

***Confronting Contingent Work Abuse
in High-Tech and Low-Tech Jobs***

*by Catherine Ruckelshaus, Bruce Goldstein
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Confronting Contingent Work Abuse In High-Tech and Low-Tech Jobs

By Catherine Ruckelshaus, Bruce Goldstein and the Subcontracted Worker Initiative

Labor subcontracting today affects a growing number of workers in a wide range of jobs. From computer programming to health care, hotels to garment manufacturing, taxi driving to farming, “contingent” or “non-standard” work arrangements encompass many categories of work, including: (1) contracting-out, including outsourcing the production of goods or the acquisition of services; (2) use of labor contractors, temporary help agencies, employee leasing companies or other intermediaries to provide or supervise labor; and (3) misclassification of workers as “independent contractors” rather than employees. These and other forms of reconfiguring the workforce have allowed firms to enjoy short-term competitive advantages at the expense of workers’ wages, benefits, and working conditions.

Although subcontracting affects workers at all socioeconomic levels, the most harmful impact tends to be on low-wage employees. Labor subcontracting often is used in an effort to reduce labor costs by using a subcontractor who will pay workers less than the larger company would have paid. In many cases, the subcontractors are not paid enough to comply with their legal obligations toward workers or to pay a court judgment. Subcontracting also impedes worker organizing, which is an effective method for workers to achieve economic and political bargaining power. Many employers engaged in subcontracting seek to avoid minimum wage, overtime, and other legal responsibilities applicable to “employers,” by characterizing the subcontractor as the sole “employer.” The reality in many cases is that the subcontracting company retains substantial control over the work performed by subcontracted workers because it will not take the financial risk of entrusting its business plans to labor contractors.

What Subcontracting Means Today

Contracting-out core functions of a business is not a new phenomenon. Before the turn of the last century, clothing manufacturers supplemented their factory production by using nominally separate entities to sew and

press the garments, the most labor-intensive phase of producing clothing.¹ Similarly, farm owners long have utilized farm labor contractors, or crewleaders, to “handle” the labor force needed to harvest the crops. Many employers have used these mechanisms in an effort to avoid liabilities imposed on employers by state and federal labor laws, and to suppress union organizing.

Current examples of subcontracting abound.² The strike by the United Parcel Service (UPS) workers in 1997 centered on their status as “permanent” temporary employees. A landmark lawsuit against Microsoft under federal pension law won the right to retirement program participation for misclassified “independent contractors” and “temporary” computer programmers in 1999. In addition, Washington State fined Labor Ready, one of the largest day labor firms in the country, \$734,000 for consistently misclassifying workers in order to reduce its workers’ compensation contributions. Grocery delivery workers in New York City, who were told they were independent contractors and made less than \$2 an hour, have sued their work-site employers as well as the contracting companies who recruited them, for minimum wage and overtime violations, settling with one employer for \$3 million dollars.

The increase in subcontracting across industries raises important policy issues. As the U.S. Commission on the Future of Worker-Management Relations (the Dunlop Commission) appropriately concluded:

“[C]ontingent [work] arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce. . . . The expansion of contingent work has contributed to the increasing gap between high and low-wage workers and to the increasing sense of insecurity among workers. . . .”³

Labor subcontracting has increased in volume and has expanded to new industries and to new functions with-

in industries. While not a new phenomenon, the temporary help industry has grown in the last decade. Many more entry-level jobs, such as poultry processing, janitorial and hotel jobs, are being subcontracted out.⁴ Not only is subcontracting prevalent among low-wage and immigrant laborers, but it has also infiltrated higher-paying, U.S. citizen-dominated industries, such as computer programming and the public sector. Across sectors, many subcontracted workers experience inequality, reduced job security, and fewer benefits overall than their permanent, non-contingent counterparts. Thus, nonstandard employment has spread beyond the recent immigrants that historically have been subjected to sweatshop practices.

There are numerous commonalities in the structure of subcontracted industries and the subsequent impact on workers. For example, UNITE Counsel Max Zimny and Brent Garren note that “[f]ashion renders apparel a perishable commodity.”⁵ This observation makes an important connection with the work of subcontracted farmworkers who harvest fruits and vegetables. The necessity for “just-in-time” sewing of garments and rapid-response harvesting of crops in these labor-intensive industries may explain some of the evident similarities in the way labor contractors are used. Workers in both industries report especially low wages and unsafe and unhealthy working conditions, coupled with a difficulty recovering unpaid wages against their employers.

Labor subcontracting often entails an outsourcing of personnel and other human resource functions. Recruitment, payroll, discipline, transportation, and other functions are not performed in-house, but by a person or firm characterized as an independent contractor. For jobs that require specialized training, subcontracting can be linked to a shift away from employer-provided, on-the-job training and toward requiring workers to finance their own training. Some employers utilize labor contractors to search the world labor market for workers who possess the necessary training or otherwise are able or willing to absorb costs that employers seek to shed. Similarly, the dissemination of important health and safety information to workers is often delegated to a labor contractor who has few resources and little economic incentive to train workers in how to prevent injuries and illness.

The use of temp agencies has moved far beyond the

notion of a temporary clerical worker who fills in while a permanent employee is out sick or on vacation, or performs a special, short-term project that temporarily increases labor needs. The chicken processing, hotel, computer programming, home care, and public sectors all reported use of temp firms to recruit and hire labor. Reasons given by employers for this externalization of a basic personnel function varied. Some companies claim that the temp agencies provide needed “flexibility” in the size of its labor force. Often, however, the customer-company wishes to create a probationary period during which the company treats the worker as an easy-to-discharge employee of the temp agency, not as an employee of the customer-company. In some instances, such as meat packing and poultry processing plants located in rural areas, employer practices lead to very high employee-turnover rates, which can produce a voracious demand for new recruits supplied through labor contractors.

When the workers are undocumented immigrant workers, such as is the case for a significant portion of timber, garment, agricultural, janitorial and day laborers, they are even more likely to be underpaid with no benefits and are unlikely to come forward to complain of unfair working conditions. Employers in these and other sectors, including meat processing and home care, seek out undocumented workers from particularly vulnerable communities to ensure that their workforce is compliant. When organizers begin to make headway, employers in the agricultural industry in California simply recruit workers from a different ethnic group, including Mixtecos and other indigenous workers of Mexico, who do not speak Spanish and who have little in common with their Spanish-speaking compatriots working in the United States. When questions arise as to compliance with immigration law, these businesses usually claim that the labor intermediaries are responsible for verifying that employees are authorized to work.

The misclassification of workers as “independent contractors” also finds parallels in a wide-ranging group of occupations. These examples are a far cry from the situation of a consultant with a college education or professional degree who possesses the skills and resources to provide businesses with specialized, problem-solving services. For example,

- “Independent contractor” janitors in Los Angeles pay larger contractors for the privilege of cleaning certain floors in buildings managed by yet another corporate interest on behalf of the building owner and in some cases, even subcontract out sections of floors to other family members or individual workers.
- In the California strawberry fields, some farmworkers are characterized as independent business people investing in growing a crop on their own plot of land. The reality is that they are sharecroppers. They tend a small portion of a corporate farmer’s land, having virtually no opportunity for real profit (despite much downside risk), and virtually no autonomy to exercise independent judgment because that might jeopardize the marketability of the farmer’s crop.
- In the home healthcare industry in Los Angeles, prior to a successful union-organizing drive, healthcare workers were treated as independent business people with no “employer,” despite the economic powerlessness of their position and the obvious fact that they worked for someone else.

Problems Facing Subcontracted Workers

Subcontracted work arrangements frequently produce substantial, negative consequences for the working conditions and economic status of workers regardless of the socioeconomic level or particular nature of the job in question. Some statistics may be helpful: while 75% of standard full-time workers have employer-sponsored health insurance, only 9% of temps do. The U.S. Department of Labor’s Bureau of Labor Statistics found that upwards of 53% of temporary workers would prefer to be permanent hires.⁶ There is strong public support for getting parity and equal job conditions for nonstandard workers; a recent poll found that 68% surveyed said that it was unfair that part-time, temporary and contract workers receive unequal treatment on the job, and 60% would vote for Congressional candidates who support workplace reforms to provide nonstandard workers with equal pay and benefits.⁷

The most exploited subcontracted workers are recent immigrants and nonimmigrant “guest workers”

hired on temporary visas. Many newly arrived foreign nationals lack the education, knowledge of the English language, and familiarity with American labor laws to feel comfortable demanding improved job terms or labor law enforcement. In many circumstances, the jobs with the worst conditions are those that have been subcontracted out and the workers with the least bargaining power accept such jobs. Even when they possess significant skills and education and perform middle-class jobs, many foreign nationals working in the United States—especially the several million who lack authorized immigration status and the tens of thousands who work on temporary visas as guest workers—justifiably believe that they must accept poorer job terms than citizens and long-standing immigrants.

The guest workers, including temporary foreign agricultural workers on H-2A visas and computer programmers on H-1B visas, are the ultimate contingent labor force. The employer—often through trade associations or contractors called “body shops”—arranges the temporary visa, which lasts only as long as the temporary job with which it is associated. Generally, when the job ends, the worker must go home. In many instances, the workers have paid large sums of money to contractor-recruiters to obtain these jobs. In these circumstances, employees are often too fearful of losing their jobs and being deported to challenge unfair or illegal employment practices. For seasonal jobs, the worker must hope that the employer decides to arrange for his or her visa in the following year. Many H-1B visa holders hope that as the six-year limit on their temporary visa expires, their employer will apply on their behalf for a permanent labor certification that would result in actual immigration status. Few guest workers want to jeopardize their chance at U.S. citizenship by seeming disloyal to the employer that must sponsor their immigration application.⁸

Some individuals enjoy the flexibility afforded under certain nonstandard work arrangements and possess the skills and knowledge to bargain with their clients for reasonable salaries and benefits, and to establish associations to supply group health insurance, training opportunities and other needs. Generally, however, subcontracted workers would prefer to be noncontingent workers either because they would prefer to be full-time, permanent employees or because they lack the bargaining power to

secure wages and benefits that compensate for the costs associated with the contingent nature of their employment.

Welfare-to-Work

Those who claim that welfare-to-work programs are a smashing success fail to mention that a significant number of participants who are hired find themselves in temporary positions. Because they are “employed,” they are usually denied any cash assistance – even though the assignments they receive may not cover full weeks or months. They simply go without income during those lag times. In reality, many women wound up on welfare because they couldn’t find permanent work and low-wage temp jobs left them without needed income or benefits, or both.

Whether or not they’ve been on assistance, temp workers often earn too little to pay for health benefits or to qualify for unemployment. They also face problems related to lack of information about the rights they have and lack of protection by some employment laws.

Solutions require changes both in enforcement of existing laws and new protections for temp and other contract workers. Minimum standards are needed to ensure temps are not charged exorbitant fees for transportation and safety equipment and that they receive accurate job descriptions and fair treatment. Temp agencies can take these steps voluntarily by signing the National Alliance for Fair Employment (NAFFE) Code of Conduct.⁹

The law must ensure that temp workers receive equal pay for the same work as permanent employees. Welfare-to-work programs need to ensure that participants will receive steady, full-time work or be eligible for cash assistance to round out their income without counting against a “welfare clock.”

— Ellen Bravo, 9 to 5, *National Assoc. of Working Women*

The argument that labor subcontracting provides needed flexibility in reacting to the exigencies of a global, high-technology economy often is belied by the evidence that business owners are simply trying to have it both ways. Many companies claim that they must delegate responsibilities for production and compliance with labor laws to subcontractors. Upon closer inspection, however, one finds that many of these companies do not risk the loss of profitability that would arise from entrusting their carefully laid

business plans to labor contractors. In reality, such companies often protect their investment and reputation by retaining and exercising substantial control over the work performed by subcontracted workers. In the apparel industry, retailers and major manufacturers engage subcontractors to produce garments and disclaim responsibility for the mistreatment of the workers who produce those goods, yet frequently they send inspectors to the contractors’ shops and factories to ensure quality control.¹⁰ At Microsoft, “permatemps,” who do not receive the benefits accorded to “employees,” work alongside permanent employees and are subject to the same supervision to assure quality control.¹¹ Such companies want the benefits of ensuring the quality of the workers’ performance to maximize their own profits but want to claim that labor contractors are solely responsible for ensuring the quality of the workers’ treatment on the job.

Many companies seek to shift all employment-related responsibility to labor contractors and force workers and government agencies to expend scarce resources to vindicate basic workers’ rights against entities that frequently cannot afford to pay. When workers are fired unjustly or fail to receive the pay they are owed, the companies often claim that they do not employ the workers and that only the labor contractor is responsible because it is the workers’ sole “employer.” In many cases, the labor contractor accepts this scheme as the price of becoming the middleman. Similar efforts to shift blame occur when work-related accidents happen. In agriculture, many workers are killed and injured while being transported to work-sites in vans or buses that violate safety codes; the farmers usually claim that a labor contractor had sole responsibility for the transportation system.

Various state and federal laws have required labor contractors to obtain a license, demonstrate solvency, maintain insurance and comply with basic labor standards. Compliance by labor contractors, however, often is the exception, not the rule. Government agencies are denied the resources needed to police the many contractors. Workers frequently cannot even locate their contractors to serve them with a summons for a lawsuit. If caught violating the law, the contractors’ punishment is negligible. It sometimes takes years for prosecutors to bring criminal charges against contractors, even when it is for violence or debt peonage. If barred from receiving a license after

numerous violations, the contractor often has family members or friends who “front” for him or her and obtain a license to continue the business. Even when caught, bankruptcy proceedings often provide the contractors with a way out. Meanwhile, the larger businesses can profitably escape sanction by using one abusive labor contractor after another.

Observers have noted for many decades that labor contractors can be both perpetrators and victims. In many settings, labor contractors need not acquire significant capital or skills to operate a business. Entry into the market is not difficult. Of course, that means that competition among contractors for customers can be fierce. Such contractors compete for business with low bids that depend on driving labor costs lower and worker productivity higher. Many contractors do not earn enough money to pay business expenses, take a profit and comply with minimum wage, overtime, workers’ compensation premiums, unemployment compensation, Social Security deductions, and other basic standards. Often the contractor ekes out a profit and ignores its other financial obligations. The larger business benefits by keeping labor costs low at the expense of workers.

Worker organizing, an effective method for improving workers’ bargaining power, is also impeded by subcontracting. As the experience of the hotel and restaurant industry points out, subcontracting often represents an effort to end collective bargaining and eliminate a union’s presence.¹² Changing the identity of the “employer” of the workers can disrupt a longstanding union shop. In many cases, the contractor’s lack of bargaining power with the larger company means that it lacks the resources to negotiate decent job terms. As suggested by Rachael Cobb in the paper on home healthcare workers, a business or a government entity that contracts out work to numerous separate locations can substantially interfere with worker-to-worker communication and union organizing.¹³ Subcontracted workers are also susceptible to threats by their bosses of losing the subcontract with the larger company and their jobs if they unionize and demand higher wages. Indeed, nothing prevents a company from discriminating against subcontractors that are unionized.

As Ruckelshaus, et. al. have pointed out, union organizing has been hindered by some decisions under the National Labor Relations Act (NLRA), which grants collec-

Temp Work in Silicon Valley

In Silicon Valley, temporary workers constitute more of the workforce than in the nation as a whole. Workers who are not in a traditional, stable employment situation, known as contingent workers, comprise 40% of the Valley population. Temporary workers, the most vulnerable of contingent workers, number over 30,000 and almost half of them earn less than \$10 an hour

Working Partnerships USA (WPUSA), an offshoot of the Santa Clara County Central Labor Council, has developed a multipronged strategy to address the situation for temporary workers:

- 1: Research the nature of temporary work, its integral role in the new economy, and the negative effect on workers;
- 2: WPUSA devised a Membership Association that provides a space for workers to organize, to access training and affordable health benefits. Training is particularly important to temporary workers for two reasons. First, employers that offer access to training on-site would not make it available to temporary workers; second, training through the membership association provides a way to show that they have recognizable skills—when training results in a certificate, workers can advocate for higher wages based on their increased skill set.
- 3: Devise and advocate for a Code of Conduct that provides standards for basic employment conditions such as a living wage and access to affordable and portable health benefits; this strategy grew from the context in which we recognized that temporary workers initially could not legally organize into a collective bargaining unit. WPUSA and its members presented the Code of Conduct to the Santa Clara County Board of Supervisors in December of 2001 to adopt and implement for county workers and the temporary agencies they contract with;
- 4: WPUSA developed its own professional staffing service, both to exemplify the capacity of a business model to succeed taking the high road, and also to raise the bar and provide a competitor that could attract temporary workers and put pressure on other low-road agencies to improve conditions.

— Bob Brownstein Working Partnerships USA

tive bargaining rights to nonsupervisory workers in non-governmental, nonagricultural employment.¹⁴ In some instances, workers are characterized as “independent contractors” who are not “employees” and therefore are not entitled to NLRA protections. Where workers are “employees,” the larger entity may claim, too often successfully, that it is not the “employer” and that the contractor is the sole employer. Even when both the larger company and the labor contractor (or temp agency) are considered to be employers of the workers, the National Labor Relations Board (NLRB) has not always made both entities legally responsible for the illegal conduct. Recently, however, the NLRB has issued some decisions that may make it easier to hold the worksite employer responsible.¹⁵

Subcontracting can quickly become prevalent even when some employees would prefer to remain in standard employment relationships. When one business succeeds in reducing its labor costs by using subcontracted labor, competing companies can feel pressured to do the same and workers at such companies can be negatively affected.

New Reform Strategies

In attempting to improve subcontracted employees’ wages and working conditions, a great deal can be learned from comparing strategies across industries and from earlier efforts to reform “sweatshops.” In general, these strategies involve changing the law, improving enforcement of the law, and organizing workers to improve conditions beyond what the law requires. The effectiveness of each strategy is maximized to the extent that both the primary employer and the subcontractor are held accountable for wages and working conditions. With the spread of subcontracting into more industries, there is an opportunity to gain strength from multisector coalition-building. In addition, advocates and organizers must build strong public support for defending the rights of subcontracted workers.

1. Reviving Existing Laws

More than a century ago, policymakers and reformers sought to control the worst aspects of labor subcontracting by regulating it. Garment contractors were required to register for a license and comply with state public health and child labor laws. Manufacturers in some states were ordered to keep records of the contractors used and to cease using contractors that subjected workers to

sweatshop conditions. A century later, the federal Farm Labor Contractor Registration Act of 1963 and its replacement, the Migrant and Seasonal Agricultural Worker Protection Act of 1983 [29 U.S.C. § 1800], extended a similar scheme to sweatshops in the fields. In recent years, states once again have sought to regulate garment contractors with bonding and registration requirements. Other state regulations include licensing, testing, disclosures to workers, and civil and criminal penalties for labor contractors that violate the law. For the most part, such systems have been recognized as inadequate and, at best, as only one part of the solution. When one labor contractor is put out of business for mistreating workers, another contractor steps into its place and is subject to the same economic pressures from the contracting business that caused the problems in the first instance.¹⁶

One approach to the problem of imposing legal responsibility on the larger companies that use labor contractors has been to utilize a broad definition of employment relationships. A broad definition of who is an “employer” and who is an “employee” can help reduce misclassification of workers as “independent contractors.” It also can help create “joint employer” status and joint liability for the larger company and the labor contractor. Once the larger company perceives a risk of liability, it will often encourage the labor contractors to comply with minimum wage, overtime, and other legal requirements. Broad definitions of employment status also protect businesses from unfair competition by companies that hope to cut their labor costs by using labor contractors whose low bids are based on their substandard wages and working conditions.

Workers have a better chance to establish joint employer status under the Fair Labor Standards Act, the Agricultural Worker Protection Act, the Family and Medical Leave Act, and the Equal Pay Act because they use a broad definition of employment in applying these laws—the “suffer or permit to work” test.

Examples of legislation taking a broad approach to employer status include the Fair Labor Standards Act, which establishes the minimum wage, overtime pay requirements, child labor restrictions, the Migrant and Seasonal Agricultural Worker Protection Act, the Equal Pay Act, the Family and Medical Leave Act, and state child

labor laws. Unfortunately, because courts in recent years have not always recognized and clearly stated the striking breadth of this standard (and because penalties for violations are low), many employers choose to litigate these issues to the detriment of workers with few resources. Some inroads have been made in enforcement actions in the agriculture and garment industries, where workers have successfully established that both the contracting business and the labor intermediary are their employers and owe them wages and other workplace protections.¹⁷

Many state and federal laws use the traditional common-law standard to define an employment relationship, which is quite restrictive. Under the common law of master and servant or agency, a business does not “employ” a worker unless it controls both the outcome of the worker’s performance and the manner in which the work is performed. When a labor contractor or temp agency pays the worker and is claimed to have the power to hire and fire, courts often conclude that the contracting company does not employ the worker. This narrow standard is applied under the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act (ERISA), the Occupational Safety and Health Act, the Social Security Act, and other laws. There have been important victories even under this standard, including by “permatemps” who successfully litigated under ERISA for fringe benefits that Microsoft had granted only to permanent “employees.” In addition, some agencies, such as the NLRB and OSHA, have used their administrative authority to incorporate a limited form of the “joint employer” concept into their interpretation of the common-law standard.¹⁸

2. State and Local Legislation and Advocacy

At the state level, creative coalitions of grassroots organizations and labor unions have taken on the challenge of changing the laws that fail to protect the subcontracted workforce.¹⁹ Several states have established commissions to evaluate application of their laws to subcontracted workers. Other states have proposed comprehensive legislation that would afford equal pay and benefits to nonstandard workers.²⁰

Some states have passed legislation affording temp workers the right to know the terms and conditions of their assignments. A few states have resurrected decades-old comprehensive legislation regulating the temp industry that had been amended in response to the temp industry’s demand for exemption. George Gonos’s paper explains the history of the temp industry’s hugely successful campaign to deregulate itself.²¹ A handful of state laws require that specific contracting sectors (namely garment and agriculture) have joint responsibility for payment of wages to the workers under certain circumstances. Comprehensive day-labor legislation has been passed in a number of states, regulating hiring halls and ensuring that workers who work on day jobs get pay and workplace protections.²²

There are other legislative mechanisms for imposing accountability on businesses that subcontract for labor. In California, UNITE and the United Farm Workers each have proposed legislation to make companies jointly liable with contractors for labor law violations, in those specific industries, regardless of whether the manufacturer or grower can be characterized as the “employer” of the contractors’ workers. The resulting legislation regulating the garment industry did not go as far as the unions wanted, but it represents an important first step.²³

The concept of a “living wage” is an old one that is being applied today. Workers performing jobs for businesses that have contracts with the federal government are entitled to the prevailing wage, usually the union wage scale, and other standards required by the Davis-Bacon Act, the Service Contract Act, and other laws. Many “living wage” ordinances are local versions of the same requirement. The government may engage a contractor and avoid employer status itself, but the implications are that it will have to pay the contractor enough to ensure a “living” (if not a government-level) wage and that it will terminate the contract if the workers do not receive the proper wage and other protections.²⁴

Make sure that legislation has strong enforcement mechanisms, in particular, the right of workers themselves to bring court cases to enforce the law. It is also possible to simply state that independent contractors are covered under certain state laws so that they are eligible for workers’ compensation or other state remedies.

More resources are needed for public and private enforcement of existing legal obligations. In addition, law reform is needed to promote greater accountability among businesses that use labor intermediaries. For some businesses, accountability for labor standards will remove the incentive to use labor contractors and will lead to treating both the labor contractor and the workers as the firm's employees. Where contractors are used, the larger companies would be more likely to train contractors and monitor their labor practices and pay enough for the contractors to comply with the law. These would be modest, but important, improvements for working people. Federal and state departments of labor develop their own enforcement plans and interpretations of the legislation. Advocates need to press government agencies to recognize the importance of bringing cases that establish joint employers status and responsibilities when labor law violations occur. When government officials adopt interpretations that do not implement the legislative intent of the law, advocates may need to bring lawsuits against governments to force agencies to implement the law properly.

3. Labor and Community Organizing

What works in combating subcontracting in one industry will quite likely be effective in another. For instance, there is a history of multiparty collective bargaining in both agriculture and the garment industry. In the temp and day labor industries, nonprofit intermediaries have been established to give workers an alternative to exploitative agencies. Industry-wide organizing has been extremely effective in organizing janitors and is now being used in the poultry industry. Code-of-conduct campaigns are being used to raise standards in both the temp industry and the garment industry. Across the board, advocates for subcontracted workers have used media campaigns to educate the public and enlist the support of a broad range of allies. And the AFL-CIO has joined with immigrant workers in demanding legalization for undocumented workers and an end to dysfunctional employer sanctions under immigration rules.

Temporary Workers

From 1990 until the NLRB's decision in *Sturgis* in September 2000, it was nearly impossible for temporary

workers to join the union at their worksite. *Sturgis* eliminated the requirement that temporary workers obtain the consent of both employers (the temp agency and its customer) in order to join a worksite bargaining unit. The decision means that temporary workers assigned to one company can now unite in the same bargaining unit with permanent employees to fight for better pay and benefits, provided that they can demonstrate that they share a "community of interest."

Another approach to improving working conditions for temp workers is to create a nonprofit temp agency so that workers have an alternative to exploitative for-profit agencies. Working Partnerships USA, an offshoot of the Santa Clara County Central Labor Council, has pursued this route. It provides health insurance and career training for the workers it places. This is in part a return to the "hiring hall," which was used so successfully by AFL craft unions at the turn of the century and is still used by building trades unions today.

Historically, voluntary codes of conduct have been used to push businesses to do the right thing. One hundred years ago, the New York Consumers' League allowed manufacturers to insert a special label in their garments if they complied with certain standards, one of which was that the garments were produced by the company's employees in a factory, not by contracted sweat shops. Recently, campaigns in the temporary help and garment industries have generated public awareness about the misuse of subcontracting. The North American Alliance for Fair Employment (NAFFE) has developed a "Temporary Industry Code of Conduct," based on codes that organizing groups around the country have pressured temp agencies to sign. These codes can create reasonable wage floors, provide for benefits, and commit agencies to taking a neutral stance in organizing drives. The problem with these codes is that it can be difficult to enforce them.

The Task Force on Temporary Work in New Jersey has developed a variation on the code of conduct campaign. It issued a "Consumer Guide to 'Best Practices' Temp Agencies" based on agencies' responses to a questionnaire about their employment practices and verification that there are no unresolved complaints filed with government agencies.

Day Laborers

Substantial efforts have been made to ameliorate the serious problems faced by day laborers. The media has focused attention on the immigrant workers who gather at a local 7-11 convenience store or a parking lot, waiting for small housing contractors, landscapers, farm labor contractors, or individual homeowners to drive up and hire them for a few hours at a relatively low wage rate, with few questions asked. The papers in our report, however, reveal a far more complex system.

In many cases, day laborers are hired by established contractors to perform construction, roofing, or other work that would ordinarily be expected to offer decent wages, safe conditions, and more steady employment. In these settings, the workers usually are paid “off the books,” with no money set aside for Social Security or unemployment insurance, and some are not paid what the law requires. Such informality can be disastrous when workers suffer serious injuries on the job, causing income loss and medical bills, but are not being covered by workers’ compensation.

While some day laborers are hired directly off street corners, more and more are hired through labor pools. These labor pools range from small neighborhood operations to multi-billion dollar corporations, such as Labor Ready. In response, day laborer projects have established organized centers to provide workers with legal and other assistance.

These centers, which have been established in a number of cities and towns, can take two forms: workers centers or nonprofit day labor pools. Workers centers help day laborers defend their employment rights and, in some cases, provide a safe, harassment-free environment in which day laborers can find work so that they do not have to wait on street corners. Workers centers that organize day laborers include the Workplace Project in Hempstead, NY, the Day Labor Project of the Chicago Coalition for the Homeless, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), Casa de Maryland in suburban Washington, DC, and CASA Latina’s Day-Workers Center in Seattle.²⁵ In contrast, nonprofit day labor pools, such as Primavera Services in Tucson, serve as the employer of the day laborers, thereby providing a positive alternative to

exploitative day labor firms. The workers center model is more prevalent in immigrant communities, while the nonprofit model is more geared towards serving the needs of American-born homeless workers with multiple barriers to employment. Among other things, these groups have been successful in recovering unpaid wages and eliminating unreasonable deductions from workers’ paychecks for transportation and equipment. Obstacles for the day laborer projects include severe community pressure, often expressed through zoning ordinance disputes and complaints about the presence of undocumented workers in public places. In November 1999, a National Day Labor Organizing Network was established.

Organized labor is taking on the fight against the corporate day labor pools’ unscrupulous practices. Labor Ready has repeatedly provided strike replacement workers, engaged in workers’ compensation fraud, and made workers pay unreasonable ATM fees in order to collect their daily wages. In response, the Building and Construction Trades Department (BCTD) of the AFL-CIO has launched a nationwide corporate campaign.

Garment Workers

The garment industry, which was featured in Jacob Riis’s exposé *How the Other Half Lives* (1890), gained early notoriety for abuses associated with the use of “the middleman, the sub-contractor,” also known as the “sweater” because he “sweated” his profit out of the workers. In many ways, we are engaged in the same struggles today as the garment workers of a century ago.

The garment industry is exempt from the National Labor Relations Act’s ban on secondary boycotts. All unions can negotiate with the employer over contracting out work, but in the garment industry, it is also permissible to restrict outsourcing to only unionized firms.

In the recent past, garment manufacturers have been held responsible for wages owed by their contractors. When Lucky Sewing, a contractor for Jessica McClintock, declared bankruptcy while owing 12 garment workers over \$15,000 in back wages, Asian Immigrant Women Advocates (AIWA) in Oakland, CA, decided to hold

McClintock, Inc. responsible. They launched the Garment Workers Justice Campaign by writing a public letter to Jessica McClintock in September 1992, requesting that she pay the workers their back wages and give them a new, two-year contract to continue sewing for McClintock, Inc. AIWA also appealed directly to a middle-class constituency through an advertising campaign.

After several years, McClintock agreed to AIWA's demands. McClintock agreed to pay each worker \$10,000, fund an organization and hotline to help garment workers, and use only fully bonded contractors. In addition, Alameda County, Berkeley, and Oakland unanimously passed resolutions supporting the campaign and set up task forces to investigate working conditions in the garment industry.

Anti-sweatshop campaigns across the country have benefited greatly from student-led groups on many large campuses. Meanwhile, efforts by the Clinton White House to encourage an international code of conduct in the garment industry generated controversy because the compromises necessary to gain support of government agencies and private companies were too extreme for many labor and community groups. The American garment and textile workers union, UNITE, has recently begun to develop bilateral relationships with garment unions in Southeast Asia in an effort to deal more effectively with multinational garment corporations. Global consumer campaigns have focused on exacting accountability for labor conditions in contracting shops from the manufacturers and retailers. The combination of union organizing and consumer pressure recently led to the organizing success of a group of Mexican workers, where university administrators and students prevailed upon Nike to persuade its contractor to rehire workers who had been fired for protesting spoiled cafeteria food. As a result, the workers were able to form an independent union with a new collective bargaining agreement.

Janitorial

In its sixteen-year history, the SEIU's Justice for Janitors campaign has organized tens of thousands of office-cleaners in major cities throughout the country, using an industry-wide, community-based strategy. The challenge in organizing contract janitors is to find a way to

prevent the building owners from replacing a recently organized contractor with a less expensive, unorganized contractor. The Justice for Janitors campaign has developed a two-pronged solution: 1) raise wages across the industry all at once, and 2) involve building owners and property managers in the process. Abandoning an exclusive focus on individual worksites, organizers sought out workers and supporters in neighborhoods, community organizations, churches, and soccer leagues. The outpouring of support from working people, community and religious leaders, consumers, and small businesses was crucial to the success of the campaign. In addition, SEIU found ways to hold building owners publicly accountable for their contractors' low wages and poor working conditions. While workers engaged in demonstrations, street theater, vigils, and hunger strikes, SEIU contacted shareholders, tenants, boards of directors, and lenders to get them to encourage building owners to hire responsible contractors.

In building coalitions, reach out beyond the usual suspects to organizations that have a common interest, but are not usually associated with workers' rights.

High-Tech and White-Collar Workers

The problems confronting high-tech workers have changed in recent years. Prior to the late 1970s, information workers could expect a permanent relationship with their employer with union-negotiated benefits (or generous benefits paid to deter union organizing). When the information industry first started contracting out, workers were often hired as independent contractors. While this entailed the loss of health care, pension coverage, and the employer's share of payroll taxes, the worker usually gained a higher hourly wage and additional tax deductions.

In the 1990s, the IRS started to more aggressively investigate the misclassification of workers as independent contractors. The United States Department of Labor's lawsuit against Time Warner is one example.²⁶ The industry responded by compelling those who had previously been independent contractors to work through third-party "payroll" agencies. This time, the impact on the workers was far worse. These subcontracted workers lost the ability to negotiate their wages directly with the primary employer. Moreover, their hourly wage, after subtracting the payroll company's "markup," was reduced below that of regular

employees. In general, subcontracted high-tech workers do not have any healthcare or pension coverage, and they no longer have the tax advantages of independent contractors. This is the world of “permatemps.”

While high-tech workers are better off than most other temp workers, most high-tech subcontracted workers earn significantly less than permanent employees doing the same work. Microsoft permatemps struck a blow against this disparate treatment in a class action lawsuit in which Donna Vizcaino was the named plaintiff. In its third review of the facts, the 9th Circuit Court of Appeals ruled that Microsoft could be considered a joint employer of workers hired through contracting agencies.²⁷ This ruling has opened the door for permatemps to recover the pension benefits they have been denied.

In 1998, a group of Microsoft permatemps formed WashTech/CWA to organize high-tech workers in new and innovative ways. While WashTech has devoted much of its attention to Microsoft permatemps, it is also organizing at other Seattle-based, high-tech companies, and its membership includes independent contractors and full-time regular employees.²⁸

4. Research and Education

More research is needed for a variety of reasons. Worker advocates cannot be helpful if they do not understand both the industry practices and workers’ problems. Research helps to identify subcontracting abuses and potential solutions. Research can also help provide important data to buttress worker claims that contingent jobs are not on a par with regular, full-time, permanent jobs. The Department of Labor (DOL) recently has collected data on minimum wage and overtime compliance in the poultry and garment industries as well as minimum wage compliance in some fruit and vegetable industries (where overtime is not applicable). The findings of high levels of non-compliance and recidivism among violators, especially where labor contractors are present, show that extensive efforts by DOL to educate employers about their obligations are not enough. Such studies also can help to blunt political attacks by politicians who might oppose appropriating more resources for labor law enforcement as heavy-handed government interference with private enterprise.

To better inform organizers, strategic research should be conducted to assist specific organizing campaigns, including cataloguing the successes and failures of groups organizing for change. In addition to organizers needing education, subcontracted workers themselves need to know that they have options. Frequently, they feel isolated and lack information about their rights on the job, resources to enforce those rights, and information about efforts by other contingent workers to improve conditions. Researchers can evaluate situations and propose specific solutions.

5. International Work

The increasingly global nature of the economy has several effects. Some manufacturers claim that they must subcontract in the United States to remain competitive with goods produced more cheaply in developing nations. Some companies argue that if they do not subcontract in the U.S., they will have to subcontract with factories abroad. In addition, many subcontracted workers are recent immigrants, both documented and undocumented, or guest workers. Many employers now rely on labor contractors to conduct international recruitment and transportation networks to supply them with a constant flow of new job applicants.²⁹

Business operations at the global level necessitate international labor organizing and coalition-building, meaningful international labor standards, and effective enforcement using both private and governmental mechanisms. Although weak and limited, such international efforts and standards do exist. RUGMARK, consumer boycotts, maquiladora organizing (i.e. focusing on treatment of workers known to be producing goods to be sold in the United States), cross-border organizing, and international solidarity efforts among labor unions are just some of the examples of international organizing and cooperation by worker advocates.

Use of international law to protect workers inside the United States is challenging, but it is growing and should be expanded. Human Rights Watch recently issued an important report that could serve as a major precedent, “Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards” (2000).³⁰ An international group of advocates

seeking to protect orchard and warehouse workers in Washington State and promote union organizing have filed a case under the North American Agreement on Labor Cooperation (NAALC), NAFTA's "labor side agreement," which obligates the United States, Mexico and Canada to enforce their own labor laws. In addition, Mexico has used the NAALC machinery to seek an investigation into the treatment of Mexican citizens working at a large egg production facility in Maine. There are also efforts in Congress to incorporate respect for basic labor standards in future international trade agreements, as well as a heightened role for the International Labor Organization of the United Nations. As international labor standards and organizing expand, worker advocates must continue these efforts to minimize abuses associated with labor subcontracting.

6. Immigrant Workers

Employers often prefer undocumented workers and guest workers because they are so vulnerable. Most guest workers are hired through labor contractors and employer associations. Such workers have no political power since they have no right to vote and no immediate prospect of becoming a citizen who could vote. They have no economic bargaining power since they may only work for the employer that obtained the visa for them and must return to their homeland when the job ends. The workers know that the labor contractors and employer associations will not request a visa for them in the following season if they "cause trouble" by seeking to enforce their rights or asking for better wages and working conditions. U.S. workers soon learn that there is no point in even trying to get a job at an H-2A employer because employers prefer guest workers over workers with options. Under the H-2A and H-2B guest worker programs, there is little political will at the Department of Labor for enforcing even the modest labor protections that do exist. Guest workers who refuse to accept the status quo and quit their jobs become undocumented workers. Undocumented workers, who do not even have the legal status of guest workers, may risk deportation if they come forward and complain.

The AFL-CIO's recent policy statements on immigration reflect the recognition that workers who have no meaningful legal status in this country cannot adequately protect themselves from abusive employment practices and may be too fearful of retaliation to cooperate with labor unions,

government agencies, legal services and others attempting to help them enforce their rights. In addition, supposed "employer sanctions" under U.S. immigration law have not stopped the hiring of undocumented workers, but have enabled some employers to respond to union organizing by threatening to seek INS enforcement. Thus, labor unions should organize immigrant workers, and immigrant workers should be granted a status that minimizes their vulnerability to exploitation. Immigration programs are to be preferred over guest worker programs because they free workers from dependence on an individual employer and the threat of withdrawal of the worker's visa.

Edited extract of *From Orchards to the Internet: Confronting Contingent Work Abuse*. This report is based on the Subcontracted Worker Initiative Strategy Forums, the result of a partnership of the National Employment Law Project (NELP) and the Farmworker Justice Fund, Inc. (FJF). The directors of the SWI are Catherine Ruckelshaus, the Litigation Director at the National Employment Law Project, and Bruce Goldstein, Co-Executive Director at the Farmworker Justice Fund, Inc.

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NOTES

¹ Bruce Goldstein and Catherine Ruckelshaus, "Lessons for Reforming 21st Century Labor Subcontracting: How 19th Century Reformers Attacked 'The Sweating System,'" <<http://www.nelp.org/swi>>.

² Examples of literature describing the growth of organizational subcontracting and reconfiguration in the legal, political, and economic press abound. See, e.g., Anne Kalleberg, Edie Rasell, et al., *Nonstandard Work, Substandard Jobs; Flexible Work Arrangements in the U.S.* (Washington, D.C.: Economic Policy Institute, 1997); U.S. General Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce* (June 2000).

³ Dunlop Commission, *Commission on the Future of Labor-Management Relations: Final Report* (Washington, DC: U.S. Dept. of Labor, 2001).

⁴ See, for example, Eric Schlosser, *Fast Food Nation*, Houghton Mifflin (2001).

⁵ Max Zimny and Brent Garren, "Protecting the Contingent Workforce: Lessons from the Women's Garment Industry," paper presented at SWI Forums and available at <<http://www.nelp.org/swi>>.

⁶ Bureau of Labor Statistics, "MLR: The Editor's Desk," *Monthly Labor Review* (12/2299).

⁷ National Alliance for Fair Employment (NAFFE), "Contingent Workers Fight for Fairness," Dec. 13, 2001 <<http://www.fairjobs.org/report/poll.php>>.

⁸ Rachel Silverman, "Short Stay: For Foreign Workers Here on Special Visas, Tech Bust Hits Hard," *Wall Street Journal*, Jun. 21, 2001: A1.

⁹ See NAFFE Web site at <<http://www.fairjobs.org>>.

¹⁰ E.g., *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

¹¹ See van Jaarsveld and Adler, *op. cit.*.

¹² See “Outsourcing in the Hotel and Restaurant Industry,” pp. 4-6, available at <<http://www.nelp.org/swi>>.

¹³ Rachael Cobb’s “Background Memo: Unionizing the Home Care Workers of Los Angeles County,” at <<http://www.nelp.org/swi>>.

¹⁴ Goldstein, Ruckelshaus, Norton, and Garren, “Subcontracting: the Legal Framework,” available at <<http://www.nelp.org/swi>>.

¹⁵ M.B. Sturgis, 331 NLRB No. 173 (Aug. 25, 2000).

¹⁶ Goldstein, Ruckelshaus, Norton, and Garren, “Subcontracting: the Legal Framework,” pp. 6-9 and at <<http://www.nelp.org/swi>>; *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998), *Antenor v. D&S Farms*, 88 F. 3d 925 (11th Cir. 1996).

¹⁷ *Sam Hall + Sons, Inc.*, 8 OSHSAs. (BNA) 2176 (1980).

¹⁸ *Bultman Enterprises, Inc.*, 332 NLRB 445 (Sept. 25, 2000), *M.B. Sturgis*, 331 NLRB No. 173 (Aug. 25, 2000).

¹⁹ Many of these groups have formed a new national network, the National Alliance for Fair Employment (NAFFE). NAFFE’s Web site is <<http://www.fairjobs.org>>.

²⁰ For a comprehensive survey of model state and local laws covering nonstandard workers, see, Emsellem and Ruckelshaus, “Workplace Equity for ‘Nonstandard’ Workers: Grassroots Organizers Campaign for Model State Legislation,” NELP Nov. 2000 at <<http://www.nelp.org/swi>>.

²¹ George Gonos, “‘Never a Fee!’ The Miracle of the Postmodern Temporary Help and Staffing Agency,” *Working USA*, Vol. 4, No. 3, Winter 2000-01: 9.

²² See NELP, “Drafting Day Labor Legislation: A Guide for Organizers and Advocates,” Apr. 2001 <<http://www.nelp.org/swi>>.

²³ Katie Quan, “Legislating Sweatshop Accountability,” (Berkeley, CA: U. of California); available at <<http://www.nelp.org/swi>>.

²⁴ Janice Fine, “Community Unionism in Baltimore and Stamford,” *Working USA*, Vol. 4, No. 3, :59-70.

²⁵ See Arthur Rosenberg’s “Manual Day Labor in the United States” in this report and at <<http://www.nelp.org/swi>>.

²⁶ “Time Warner fixed in Employee Benefits Case,” *N.Y. Times* (10/27/98).

²⁷ See *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999).

²⁸ See “A Discussion of Organizing and Legal Strategies in a High Technology Environment: The Microsoft-WashTech/CWA Case” by Danielle D. van Jaarsveld and Lee H. Adler presented at SWI Forums and available at <<http://www.nelp.org/swi>>.

²⁹ On Dec. 19, 2001, the U.S. government indicted Tyson Foods, Inc., the world’s largest poultry processor, for conspiracy to smuggle undocumented workers into the U.S. Jan. 8, 2002, <<http://news.findlaw.com/cnn/docs/tysonfoods/ustyson1201ind.pdf>>

³⁰ Human Rights Watch, “Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards” (2000), available online at <<http://www.hrw.org>>.

