

**NELP**

## **Immigrant & Nonstandard Worker Project Policy Update**

*Advocating for the Working Poor and the Unemployed*

March 2004

### **Subcontracted Workers: The Outsourcing of Rights and Responsibilities**

#### ***Subcontracted Workers are Everywhere in Our Economy***

The media is full of stories of businesses that are increasingly using a time-worn system historically pervasive in the garment and agricultural sectors: subcontracting out work that could be done in-house to outside contractors. This tactic can take many forms and is found in most industries. Examples are:

- Outsourcing low-skilled and labor-intensive work to separate middlemen entities, like Wal-Mart and leading restaurant chains have done for their cleaning and janitorial services, and like Tyson Foods did for its poultry processing plants;
- Using temporary help or leasing firms to “payroll” existing staff who overnight become the “employee” of another business, as Microsoft did with its “perma-temp” programmers;
- Calling employees “independent contractors” and treating them as exempt from all labor and employment and tax laws, as cleaning companies and grocery stores have done in New York and California; construction drywall firms have done in California, Tennessee, and Nebraska, and home care placement companies have done in Maryland and elsewhere.

While there are many stated reasons for the surge in these strategies, businesses typically cite the payroll-related savings that accompany subcontracting as a reason for doing it. Employers stand to gain back the 7.65 % of employer-provided federal Social Security and unemployment taxes owing on an employee’s salary; health and pension benefits and workers’ compensation coverage provided only to “employees” of a firm, and escape responsibility for paying minimum wage and especially overtime pay to workers who are nominally employed by someone else.

In low-wage sectors especially, subcontracted workers are often immigrants and are typically paid in cash, making the direct employers and any workplace rights violations difficult to track down. It’s usually not too hard, though, to find the worksite employer to whom the worker reports every day and for whom the worker performs the service. If there’s a labor or employment violation, the worksite employer is usually responsible too.

#### ***Labels Don’t Matter – Subcontracted Workers Have the Same Workplace Rights as Others***

Businesses that try to shield themselves from the responsibility that comes with employing workers by subcontracting cannot escape liability for workplace violations if they legally “employ” the workers. Slapping a name on a worker, like calling him an “independent contractor” and having him sign an agreement that

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states he's an "independent contractor," doesn't change that worker's status as a covered "employee" under labor and employment laws. Neither does inserting a leasing or temp agency in between the worksite employer and the worker, and having the temp agency cut the payroll checks and withhold taxes. Labor and employment laws have their own definitions of who's a covered "employee" (and thus subject to protections) and who's a responsible "employer" (and thus subject to responsibilities). See NELP publications, <http://www.nelp.org/docUploads/pub8%2Epdf> ; <http://www.nelp.org/docUploads/pub42%2Epdf>

Workers who are underpaid can and should seek back pay from their worksite or joint employer if that employer is larger and in a better position to pay unpaid wages.<sup>1</sup> By going up the industrial food chain, workers can also help to change the economics of outsourcing; if the larger businesses are accountable for the labor standards in their business, using middlemen may not be as attractive anymore.

### **States Are Reining In the Worst Employer Abuses**

#### *Accountability for Garment, Janitorial, Day Labor and Agricultural Businesses*

A handful of states, including California, New York and New Jersey, hold businesses in certain sectors with an entrenched subcontracting structure accountable for any wage and hour and other workplace violations occurring in their business.<sup>2</sup> California recently passed a more sweeping accountability law covering janitorial services as well. Several states have regulated day labor agencies to curb such abuses as overcharging for transportation to work and check-cashing schemes.

#### *Provisions to Combat Firms Misclassifying Workers as Independent Contractors*

California and Pennsylvania require all construction site owners to provide workers' compensation coverage for all workers on-site, regardless of whether they are classified as employees or independent contractors. Many states' unemployment compensation acts have broad definitions of "employee," and broadly cover workers classified by their employers as independent contractors..

#### *Regulating Temp Agencies*

Several states have provisions requiring temporary help and related labor intermediaries to provide temp workers notice of the terms of their assignments, hours and pay, and prohibiting temp firms from

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<sup>1</sup> For recent examples of successful worker actions against so-called joint employers, *see Ansoumana et al v. Gristedes et al.*, 255 F.Supp. 2d 184 (S.D.N.Y. 2003) (immigrant grocery delivery workers sued labor contractors and grocery and drug store chains for unpaid minimum wage and overtime, netting over six million dollars in damages); *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d. Cir. 2003) (garment workers hired and working in a sweatshop can sue the off-site clothing manufacturer who dictated the production process and ran the business of making the garments).

<sup>2</sup> For a listing of model state and local laws relating to subcontracted and other contingent workers, *see* <http://www.nelp.org/docUploads/pub17%2Epdf>. NELP's periodic state legislative round-ups are also available on-line, with proposed and recently-enacted nonstandard legislative provisions. <http://www.nelp.org/nwp/reform/summarynonstan032003.cfm>

discriminating against temp workers. Some provisions require temp firms to register with the state and post a bond to cover any wage abuses suffered by workers placed by the temp agency at a worksite employer.

### *Tax Authorities Cracking Down*

In recognition of the tax benefits to businesses that misclassify their workers as “independent contractors,” some states have begun to focus on enforcement of requirements to pay employment taxes, workers’ compensation and unemployment benefit taxes for all “employees.” Los Angeles County recently estimated that the explosion in its underground cash economy has created a federal and state tax shortfall of \$1.1 billion a year.<sup>3</sup> Washington state regulatory agencies studied the problem of decreased tax revenues due to employer misclassification and began audits of state workers’ compensation and unemployment insurance programs to stem abuses and increase employer participation.

### ***What Can You Do to Hold Businesses Accountable?***

Enforcing existing requirements holding employers responsible for workplace violations is a start, especially when the law in question has an expansive accountability reach, as do wage and hour requirements and most family and medical leave provisions. Following the states that have focused efforts on particularly entrenched sectors with repeat sweatshop violators, like garment and agricultural industry provisions found in California, New York and New Jersey, can also be productive. Local campaigns have succeeded in creating living wage requirements for any worker in a particular job, regardless of the name or status of the direct employer.

Finally, it is important to think and talk about the responsibilities all firms have towards workers in their business. Recognizing the goals of our nation’s labor and employment protections and honoring our commitment to paying workers at least the minimum wage and overtime, protecting their rights to family and medical leave and a safe and healthy workplace, and protecting their rights to be free from discrimination, requires us all to ensure that employers are held accountable for these standards, regardless of how they structure their businesses in this competitive, global economy.

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<sup>3</sup> Daily News, “Cash Economy Threatens Wages, Tax Base,” Monday May 6, 2002.  
<http://www.dailynews.com/news.articles/0502/06/Dnew01.asp>