic theory that underlies information-forcing; the possible First Amendment challenges to the government's information-forcing mandates; and the question of whether workplace information forcing is effective and appropriate as a matter of policy. In the end, the Article concludes that workplace information-forcing strategies should be retained, and even expanded and strengthened. However, the mere act of providing information to workers about their rights cannot itself produce the sort of enforcement action that workplace information-forcing rules seem to envision. Instead, attention must be paid not only to increasing workers' legal knowledge, but also to incentivizing workers to act on that knowledge, to become enforcers of their own rights and active participants in our system of labor and employment rights enforcement.

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[1] *See, e.g.*, Peter D. DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 433 (1995) (collecting studies); J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, Univ. of Virginia Law & Econ Research Paper No. 03-4 at 5, available at SSRN: http://ssrn.com/abstract=405560 (2004) (collecting studies and concluding, "abundant empirical evidence reveals widespread ignorance about many aspects of civil law"); Lisa J. Bernt, *Tailoring A Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31, 43-46 (2012) ("There is ample evidence that the population generally does not understand the law [of the workplace]."); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 115 (2005) (reporting that many administrative and clerical women employees of a large university were misinformed about sexual harassment law as it applied to them).

[2] *See, e.g.*, Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, (2014) (reporting empirical results showing low-wage workers' misunderstanding of their wage and hour rights); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110, 133 (1998) (quizzing over 330 unemployed workers on knowledge of at-will employment legal rules and finding that workers gave correct answers only 51% of the time on average); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 458 (administering the same survey in multiple additional states; finding corresponding correct answer rates ranging from 25.2% to 40%); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y. J. 59, n.6 (2005) (summarizing the "literature on the lack of knowledge of statutory rights under a variety of laws"); S. Poverty L. Ctr. & Ala. Appleseed, *Unsafe at These Speeds: Alabama's Poultry Industry and Its Disposable Workers* (2013) available at http:// www.splcenter.org/sites/default/files/downloads/publication/Unsafe_at_These_ Speeds_web.pdf (discussing workers' lack of knowledge of legal protections against retaliation).

[3] *See, e.g.*, Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1100 (2011) (discussing unauthorized immigrants' misconceptions about their legal protections and fear of legal authorities); *cf.* Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOCIAL INQUIRY 561, 590 (2010) (discussing undocumented workers' legal knowledge and lack of self-perception as claims-makers).

[4] Alexander & Prasad, *supra* note 2 at 1071 ("Workplace rights in the United States are generally enforced from the bottom up. With few exceptions, labor and employment laws contain private rights of action that enable workers themselves to bring lawsuits when their rights are violated. These private lawsuits vastly outnumber government enforcement actions against law-breaking employers. Even what seems to be top-down government enforcement is

often bottom-up enforcement in disguise, as government agencies depend in large part on worker complaints to direct their enforcement activity.").

[5] Miranda v. Arizona, 384 U.S. 436, 468 (1966) ("For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. . . Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it."); DeChiara, *supra* note 1 at 439-40 ("[B]y requiring the police to serve as the source of the warnings, *Miranda* not only ensures that the suspect knows his rights, but also helps assure the suspect that his rights will be honored.").

[6] Verkerke, *supra* note 1 at 5 ("[A]n information-forcing rule would force the comparatively better informed party either to reveal the relevant . . . information or to accept a default rule that favors the less informed party."); Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 2 (1996) ("Informational asymmetry arises when one party to a bargain, usually the seller, has more and better information about the condition of a product than does the buyer. In the presence of informational asymmetry, inefficient transactions may be consummated or the market may completely fail.").

[7] *See, e.g., Notification of Employee Rights Under the National Labor Relations Act, Final Rule*, 76 Fed. Reg. 54,005, 54,018 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104). ("The [National Labor Relations] Board believes that there is no question that at least a [ten percent] of employees are unaware of the [labor] rights explained in the notice. In the Board's view, that justifies issuing the rule [requiring a workplace labor rights poster].").

[8] Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947 (D.C. Cir. 2013) (hereinafter "NAM") (invalidating labor rights workplace poster requirement issued by National Labor Relations Board).

[9] *See* Part III, *infra*.

[10] *See* Part IV, *infra*.

[11] *See, e.g.*, W. KIP VISCUSI AND WESLEY A. MAGAT, LEARNING ABOUT RISK (1987).

[12] For example, the Occupational Safety and Health Administration describes its Hazard Communication Standard (HCS) as requiring "chemical manufacturers and importers . . . to evaluate the hazards of the chemicals they produce or import, and prepare labels and safety data sheets to convey the hazard information to their downstream customers," and "all employers with hazardous chemicals in their workplaces must have labels and safety data sheets for their exposed workers, and train them to handle the chemicals appropriately." U.S. Dept. of Labor, Occupational Safety & Health Administration, Hazard Communication, https://www.osha.gov/dsg/hazcom/.

[13] Of course, a worker could arguably perform his or her own hazard analysis of workplace chemicals in order to discern the risk that they pose, just as a worker could independently research his or her legal rights. However, the difficulty and expense involved in performing one's own chemical analysis means that hazard information is essentially exclusively in the hands of the employer and/ or manufacturer. In contrast, rights information is much more readily available – though accessing it in the absence of workplace information forcing may not be costless, as explored further in Part IV below.

[14] *See* 29 U.S.C. § 157 (2006) (protecting workers' rights to engage in concerted activity).

[15]U.S. Dep't of Labor, Wage and Hour Division, Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers, available at http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm; *see also* Joseph H. McFarlane, *Poster Wars: The NLRB and the Controversy over an 11-by-17-Inch Piece of Paper*, 38 J. CORP. L. 421, 429 (2013) (discussing federal and state agency poster requirements); DeChiara, *supra* note 1 at 433 (same). Notably, there is no requirement that employers hang a poster describing workers' rights under the NLRA; this omission, and the NLRB's attempt to rectify it, is discussed at length below in Part III.

[16] *See, e.g.*, J.J. Keller & Associates, Inc., Labor Law Poster Finder, http://www.jjkeller.com/webapp/wcs/stores/servlet/llpFinder_10151_-1_10551?cm_sp=Endeca-_-LLP_Finder_150x150-_-Right.

[17] U.S. Department of Labor, Wage & Hour Division, Fair Labor Standards Act (FLSA) Minimum Wage Poster, http://www.dol.gov/whd/regs/compliance/posters/flsa.htm

[18] *Id.*

[19] 29 C.F.R. pt. 516.4 ("Every employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not apply because of an exemption of broad

application to an establishment may alter or modify the poster with a legible notation to show that the overtime provisions do not apply. For example: Overtime Provisions Not Applicable to Taxicab Drivers (section 13(b)(17)").
[20] *Id.*
[21] United States Department of Labor, Office of Small and Disadvantaged Business Utilization, Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers, http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm (stating "No citations or penalties for failure to post." in "Citations/ Penalty" field in table summarizing poster requirements).
[22] *See, e.g.*, Cortez v. Medina's Landscaping, Inc., 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) ("Accordingly, this court holds that an employer's failure to post the notice required by 29 C.F.R. § 516.4 tolls the limitations period until the employee acquires a general awareness of his rights under the FLSA."); Asp v. Milardo Photography, Inc., 573 F. Supp. 2d 677, 698 (D. Conn. 2008) (collecting cases and concluding that "the trend regarding the failure to post FLSA notices . . . permits equitable tolling where the plaintiff did not consult with counsel during his employment and the employer's failure to post notice is not in dispute").
[23] United States Department of Labor, Wage and Hour Division, Economic Report, American Samoa Industry Committee No. 26, available at http://www.dol.gov/whd/as/sec1.htm.
[24] Wage and Hour Division, Department of Labor, 14 Fed. Reg. 7,516-02 (December 16, 1949).
[25] *Id.*
[26] *Id.* (emphasis added)
[27] *Id.* (emphasis added)
[28] 29 C.F.R. § 516.4.
[29] U.S. Dep't of Labor, Wage and Hour Division, Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers, available at http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm.
[30] *See supra*, note 5.
[31] Leonard R. Page, *NLRB Remedies: Where Are They Going?*, University of Richmond School of Law, The Austin Owen Symposium and Lecture, Labor Law: Current Issues (April 10, 2000) ("The Board's practice of including notice postings in its remedial orders dates back to the Board's inception.").
[32] 29 C.F.R. § 1903.16(a) ("Upon receipt of any citation under the Act, the employer shall immediately post such citation, or a copy thereof, unedited, at or near each place an alleged violation referred to in the citation occurred . . . ."); *see, e.g.*, U.S. Department of Labor, Occupational Safety and Health Administration, Bostik, Inc. Citation and Notification of Penalty 2 (Sept. 12, 2011) (on file with author) (describing citations, penalties, posting requirements, and workers' rights: "Employer Discrimination Unlawful -The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the U.S. Department of Labor Area Office at the address shown above.").
[33] In Re J & R Flooring, Inc., 356 NLRB No. 9 (Oct. 22, 2010).
[34] N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938) (affirming the NLRB's power to require remedial notice posting).
[35] N.L.R.B. v. Falk Corp., 308 U.S. 453, 462-63 (1940).
[36] In Re J & R Flooring, Inc., 356 NLRB No. 9 (Oct. 22, 2010) ("In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means.").
[37] Federated Logistics & Operations, a Div. of Federated Corporate Servs., Inc. v. N.L.R.B., 400 F.3d 920, 929-30 (D.C. Cir. 2005) (discussing "particularized need" standard for compelling the public reading of a NLRB remedial order).
[38] McKinney v. Creative Vision Res., LLC, CIV.A. 12-1934, 2013 WL 351655 (E.D. La. Jan. 24, 2013)
[39] N.L.R.B. v. Falk Corp., 308 U.S. 453, 462 (1940).
[40] *Id.*
[41] N.L.R.B. v. Methodist Hosp. of Gary, Inc., 733 F.2d 43, 48 (7th Cir. 1984); *see also* N.L.R.B. v. Gen. Thermodynamics, Inc., 670 F.2d 719, 722 (7th Cir. 1982) ("The Board could reasonably conclude that requiring respondent to post a notice regarding the change in its solicitation and distribution rule will carry more impact in informing employees of their rights and effectuating the policies of the Act than the respondent's muted removal of the rules from the bulletin boards.")
[42] J.P. Stevens & Co. v. N.L.R.B., 417 F.2d 533, 538 (5th Cir. 1969). A former NLRB General Counsel has stated similarly, "The Board notice serves an important purpose: it describes their rights to employees and reassures them that these rights will be vindicated." Page, *supra* note 31.

[43] The significance of this difference between mandatory and incentivized workplace information forcing is explored further below in Part II, which examines workplace information forcing's fit with the economic theory behind information-forcing rules generally. The significance of the prophylactic-antidote distinction is also explored in Part II, as well as Part III, which takes on the constitutional ramifications of workplace information forcing.
[44] Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
[45] *Faragher*, 524 U.S. at 780 ("This case calls for identification of the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964 . . . for the acts of a supervisory employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination."); *Ellerth*, 524 U.S. at 746-47 ("We decide whether, under Title VII of the Civil Rights Act of 1964. . . an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions.").
[46] *Ellerth*, 524 U.S. at 765.
[47] *Id.* at 773.
[48] Taylor v. CSX Transportation, 418 F.Supp.2d 1284, 1304 (M.D.Ala 2006); McGriff v. American Airlines, Inc., 431 F.Supp.2d 1145, 1155 (N.D.Okla. 2006) (stating with approval that "American has offered as evidence a copy of its Policy Statement, which expresses American's commitment to providing a workplace free of unlawful harassment and which provides a listing of protected traits as well as a non-exhaustive list of the forms unlawful harassment might take.").
[49] Davis v. River Region Health Systems, 903 F.Supp.2d 424 (S.D.Miss. 2012) (emphasis added).
[50] 29 C.F.R. § 1604.11(f).
[51] *Taylor*, 418 F.Supp.2d 1284 (discussing posting in a crew room); Atwell v. Smart Alabama, LLC, 546 F.Supp.2d 1250 (M.D.Ala. 2008) ("The Court finds sufficient evidence from which a reasonable jury could conclude that Defendant's sexual harassment policy was effective and was disseminated. The policy was in the employee handbook, which was distributed to all employees during training. Managers were also given annual training in the policy. The policy was posted on employee bulletin boards.").
[52] Bush v. Penske Truck Leasing Co., LP, CIV 06-1110 RHK/AJB, 2007 WL 1321853 at *5 (D. Minn. May 4, 2007) ("More importantly, however, the Handbook's table of contents provides the specific page where Penske's policy on harassment may be found.").
[53] *Faragher*, 524 U.S. at 808 ("The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman.").
[54] Nor has the law review literature identified the information-forcing nature of *Ellerth* and *Faragher*, focusing in large part instead on whether the antiharassment policies prompted by those two decisions are effective in enabling workers' complaints and reducing workplace harassment. *See, e.g.,* Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1239 (2006) ("The statistical analysis of survey responses from a group of 120 female sexual harassment victims suggests that White women and Women of Color may differ in their uses of internal complaint procedures."); Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2748 (2008) (collecting studies showing the discrepancy between workers' experiences of harassment and their filing of claims). This Article considers these same questions of effectiveness – as applied to all forms of workplace information forcing – in Part IV.
[55] Verkerke, *supra* note 1 at 3 ("[A]cademic attention to the theory of information-forcing rules originated among economically oriented commentators examining what is now one of the most thoroughly debated contract doctrines – the foreseeability limitation on consequential damages."); John Ferejohn & Barry Friedman, *Toward A Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 846-47 (2006) ("Many of the prominent examples of penalty default rules in the contractual area serve the purpose of information-forcing in the service of efficiency.").
[56] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) ("An asymmetry in available information has developed: for the sellers now have more knowledge about the quality of a car than the buyers. But good cars and bad cars must still sell at the same price — since it is impossible for a buyer to tell the difference between a good car and a bad car."). Other examples of information asymmetry outside the sales contract setting include toxicity information held exclusively by toxic polluters and private information held by a party to litigation. Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861, 874 (2006) (describing state regulation that "gives toxic polluters in

California an unusual incentive to cooperate with state regulators in setting, justifying, and defending numerical regulatory standards and to produce and disclose as much credible toxicity and exposure information necessary to enable regulators to implement these regulatory standards"); Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND JOURNAL OF ECONOMICS 183, 183 (1989) (developing a model of information asymmetry in which "one party [to litigation] possesses 'private' information [that] pertains to the expected judgment he would obtain from trial—to the likelihood of prevailing at trial or to the size of the judgment he would receive in that event").

[57] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (introducing the concept of "penalty defaults").

[58] *Id.* at 94.

[59] *Id.*

[60] *Id.* at 95.

[61] Likewise, in an example supplied by Verkerke, an employer might know that jobs in his or her company are "at will," carrying no promise of job security. Employees may be misinformed about this fact, believing on the basis of employer statements about loyalty and job tenure that they can be fired only for good cause. If a fired employee sues for wrongful termination, a court might recognize the employer's statements as creating a good cause termination requirement, *unless* the employer has also explicitly and specifically informed employees of their at-will status. Here, the court's imposition of a good cause termination requirement is the imposition of a penalty default rule. If an employer wishes to avoid this outcome, she must clearly disclose accurate job security information – she must contract around the penalty default rule. This is an incentive-based information-forcing result. Verkerke, *supra* note 1 at 7-8.

[62] LUKE FROEB & BRIAN MCCANN, MANAGERIAL ECONOMICS: A PROBLEM SOLVING APPROACH 16 (2007) ("We begin with efficiency, the Holy Grail of economics.").

[63] *See, e.g.*, Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 NEV. L.J. 937, 971-73 (2013) ("Imbalance in information between workers and employers is well established.") (citing George J. Stigler, *The Economics of Information*, 69 J. OF POL. ECON. 213 (1961); George J. Stigler, *Information in the Labor Market*, 70 J. POL. ECON. 94 (1962).).

[64] For example, workers might receive "know your rights" education outside the workplace from community groups or advocates. The legislation that governs the federal Legal Services Corporation, which funds free civil legal aid for low-income clients, already specifically empowers attorneys to "provid[e] information regarding legal rights and responsibilities . . . through community legal education activities such as outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them." 45 C.F.R. §1638.4. Workers might also be encouraged to share information with one another about their legal rights and experiences at work. The NLRA specifically protects this sort of "concerted activity" – workers' joining together to discuss their wages and working conditions – and President Obama's and Congressional Democrats' recent efforts around wage transparency seem designed to accomplish similar legal knowledge-enhancing goals. *See* 29 U.S.C. § 157 (2006) (protecting workers' rights to engage in concerted activity); Jeremy Blasi, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95 (2012) (discussing wage transparency proposal); Gowri Ramachandran, *Pay Transparency*, 16 PENN STATE L. REV. 1043, (2012) (same); Tom Risen, *Obama Seeks Wage Transparency With Executive Orders*, U.S. News (Apr. 7, 2014).

[65] *NAM*, 717 F.3d 947; Chamber of Commerce of U.S. v. N.L.R.B., 721 F.3d 152 (4th Cir. 2013).

[66] *NAM*, 717 F.3d at 967 (Henderson, J., concurring); *Chamber of Commerce*, 721 F.3d at 27 ("[R]egardless of how laudable the NLRB's goal of educating workers may be, 'there is nothing in the text of the NLRA to suggest the burden of filing the 'knowledge gap' should fall on the employer's shoulders.").

[67] *NAM*, 717 F.3d at 967.

[68] *J.P. Stevens & Co*., 417 F.2d at 538.

[69] *Ellerth*, 524 U.S. at __ ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.").

[70] *Chamber of Commerce*, 721 F.3d at 27.

[71] Verkerke, *supra* note 1 at 5 ("We could treat legal information just as we do information about the expected consequential damages resulting from a breach of contract. Courts or legislatures could determine whether one party has a comparative advantage in obtaining and communicating information about the prevailing law. If so, an information-forcing rule would force the comparatively better informed party either to reveal the relevant legal information or to accept a default rule that favors the less informed party."); Bernt, *supra* note 1 at 43-46

("Employers typically have legal counsel to help them sort out the complexities of employment law, but few employees or job applicants have meaningful access to reliable information or advice regarding the laws that govern their livelihood.").
[72] Ayres & Gertner, *supra* note 57 at 124 (emphasis added).
[73] *See, e.g.*, Verkerke, *supra* note 1 at 6 ("A critic who sought to encourage self-reliance would perhaps contend that a principle of *caveat emptor* should shield parties from any duty to inform their contractual partners about the law.").
[74] *See, e.g.*, N. L. R. B. v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969) (observing "in the context of [the] labor relations setting . . . the economic dependence of the employees on their employers").
[75] Ayres & Gertner, *supra* note 57 at 94.
[76] *Id.* at 106-107 ("Particularly when individual parties have private incentives to withhold information, it may be desirable for the law to give them a nudge.").
[77] Ireland, *supra* note 63 at 971-73.
[78] Wage and Hour Division, Department of Labor, 14 Fed. Reg. 7,516-02 (December 16, 1949).
[79] Alexander & Prasad, *supra* note 2 at 1070-71.
[80] Lake Butler Apparel Co. v. Sec'y of Labor, 519 F.2d 84, 85 (5th Cir. 1975); *see also* McFarlane, *supra* note 14 at 430 ("The NLRB notes that it "is unaware of any challenge to the Labor Department's authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years.").
[81] *Lake Butler*, 519 F.2d at 85.
[82] *Id.*
[83] *Id.*
[84] United Food & Commercial Workers Int'l Union, AFL-CIO v. N.L.R.B., 852 F.2d 1344, 1349 (D.C. Cir. 1988); *see also* Federated Logistics & Operations, a Div. of Federated Corporate Servs., Inc. v. N.L.R.B., 400 F.3d 920, 930 (D.C. Cir. 2005).
[85] Stockwell Mfg. Co. v. Usery, 536 F.2d 1306, 1309-10 (10th Cir. 1976); *cf.* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113-16 (2d Cir.2001) (upholding OSHA hazard labeling requirements of the sort examined by Viscusi and in Part I, *supra*, in the face of First Amendment challenge).
[86] UAW-Labor Employment & Training Corp. v. Chao, 325 F.3d 360, 365 (D.C. Cir. 2003).
[87] Healthcare Ass'n of New York State, Inc. v. Pataki, 471 F.3d 87, 98 (2d Cir. 2006).
[88] Notification of Employee Rights Under the National Labor Relations Act, Final Rule, 76 Fed. Reg. 54,005, 54 (noting unique lack of poster requirement under the NLRA).
[89] *Notification of Employee Rights Under the National Labor Relations Act, Final Rule*, 76 Fed. Reg. 54,005, 54,018 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
[90] *NAM*, 717 F.3d 947.
[91] *Chamber of Commerce*, 721 F.3d 152.
[92] Anne C. O'Donnell, *NLRB Issues Decision on Notice Posting Rule*, FindLaw for Legal Professionals (Jan. 7, 2014), available at http://corporate.findlaw.com/human-resources/nlrb-issues-decision-on-notice-posting-rule.html.
[93] 29 U.S.C. § 158.
[94] *See generally Gissel Packing Co.*, 395 U.S. 575 (defining coercive and noncoercive speech).
[95] 29 C.F.R. § 104.210 ("Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).").
[96] 29 C.F.R. § 104.214(b) ("The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue.").
[97] *NAM*, 717 F.3d at 22.
[98] *Id.* at 18.
[99] *Id.* at 19-20.
[100] Am. Meat Inst. v. U.S. Dep't of Agric., 13-5281, 2014 WL 1257959 (D.C. Cir. Mar. 28, 2014) ("*NAM* in fact did not apply the First Amendment at all, but rested instead on 29 U.S.C. § 158(c), which, it carefully explained, goes significantly beyond merely incorporating the First Amendment.").
[101] Am. Petroleum Inst. v. S.E.C., 953 F. Supp. 2d 5, 23-24 (D.D.C. 2013) (describing *NAM* as "concluding that ordering companies themselves to display certain information on their premises violates '[t]he right against compelled speech' even if that information is non-ideological").

[102] Nat'l Ass'n of Mfrs. v. Perez, Civil Action No. 13-cv-01998, Memorandum of the National Association of Manufacturers and Virginia Manufacturers Association in Support of Their Motion for Summary Judgment 12 (May 1, 2014 D.D.C.).
[103] *Id.* at 8.
[104] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-61 (1978) (discussing application of strict scrutiny); Blasi, *supra* note 64 at 128-29 (discussing application of rational basis review).
[105] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).
[106] Blasi, *supra* note 104.
[107] *Id.* at 128-29 (collecting cases upholding rules "requiring disclosure of mercury in products or packaging, caloric content information in restaurant menus and menu boards, fee arrangements in advertising for legal services, information concerning the public impact of storm water discharges by municipal storm operators, and notice of a preliminary injunction to be posted on the website of a company engaged in suspect tax advice").
[108] *Notification of Employee Rights Under the National Labor Relations Act, Final Rule*, 76 Fed. Reg. 54,005, 54,018 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
[109] *Id.*
[110] *Id*.
[111] Alexander & Prasad, *supra* note 2 at 1089.
[112] Kim, *supra* note 2 at __.
[113] *Id.*
[114] Alexander & Prasad, *supra* note 2 at 1089.
[115] Hernandez, *supra* note 53 at 1239 ("The statistical analysis of survey responses from a group of 120 female sexual harassment victims suggests that White women and Women of Color may differ in their uses of internal complaint procedures."); Sachs, *supra* note 53 at 2748 (collecting studies showing the discrepancy between workers' experiences of harassment and their filing of claims).
[116] Wage and Hour Division, Department of Labor, 14 Fed. Reg. 7,516-02 (December 16, 1949) (emphasis added).
[117] *See, e.g.*, DEBORAH LEWIS, ET AL., CONSUMER HEALTH INFORMATICS: INFORMING CONSUMERS AND IMPROVING HEALTH CARE (___).
[118] *See generally* The CLEAN Carwash Campaign, available at http://cleancarwashla.org/the-clean-carwash-campaign, last visited July 1, 2014 (describing the campaign); Eduardo Soriano-Castillo, *L.A. Car Wash Workers Win a Union*, Labor Notes (Nov. 1, 2011), available at http://www.labornotes.org/2011/11/la-car-wash-workers-win-union#sthash.FqKwalLp.dpuf, last visited July 1, 2014 ("The CLEAN campaign grew out of a 2004 state law that gave car wash workers an expedited means to pursue claims against abusive owners. Organizers got the word out about the Car Wash Worker Law by distributing bottles of water, complete with legal standards for pay and breaks (and a pitch to join up) printed on the side."); UCLA-LOSH Newsletter (Summer 2013), available at http://www.losh.ucla.edu/losh/resources-publications/pdf/LOSHSummer2013Newsletter-.pdf, last visited July 1, 2014 (describing the CLEAN Carwash Campaign's "*novela* style comic book on heat stress and strategies for collective action"); Justice for Carwash Workers, *Agua, Sombra y Descanso! By Teatro Carwashero*, available at http://laborweb.aflcio.org/sites/Open5/carwash/index.cfm?action=article&articleID=c8be7a11-bc57-45cb-bfae-1781e08ee2e8, last visited July 1, 2014 (showing educational skit).
[119] The CLEAN Carwash Campaign, *supra* note 118 (describing successes).
[120] *See* note 84, *supra*.
[121] *See, e.g.*, Richard A. Siegel, Memorandum on Remedial Initiatives, NLRB Office of the General Counsel, Division of Operations-Management, Memorandum OM 99-79 (Nov. 19, 1999).
[122] In Re J & R Flooring, Inc., 356 NLRB No. 9 (Oct. 22, 2010) ("Given the increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards, the continuing efficacy of the Board's remedial notice is in jeopardy. Notices posted on traditional bulletin boards may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board. Furthermore, the growth of telecommuting and the decentralization of workspaces permitted by new technologies mean that an increasing number of employees will never see a paper notice posted at an employer's facility. As a matter of general policy, it follows that, in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent

customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent.").

[123]*NAM*, 717 F.3d at 967 (Henderson, J., concurring).