

Testimony of  
Catherine K. Ruckelshaus  
National Employment Law Project

Hearing Before the  
United States Congress  
House of Representatives  
Committee on Education and Labor  
Subcommittee on Workforce Protections  
*Providing Fairness to Workers Who Have Been Misclassified as  
Independent Contractors*

March 27, 2007

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Madam Chairwoman and members of the Committee: thank you for this opportunity to testify today on the important subject of independent contractor misclassification and its impacts on workers and their families, law abiding employers, and our economy.

My name is Cathy Ruckelshaus, and I am the Litigation Director for the National Employment Law Project (NELP), a non-profit advocacy organization that specializes in access to and keeping good jobs for low-income workers. In the twenty years I have spent working with and on behalf of low-wage workers around the country, I have been struck by the success some businesses have had in devising ways to evade responsibility for fair pay, health and safety, and other workplace standards. Calling employees independent contractors (“1099-ing” them, so-called because of the IRS Form 1099 issued to independent contractors) is a top choice of these employers.

I and my colleagues at NELP have worked to ensure that *all* workers receive the basic workplace protections guaranteed in our nation’s labor and employment laws; this work has given us the opportunity to learn up close about job conditions in garment, agricultural, construction and day labor, janitorial, retail, hospitality, home health care, poultry and meat-packing, high-tech, delivery, and other services. We have seen low, often sub-minimum wage pay, lack of health and safety protections and work benefits, and rampant discrimination and mistreatment of workers in these jobs.

NELP focuses on simply enforcing workplace laws on the books. In addition to bringing job standards actions against employers, NELP has partnered with labor and immigrant community groups in the states to promote good models for closing independent contractor loopholes. This background in direct workplace laws enforcement and crafting state practices informs my testimony today.

Today, I will describe independent contractor misclassification and its impacts on workers, on state and federal government coffers, and on law-abiding employers. I will illustrate its effects in all sectors of our economy, including the so-called “underground economy” where workers labor in the shadows. I will conclude with some ideas for policy reforms to contend with this unchecked and growing practice.

## I. What is Independent Contractor Misclassification and How Common is It?

With increasing frequency, employers misclassify employees as “independent contractors,” either by giving their employees an IRS Form 1099 instead of a Form W-2, or by paying them off-the-books. Businesses also insert subcontractors, including temporary help firms and labor brokers, between them and their workers, creating another layer of potentially-responsible entities and creating confusion among workers. Here are some reasons why 1099-ing is on the rise:

- Firms argue they are off-the-hook for any rule protecting an “employee,” including the most basic rights to minimum wage and overtime premium pay, health and safety protections, job-protected family and medical leave, anti-discrimination laws, and the right to bargain collectively and join a union. Workers also lose out on safety-net benefits like unemployment insurance, workers compensation, and Social Security and Medicare.
- Misclassifying employers stand to save upwards of 30% of their payroll costs, including employer-side FICA and FUTA tax obligations, workers compensation and state taxes paid for “employees.”
- Businesses that 1099 and pay off-the-books can underbid competitors in labor-intensive sectors like construction and building services, and this creates an unfair marketplace.

The United States Government Accountability Office (GAO) concluded in its July 2006 report, “employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers’ compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.”<sup>1</sup>

Genuine independent contractors constitute a small proportion of the American workforce, because by definition, an “independent contractor” operates a business. True independent contractors have specialized skill, invest capital in their business, and perform a service that is not part of the receiving firm’s overall business.<sup>2</sup> Most workers in labor-intensive and low-paying jobs are not operating a business of their own. As the

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<sup>1</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 25.

<sup>2</sup> *See, Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 43. Examples are a plumber called in by an office manager to fix a leaky sink in the corporate bathroom, or a computer technician on a retainer with a shipping and receiving company to trouble-shoot software glitches.

U.S. Department of Labor’s Commission on the Future of Worker-Management Relations (the “Dunlop Commission”) concluded, “[t]he law should confer independent contractor status only on those for whom it is appropriate—entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.”<sup>3</sup>

The problem is so pervasive that states have begun mandating studies of the problem and lead the way in reforms; in the last five years, at least nine states have collected data on the problem. In addition:

- Many states create a presumption of employee status so that workers providing labor or services for a fee are “employees” covered by labor and employment laws. This is already law in over ten states’ workers’ compensation acts<sup>4</sup> and in Massachusetts’ wage act.<sup>5</sup>
- A few states have created inter-agency task forces to share data and enforcement resources when targeting 1099 abuses.<sup>6</sup>
- Several states create “statutory employees” in certain industries (construction, trucking) where independent contractor schemes prevail.<sup>7</sup> Similarly, states have created job-specific protective laws that target persistent abuses to encourage compliance, regardless of the label (independent contractor or employee) attached to the worker. At least five states have farm labor contracting laws (CA, FL, IA, OR and WA).<sup>8</sup> Three states have laws regulating employment in the garment industry (CA, NJ and NY).<sup>9</sup> One state has specialized laws regulating the meat

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<sup>3</sup> U.S. DEP’T OF LABOR, Commission on the Future of Worker- Management Relations, (1995), available at [http://www.dol.gov/\\_sec/media/reports/dunlop/dunlop.htm#Table](http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table).

<sup>4</sup> See definition of “worker” in the WA state workers’ compensation act as an example: <http://apps.leg.wa.gov/RCW/default.aspx?cite=51.08.180>. At least 10 states (AZ, CA, CO, CT, DE, HI, NH, ND, WI, WA) have a general presumption of employee status in their workers’ compensation acts (regardless of what job the injured worker has).

<sup>5</sup> <http://www.mass.gov/legis/laws/mgl/149-148b.htm>.

<sup>6</sup> See, NELP, *Combating Independent Contractor Misclassification in the States: Models for Successful Reform* (December 2005).

<http://www.nelp.org/docUploads/COMBATING%20INDEPENDENT%20CONTRACTOR%20MISCLASSIFICATION%20Epdf>

<sup>7</sup> *Id.*

<sup>8</sup> See, NELP, *Subcontracted Workers: The Outsourcing of Rights and Responsibilities* (March 2004).

<http://www.nelp.org/docUploads/subcontracted%20work%20policy%20update%5F072704%5F065405%20Epdf>

<sup>9</sup> CAL. LAB. CODE § 2675 et. seq.; N.J. REV. STAT. § 34:6-144; N.Y. LAB. LAW § 340 et. seq.

packing industry (NE).<sup>10</sup> Six states have laws that regulate day labor (AZ, FL, GA, IL, NM and TX).<sup>11</sup>

### **A. Misclassification is Found in Every Job Sector.**

Calling employees “independent contractors” is a broad problem and affects a wide range of jobs. It could be happening to someone you know. A 2000 study commissioned by the US Department of Labor found that up to 30% of firms misclassify their employees as independent contractors.<sup>12</sup> Many states have studied the problem and find high rates of misclassification, especially in construction, where as many as 4 in 10 construction workers were found to be misclassified.<sup>13</sup>

Most government-commissioned studies do not capture the so-called “underground economy,” where workers are paid off-the-books, sometimes in cash. These workers are *de facto* misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules. Many of these jobs are filled by immigrant and lower-wage workers.<sup>14</sup>

In my practice, I have met workers who were misclassified. Here are a couple of examples:

- ❖ Faty Ansoumana, an immigrant from Senegal, worked as a delivery worker at a Gristede’s grocery store in midtown Manhattan. He worked as many as seven days a week, 10-12 hours a day and his weekly salary averaged only \$90. He and his fellow delivery workers, who had similar pay and hours, were all hired

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<sup>10</sup> NEB.REV.STAT. § 81-404.

<sup>11</sup> ARIZ. REV. STAT. § 23-551 et. seq.; FLA STAT. ANN. § 448.20 et. seq.; GA. CODE ANN. § 34-10-1 et. seq.; 820 ILL. COMP. STAT. 820/175 et. seq.; N.M. Stat. Ann. 50-15-1 et. seq.; TEX. LAB. CODE Ann. § 92.001 et. seq.

<sup>12</sup> Lalith de Silva *et al.*, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” i-iv, *prepared for* U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), *available at* <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>13</sup> *See* Fiscal Policy Institute, “New York State Workers Compensation: How Big is the Shortfall?” (January 2007); Michael Kelsay, James Sturgeon, Kelly Pinkham, “The Economic Costs of Employee Misclassification in the State of Illinois” (Dept of Economics: University of Missouri-Kansas City: December 2006); Peter Fisher *et al.*, “Nonstandard Jobs, Substandard Benefits”, Iowa Policy Project (July 2005); Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004); State of New Jersey, Commission of Investigation, “Contract Labor: The Making of an Underground Economy” (September 1997).

<sup>14</sup> Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004), at p. 8.

through two middlemen labor agents, who in turn stationed the workers at grocery and pharmacy chain stores throughout the City. The workers all reported directly to the stores and provided deliveries pursuant to the stores' set delivery hours and under the stores' supervision. Many delivery workers were required to bag groceries and to do other non-delivery work, including stocking shelves. When NELP challenged the abysmally low pay, the stores said the workers were not their employees, and the labor brokers said the deliverymen were independent contractors. We were able to recover \$6 million for the over 1,000 workers in the lawsuit, but only after overcoming the stores' claims that they were not responsible.

- ❖ Janitors from Central and South America and Korea were recruited by a large building services cleaning company, Coverall, Inc., to clean office buildings in MA and other states. The janitors were "sold" franchise agreements for tens of thousands of dollars, permitting them to clean certain offices assigned by Coverall. The janitors were told where to clean, what materials to use, and were not permitted to set their own prices for the cleaning services. When one janitor quit when she couldn't make ends meet, she applied for unemployment benefits in MA and was told she was an "independent contractor" and not eligible. She challenged that decision and Massachusetts' Supreme Judicial Court ruled in her favor. NELP wrote an *amicus* brief in Coverall and provided assistance.<sup>15</sup>

Independent contractor misclassification occurs with an alarming frequency in: construction,<sup>16</sup> day labor,<sup>17</sup> janitorial and building services,<sup>18</sup> home health care,<sup>19</sup> child care,<sup>20</sup> agriculture<sup>21</sup>, poultry and meat processing,<sup>22</sup> high-tech,<sup>23</sup> delivery,<sup>24</sup> trucking,<sup>25</sup>

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<sup>15</sup> *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006).

<sup>16</sup> Francois Carre, J.W. McCormack, *et al.*, "The Social and Economic Cost of Employee Misclassification in Construction" 2, Labor & Worklife Program, Harvard Law School and Harvard School of Public Health, Dec. 2004, available at [http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work\\_Misclass\\_Study\\_1.pdf](http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work_Misclass_Study_1.pdf)

<sup>17</sup> Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States* (January 2006).

<sup>18</sup> See *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006); *Vega v. Contract Cleaning Maintenance*, 10 Wage & Hour Cases 2d (BNA) 274 (N.D. IL 2004).

<sup>19</sup> See *Bonnette v. Cal. Health & Welfare Agcy.*, 704 F.2d 1465 (9<sup>th</sup> Cir. 1983).

<sup>20</sup> See, e.g., IL Executive Order conferring bargaining status on child day care workers otherwise called independent contractors:  
<http://www.gov.il.gov/gov/execorder.cfm?eorder=34>.

<sup>21</sup> *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7<sup>th</sup> Cir. 1988).

<sup>22</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 30.

<sup>23</sup> *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9<sup>th</sup> Cir. 1996).

home-based work<sup>26</sup>, and the public<sup>27</sup> sectors. I could relate stories to you of independent contractor abuses in each of these job categories.

## II. What is The Impact on Workers and Their Families?

Just because an employer calls a worker an “independent contractor” does not make it legally true. But, these labels carry some punch and deter workers from claiming rights under workplace laws. Because misclassified independent contractors face substantial barriers to protection under labor and employment rules, workers and their families suffer. The same occupations with high rates of independent contractor misclassification are among the jobs with the highest numbers of workplace violations. This is because of the labor standards loopholes created by improper use of 1099-ing. The result is our “growth-sector” jobs are not bringing people out of poverty and workers across the socio-economic spectrum are impacted.

Workers could lose out on: (1) minimum wage and overtime rules; (2) the right to a safe and healthy workplace and workers’ compensation coverage if injured on the job; (3) protections against sex harassment and discrimination; (4) unemployment insurance if they are separated from work and other “safety net” benefits; (5) any health benefits or pensions provided to “employees;” (6) the right to organize a union and to bargain collectively for better working conditions, and (7) Social Security and Medicaid payments credited to employee’s accounts.

Recent government studies find as many as 50–100% of garment, nursing home, and poultry employers in violation of the basic minimum wage and overtime protections of the Fair Labor Standards Act.<sup>28</sup> Community group surveys in the day labor, restaurant

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<sup>24</sup> *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).

<sup>25</sup> New York Times, “Teamsters Hope to Lure FedEx Drivers,” May 30, 2006 (cataloguing cases).

<sup>26</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 31.

<sup>27</sup> Phillip Mattera, “Your Tax Dollars at Work... Offshore,” Good Jobs First (July 2004) [http://www.goodjobsfirst.org/publications/Offshoring\\_release.cfm](http://www.goodjobsfirst.org/publications/Offshoring_release.cfm)

<sup>28</sup> (Poultry – 100% noncompliance) U.S DEP’T OF LABOR, FY 2000 POULTRY PROCESSING COMPLIANCE REPORT (2000); (garment – 50% noncompliance), BUREAU OF NATIONAL AFFAIRS, U.S. DEP’T OF LABOR, LABOR DEPARTMENT: CLOSE TO HALF OF GARMENT CONTRACTORS VIOLATING FAIR LABOR STANDARDS ACT, DAILY LABOR REPORTER 87 (May 6,1996); David Weil, *Compliance With the Minimum Wage: Can Government Make a Difference?* VERSION (May 2004), available at

[http://www.soc.duke.edu/sloan\\_2004/Papers/Weil\\_Minimum%20Wage%20paper\\_May04.pdf](http://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf); (agriculture – “unacceptable” levels of noncompliance) U.S. DEP’T OF LABOR, COMPLIANCE HIGHLIGHTS 1,3 (1999); (nursing homes – 60% noncompliance), EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP’T OF LABOR, NURSING HOME 2000 COMPLIANCE FACT SHEET, available at <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm>.

and domestic service industries find similar sweatshop conditions.<sup>29</sup> Immigrant workers predominate in many of these jobs, creating more barriers to enforcing labor standards where complaints trigger agency action.<sup>30</sup> Immigrant and other workers fear retaliation and other reprisals, chilling them from coming forward to lodge complaints of unfair workplace conditions. Without overt agency action to ferret out the violations, many 1099 abuses go unnoticed.

Low wages and unsafe conditions persist in these jobs.<sup>31</sup> The Bureau of Labor Statistics found that 2.2 million hourly workers were paid at or below the federal minimum wage in 2002.<sup>32</sup> The federal minimum wage at its current level of \$5.15/ hour nets an earner a little over \$10,700 annually, hardly enough to make ends meet. The employer-backed Employer Policy Foundation estimated that workers would receive an additional \$19 billion annually if employers obeyed workplace laws.<sup>33</sup> A 2000 U.S. DOL-commissioned study of employer tax evasion in the unemployment insurance system found lost unemployment insurance benefits to 80,000 workers annually from employer misclassification of workers as independent contractors.<sup>34</sup> These studies, while showing important losses, are in dire need of updating with new data and information.

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<sup>29</sup> More than half of New York City restaurants were violating overtime or minimum wage laws in 2005. Restaurant Opportunities Center of New York and the New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (New York, 2005), available at <http://www.rocny.org/documents/ROC-NYExecSummary.pdf>; Domestic Workers United and DataCenter, *Home is Where the Work is: Inside New York's Domestic Work Industry*, (2003-3004); Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States* (reporting half of day laborers surveyed experienced wage theft, and many suffer harassment from merchants and arrests by police)(January 2006).

<sup>30</sup> David Weil and Amanda Pyles, Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace, *Comp. 27 Labor Law & Pol'y Journal* 59, 60 (2006). U.S. GENERAL ACCOUNTING OFFICE, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO 02-925 (September 2002)(“GAO Day Labor Report”) (Noting that day laborers rarely complain to DOL due to fear and intimidation by employers and perception of inactivity on the part of DOL).

<sup>31</sup> For a list of the statistics on various low-wage industries, see,  *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability*, (New York: National Employment Law Project, Oct. 2006), available at <http://www.nelp.org/>.

<sup>32</sup> See, *Workers are Paid at or Below Minimum Wage in 2002, BLS Says*, 173 Lab.Rel.Rptr. 16, ECONOMIC NEWS, September 1, 2003.

<sup>33</sup> See Craig Becker, A Good Job for Everyone, *LegalTimes*, Vol. 27, No. 36. (Sept. 6, 2004).

<sup>34</sup> Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (February 2000).

### III. What is the Impact on Federal and State Government Receipts?

Federal and state governments suffer hefty loss of revenues due to independent contractor misclassification, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. The GAO estimated that misclassification of employees as independent contractors reduces federal income tax revenues up to \$4.7 billion.<sup>35</sup> Coopers & Lybrand (now PriceWaterhouse Coopers) estimated in 1994 that proper classification of employees would increase tax receipts by \$34.7 billion over the period 1996-2004.<sup>36</sup>

A recent analysis of workers' compensation and unemployment compensation data in New York state found that noncompliance with payroll tax laws means as many as twenty per cent of workers' compensation premiums—\$500 million to \$1 billion—go unpaid each year.<sup>37</sup> A recent study of the Massachusetts construction industry found that misclassification of employees resulted in annual losses of up to \$278 million in uncollected income taxes, unemployment insurance taxes, and worker's compensation premiums.<sup>38</sup>

### IV. What Are Some Federal Policy Reform Possibilities?

Much progress can be made to combat independent contractor misclassification by beefing up enforcement of existing labor and employment laws to close independent contractor loopholes. This can be achieved by making the DOL more effective. Another area ripe for reform is in the tax area; but because this Committee has jurisdiction over worker protection rules, I will focus on those areas of potential reform.<sup>39</sup>

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<sup>35</sup> U.S. GENERAL ACCOUNTING OFFICE, *Tax Administration Information: Returns Can Be Used to Identify Employers Who Misclassify Employees* GAO\GGD-89-107 (1989).

<sup>36</sup> Projection of the Loss in Federal Tax Revenues Due to Misclassification of Workers, Coopers & Lybrand (1994).

<sup>37</sup> [New York State Workers' Compensation: How Big Is the Coverage Shortfall?](#), (New York: Fiscal Policy Institute, Jan. 2007).

<sup>38</sup> Francois Carre, J.W. McCormack, *et al.*, "The Social and Economic Cost of Employee Misclassification in Construction" 2, Labor & Worklife Program, Harvard Law School and Harvard School of Public Health, Dec. 2004, *available at* [http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work\\_Misclass\\_Study\\_1.pdf](http://www.faircontracting.org/NAFCnewsite/prevalingwage/pdf/Work_Misclass_Study_1.pdf)

<sup>39</sup> A major problem barring effective enforcement against independent contractor abuses is the safe harbor provision in the Internal Revenue Code, at Section 530 of the Revenue Act of 1978, 26 U.S.C. § 7436. Currently, employers decide whether their workers are employees or independent contractors with little scrutiny from the IRS and no consequences. Under current law, an employer who is found by the IRS to have misclassified its workers can have all employment tax obligations waived. Section 530 also prevents the IRS from requiring the employer to reclassify the workers as employees in the future. Among other factors, a business can rely on its belief that a significant

## A. Make the U.S. DOL More Effective.

Workplace enforcement of labor standards for all workers should be at a level designed to send a message that America will not tolerate non-payment and underpayment of wages. This means more emphasis on enforcement: more personnel, and more focus on industries that are known violators of wage and hour laws, so that at a minimum, low-wage workers get the wages that they are entitled to under current law. This focus on enforcement includes ensuring employers do not evade the basic job laws by misclassifying employees as independent contractors.

Enforcement by DOL generally is down. In the face of wholesale violations in particular industries, resources dedicated to enforcement have been falling for many years. For example, from 1975–2004, the budget for U.S. Wage and Hour investigators decreased by 14% (to a total of 788 individuals nationwide) and enforcement actions decreased by 36%, while the number of workers covered by statutes enforced by the Wage and Hour Division grew by 55%.<sup>40</sup> At present, there is approximately one federal Wage and Hour investigator for every 110,000 workers covered by FLSA.<sup>41</sup> By 2007, the U.S. Department of Labor’s (U.S. DOL) budget dedicated to enforcing wage and hour laws will be 6.1 percent less than before President Bush took office.<sup>42</sup>

Some particular DOL-based reform suggestions are:

- Direct DOL to be more strategic with existing resources, including conducting proactive audits of problem industries with persistent violations and sharing audit data with the unemployment insurance arm of DOL;
- Require that DOL share information on independent contractor problems and coordinate with the IRS, as suggested by the 2006 GAO Report<sup>43</sup>;
- Mandate “hot goods” seizure of goods produced under substandard conditions and where misclassification has occurred;
- Create an Office of Community Outreach charged with working with community and organizing groups to identify 1099-related problems and witnesses for enforcement targets and to educate workers about their rights;

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segment of the industry treated workers as independent contractors, thereby perpetuating industry-wide noncompliance with the law.

<sup>40</sup> Annette Bernhardt & Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, Economic Policy Brief No. 3 (New York: Brennan Center for Justice at NYU School of Law, September 2003).

<sup>41</sup> *Id.* There are nearly 88 million people covered by FLSA. *Id.*

<sup>42</sup> Judd Legum, Faiz Shakir, Nico Pitney, Amanda Terkel, and Payson Schwin et.al., *Labor—Bush Priorities Hurt Workers, Help Employers (Under the Radar)*, THE PROGRESS REPORT, June 14, 2006.

<sup>43</sup> *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 33, 35.

- Require data collection on wage claim levels and violations, by industry, and on independent contractor misclassifications;
- Enhance DOL's Wage & Hour Enforcement Budget, and earmark it for more targeted industry audits and investigations where independent contractor abuses prevail.

A critical component of any US DOL reform package is to ensure that there is a firewall between immigration and labor law enforcement. All workers should have meaningful access to systems of labor law enforcement: Because labor and employment laws are complaint-driven and because many of the industries with independent contractor abuses are dominated by immigrant workers, workers must feel free to come forward to complain. This means preserving historic boundaries between labor law enforcement and enforcement of immigration law. In 1998, US DOL entered into a Memorandum of Understanding (MOU) with the then-INS establishing that the labor agency will not report the undocumented status of workers if discovered during an investigation triggered by a complaint made by an employee when there is a labor dispute, nor will it inquire into a worker's immigration status while conducting a complaint-driven investigation.<sup>44</sup> This policy must be enforced, and strengthened with clear directives to field staff at the enforcement agencies.

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<sup>44</sup>See *Memorandum of Understanding Between the Immigration and Naturalization Service* (Department of Justice, and the Employment Standards Division, Department of Labor, November 23, 1998).