WHO'S THE BOSS:

Restoring Accountability for Labor Standards in Outsourced Work

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ABOUT NELP

For 45 years, the National Employment Law Project has sought to ensure that work is an anchor of economic security and a ladder of opportunity for all working families. In partnership with national, state, and local allies, NELP promotes policies and programs that create good jobs, strengthen upward mobility, enforce hard-won workplace rights, and help unemployed workers regain their economic footing. To learn more about NELP, visit **www.nelp.org.**

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EXECUTIVE SUMMARY

Business outsourcing is on the rise, through practices such as multi-layered contracting, use of staffing or temp firms, franchising, misclassifying employees as independent contractors, and other means. The label on a worker's uniform and the brand on the outside of the establishment where the work occurs may not match the business name on the paycheck or the company that recruits and hires that same worker. Lead companies that outsource distance themselves from the labor-intensive parts of their businesses and their responsibilities for those workers. While some of these outsourcing practices reflect more efficient ways of producing goods and services, others are the result of explicit employer strategies to evade labor laws and worker benefits. This restructuring of employment arrangements may well foreshadow a future of work different from the employer-employee paradigm around which many of our labor standards were constructed, but it should not spell the end of living wage jobs or business responsibility for work and workers.

This report describes some of the organizational shifts in the way businesses operate, profiles some of the leading lower-wage service sectors where these outsourced structures have taken hold, and describes how these changes can result in poor working conditions and a lack of corporate responsibility.

Anecdotal evidence suggests that the ambiguous legal status of many workers in contracted jobs is one of the central factors driving lower wages and poor working conditions in our economy today.

- Median hourly wages for workers in janitorial, fast food, home care, and food service, all sectors characterized by extensive contracting and franchising, are $10 or less;
- Once outsourced, workers' wages suffer as compared to their non-contracted peers, ranging from a 7 percent dip in janitorial wages, to 30 percent in port trucking, to 40 percent in agriculture; food service workers' wages fell by $6 an hour;
- These same sectors see routine incidences of wage theft, with 25 percent of workers reporting minimum wage violations, and more than 70 percent of workers not paid overtime; and
- Construction, agriculture, warehouse, fast food, and home care workers suffer increased job accidents compared with workers in other sectors.

Conscientious employers are harmed, too, as they are unable to compete with lower-bidding companies reaping the benefits of rock-bottom labor costs. Local economies and the

public lose out when paychecks shrink, taxpayer-funded benefits subsidize the low wages, and employers skirt payroll and other workplace insurance payments.

Negative consequences of outsourcing can be mitigated somewhat through rigorous enforcement of existing federal and state laws to hold more entities accountable for degraded conditions under the broadly-defined workplace "joint employer."

In addition, there are promising models in the states:

- More than 30 states create a presumption in their laws that work creates an employment relationship with attendant rights and responsibilities;
- Illinois, Massachusetts, California, and other states hold lead companies jointly accountable along with contractors, including staffing firms, in certain industries;
- California requires responsible contracting in selected outsourced sectors; and
- Worker advocates have negotiated innovative private codes of conduct to broaden responsibility for supply-chain working conditions.

While these approaches are promising, more needs to be done. The United States should follow other countries and re-regulate staffing arrangements, making both parties responsible for working conditions and, in some cases, prohibiting outsourcing where accountability is not possible. In addition, a small but growing number of worker advocates are bringing these practices to light and devising innovative campaigns to hold more firms accountable for the workers in their realm, especially in low-wage industries.

The report concludes with a recommendation for a new and broader legal and policy framework that creates responsibility for working conditions down the domestic supply chain and in myriad contracting structures. Under the framework, any subset of business players or creators of supply chains and outsourced arrangements that can impact the working conditions in those arrangements because they are still controlling key aspects of the business operations would be held responsible for the labor conditions. By moving away from existing, more-limited employer liability paradigms under labor and employment laws, this policy frame better responds to the constellation of employment arrangements typifying many business operations today, aligns accountability with the capacity to know of and control the operations around work, and thereby creates a better chance that labor standards and protections will hold.

I. INTRODUCTION

Our economy is in the midst of a major restructuring in the way business operates, particularly in fast-growing service industries. Whether the result of contingent work structures, outsourcing to contractors, the misclassification of employees as independent contractors, individual franchising, or other strategies, increasingly the businesses that individuals "work for" are not the ones they are "employed by"—a distinction that can hamper organizing, erode labor standards, and dilute accountability.

These organizational changes are an important part of the story of the "future of work" and have greatly contributed to the degradation of jobs and attendant income inequality in many sectors.

Some of these arrangements—broadly termed "outsourcing" (see box below for related terms)—truly reflect efficient ways of producing goods and services, while others represent explicit attempts by employers to evade their legal obligations to workers. But all challenge nearly century-old workplace policies built around direct, bilateral employment relationships, and many discourage companies from taking responsibility for workplace problems. In outsourcing work, all too often companies outsource responsibility as well—and by design or effect, create poor-quality jobs and undermine businesses trying to do right by their workers and the economy overall.

This report illuminates the scope and characteristics of companies' decisions to outsource or use related structures in a variety of high-growth and lower-wage sectors that result in poor working conditions, with no accountability on the part of those companies. It describes how this lack of responsibility in the face of complex supply chains, multi-tiered business arrangements, and inaccurate job labels harms workers, law-abiding employers, and the economy overall. It details the culture of non-compliance that has emerged in many of our economy's largest and fastest-growing sectors, as firms encourage intense low-bid competition by subcontractors, evade unions, and skirt baseline labor and employment standards.

Finally, the report chronicles policy responses to the problems under existing and new models, assessing successes and lessons learned, and proposes a new framework to encourage and require more accountability from those in a position to ensure fair working conditions.

Myriad Forms and Evasions

The new forms of work arrangements and production can reflect legitimate structural change and a response to heightened competitive pressures. Employers appropriately contract every day with independent businesses for specialty jobs that those businesses also perform for a variety of other customers. These independent businesses invest capital in their firm and bring technical skills. Lead companies cede control to them as specialists. These arrangements are not the focus of this report.

Other companies outsource work to separate middlemen entities, sometimes creating multi-tiered supply chains with complex structures, as Walmart and other big-box retailers have done. Others insert temporary, staffing, or leasing firms to "payroll" their existing staff, who then become the "employees" of that staffing firm, as many warehousing and light

Table 1: **Outsourced Workers - Related Terminology**

Agency temporary workers (temps)	*Individuals who work for temporary employment agencies and are assigned by the agencies to work for other companies ("client firms"), such as temporary workers supplied to companies to fill in for full-time workers who are on vacation or to work on special projects.*
Contract company workers	*Individuals who work for companies that provide services to other firms under contract, such as security, landscaping, or computer programming services.*
Day laborers	*Individuals who get work by waiting at a place where employers pick up people to work for the day, such as construction workers.*
Direct-hire temps	*Temporary workers hired directly by companies to work for a specified period of time, such as seasonal workers and workers hired to work on special projects.*
Independent Contractors	*Individuals who obtain customers on their own to provide a product or service (and who may have other employees working for them), such as realtors and management consultants.*

Source: Adapted from Government Accountability Office, 2006.

manufacturing companies do. Still others create nominal businesses by requiring their workers to be independent contractors, limited liability corporations (LLC), and even individual franchisees as a condition of getting a job, as janitorial, delivery, construction, and port trucking companies do. These practices are the target of this report.

These reconfigurations can create confusion on the part of workers and enforcement agencies; inserting a temporary, staffing, or other labor broker between employees and the firm can enable a lead company to claim that the direct contractor is the workers' sole employer. Workers who sign "independent contractor" or "franchise" agreements as a condition of getting a job are led to believe that they have no rights to workplace protections, and companies that pay off-the-books can be difficult to track down.

Classic definitions of employment under applicable workplace protection laws do not capture enough of these often-convoluted structures, and allow companies to evade responsibility for workers who historically were considered to be in the businesses' domain. Outsourced workers can lose out on protections under core wage and hour, discrimination, and health and safety laws. They may have no safety-net compensation for on-the-job injuries or layoffs. They may lose access to career ladders, health care coverage, and retirement benefits available to direct employees.[1] Many of the workers in these jobs are immigrants who are afraid to come forward to complain of unfair treatment. And unfortunately, there is a close correlation between contracted occupations and those with the highest numbers of workplace violations.[2]

These arrangements can mean that workers and our economy lose out on the growth and opportunity that come from better jobs. And law-abiding employers cannot compete with companies that use these structures to evade responsibility for the jobs in their overall businesses.

Restoring Employer Responsibility

Baseline workplace protections remain an essential bulwark against degraded jobs and the resulting economic distress for workers, families, and communities. The starting point for ensuring accountability for meeting these core labor standards is robust and strategic enforcement of existing broadly-defined labor laws. There is much that can and should be done using these tools, including holding more entities and individuals responsible as "joint employers" and applying state laws that create a presumption of employment status for workers in these altered employment arrangements. State-level "responsible contractor" provisions can also bring enhanced accountability and create strong incentives for companies to outsource responsibly.

In addition, this report proposes a new frame-work, in which a broader subset of the players and creators implicated by these myriad layers and forms of employment arrangements are explicitly responsible for their workers. This would include those entities that are in a position to ensure compliance with labor standards because they know of work being performed in and can exercise operational control over their business, broadly defined. This more expansive reach would capture some but not all entities in a supply chain and hold them responsible for workplace violations in the chain.

This framework moves away more purposefully from the more-limited employer responsibility paradigms in labor and employment regulation, instead creating more entities bound to care about what happens in the workplaces in their realm of control.

II.OUTSOURCING, CONTRACTING, AND BEYOND: AN OVERVIEW

A. Types of Structures

Companies that outsource use a variety of structures to do so, depending on the employer and the industry. There are numerous variations to these basic arrangements, with individual iterations mattering for purposes of what individual or entity should be responsible. We highlight here some paradigmatic structures to illustrate our reform prescriptions.

The simplest outsourcing models are those that entail only a firm-to-worker engagement, with an employer converting all of its employees to "independent contractors," or requiring applicants to sign agreements purporting to make them "independent contractors," "franchisees," or limited liability corporations (LLC's). (Figure 1.) The case law and literature are replete with examples of employers in construction, cable and cell tower installation, janitorial, delivery services, and port truck driving that have used this model.[3] This misclassification often occurs at the bottom of an outsourcing chain involving multiple layers of contractors between the workers and the lead company setting the terms of the arrangements.

Another widely-recognizable form of outsourcing is one in which an employer inserts an intermediary between itself and the workers and designates the intermediary as the workers' sole "employer." These intermediaries may be "labor only" temporary or staffing

Figure 1: **Independent Contractors, Franchisees and LLC's**

agencies—which oten provide workers who are anything but temporary—or specialized contractors who work within one specific industry. (Figure 2.) Examples of the latter include farm labor contractors, drywall companies, and garment "jobbers." A variant of this type of two-tiered structure is companies that franchise their businesses to another, such as in the fast-food industry. Extreme examples of this contracting can be found in some hollowed-out hotels and hospitals, where almost every segment of the business (housekeeping, catering, building services, recordkeeping, professional staffing) is outsourced to other entities, leaving a skeletal crew of direct employees.

In still other sectors, there are multiple layers of contractors, with the first-tier contractor operating as a broker that secures contracts and then contracts with a second tier of sometimes undercapitalized subcontractors. At the second tier, fierce competition means the subcontractors have little ability to comply with labor laws, but are nonetheless designated as the "employer" of the workers at the bottom of the chain. (Figure 3.)

These multi-tiered outsourcing arrangements are a simpler variant of the supply chains common in retail and garment. On one end of the chain, one or more tiers of contractors make the products for a brand, often in other countries. The brand or major retailer imposes price controls that make it next to impossible for contractors to pay workers producing goods at the bottom of the chain fairly. Then, as products move further through the chain, the retailer's tight control of prices pits bidding subcontractors against each other, creating unsafe and underpaid workplaces in warehouses, ports, and other logistics distribution centers.

Figure 2: **Staffing Agency Subcontracting**

B. Outsourced Industry Profiles

The arrangements described above are manifested in a number of large and growing sectors, with resulting harm to the working conditions; a few are highlighted in this section.

Contracting in the Janitorial Industry

The janitorial services industry generates approximately $47.2 billion in revenue per year, with revenues expected to rise in the recovery.[4] In the past two decades, companies' outsourcing of janitorial services has grown dramatically.[5] As a result, janitors who often clean restaurants, hospitals, and offices are most likely not hired directly by the facility that they clean; instead, they work for a janitorial contractor.

Under a typical model of outsourced labor in the industry, a lead company contracts with a janitorial company to provide maintenance services at the lead company's facilities. The first tier janitorial company does not directly provide cleaning services, and instead hires second-tier subcontractors to provide cleaning services at a lower price. The second-tier subcontractors provide the janitors to clean facilities. Second-tier subcontractors are often able to make a marginal profit only by engaging in cost-saving strategies, including misclassifying janitors as independent contractors or selling "franchise" licenses to unwitting workers. Second-tier contractors save costs by evading payroll taxes, workers' compensation, and minimum wage and overtime requirements at the cost of the janitorial workers.[6] Industry analysts note that "non-employers"—those classified as independent contractors and franchises—account for 93 percent of all janitorial service companies.[7]

Figure 3: **Retail Supply Chain Subcontracting**

Violations of basic labor law protections are endemic in the janitorial industry, and job quality has decreased significantly since the emergence of these contracting and franchising models. One academic study found that janitorial workers suffered a four-to-seven percent wage penalty from 1983 to 2000 as a result of outsourcing in theindustry.[8] (Table 2.)

Franchising in the Fast-Food Industry

The franchising structure began in the 19th century after the McCormick Harvesting Machine Company and the Singer Company found that wholesalers neither wanted to distribute nor repair their products. To address this void, the companies built a network of independent agents to be the exclusive sellers of their products.[14] In the mid-20th century, Ray Kroc (the founder of McDonald's) and others began using the franchise model in the fast-food industry. Today, nearly all fast food in the United States is sold through this model.[15]

Publicly-traded fast-food companies including McDonald's, Yum!Brands, Subway, Burger King, Wendy's, Dunkin' Donuts, Dairy Queen, Little Caesars, Sonic, and Domino's are highly profitable. In 2012, these companies collectively earned $7.44 billion in profits; paid $52.7 million to their highest-paid executives; and distributed $7.7 billion in dividends and buybacks to their shareholders.[16]

Table 2: **The Janitorial Industry by the Numbers**

Number of workers in the janitorial industry:	*2,101,810*[9]
Estimated percentage in contracted work:	*37%*[10]
Demographics:	*18.4% African American;* *3.9% Asian;* *30.3% Hispanic*[11]
Median wage:	*$10.86/hour; $22,590 annual*[12]
Incidence of wage theft:	*26% minimum wage violations;* *71.2% overtime violation rates;* *72.5% off-the-clock violations*[13]

By contrast, fast-food franchisees themselves are in many cases unprofitable. A 2007 study commissioned by the brands found that franchises have a higher failure rate on Small Business Administration loans than non-franchisees. Like other contractors, franchisees can easily be replaced if their business fails.

Franchise brands typically dictate the terms of agreements with their franchisees, including charging exorbitant fees for the right to operate their businesses. Lead companies can exert significant control over the day-to-day operations of their franchisees. The franchisors can dictate how many workers are employed at an establishment, the hours they work, how they are trained, and how they answer the telephone. While the brands claim that they have no influence over wages paid to workers, they control wages by controlling every other variable in the businesses except wages.

Recent news reports say that McDonald's computers keep track of data on sales, inventory, and labor costs, calculate the labor needs of the franchisees, set and police their work schedules, track franchisee wage reviews, and track how long it takes for employees to fill every customer order.[17] Domino's Pizza tracks the delivery times of its franchisee's employees, holding them to the brand's standards.[18] McDonald's reportedly acts as a labor broker for its franchisees, via a website that screens applicants. Fast-food workers say that on occasion, McDonald's has fired employees of its franchises, exercising a right commonly associated with employer status.[19]

Fast-food workers make a median hourly wage of $8.94.[20] Two-thirds of core front-line fast-food workers are adults 20 and older, and 68 percent are the main earners in their families. More than one-quarter are raising children.[21] Compared to the overall economy, fast-food jobs are twice as likely as other jobs to pay so little that workers are forced to rely on public assistance (52 versus 25 percent).[22] In fact, the low-wage business model at the 10 largest fast-food companies in the country costs U.S. taxpayers more than $3.8 billion each year to subsidize public benefits these workers are forced to rely on to meet their basic needs.[23] In New York, 60 percent of fast-food workers say they are forced to rely on public assistance to cover basic needs.[24] (Table 3)

Even beyond the impact of low wages, fast-food workers' earnings are depressed by extensive wage theft and violations of health and safety laws. Nationally, nearly 90 percent of fast-food workers surveyed in early 2014 reported some sort of wage theft on the job.[25] One survey of fast-food workers in New York found that 30 percent of the workers had late or bounced checks, 30 percent had overtime violations, and 36 percent had off the clock violations.[26] A national study on health and safety conditions in the restaurant industry found that 95.3 percent of workers had been either cut or burned on the job; 24.5 percent came into contact with toxic chemicals on the job; 87.7 percent did not get paid sick days; and 63.6 percent cooked and served food while sick.[27]

Recently, fast-food workers have begun to highlight wages and working conditions in their industry. In March 2014, the McDonald's Corporation was sued in seven class action lawsuits filed in California, New York, and Michigan for violations of wage and hour standards, including requiring workers to work off the clock, failure to pay overtime pay for overtime work, and failure to provide workers rest and meal breaks.[28] That same month, New York Attorney General Eric Schneiderman announced two settlements of claims against McDonald's and Domino's franchisees for failing to pay proper wages. An earlier wage and hour claim brought by delivery workers was settled for $1.3 million after the Domino's corporation was added as a defendant.[29]

Contracting in the Home Care Industry

The home care industry employs two million home care workers and is both the fastest-growing sector of the American economy and one expected to add the most jobs throughout the decade.[34] While few home care employers are subcontractors in the traditional sense, jobs in this industry are characterized by an attenuation of the employment relationship with multiple entities between the funding source and the worker. Medicaid and Medicare (and other government programs) are the primary sources of funding for home care jobs and directly or indirectly set workers' pay rates, funneling funds through one or more employer entities that issue

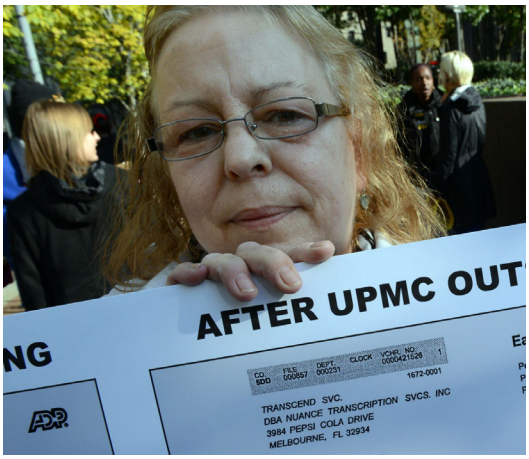
Table 3: **The Fast-Food Industry by the Numbers**

Number of workers in the fast-food industry:	*3.8 million.*[30]
Estimated percentage contracted (in franchisee stores)	*76.3% as of 2007.*[31]
Demographics:	*70% are over age 19;* *56.4% women;* *41.5% people of color.*[32]
Median wage:	*$8.94*
Incidence of wage theft:	*A recent nationwide poll of fast-food workers found that nearly 89% have been the victim of wage theft at their fast-food job, and most have experienced multiple forms of wage theft.*[33]

workers' paychecks and perform other employer functions.[35] The result is often a complex work structure, where workers in publicly-funded programs relate to two, three or more entities for different aspects of their job, including home care agencies, fiscal intermediaries, quasi-public entities, and Medicaid recipients (the clients served by the workers). In addition, the private-pay portion of the industry has seen an increase in for-profit franchises and "registries" that misclassify workers as independent contractors, and for-profit and non-profit agencies operate in the private pay and underground "gray market."[36]

Wages and worker protections in home care are almost uniformly poor. Medicaid and Medicare home care funds, already in short supply as governments seek to trim budgets, are further drained when home care agencies take their cut for overhead and profits, leaving little money for the workers. On average, agencies take about half of the hourly rate they receive from the government or families, leaving workers with median wages of under $10 an hour.[37] Many workers do not have health insurance, and over half of the personal care workforce relies on public assistance. Another cause of low wages is workers' 40-year exemption from federal minimum wage and overtime protections, which the U.S. Department of Labor recently closed through a rules change scheduled to go into effect in January 2015.[38] But violations are high even in states that have covered home care workers under wage laws, because workers fear to report violations and responsible employers are elusive. (Table 4.)

Worker Profile: **Cindy Cromie**



Cindy Cromie worked as a medical transcriptionist for UPMC Hamot in Erie, Pennsylvania for over 20 years. In May 2013, the hospital system outsourced its medical transcriptions work to Burlington, Massachusetts-based Nuance Communications. Nuance offered jobs to Cindy and 130 of her coworkers, but told them that after three months, it would convert their jobs from hourly employment to a piece rate system: workers would be paid 8 cents a line for transcribing written charts dictated by doctors, and would not be eligible for unemployment or severance pay if they rejected the offer. Cindy's first pay check at the piece-rate was 60 percent lower than the checks she received as an hourly employee, when she was paid $16.50/hour. In fact, her pay was so low that Nuance had to add $26.86 to her paycheck just to keep her at the minimum wage. Cindy was forced to quit because she could no longer make a living.

Unions have won state legislation establishing employers-of-record in several "independent provider" programs; these reforms allow workers to collectively bargain with a common state entity and have significantly boosted wages.[39] But throughout the industry, workers are plagued by involuntary part-time work on the one hand, and excessive overtime, often without the required overtime pay, on the other; nonpayment of wages for travel time between client homes, training time and nighttime work, and other off-the-clock violations; and high injury rates.

Contracting in the Food Service Industry

Food service contractors provide catering services and related food services at public institutions such as correctional, educational, and healthcare facilities, and to airports, hotels, recreation, and sports facilities. Food service contracting is growing: industry revenue is forecast to grow an average of 3.2 percent per year over the next five years, to $38.3 billion. An estimated 423,000 workers will work for food service contractors in 2014. Major players in the food service industry include Aramark, Sodexho, and Compass, which generate 90 percent of the sector's revenue.[42]

Table 4: **The Home Care Industry by the Numbers**[40]

Number of workers in the home care industry:	*2 million; of those, 630,000 estimated in Independent Provider programs*
Part-Time Workers:	*56%*
Demographics:	*32% African American;* *17% Hispanic/Latino;* *7% Other;* *44% White;* *24% Foreign-born*
Median wage:	*$9.38*
Incidence of wage theft:	*17.5% minimum wage violations;* *82.7% overtime violation rate;* *90.4% off-the-clock violations*[41]

Although food preparation and service work is one of the fastest-growing occupations in the United States, food service workers earn among the lowest wages in the country. The Bureau of Labor Statistics estimates that the median hourly wage for food service workers in 2013 was $9.15 per hour, or $19,020 per year.[43] Institutions' shift to food service contractors, moreover, often results in lower wages for workers performing the same duties as in-house employees. One study of contracted food service workers found that workers previously employed by a public school district and then employed by subcontractors experienced pay cuts as great as $4.00 to $6.00 per hour.[44] (Table 5.)

Contracting in the Warehouse and Logistics Industry

Warehouse and logistics workers play a central role in U.S. commerce, transferring imported goods from shipping containers to warehouses and reloading goods for shipment to retail stores around the country. However, recent reports show that warehouse and logistic workers face low wages, with few worker protections, as a result of outsourcing.[49]

Outsourcing has reshaped the warehouse and logistics industry with the use of "third-party logistics" (or 3PL) firms, highly integrated companies with the capacity to handle goods at several different points in a supply chain. A reported 77 percent of Fortune 500 companies use 3PL firms.[50] These third-party logistics companies, in turn, contract with staffing agencies,

Table 5: **The Food Service Industry by the Numbers**

Number of workers in the food service industry:	*11,914,590*[45]
Demographics:	*12.2% African American;* *5.7% Asian;* *24.4% Hispanic*[46]
Median wage:	*$9.15/hr, $19,020 annual*[47]
Incidence of wage theft:	*23.1% minimum wage violations;* *67.8% overtime violation rates;* *72.9% off-the-clock violations*[48]

Worker Profile: **Jose Martinez**

Jose Martinez works at the Schneider National warehouse in Mira Loma, California loading merchandise destined for Wal-Mart Stores. He supports his wife and their 3-year-old daughter on his income.

When Jose began working at the Schneider warehouse in October 2009, he was hired and paid by a temporary staffing agency called Rogers Premiere Staffing. Jose's schedule was extremely unpredictable: some days Jose and his co-workers were sent home after they reported to work, while other days they worked 16 hour days for less than minimum wage. The workers labored in extreme heat or cold depending on the season, and supervisors threatened them to not report work injuries.

In late 2011, Jose and his co-workers decided they had had enough and filed a class action lawsuit against Rogers and Schneider to for violations of wage and hour laws for illegal retaliation. They named Walmart as a defendant in 2014. The lawsuit has led to major victories. In February 2012, Schneider National eliminated the staffing agency and hired Jose and his co-workers directly. Workers now earn $15.00 per hour with full benefits and have seen improvements in their work environment. Thanks to these changes, Jose has been able to buy a home for the first time.

which hire temporary workers to unpack, load, and ship goods to retail facilities across the country.[51]

Third-party logistics firms encourage bidding wars among motor carriers and staffing firms, placing continual pressure on contractors to provide cheaper services. These lower rates are passed on in the form of decreased prices for truck drivers (who are often misclassified as independent contractors) or decreased wages for warehouse workers.[52] Workers employed at the bottom of this supply chain face deteriorated working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners. As one study of outsourced and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level; more than one in ten had reported an injury on the job, and over 40 percent had not received necessary safety equipment.[53] (Table 6.) A judge in a still-pending wage and hour class action suit against Walmart, Schneider Logistics, and several temp and staffing firms involving working conditions in California warehouses has found that Walmart and Schneider jointly employed warehouse workers, along with the direct lower-level subcontractors.[54]

Extensive outsourcing by some giant corporations, most notably Walmart, across multiple industries in their supply chains has placed labor costs in competition, driving down wages and eroding working conditions. By aggressively outsourcing many labor-intensive parts of its business to the lowest bidders,

and taking advantage of its huge size and market dominance, Walmart has engendered workers' rights violations throughout its vast network of subcontractors—from the workers who process seafood sold in its stores[55] to the warehouse workers who ferry Walmart goods from suppliers to customers.[56]

As Walmart's leadership once explained to Wall Street analysts, "The misconception is that we're in the retail business, we're in the distribution business." [57]

Outsourcing in the Agricultural Industry

Farm work has long been characterized by an employment dynamic that has now spread to many other industries. Profitable multinational interests—some involved directly in the growing of agricultural products and others that purchase these products—have for decades attempted to shed responsibility for workplace abuses by hiring farm labor contractors. The farm labor contractors are often thinly capitalized and face fierce competition for agricultural employers' business, leaving them little choice but to accept contract terms dictated by the growers. At the bottom of this chain lies an overwhelmingly immigrant workforce of some two million farmworkers, whose physically demanding jobs are

Table 6: **The Warehouse and Logistics Industry by the Numbers**[58]

Number of workers in the warehouse and logistics industry:	*3,428,800*
Median Wage:	*$11.04/hour; $22,970 annually*
Incidence of wage theft:	*25.2% minimum wage violations;* *44.3% overtime violations for packaging and warehousing;* *66.0% off the clock violations* [59]

Worker Profile: **Arold Haro**

Arold Haro has worked full-time at Taylor Farms in Tracy, California for over a year. While all food processors at Taylor have struggled with low wages, conditions are especially poor for Arold and other workers hired by SlingShot Connections, a so-called "temporary" agency, despite the fact that some workers have been employed by the agency for as long as eight years. As compared with "direct-hires", Arold and his colleagues are paid less per hour for the same work, at or barely above the minimum wage, and don't have paid time off or medical coverage. They cannot plan their lives outside of work because they never know when their shifts will end, and they don't have a fixed day off. When Arold and his co-workers joined a union organizing campaign, SlingShot and Taylor Farms told agency workers that didn't have the right to vote for a union with Taylor direct-hires, and then threatened to close the agency and fire all the workers.

After learning that there are millions of other agency workers facing the same injustice, Arold and his co-workers traveled to the state Capitol to testify about their struggle and ask elected officials to act to put an end to the abuses they face by labor subcontracting.

characterized by low wages, high accident levels, and no workplace benefits.

The share of workers subcontracted from a primary agricultural firm and employed by a farm labor contractor increased by 50 percent between the periods 1993 to 1994 and 2001 to 2002.[60] Some estimates place the number of farmworkers employed by farm labor contractors as high as 80 percent.[61] Earnings for workers employed by labor contractors are lower than those directly hired by growers. A 1993 study in California found that annual earnings for workers employed by farm labor contractors are only 60 percent of those for workers hired directly by growers.[62] (Table 7.)

For decades, farmworkers have been excluded from major labor-protective laws in the United States, including federal overtime pay and the National Labor Relations Act.[63] Minimum wage violations are a longstanding problem that can be traced to the contracting system.

Contracting in the Staffing Industry

The temporary employment and staffing industry is composed of companies that offer workers to other companies, sometimes for a limited time.[76] Workers in this industry are by definition outsourced workers, as the lead company contracts with the staffing firm for their labor. Temporary and staffing agencies provide workers for companies in a variety of

underlying industries and occupations, from business services to manufacturing and from clerical to production.[77]

The staffing industry grew sharply in the 1990s, more than doubling as a share of overall employment by 2000 to 2.9 percent, or 3.8 million jobs. In 2013, there were approximately 3.4 million jobs in the staffing sector, accounting for 2.5 percent of U.S. employment.[78] But according to the American Staffing Association, the pool may be larger: the industry says that every year a tenth of all U.S. workers finds a job through a staffing agency. [79]

While staffing industry employment still represents a relatively small share of the labor market, the sector plays an important role during recessions and recoveries, rising and falling more sharply than total employment (Table 8). During the Great Recession, for example, U.S. employment declined from peak to trough by 6 percent while staffing employment dropped by 36 percent (Table 8). Similarly, in the four years from when staffing employment hit bottom in August 2009, the sector grew by 41 percent, compared with just 6 percent overall. (Table 8.)

Staffing jobs made up similar shares of total employment changes over the Great Recession relative to the two prior recessions, when the sector's share of jobs lost was higher than the share gained (Table 9). Eleven percent of jobs gained since employment hit its low

Table 7: **The Agricultural Industry by the Numbers**

Number of workers in the agricultural industry:	*Approximately two million*[64]
Estimated percentage in contracted work	*As high as 80%*[65]
Demographics:	*76% immigrant,*[66] *more than half undocumented.*[67]
Median wage:	*$8.90 to $11.10 per hour*[68]
Incidence of wage theft:	*A 1999 DOL study found a compliance rate with the Fair Labor Standards Act and the Agricultural Worker Protect Act was between 50% and 65% for lettuce, tomato and onion growers.*[69]

Guest Worker Programs: **A Study in Outsourcing**

The federal H-2A and H-2B "guestworker" programs allow employers to hire temporary foreign workers for seasonal jobs in agriculture and other industries. In addition, recent investigations have uncovered a number of high-profile incidences of use of foreign students in the J-1 "cultural exchange" visitor program to provide cheap labor in Hershey's warehouses and McDonald's outlets, for example.[70] *Over 200,000 visas were issued in these three programs combined in 2012.*[71]

U.S. guestworker employers rely on private individuals or agencies to find and recruit workers in their home countries.[72] *Abuses by recruiters, intermediary processing agencies, and host employers, ranging from wage and hour and housing violations to human trafficking, have been well documented.*[73] *Lured with false promises of lucrative jobs and permanent U.S. residency, temporary foreign workers have signed over property deeds, dissolved life savings, and fallen into debt to pay up to $20,000 in "recruitment" fees—only to be placed in abysmal working and living conditions when they arrive in this country.*[74]

Worker organizing and litigation, including by the National Guestworker Alliance, Centro de los Derechos Migrante, and the Southern Poverty Law Center, have brought national attention to the way in which employers use the H-2B program, in particular, to obtain cheap labor to be performed by a vulnerable and exploitable workforce.[75]

point in February 2010 have been in the staffing sector. It may be too early to tell, but the strong growth of the sector along with its position among recovered jobs suggest it may hold a greater share of employment in the future.

Employers in certain occupations and industries have increased their use of temporary and staffing models, creating a shift in the types of occupations dominating the sector. In particular, the last 30 years have witnessed a transfer of temporary work from white-collar occupations, specifically office and administrative support occupations, to blue-collar occupations, like production and material-moving: in 1990, four in ten (42 percent) workers in staffing were in office and administrative support jobs, whereas in 2013, these occupations made up just 21 percent of the industry.[82] Of the 10 largest staffing firms in the United States in 2012, eight list industrial work as their largest staffing segment.[83] This is consistent with other research documenting an increasingly heavy reliance by the manufacturing industry on staffing agencies.[84]

Temporary workers typically experience lower wages, less job security, and fewer workplace benefits compared to permanent, full-time employees.[85] A 2012 UC Berkeley Labor Center study concluded that temporary workers in California, for example, are twice as likely as non-temps to live in poverty, face lower wages, and less job security. Median hourly wages for temp workers were $13.72 as compared to $19.13 for non-temps. Temp workers are also twice as likely to receive

Table 8: **Percentage Change in Total and Staffing Employment Over Last Three Recessions**[80]

	JOB LOSS (HIGH TO LOW)		JOB GROWTH (4 YEARS FROM LOW)	
RECESSION	TOTAL	STAFFING	TOTAL	STAFFING
1990	-1%	-6%	8%	67%
2000	-2%	-18%	6%	14%
2008	-6%	-36%	6%	41%

Table 9: **Staffing's Share of Total Jobs Lost and Gained Over Last Three Recessions**[81]

RECESSION	% OF JOBS LOST	% OF JOBS GAINED
1990	5%	11%
2001	13%	1%
2008	9%	11%

food stamps and be on Medicaid as other workers. The Berkeley study concludes that temporary and outsourced arrangements erode wages and working conditions for workers in those positions.[86] For temporary workers employed in manual occupations in particular, it may also mean being subject to unsafe working conditions and other abuses as host companies and temp agencies each blame the other for health and safety violations.[87]

Latinos make up 16 percent of employed workers, and African-Americans, 11 percent, but both groups are overrepresented in the staffing industry: 20 percent of workers are African-American and 20 percent are Latino.[88] They also make up relatively large shares of workers in production, transportation and material moving occupations, which make up a significant share of jobs in the sector: 22 percent of these workers are Latino and 15 percent are African-American.

Breakdowns of racial and ethnic groups by occupation tell a similar story. Employed African-American and Latino workers, especially men, are more likely than

employed White and Asian workers to be employed in production, transportation and material moving occupations. In 2013, 25 percent of Black men and 22 percent of Latino men were employed in such occupations, compared with 17 percent of White men and 13 percent of Asian men. (Table 10).

Contracting in the Port Drayage Industry

There are an estimated 75,000 port truck drivers in the United States.[92] These are the workers who transport around 250 million metric tons of imported goods worth $900 billion dollars from our ports to railheads or other logistics firms.

Prior to deregulation of the trucking industry in 1980, port trucker jobs were family sustaining, union jobs. After deregulation, new companies, mostly small and without assets, entered the industry, driving down rates and wages.[93] The companies soon turned to a new business model: they could cut costs by shifting liability to drivers, simply by calling them "independent contractors."

Approximately 80 percent of port truck drivers are now labeled "independent contractors." Of these, approximately 80 percent, or 50,000 workers, are misclassified.[94] The shift to an independent contractor model from an employee model is correlated with a 30 percent decline in wages between 1980 and 1995. Current median net annual earnings for port drayage drivers are $35,000 for those classified as employees, and $28,783 for those classified as independent contractors.[95] (Table 11.)

Table 10: **Temporary and Staffing Work by the Numbers**

Number of workers in the staffing industry:	*3.4 million (2.7 million in temporary help services)*
Estimated percentage of industry contracted	*100%*
Median Wage:	*$12.40*[89]
Incidence of wage theft:	*African Americans and Latinos over-represented in temporary industries.*[90] *Undocumented workers are also an increasing source for temporary labor.*[91]

The port trucking business model includes passing the capital costs of the business onto its workers. Trucking companies do not own their own trucks; instead, they require workers to sign contracts attesting that they are independent contractors, "leasing" themselves and their trucks back to the companies. The companies retain nearly complete control over the work: they tell the workers when, where, and how to perform the job, and require that workers render services to only one company at a time.[96]

In the past three years, workers have begun challenging their characterization as "independent contractors," with positive results. Nearly every relevant federal agency, including the U.S. Department of Labor, the Internal Revenue Service, and state agencies from Washington, New Jersey, and California, have held that port truck drivers should be properly classified as employees.[97] The California Department of Labor Standards Enforcement has assessed more than one million dollars in back wages owed to 19 misclassified port truck drivers, with more decisions on the way.[98]

Worker Profile: **Dennis Martinez**

Dennis Martinez has been a port truck driver serving the Ports of LA/Long Beach for three years, working hard every day to provide for his wife and four young children. Dennis is employed full time by Total Transportation Services Incorporated (TTSI). Though the company calls him an 'independent contractor,' he works under the same conditions as two TTSI drivers that the California Department of Labor Standards Enforcementfound to be misclassified.

Every week, regardless of how much or how little he makes, TTSI's business expenses are deducted from Dennis' paycheck. If Dennis earns less than the total of the deductions, he falls into debt with the company. "There are times when I work 6 days a week, 8-14 hours a day and bring home less than $200 for the week. It's tough when you earn that little and have to provide for the family." Although TTSI claims that its drivers are "independent," their relationship is dependent on the company. Drivers do not have a say in how much they are paid per load, or where the load must be delivered.

Table 11: **Port Truck Drivers by the Numbers**

Number of workers in the port trucking industry:	*75,000*
Estimated number misclassified	*60,000*
Median wage:	*Contractors: $11.91 Employees: $14.71*

Public Contracting

Under ever-increasing pressure to cut budgets and workers, both the federal government and the states have increased their reliance on the private sector to provide a variety of goods and services that have traditionally been supplied by the governments. Federal spending on contracts for good and services rose 150 percent in recent years, from $206 billion in 2000 to $517 billion in 2012.[99] According to the Economic Policy Institute, even before the Great Recession, federal contract workers represented 43 percent of all employees doing work for the federal government.[100] A 2008 study by the Center for American Progress found that of the 5.4 million federally-contracted service workforce, an estimated 80 percent earned below the living wage for their city or region. Four types of contracts were particularly likely to pay low wages: utilities and housekeeping; property maintenance and repair; clothing and apparel; and food preparation.[101] In many cases, contracting agencies award service contracts based solely on the lowest bid submitted, which gives contractors an incentive to cut costs by cutting compensation packages.

A recent survey of 567 workers in contracted jobs who provide food service, retail services, or janitorial services in various buildings occupied or controlled by the federal government, and 34 port truckers who haul loads under federal contracts, found that most (74 percent) earned less than $10 per hour.[102] Few reported receiving paid sick days, employer-provided health insurance, or a retirement plan. In fact, more than half of the workers interviewed reported receiving no benefits at all.

Many federal contractors are also frequent violators of core labor laws. A recent Senate inquiry found that almost 30 percent of the top violators of federal wage and safety laws are also current federal contractors.[103] A 2004 Department of Labor investigation found that in 80 percent of its wage and hour investigations, employers operating under the federal Service Contract Act had failed to pay legally-mandated minimum wages and benefits.[104]

Like many other workers in low-wage outsourced jobs, one in five of the food service, retail, and janitorial workers interviewed for the survey described above reported depending on Medicaid for their health care. And 14 percent depend on the Supplemental Nutrition Assistance Program (food stamps) to meet their family's food needs.[105] A study of school cafeteria workers employed by private contractors found that these workers are nearly twice as likely as the workforce as a whole to participate in one or more public assistance programs: 36.3 percent compared to 19.7 percent.[106]

President Obama's promulgation of an executive order requiring that wages on federal contracts must be no less than $10.10 an hour will help boost wages for many of these workers.[107] A report of states and localities

that had adopted contracting policies similar to the President's executive order found that these policies reduced the hidden public costs of low-wage work, while delivering better-quality services for the taxpayer and encouraging more companies who paid decent wages to enter the bidding process.[108]

Table 12: **Public Sector Outsourcing by the Numbers**

Number of workers in the public sector:	*9,681,240* [109]
Estimated percentage contracted	*Estimated 2 million low-wage jobs are publicly funded.*[110]
Demographics:	*57.7% female at state and local level; 42.2% in federal;* [111] *30% more African Americans in public sector than other workers.* [112]
Median wage:	*Median wage: $26.41, but wide range of jobs, larger occupations within government sector range $9.00 to $23.44 per hour.* [113]

III. OUTSOURCING DEGRADES JOBS, HARMS LAW-ABIDING EMPLOYERS AND THE ECONOMY

In many industries where outsourcing is on the rise, the intense pressure on contractors to compete fiercely for the work under the contract drives them to reduce labor costs, sometimes illegally, in order to underbid competitors. This race-to-the-bottom dynamic, combined with a decreased ability of government regulators to detect violations among a sea of small players, has severe consequences not only for individual workers' pay and job standards, but for the economy as a whole: local economies are strained by the cumulative effect of lower wages on consumer spending and reliance on safety-net programs; local, state, and federal tax revenues suffer; public safety is undermined; and responsible employers attempting to play by the rules cannot compete.

A. Unfair Competition

In many sectors, including ones profiled above, outsourcing is now a deeply-entrenched business model that has transformed the industry. In at least some segments of key industries, competing firms cannot survive unless they violate workers' compensation laws, skimp on their unemployment insurance taxes, and pay less than the required minimum or prevailing wages; often, they achieve all of these by misclassifying workers as independent contractors, franchisees, or other non-employee labels. Companies that misclassify their workers can save as much as 30 percent of their payroll costs. Businesses that require workers to sign independent contractor or individual franchise agreements or pay off the books can underbid their law-abiding competitors, particularly in labor-intensive sectors like construction, delivery, and building services.

In the construction industry, for example, general contractors facing stiff competition for contracts push heavily on subcontractors to reduce project costs, which leads—intentionally or not—to neglect for workers' rights as subcontractors are forced to trim expenses. As described by the authors of one recent report, the industry is "a fiercely competitive contract industry, characterized by slim profit margins, high injury and [workers'] comp rates, comprised largely of numerous small to medium-sized companies whose numbers and size may make them more likely to operate beyond the view of state regulators."[114] Janitorial cleaning contractors like

Coverall, Jani-King, and Jan-Pro base their business models on calling their janitorial workers "franchisees," requiring their workers to pay for the right to clean a particular building.[115] The U.S. Department of Labor's Wage & Hour Division has named janitorial and construction as two of its top priority industries,[116] specifically citing high labor-standards-violation levels and use of contracting structures.[117]

In addition, law-abiding firms treating their workers as "employees" struggle to compete, and in some cases are driven out of business by widespread misclassification. Some businesses in labor-bidding sectors have backed more robust enforcement and other reforms to stem labor standards violations and payroll fraud, in hopes of leveling the playing field.[118]

The costs of these business models, and of independent contractor misclassification in particular, are shocking. While the broader financial costs of outsourcing have yet been measured, federal and state governments suffer a hefty loss of revenues due to misclassification of employees as independent contractors, in the form of unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers' compensation premiums. Misclassification of this magnitude exacts an enormous toll: researchers found that misclassifying just one percent of workers as independent contractors would cost unemployment insurance trust funds $198 million annually, and a 2009 report by the Government Accountability Office (GAO) estimated that independent contractor misclassification cost federal revenues $2.72 billion in 2006.[119]

A wave of state-level studies on the costs of independent contractor misclassification over the past decade supplement federal data to paint a bleak picture of how this practice robs unemployment insurance and workers' compensation funds of billions of much-needed dollars and significantly reduces federal, state, and local tax withholding and revenues.[120] In California and New York alone, employers fail to report billions of payroll to state agencies each year.[121] A study of misclassification in Texas's construction industry found that at least 41 percent of workers were misclassified as independent contractors or paid off the books, costing the Texas Unemployment Insurance Fund an estimated $54.5 million annually; and 7.6 percent of workers experienced wage theft, costing the state an estimated $8.8 million in lost sales tax.[122] Misclassification in the port trucking industry nationally costs an estimated $563 million in unpaid Social Security and Medicare taxes, unemployment insurance taxes, and Workers' Compensation premium contributions each year, while California drivers lose an additional $850 million annually in misclassification-related wage and hour violations.[123]

Studies from multiple states have noted that both the prevalence of misclassification and the severity of its impact have worsened over the years. And the most active state-level task-

forces have each reported that they have recovered tens of millions of dollars in unpaid taxes and penalties annually through their investigations and enforcement—even given inadequate resources for dedicated enforcement staff.

B. State Unemployment Insurance Dumping and Related Workers' Compensation Fraud Schemes

State unemployment insurance (UI) systems and workers' compensation (WC) programs lose out significantly in heavily outsourced industries, and not only because of independent contractor misclassification costs described above. Companies and contractors take advantage of technical loopholes in both the UI and WC systems so that contractors pay lower rates per worker than the lead company would have.[124] UI and WC programs' "experience rating" systems base the amount of an employer's payroll contributions on its employees' use of the programs. In order to reduce potential costs, lead companies with high experience ratings (for example, because their work is seasonal and thus their unemployment levels are high, or the work is dangerous, leading to higher-than-normal injury rates) turn to staffing agencies to hide mounting UI and WC charges and take advantage of the staffing firms' lower rates. State funds suffer an overall loss from the transfer of obligations, and direct-hire employers that do not outsource take on a heavier obligation.

In addition, employees getting a job through a temporary or staffing agency lose out in another way, because many states have adopted industry-backed eligibility requirements that limit access to UI for people employed by temporary staffing agencies.[125] Thirty-two states make an exception to UI eligibility for temporary workers, requiring them to report to the staffing agency that laid them off for a new assignment.[126] If they do not or refuse another placement (even if it is a poorer job or geographically remote), they are deemed to have voluntarily quit without good cause and are disqualified. The staffing agency industry thus avoids UI charges and an experience rating boost because the special rules for the agencies make workers much less likely to qualify for benefits.

Finally, temp and staffing agencies misclassify the type of work of being done for workers' compensation reporting as one in a less hazardous occupation that has a lower premium.[127] Government enforcement agencies, already stretched for resources, have trouble detecting this type of evasion by smaller industry-specific temporary and staffing firms, some of them fly-by-night operations that may shut down at a hint of trouble. Detection is thus further reduced the more fractured the workforce becomes.

C. Privatization and Public Safety

Outsourcing of public services to private players raises serious concerns not only for the public sector workers who may lose their jobs or see their pay decrease, but also for public safety and welfare, especially when government entities fail to provide appropriate oversight of private contractors.

Outsourcing in the public sector can often be less of a savings than its proponents argue. When workers depend on publicly-subsidized social service programs as noted above, the costs of those public benefits should be added to the wages paid by the service-providing contractor, in order to assess the total costs. In many cases, those costs are no less than they would be if the government directly provided the service; low-cost bidding is thus more of a bookkeeping trick than a cost savings. Furthermore, poor working conditions can lead to higher turnover rates and accompanying cost increases for additional recruitment, hiring, and training. Economists find that turnover in low-wage jobs can equal anywhere between 16 and 20 percent of an employee's annual salary.[128] Most costly is the truism that profit-making entities must make a profit, and those costs are added to the taxpayers' bill. In many cases, the profit motive conflicts with other public goals. For example, in 2012, Corrections Corporation of America (CCA), the largest for-profit private prison company in the country, sent a letter to 48 state governors offering to buy their public prisons. The offer of a 20-year contract included a 90 percent occupancy rate guarantee for the entire term of the contract—an incentive for states to keep up occupancy in the prisons, rather than search for less costly alternatives to prison or strategies to reduce crime rates.[129]

As in the private sector, low-wage outsourcing in the public sector has impacts beyond those on the workers in contracted jobs and the taxpayers who fund the contracts and the safety net that offsets low-quality jobs. The economic and social costs reverberate throughout the communities in which the workers reside. If wages go down due to outsourcing, so too does the spending of the outsourced workers. Income tax revenues are also diminished, leading to public service cuts and perhaps, more ironically, more public sector outsourcing. Home ownership, and thus property tax bases, also decline. More low-income families in a community means more risk that public schools will fail, and more local youth will miss out on the opportunity to attend college.[130] That is why a growing number of policy experts across the country have recommended that outsourcing public jobs should be examined carefully and subject to increased oversight.[131]

Outsourcing of social service programs has also been implicated in threats to public safety and welfare. A recent report from Rutgers University on public sector outsourcing warned

that "a lack of oversight has had significant consequences for vulnerable people and for New Jersey taxpayers and is continuing to place assets at risk."[132] In particular, the report's authors noted, New Jersey agencies' lax monitoring of contractors jeopardized the safety of children in the state's child protection program; led to assaults and deaths at half-way houses as well as in surrounding communities; and led to the denial of aid to thousands of families and businesses affected by Hurricane Sandy.[133] Similarly, a recent decision by New York City's public hospital system to outsource its dialysis care to a for-profit franchise raised the ire of the New York State Nurses Association and patient advocates, who pointed to the franchise's poor patient-care record as well as its lack of a "moral obligation to the people of New York City."[134]

Overall, research shows that employers that violate labor laws are also more likely to break laws relating to public safety or consumer protections, suggesting that the loosely-regulated web of contractors and staffing agencies that have driven down labor standards are likely imposing other risks on the public.[135]

D. Costs to Local Economies

The consequences of the wage theft that pervades contracted work structures are severe not only for workers, state and federal revenues, and public safety, but also for local economies. When employers rob workers of their wages, bills go unpaid, housing situations are unstable, families have less food on their tables, and workers are not able to spend as much money to support local business in their communities. According to one study, in New York City alone, more than 300,000 workers are robbed of $18.4 million every week, totaling close to $1 billion a year.[136]

Another study found that, in any given week, approximately 1,114,074 workers in New York, Chicago, and Los Angeles combined experience at least one pay-based violation.[137] The average worker surveyed lost $51 a week, or about 15 percent of earnings.[138] Extrapolating from this figure, front-line workers in low-wage industries in those three cities, including those with high rates of outsourcing, like garment, construction, and building services, lose more than $56.4 million per week as a result of employment and labor law violations.[139]

Extending these losses to the state and national levels, this adds up to a staggering amount of potential stimulus drained from the pockets of working families, local businesses, and state funds.

IV. POLICY RESPONSES AND RECOMMENDATIONS: RESTORING CORPORATE RESPONSIBILITY FOR WORKERS

Ensuring appropriate accountability by entities able to control what happens in workplaces requires (1) strategic enforcement of existing rules with broadly-defined scopes; (2) concerted application of newer state provisions that address some of the related problems; and (3) development and application of new policy models and frameworks that broaden the scope of accountability to encompass any business or individual in a position to ensure adherence to labor protections and standards. Our final section describes a framework for these latter models.[140]

A. Enforcing Old and New Rules

1. Enforcing Against Joint Employers

Nearly all labor and employment laws permit an employee to claim responsibility for a work-place violation against more than one entity or individual. Any "joint employer" will generally be held jointly and severally liable for all labor and employment violations.[141] Extending liability up and across supply chains and other structures may preclude outsourcing firms from insisting on rock-bottom pricing arrangements and require them to consider the ability of the lower-level entities to comply with and pay for any violations of basic labor-standards laws. In addition, holding multiple entities responsible can have a broader impact across a wider swath of worksites and geographies, making compliance more likely.

The breadth of coverage of the various labor and employment laws falls on a spectrum from the most protective and broadest (such as the federal Fair Labor Standards Act (FLSA), the Family and Medical Leave Act, and most state wage and hour laws, which define "employ" to include "to suffer or permit to work") to the least protective and narrowest (including the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Internal Revenue Code, and common law employment statutes like many state workers' compensation acts, which use the right-to-control test). In between are a majority of state unemployment insurance

laws (which commonly use the "ABC test" creating a presumption of employee status), state and federal anti-discrimination laws, and the Occupational Safety and Health Act, which use a hybrid test.

For more on this policy recommendation, see Policy # 1 in the Appendix (www.nelp.org/subcontracting_policy_templates)

The broad definition in the FLSA and other laws—the "suffer or permit to work" definition—has its historical roots in state child labor laws that imposed liability on any entity that was in a position to know about work being performed and that had the power to prevent that work. Congress knew that its goal of eliminating child labor and other harms would be undermined if companies could erect insulating layers of contractors between themselves and their employees. The "suffer or permit" language was intended to encompass many categories of employment relationships that would not have been be considered "employment" under the narrower common-law right-to-control standard, and can therefore be used to encompass multiple employers.[142]

Court decisions applying the FLSA test have become muddied, unfortunately, as courts lose track of the question to be answered, and multi-factored tests created to discern the existence of an employment relationship are dense and difficult to predict. Courts, too, are reluctant to apply what can be perceived as overly-broad responsibility to multiple entities and individuals, especially when courts deem the contracting to be "legitimate."[143] New statutory models should clarify that an entity's reason for contracting is not relevant to a finding of joint responsibility, and note that written contracts purporting to create sole responsible employers are not valid.

Labor departments at the state and federal level should issue regulations or guidance that clearly identify modern examples of joint employer relationships from cases in the janitorial, construction, warehouse, garment, and home care sectors, and include examples where employers use temporary or staffing companies to staff their business.

2. USDOL's Use of "Hot Goods" Seizures

Since the FLSA was enacted in 1938, the U.S. Department of Labor's (USDOL's) arsenal of tools to stop wage theft has included a "hot goods" hold to secure payments for workers if they worked on tainted goods. These goods are considered to be tainted or "hot" due to the FLSA violations, polluting the channels of interstate commerce with goods that could be

used to unfairly compete with law-abiding employers. It is one powerful tool that an over-stretched USDOL has to combat rampant wage theft and a primary and effective strategy for dismantling the legal shell games in outsourcing. New York and California have analogous state hot-goods powers with limited scope.

For more on this policy recommendation, see Policy # 5 in the Appendix (www.nelp.org/subcontracting_policy_templates)

The USDOL is currently in hot water for using its hot-goods power to settle a large blueberry picker wage theft case in Oregon.[144] The agency used this FLSA remedy to temporarily seize blueberries picked by workers paid sub-minimum wages until the workers were properly paid. The growers, whose farm labor contractors failed to pay 1,300 migrant workers minimum wage, negotiated with the USDOL for a month and paid up. Then, instead of going after their labor contractors for the money, the growers launched a broad "anti-extortion" campaign against the USDOL in protest. The backlash has been mighty, due to the effectiveness of the remedy:

- federal legislators from Oregon have introduced a bill in Congress to take away USDOL's use of hot-goods seizures for any perishable crops;[145]
- the recently-signed federal Farm Bill requires USDOL to "consult" with the Department of Agriculture before invoking hot-goods; and
- a federal magistrate judge in Oregon found that the USDOL had improperly invoked its hot-goods power in the blueberry cases; USDOL has objected to the magistrate's ruling.

3. Sector-Specific Automatic Coverage Laws and Presumption of Employment

States have begun to create automatic coverage under their laws for certain workers, regardless of the employment status label attached to them and regardless of which entity claims to be the employer. Just as many state labor standards laws have exclusions for certain types of workers, so they can have inclusions for others. For example, taxi drivers and construction workers are covered under some state workers' compensation laws regardless of how their employers categorize them or what entity is named as the employer.

For more on this policy recommendation, see Policy # 3 in the Appendix (www.nelp.org/subcontracting_policy_templates)

Relatedly, states have begun to take note of the huge economic and social costs of independent contractor misclassification, and have enacted laws creating study commissions and task forces, and laws closing loopholes for employers seeking to evade labor and employment standards.[146] The strongest laws create a presumption that a worker is an employee. The employer can rebut the presumption by showing that (1) an individual is free in fact from control or direction over performance of the work; (2) the service provided is outside the usual course of the business for which it is performed; and (3) an individual is customarily engaged in an independently-established trade, occupation, or business. This "ABC" test, found in a majority of state unemployment insurance acts and in a handful of state wage laws, rests upon objective factors that are difficult for employers to manipulate.

For more on this policy recommendation, see Policy # 2 in the Appendix (www.nelp.org/subcontracting_policy_templates)

Due to employer pushback in certain industries and overall judicial and administrative agency reluctance to apply the presumption strictly, the standard can be undermined in less receptive states. Advocates in Massachusetts and Maryland have had to fight back a number of efforts to water down their ABC laws, for instance.

4. Responsible Contractor Laws

California Labor Code Section 2810 ("Section 2810") prohibits a person or entity from entering a contract for certain types of labor or services if the contracting party knows or should know that the contract does not provide "sufficient" funds to allow the contractor to comply with applicable labor laws. To recover from the contracting party, workers must show that the person outsourcing "knows or should know" of the contract's insufficiency in funds. The law covers construction, farm labor, garment, janitorial, security guard, and warehouse contractors.

For more on this policy recommendation, see Policy # 8 in the Appendix (www.nelp.org/subcontracting_policy_templates)

A weakness in Section 2810 is that it places the burden on workers to show that when contractors entered into the contracts, they knew or should have known of the insufficiency. It can be difficult for workers to show that the general contractors turned a blind eye to potential wage violations when entering the contract or pressured the bidders to lower their bids.

5. Regulating Outsourcing by Prohibition and Requiring Lead Employer Liability

A couple of state laws have created express worksite employer or end-user joint liability for labor standards violations; a strong recent one is the Illinois Day and Temporary Labor Services Act.[147] The Illinois law also requires disclosures to workers of the particulars of the work arrangement. Massachusetts' Temporary Worker Right to Know Act prohibits worksite employers and temporary or staffing companies from deducting certain tools and facilities from a worker's wages, and requires the temporary or staffing firm to disclose details of the job.

For more on this policy recommendation, see Policy # 4 in the Appendix (www.nelp.org/subcontracting_policy_templates)

Laws explicitly regulating outsourcing and use of temporary workers in the United States lag behind much of the rest of the world. Globally, it is common to require temporary or staffing agencies to register with the government, offer equal pay and benefits to staffing workers, and to limit the amount of time that a worker can be employed as a temporary worker.

In some countries, a company's outsourcing of its core business is illegal. For example, in Indonesia, only "supportive" services such as cleaning services, catering services for employees, security services, and transportation services for employees may be outsourced. Argentina, Brazil, Colombia, Panama, Peru, and Turkey have similar laws. In others, including South Korea, outsourcing of dangerous jobs is illegal. In many countries around the world, joint and several liability for employers who use labor intermediaries is automatic.[148]

For more on this policy recommendation, see Policy # 13 in the Appendix (www.nelp.org/subcontracting_policy_templates)

6. Public Procurement and Anti-Privatization Protections

Some state and federal contracting agencies are moving to include consideration of employment practices as part of determining the best value when awarding contracts. At the state level, Connecticut's Standard Wage Law requires certain employers operating at state facilities to pay their employees a standard wage and benefits package. In a model that could be replicated in federal service contracts, the recent request for proposals (RFP) released by

Amtrak, for example, asks bidders to disclose their plans to create U.S.-based jobs, wage and benefit levels, plans for training, and plans for recruiting from low-income communities, and includes a mechanism to include these elements in scoring the bids.[149] The Amtrak RFP not only creates a wage and benefit floor, but prioritizes job quality and fair access to new jobs that maximizes responsible use of taxpayer funds and the quality of work performed for the public.

For more on this policy recommendation, see Policy # 6 in the Appendix (www.nelp.org/subcontracting_policy_templates)

7. Privately-Negotiated Codes of Conduct

Private agreements that companies enter into to abide by certain minimum protections for workers can be effective organizing and compliance tools. In the outsourcing context, worker rights organizations have used codes of conduct as a mechanism to extend lead employer accountability for workers throughout an entire supply chain, or to limit outsourcing as a practice itself. The success of such codes of conduct, however, often depends on enforcement mechanisms external to the codes themselves, and because they are voluntary, they can be difficult to get to scale. A few notable examples are described in our appendix and below.

Especially strong codes include the Accord on Fire and Building Safety signed after the Rana Plaza clothing factory fire in Bangladesh that resulted in the death of more than 1,200 workers in 2013, and a Fair Code of Conduct established by the Coalition of Immokalee Workers between tomato workers, growers and buyers. Responsible Contracting Policies, used by many Taft Hartley and public employee retirement plans to guide the selection of building service and other contractors at the plans' properties, provide another useful model.

For more on this policy recommendation, see Policy # 9 and Policy #12 in the Appendix (www.nelp.org/subcontracting_policy_templates)

B. A New Framework for Accountability: Bosses, Inc.

Instead of or in addition to stretching existing labor and employment laws to encompass more entities and individuals in a supply chain or a multi-tiered firm structure, policy-makers should

create a broader accountability framework in which some subset of the players and creators of these chains are recognized as responsible. This framework would hold responsible any subset of individuals and entities that have the power to impact the working conditions in their contracted arrangements. It assigns accountability in outsourced work to those that are in a position to know of and control the operations around that work, improving the chances that labor standards and protections will hold.

In this way, lead controlling entities in a supply chain would be accountable for workplace violations in that chain. This framework would move away from the more-limited paradigm in labor and employment law that too often chooses only one responsible employer, with the rare cases finding two or more employers accountable. Environmental laws already do this; statutes impose liability on multiple classes of persons for the release of hazardous substances, for instance; the oil rig explosion in the Gulf of Mexico that has held British Petroleum liable despite multiple levels of intermediaries large and small is a recent example.[150]

Pieces of this framework have been proposed; one proposal from a scholar at Oxford University suggests aligning liability for workplace conditions with those entities performing different functions of an employer.[151] Because in today's multi-leveled contracting structures, no one entity typically performs all of the functions and roles of an "employer," this model identifies the key elements of those employer functions and then the entities or individuals that perform those functions in a given workplace scenario. The more potentially-responsible parties, the greater the likelihood that labor standards and protections will hold.

Another proposal by a Columbia Law School professor would impose legal responsibility on any enterprise that has the latent capacity to ensure that the direct employer complies with the employee's rights. This proposal requires every employer to implement an internal compliance system and monitor the employment standards of each of its contractors and subcontractors, and requires employers to disclose information about compliance with employment law.[152]

Solutions like these make good policy sense because they hold those entities and individuals that are in a position to know of and control a company's operations accountable for the work performed in those businesses.

This concept is not wholly new to American policy. Some labor and employment cases are beginning to use the language of "functional control" when determining whether to hold a joint employer responsible under the broadest laws, but the analysis is not well formed and remains relatively rare.[153] In addition, existing tests in case law determining whether more than one

entity is responsible as a joint employer often look to some employer functions; e.g., the power to hire and fire, setting of hours and pay, overseeing the work being performed, and, in individual liability cases, whether the individual exercises "operational control" over the company. But the factors do not often take into account other key functions of an employer, including the external market activity needed to turn a profit, and do not frame the overall question as one of employer operational and functional control over entities in a business structure.

The proposed framework would sweep in as potentially accountable a major retailer that creates a multi-tiered supply chain, comprised of a third-party logistics firm hired to manage the delivery and distribution of goods from the ports to retail stores, which in turn engages a logistics company to manage a warehouse where workers, supplied by a temporary agency or labor staffing firm, unload and pack shipping containers for distribution to the retail outlets, because that retailer is in a position to know of the work being performed and can control the operations of the businesses in the chain so that they comply with basic labor standards.

Importantly, this framework captures those entities that are the ultimate recipient of the goods and services before sale, and that benefit from the labor and any substandard labor. This is important because federal labor-standards laws are intended to stop the flow of goods produced with substandard labor. The proposal would make the outcomes less speculative and more predictable, so that the lead company can determine its most efficient response to its being the guarantor of properly-produced goods and services.

V. CONCLUSION

Business outsourcing and restructuring cannot be assessed in a vacuum devoid of workplace standards and fair play. The future of work and of workers' rights is now, and ensuring a bright future for economic opportunity and security means that all must step up and conduct business with integrity and accountability. Our nation's policies and innovations must take these goals and proposals into account.

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141. *See, e.g., 29 C.F.R. §791.2(a) ("all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act . . . .").*
142. *Leading recent cases finding joint employer responsibility are Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61, 67 (2d Cir. 2003), a case involving a garment factory manufacturer, and Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 407 (7th Cir. 2007), an agricultural worker case. See also, Carrillo v. Schneider Logistics, Inc., 823 F.Supp.2d 1040 (C.D. Cal., 2011) (where Walmart is alleged to be a joint employer of warehouse workers, along with its contractor and subcontractors).*
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