

# Contracted Work Policy Options Table of Contents

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## Contracted Work Policy Option #1:

### Policy: Bring “joint employer” cases against multiple parties using broadly-defined labor and employment statutes.

#### I. What is the policy?

Nearly all labor and employment statutes permit an employee to claim responsibility for a workplace violation against more than one entity or individual. Statutes that define a responsible “employer” broadly can be used to capture more responsible parties, including individuals and companies occupying multiple layers in a subcontracting chain. Companies or individuals found to be an employee’s “joint employer” under a particular statute will generally be held jointly and severally liable for all labor and employment violations committed against that employee.<sup>1</sup> By taking the liability up the chain, firms that use lower-level worksite employers that lack the capital, power, and often the will to ensure that workplace laws are complied with, can no longer insist on rock-bottom pricing arrangements and must consider the ability of the lower-level entities to comply with basic labor standards laws.

To establish “employer” liability, one must look to the definitions in a particular law being violated; the breadth of coverage falls on a spectrum from the most protective (such as the federal Fair Labor Standards Act (FLSA), the Family & Medical Leave Act, and most state wage and hour laws, which define “employ” to include “to suffer or permit to work”<sup>2</sup>) to the least protective (including the NLRA, Internal Revenue Code, and common law employment statutes like state worker 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 OSHA, which use a hybrid test.

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<sup>1</sup> 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 . . .”).

<sup>2</sup> The US DOL’s “joint employment” regulation, at 29 C.F.R. §791.2, describes a joint employment relationship in part as one where one employer is “acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee” and “where the employers are not completely disassociated with respect to the employment of a particular employee.”

Because the FLSA and statutes with the same definitions are the broadest and have the potential to sweep in more entities, this outline focuses on that statute; yet, the concepts can be used under other more narrowly-defined laws if the facts support it.

In enacting the FLSA, Congress knew that its goal of eliminating child labor and other harms would be undermined if companies could erect insulating layers of subcontractors between themselves and their employees. One mechanism Congress used to prevent this exculpatory practice was to define the employment relationship broadly – in particular, to define the term “employ” to include “to suffer or permit” to work. This broad statutory “suffer or permit” definition has its historical roots in state child labor statutes 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. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).<sup>3</sup> The “suffer or permit” language was intended to encompass many categories of employment relationships that would not have been considered “employment” under the narrower common law right-to-control standard.

Another reason Congress decided to define the term “employer” more broadly under the FLSA than it had been defined at common law is because the FLSA was addressing a different problem than the common law addressed. Common law employment cases were frequently brought by third parties who played no participatory role in the employment relationship, and who sought to establish liability from the “master” for personal injuries suffered through the negligence of a “servant.”<sup>4</sup> Courts narrowly limited those masters’ responsibility to circumstances where they had an actual right to control the conduct of the allegedly negligent servant who caused the third party’s injury. By contrast, under the FLSA, Congress’s goal was to entirely eliminate from the broad stream of commerce goods that were produced under substandard employment conditions. In those circumstances, a broad definition of the responsible “employer” better served the legislative purposes.

## II. How has the policy worked in practice?

Many important Circuit court decisions have found more than one entity or individual in a contracted relationship responsible for the labor violations in a workplace. The leading FLSA “joint employer” case is *Rutherford Food Corp.*, 331 U.S. 722. The question in *Rutherford* was whether workers who de-boned meat were employed by the slaughterhouse where they worked, when an intermediary contractor hired, paid, and supervised them and was designated by contract as their sole employer. In holding that

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<sup>3</sup> See also Goldstein, Linder, Norton and Ruckelshaus, “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” 46 UCLA L. Rev. 983, 1093(1999); Brief for Amici United Farm Workers of America et al. in *Reyes v. Remington Hybrid Seed Co.*, 495 F.403 (7th Cir. 2007).

<sup>4</sup> See *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1544 (7th Cir. 1987)(Easterbrook, J., concurring).

the slaughterhouse, too, was an “employer” of the workers, the Supreme Court emphasized that the de-boners’ work was part of an integrated economic unit devoted to the slaughterhouse’s production of boneless beef because that de-boning occurred in the context of a continuing process of slaughtering the cattle, preparing the meat for de-boning, packing, and shipping, all the rest of which was performed by admitted slaughterhouse employees. *Id.* at 726. The Court also found significant that de-boning work did not require initiative or independent judgment to perform successfully, but was more akin to routine piecework. *Id.* at 730.

Drawing from *Rutherford*, lower courts have developed different multi-factor tests for determining who is an “employer” under the FLSA and related laws.<sup>5</sup>

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.<sup>6</sup> See also, *Carrillo v. Schneider Logistics, C.D. Cal.*,<sup>7</sup> where Walmart is alleged to be a joint employer of warehouse workers, along with its contractor and subcontractors.<sup>8</sup>

### III. What are the limitations of the policy? What are lessons learned for new drafters?

Court decisions applying the FLSA test have become muddled, unfortunately, because courts lose track of the question to be answered, and due to the too-frequent use of the shorthand phrase “economic reality” to summarize what the statutory test of “employment” is seeking to discover. The term “economic reality” lacks significant content, other than as a general guidepost to look beyond labels, written contracts, and self-serving employer identification, and its use allows courts to mask idiosyncratic

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<sup>5</sup> The Ninth Circuit uses a four-part and a five-plus-eight part test in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 and in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), respectively; the Eleventh Circuit also uses different multi-factor tests, see *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999) (seven factors); *Layton v. DHL Express, Inc.*, 686 F.3d 1172 (11th Cir. 2012), and other circuits use a broad range of factors, from two to at least six. See, e.g., *Beliz v. W.H. McLeod and Sons Packing Co.*, 765 F.2d 1317, 1327 (5th Cir. 1985) (two factors); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998) (four factors); *Hodgson v. Griffin & Brand Ltd.*, 471 F.2d 235 (5th Cir. 1973) (five factors); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2nd Cir. 2003) (six factors).

<sup>6</sup> The Seventh Circuit in *Reyes* pointed out that if a company knows when it retains one or two levels of contractors that it will remain liable for those contractors’ violations of workplace rights, the company will have a greater incentive to retain competent contractors, to pay them enough to permit compliance with applicable law, and to supervise them carefully enough to stand guard against potential violations. 495 F.3d at 409.

<sup>7</sup> The circumstances underlying that lawsuit are described in NELP, “Chain of Greed: How Walmart’s Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers,” [http://nelp.3cdn.net/5b7daf391f06aa6413\\_qfm6bigxz.pdf](http://nelp.3cdn.net/5b7daf391f06aa6413_qfm6bigxz.pdf) (June 2012). See also *Carillo v. Schneider Logistics*, 2014 WL 183965 (C.D. Cal. 2014) and *Carillo v. Schneider Logistics*, 2014 WL 183956 (C.D. Cal. 2014), where the district court found a genuine dispute of material fact as to whether Schneider Logistics and Walmart were joint employers.

<sup>8</sup> The plaintiffs in that case are also alleging that Walmart breached a duty of care under a negligence theory by failing to properly engage its subcontractors that it knew or should have known were not complying with workplace laws.

decision-making under a standard that suggests a more practical, common sense approach than it actually provides.<sup>9</sup> The result is that many cases with seemingly-identical employment relationships come out with opposite findings of employer responsibility.<sup>10</sup>

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” and not intended as an exculpatory act<sup>11</sup>. Judges seem to go out of their way in some decisions to argue around the broad definitions to find no employment relationship. This may be due to the inherent bias in our courts and in individual judges towards common-law notions of employment relationships and who or what entities should be held responsible.

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.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

A majority of states have “suffer or permit” or some version of that language in their state Minimum Wage Acts.<sup>12</sup>

As noted in Policy Option # 13, a number of countries around the world establish automatic joint liability for user companies of subcontracted workers. According to one comparative review, joint liability is very common outside the United States.<sup>13</sup>

Articles:

Goldstein, Linder, Norton and Ruckelshaus, “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” 46 *UCLA L. Rev.* 983, 1093(1999).

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<sup>9</sup> Some courts have interchanged “economic reality” with “economic dependence.” That latter term does not seem to have much independent meaning either. “We should abandon these unfocused factors and start again. The language of the statute is the place to start.” *Lauritzen*, 835 F.2d at 1543.

<sup>10</sup> See e.g. *Antenor v. D & S Farms*, 88 F.3d 925, 933-35 (11th Cir. 1996); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir. 1994).

<sup>11</sup> See *Zheng v. Liberty Apparel*.

<sup>12</sup> Only California, Colorado, Georgia, and Missouri do not have that broad language.

<sup>13</sup> Donald C. Dowling, Jr., Global HR Hot Topic—February 2014: International Outsourcing and Offshoring: An Employment Law Checklist, available at : <http://www.whitecase.com/newsletter/022014/hrhottopic-international-outsourcing-and-offshoring-an-employment-law-checklist/#.U0wzcPldWkE>.

**Brief for *Amici United Farm Workers of America et al. in Reyes v. Remington Hybrid Seed Co.*, 495 F.403 (7th Cir. 2007).**

## Contracted Work Policy Option #2:

### Policy: Create a strong test for “employee” status and include a presumption.

#### I. What is the policy?

At the state level, two trends are emerging with respect to classification of workers as independent contractors and subcontracting. One of these, particularly in the construction industry, is to create in state law a “presumption” that anyone working for wages is an employee, and to simplify the test of “employee” status. The second uses a three-part “ABC” test to provide that a worker is an employee unless the employer can meet all of the elements of the test. Since under most of these states’ tests the worker is an employee **UNLESS** the employer can meet the **ABC** test, it creates a presumption of employee status.

Though these tests are primarily for determination of “employee” status and not for attaching liability to an employer in a subcontracting chain, they could be used to establish liability for workplace violations farther up the chain on a joint employment theory.

The most expansive model is in Massachusetts Gen. Law 149, § 148B, regulating wages:

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:—

- (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of the business of the employer; and,
- (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

## II. How has the policy worked in practice?

When applied properly, the three-part test acts to weed out misclassified independent contractors fairly routinely, given the presumption and the difficulty employers have in overcoming the second, or (B) prong of the test looking to see whether the work is integrated into the employer's business – whether the work is performed outside of the regular business of the employer.

Due to employer pushback in certain industries (e.g., FedEx is fighting back in many states), and overall judicial and administrative agency reluctance to apply the presumption strictly, the standard can be undermined in less receptive states.

Advocates in Massachusetts report that there have been a number of efforts to water down the law.

## III. What are the limitations of the policy? What are lessons learned for new drafters?

It has been challenging for advocates to apply the ABC test/presumption in industries other than construction, because industry structures vary enormously. In addition, like other tests of employee status, the “control” factor has been applied differently by different courts and often eclipses the other two required components. Finally, the ABC test and presumption are useful for subcontracting arrangements only if they are coupled with a joint employment provision.

A proposal, [HB 3142](#), in the Oregon legislature in 2013 would have done away with the control factor and established an “AB” test, presuming that unless a worker performs a job that is not outside the company's course of business and has an independently established business, she is an employee.

## IV. Other resources: states with analogous laws and articles or reports about the policy.

### Articles:

Lauren Hoff and Anna Deknatel, **ABC ON THE BOOKS AND IN THE COURTS: AN ANALYSIS OF RECENT INDEPENDENT CONTRACTOR AND MISCLASSIFICATION STATUTES.**



**An Advisory from the Attorney General’s Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1, available at <http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf>.**

**Other State Statutes:**

**Half of the states have the ABC test in their state unemployment insurance laws, supporting the case that the laws are easy to apply and have been used for decades.<sup>14</sup>**

**Laws creating a presumption in free-standing independent contractor or wage and hour laws: Statutes in Delaware (19 Del. Code 3503), Illinois (820 ILCS 185/10), Maryland (Md. Code Labor & Employment, 3.903), Massachusetts (Gen. Law 149, § 148B), Minnesota (M.S.A. §181.723), New Jersey (N.J.S.A. 34:20-4), New Mexico (N.M. Stat. § 60-13-3.1), and Nebraska (Neb. Rev. Stat. § 48-2903) establish a presumption that when work is performed by an individual for remuneration paid by an employer, an employment relationship exists. Of these, Massachusetts is the only one that applies to all industries. Most apply only to construction, with Maryland and Illinois law applying also to landscaping.**

**ABC test: Delaware, Illinois, Maryland, Massachusetts and New Jersey use the ABC test, in the same industries noted above. Each of these, except Massachusetts, has also created a category of “sole proprietor” or “exempt” individual that allows certain individuals to escape classification as an employee, based on additional factors like personal liability for debts, investment, use of a business name, licensing, and making services available to the general public.**

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<sup>14</sup> U.S. Department of Labor, Comparison of State UI Laws 2013, p. 1-6 to 1-7, <http://workforcesecurity.doleta.gov/unemploy/pdf/uilawcompar/2013/coverage.pdf>.

## Contracted Work Policy Option #3:

### Policy: Make entities in the supply chain statutory employers.

#### I. What is the policy?

According to Larson, in the *Law of Workmen's Compensation* § 70.01(1990), every state except Alabama, California, Delaware, Iowa, Maine, Rhode Island, and West Virginia has some form of “contractor-under” statute that imposes workers’ compensation liability on general construction contractors in relation to the employees of subcontractors working under them.

The language varies considerably between states. The best models operate as a kind of strict liability standard: they apply whenever the general contractor would have been liable had the employee been its own direct employee, and they apply to subcontractors, sub-sub-contractors, and so on down the chain. An example of these is in the Idaho Code, § 72-216:

“(1) Liability of employer to employees of contractors and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.”

#### II. How has the policy worked in practice?

The Idaho Code was applied to a purchaser of timber in a sub-sub-contracting relationship. In *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000) Weyerhaeuser, as a purchaser of lumber was liable to an injured logger claimant because Weyerhaeuser hired a contractor/property owner who hired a subcontractor to harvest logs. The injured worker was employed by the subcontractor, which had not complied with the worker's compensation provisions.

#### III. What are the limitations of the policy? What are lessons learned for new drafters?

One possible limitation to this policy is that it still requires that the worker be an employee of the subcontractor. And because independent contractor misclassification is quite common in construction<sup>15</sup>, this could exclude many workers not covered by workers' compensation. Secondly, the *Spencer* case in Idaho described above, applying the contractor-under statute to a purchaser, had some special facts not present in every case. In that case, *Weyerhaeuser* was more than a simple purchaser, because it extended a loan to the property owner/contractor so that the contractor could complete the harvest. Other laws, such as the Missouri statute cited below, typically only apply to the general contractor on a construction site.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Larson writes that practically all of the cases interpreting this type of statute address one question: When is the subcontracted work part of the regular business of the statutory employer? The statutory language lying behind this question varies somewhat. Some acts speak of work which is "part of or process in" the employer's trade or business, perhaps excluding, for good measure, work which is "merely ancillary and incidental" to such trade or business, and sometimes requiring that the work be on or about premises under the control of the employer; some use the phrase "any work which is a part of its trade, business or occupation;" and there are many other variants.

Examples of state contract-under workers' compensation statutes that are more limited:

**By whether the work is integral to that of the worksite employer:**

In Connecticut, Conn. Gen. Stat. Ann. § 31-291, applies to a principal-contractor-subcontractor relationship for example, the employees' work must be a "part or process" of the client's trade or business and performed on property that it owns or controls. In South Carolina, the injured employees' work must be a "part of [the alleged statutory employer's] trade, business or occupation." Likewise, S.C. Code Ann. Title § 42-1-400 requires that the work be part of the trade, business or occupation of the general contractor.

**By whether the work takes place on the property of the general contractor:**

In other states, the laws reach entities that contract for work on premises they own or control--whether or not they function as general contractors. Under such statutes, a

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<sup>15</sup> See, e.g., NELP, Misclassification Imposes Huge Costs, updated 2012, listing studies showing upwards of 30% of construction employers misclassify their employees as independent contractors.

landlord that contracts with a firm to clean the windows in its building has been held to be the statutory employer of the employees of the window cleaning contractor.

**Mo. Rev. Stat. s 287.040(1) (1986)**. Applies only when work is done by contract “on or about” the business premises and requires that the work be “an operation of the usual business which he there carries on.”

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## Contracted Work Policy Option #4:

### Policy: Regulate labor recruiters and suppliers and those who use them.

#### I. What is the policy?

A number of laws focus on “labor-only” middlepersons: entities whose job is to recruit and furnish workers to a worksite or end-user employer. These are most prevalent in state laws regulating temporary services agencies or particular industries with long-standing subcontracted structures, like garment, day labor, or agriculture.

These laws have several provisions in common. They require that the contractor register with a state agency. They frequently require that the contractor post a bond intended to cover lost wages and penalties. See, e.g., California, ([Cal. Labor Code § 2677](#)). They often contain transparency provisions, such as required disclosures of terms and conditions of employment, and often prohibit certain deductions from wages. These laws typically do not impose significant liability on the end-user of the contractor’s services, assigning liability only for the use of an unlicensed contractor. The federal [Agricultural Worker Protection Act, 29 U.S.C. § 1802, § 1854](#), employs a “joint employment” standard borrowed from the Fair Labor Standards Act, which is not limited to liability for use of an unlicensed contractor.

The strongest model of these labor recruiter laws was inserted in the original [S. 744](#), introduced April 16, 2013, the federal immigration reform bill now pending in the Senate. A chapter of the bill covers the activities of international labor recruiters. The chapter covers licensing and registration of international labor recruiters, much like the state laws regulating labor recruiters described here. It also would have outlawed some actions by employers using these recruiters, such as discrimination, retaliation, and the provision of false and misleading information to workers. In addition, the original version made an end-user liable for the actions of the international labor recruiter either if it used an unlicensed contractor or recklessly disregarded the contractor’s illegal activities, or if it failed to report violations to the U.S. Department of Labor.<sup>16</sup>

The [original language](#), at § 3610 of the S. 744, said:

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<sup>16</sup> The provision was amended in the Senate Judiciary Committee and now establishes responsibility only if the contractor is unlicensed.

**(2) SAFE HARBOR.—**An employer shall not have any liability under this section if the employer—

- (A)** hires workers referred by a foreign labor contractor that has a valid registration with the Department [DOL] pursuant to section 3604;
- (B)** does not act with reckless disregard of the fact that the foreign labor contractor has violated any provision under this section; and
- (C)** reported any violation of a provision under this section after obtaining knowledge of such violation.

Another law, the New York garment jobber’s law, New York Labor Law section 345-a, imposes liability for the manufacturer or user of a jobber if the user “knew or should have known” of the contractor or subcontractor’s violation of the state minimum wage or overtime law. But the law allows a presumption of manufacturer compliance if the NYS Department of Labor certifies that the subcontractor complied with the garment contractor registration provision.<sup>17</sup>

## **II. How has the policy worked in practice?**

There are no reported cases discussing either the California, (Cal. Labor Code § 2677) or New York jobber’s laws, and the international labor recruitment scheme outlined in S. 744 was ultimately amended out of the bill. While there are many cases discussing “joint employment” under the Agricultural Worker Protection Act, that provision suffers from the difficulties outlined in NELP’s policy option on joint employment.

## **III. What are the limitations of the policy? What are lessons learned for new drafters?**

Regulatory schemes such as these have several weaknesses. Bonds required by statute are often based on the number of employees that a contractor reports. Even so, the bonds may be inadequate to cover the most egregious cases of failure to pay wages, or failures to pay wages over a long period of time. In addition, advocates have argued that the laws make it easy for a contractor, once it is caught, to simply transfer its assets to a related party. Often, the end-user only needs to have a written statement from a subcontractor that it is complying (or will comply) with the applicable laws in order to escape responsibility for any violations. Finally, the laws often regulate only two entities in the supply chain (though many make a labor contractor liable for the acts of its subcontractors).

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<sup>17</sup> That statute also contains a “hot goods” provision, which has proved more useful. New York Labor Law section 345-b. See *also*, NELP summary of hot goods policies in Policy Option #5 in these materials.

The most important component is the standard of liability for a user of a contractor, and new drafters should look to a “knew or should have known” standard that is harder to evade.

## **IV. Other resources: states with analogous laws and articles or reports about the policy.**

### Reports:

Seville, Marci, "Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law - An Evaluation of Assembly Bill 633 Six Years Later" (2005).

Women's Employment Rights Clinic. Paper 4. <http://digitalcommons.law.ggu.edu/werc/4>

### Standards of user liability in similar state and federal laws:

- The weakest models regulate only the labor intermediary, like in the Nebraska Farm Labor Contractor law, (Neb. Rev. Stat. §§48-1701 to 48-1714), and the day labor acts in Florida, (Fla. Stat. § 31- 448.20), Georgia, (Ga. Code Ann. § 34-10-1), and New Mexico, (N.M. Stat. Ann. § 50-15-1).
- User is liable for its own violations, e.g., unlawful deductions or non-payment of wages. This is typical of the day labor statutes cited below. Under the California Farm Labor Contractor Act, (Cal. Lab. Code § 1682), a grower-user can be criminally liable for its own failure to pay wages.
- User is jointly liable for violations committed by the contractor only if it uses an unlicensed contractor. This is the case under most of the farm labor contractor laws, including Washington's, (RCW 19.30.010) and Oregon's, (Or. Rev. Stat § 658.005). The Illinois Day and Temporary Labor Services Act, (820 ILCS 175/1), imposes a fine of \$500 per day on a user of an unlicensed temporary services agency.
- User is liable on a theory of “joint employment.” This is the case under the Agricultural Worker Protection Act, AWPA, 29 U.S.C. § 1802, § 1854, and the California garment industry law (although under California law, the user is liable only for the registration violation).<sup>18</sup>

### Other analogous laws:

- Florida Labor Pool Act, Fla. Stat. § 31- 448.20
- Georgia Ga. Code Ann. § 34-10-1

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<sup>18</sup> For more on enforcing state laws imposing joint employer liability, see the NELP write-up included in these materials.

- **Illinois Day and Temporary Labor Services Act, 820 ILCS 175/1**
  - **New Mexico Day Laborer Act, N.M. Stat. Ann. § 50-15-1**
  - **California Farm Labor Contractor Licensing, Cal. Lab. Code § 1682**
  - **Idaho Farm Labor Contractor Licensing, Idaho Code Ann. § 44-1601**
  - **Maryland Farm Labor Contractor Registration, Md. Code Lab. & Employment § 7-101**
  - **Nebraska Farm Labor Contractor Act, Neb. Rev. Stat. §§48-1701 to 48-1714**
  - **Oregon Farm Labor Contractor Laws, Or. Rev. Stat § 658.005**
  - **Washington Farm Labor Contractors Laws, RCW 19.30.010**
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## Contracted Work Policy Option #5:

### Policy: Use the “hot goods” provision in the FLSA against end-users of goods.

#### I. What is the policy?

The Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(1) empowers the United States Department of Labor (DOL) to institute litigation to stop the transportation, shipment, delivery or sale across state lines of goods produced by any employee not properly paid under the FLSA.<sup>19</sup> As part of the remedies available under the provision, the DOL can also seek monetary damages, including the amount of unpaid wages, from those holding the 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. A hot goods order prevents goods produced or handled by sub-minimum wage workers from entering interstate commerce, and runs to employers whose employees produced the goods, and also to subsequent purchasers or possessors of the goods.

Hot goods orders can cover “any person” moving the tainted goods, including those with no knowledge that the goods were produced in substandard conditions, such as secured creditors. Common carriers and “good faith purchasers” that get assurance in writing that the goods were produced in compliance with the FLSA are excepted. 29 U.S.C. § 215(a)(1); 29 C.F.R. § 789.2-5.

Only a court can issue a hot goods order, and it may only be issued if the judge finds it highly likely that the law has been violated. An affected employer can contest the order in court with the same due process rights normally available to parties subject to a proposed injunction. Employers can contest a proposed order with records of hours and wages paid, for instance. Even when an employer cannot prove it complied with the law, the judge can

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<sup>19</sup> 29 U.S.C. §212(a) also permits the DOL to seize hot goods if the goods were produced in a location where children were illegally working. 29 U.S.C. §217 empowers the DOL to seek an injunction against the sale of the goods.

be asked to consider the hardship a hot goods order may cause. Where goods are perishable or will lose value if not sold promptly, courts have allowed the goods to be sold, with proceeds paid to the court to pay the wages that are due.

Once the order is issued, an employer or possessor of the goods can cleanse the taint by paying or arranging for the payment of unpaid wages, enabling the goods to be put back into interstate commerce after the judge lifts the order.

## II. How has the policy worked in practice?

Often, the mere threat of a hot goods injunction by the DOL will result in a prompt payment to the workers. Its use creates a powerful incentive for downstream purchasers of goods to avoid disruption of their operations. In particular in industries where wage theft is rampant, competition is fierce, and there are goods to be seized – garment, agriculture, retail – use of the hot goods power to get swift payment to workers can have important effects in those jobs.

Because the law places potential responsibility on the end-users or possessors of the goods, these entities are more likely to consider the contractors with whom they do business. In addition, downstream users are empowered to police the producers to avoid seizures and liability.

The hot goods provision has long been underused by the DOL, and typically only in agriculture and garment cases. Recently, the Obama DOL has begun to use the power more strategically and creatively, building on earlier Clinton-era invocations of the hot goods powers to secure contractor monitoring agreements, for instance.<sup>20</sup>

In August 2012, the U.S. Department of Labor invoked its “hot goods” authority and placed a temporary hold on shipments from three Oregon blueberry farmers whose labor contractors paid 1,300 migrant workers sub-minimum wages. A settlement was reached whereby the growers agreed to pay \$240,000 in back wages, damages and penalties. The

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<sup>20</sup> For some examples of recent DOL use of the hot goods provision, see, e.g., <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20100909.xml> (FL cigarette manufacturer and water purification systems company); <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Western/20120808.xml> (garment in CA); <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20110217.xml> (auto parts in Nashville, TN).

farms were in no way denied or deprived of their option to force DOL prove its case in court; they chose to settle. Almost a year later, the growers, backed by the Oregon Farm Bureau, launched an aggressive campaign accusing the DOL of extortion. The recently-signed 2014 federal Farm Bill now requires DOL to “consult” with the Department of Agriculture before invoking hot goods.<sup>21</sup> An Oregon Democrat, working closely with the Oregon Farm Bureau, introduced a bill in Congress to ban the seizure of perishable agricultural goods.<sup>22</sup> A federal magistrate judge in Oregon recently found that the DOL improperly invoked its use of hot goods power in the blueberry case.<sup>23</sup> The DOL has filed an “objection” to the opinion, asking a federal district judge to overrule the magistrate and keep the settlement agreements intact.

### **III. What are the limitations of the policy? What are lessons learned for new drafters?**

Because only the DOL is empowered to use the hot goods provision, its use is subject to political willingness and resource constraints. A simple fix would be to permit private enforcement of the provision.

The hot goods provision exempts purchasers who obtain the goods “in good faith reliance on written assurances from the producer” that the goods were produced in conformity with the FLSA and “without notice of any such violation,” but the underlying regulations set a fairly demanding standard for a purchaser to avoid the issuance of an injunction, stating that the act imposes “an affirmative duty” on each purchaser to ensure that the goods were produced in compliance with the FLSA. 29 C.F.R. 789.1.

Because the hot goods provision only applies to goods transported in interstate commerce, not services, it is not available as a remedy for many jobs.

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<sup>21</sup> Agricultural Act of 2014, H.R. 2642, 113th Cong. § 10011 (2014) (enacted).

<sup>22</sup> H.R. 1387, 113th Cong. (2014).

<sup>23</sup> *Perez v. Pan-American Berry Growers, LLC*, 2014 WL 198781 (D. Or. 2014).

## **IV. Other resources: states with analogous laws and articles or reports about the policy.**

California has a state hot goods provision for garments illegally made by unregistered garment contractors, enabling the state agency to seize garments. Cal. Labor Code 2680; Cal. Code Regs., tit. 8, sec 13649. New York also has a hot goods provision for garments produced in illegal conditions. New York Labor Law section 345-b.

### **Resources:**

James Leonard, **Hot Goods Temporary Restraining Orders Under the Fair Labor Standards Act in the Agricultural Sector of the Economy (September 2010)**, *available at* [www.nelp.org](http://www.nelp.org).

Catherine Ruckelshaus, **BLUEBERRY LIES: WSJ SPEARHEADS DISINGENUOUS EFFORT TO KEEP EXPLOITING FARM WORKERS**, *available at:*  
[http://www.salon.com/2014/03/30/blueberry\\_lies\\_wsj\\_spearheads\\_disingenuous\\_effort\\_to\\_kee\\_exploiting\\_farm\\_workers/](http://www.salon.com/2014/03/30/blueberry_lies_wsj_spearheads_disingenuous_effort_to_kee_exploiting_farm_workers/).

**DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 81 (2010)**, *available at* <http://ssrn.com/abstract=162339>;  
<http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

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## Contracted Work Policy Option #6:

**Policy: Strengthen federal procurement and contracting policies that set wage and benefit standards for workers providing services and labor via public contracts.**

### **I. What is the policy?**

Update and strengthen protections for the estimated 2 million privately-contracted workers who help provide public services to ensure that federal spending creates the high-quality jobs that benefit taxpayers and the government alike:

The McNamara O'Hara Service Contract Act, the Walsh-Healy Public Contracts Act, and the Davis Bacon Act, enacted in the 1930s and 1960s to provide protections for federally-contracted workers, fail to reach large groups of workers, both because they contain significant exemptions and because the laws have not been updated to reflect changing contracting practices and other shifts in the economy. These laws also fail to set wage and workplace standards high enough to guarantee good quality jobs, while lax monitoring systems mean federal contracts may go to or remain with firms that violate workers' rights.

In the absence of comprehensive labor standards for contractors, the federal government's "best value" contracting process has raised costs to taxpayers as poorly-paid workers are forced to rely on food stamps, Medicaid, the Earned Income Tax Credit, and housing, childcare and other subsidies from government agencies. Strengthening baseline standards for government contractors and closing loopholes to ensure that these requirements apply to more workers would help raise wages, benefits and working conditions for hundreds of thousands of workers employed by firms that do business with the government.

This February, President Obama took a crucial step towards improving standards for federally-contracted workers when he issued an Executive Order that requires federal contractors to pay employees at least \$10.10 on all new contracts, which will reach some groups of workers (concessionaires serving the public on federal property) not previously covered. The Executive Order does not, however, include a benefits requirement or cover

workers on goods contracts such as food and clothing, or specify strengthened monitoring measures.

The following reforms are needed to further strengthen federal procurement and contracting policies that set wage and benefit standards for workers providing services and labor via public contracts: (1) raise the wage and workplace standards requirements and strengthening monitoring mechanisms; and (2) ensure that these standards cover workers in a broader variety of settings than are currently covered. Local and state policies can and should build from the best models.

### Broaden the reach of current federal contracting and procurement rules:

Amend the Service Contract Act (SCA) and other existing federal job standards to cover (1) low-wage workers employed by businesses operating under concessions, leases, or service contracts at government-linked facilities such as airports, public office buildings, public universities, and similar institutions and (2) low-wage workers employed in privately-operated buildings where the government is a major or anchor tenant. Such a change would help improve wage standards for food and retail concessions workers, security personnel, baggage handlers, cleaners, shuttle bus drivers and others. In many cases, these reforms could be implemented administratively as a condition of federal agency leases, concession agreements, and other contracts.

Strengthen enforcement of the SCA to ensure its protections are applied to all covered workers.

### Incorporate these standards into federal contracting & procurement rules to ensure high quality jobs:

States and cities across the country have used these policies successfully in a wide variety of settings, some of them over many years. The federal government should scale up these best practices to the federal level, using them as models to update and fill gaps in federal contracting and procurement policies.

Living Wage Policies – set a wage floor above the state or federal minimum wage and require employers to provide workers with basic benefits, valued at a certain minimum amount, or to pay the worker the equivalent in higher wages. Rather than basing wage requirements simply on the standard wage levels for similar workers in that region, wage standards should be at least high enough for workers to support a family in that region. Ensure that these standards apply to workers in all federally-linked settings (see above).

Prefer “High Road” Contractors: -- create a preference in contractor selection decisions for businesses paying decent wages and benefits to their entire workforce (not just workers

on the specific contract). Like President Lyndon Johnson's EO 11246, this policy would use federal contracting dollars to leverage positive change across the entire private-sector economy.

**Worker Retention (displaced worker) policies** – provide that when a contractor or concessionaire is replaced, the successor company must give the workers previously performing the work the opportunity to keep their jobs at least for a probationary period. The federal government has already adopted displaced worker protections for certain categories of federal agency contracts under Executive Order 13495 “Nondisplacement of Qualified Worker Under Service Contracts.” The federal government should extend displaced workers protections to all concessionaires, leaseholders, and service contractors at federally linked facilities.

**Labor-Peace Policies** – require employers and unions to use non-disruptive means to settle disputes in order to avoid strikes, lock-outs and work stoppages. The Administration already encourages use of Project Labor Agreements, which contain labor-peace provisions, in public works contracting. It should also adopt labor peace policies for federal concessionaires and sensitive service contracts where interruption of services would threaten vital services or cost the government lost revenue.

**Sweat-Free Purchasing Policies** – fill in gaps in the Walsh-Healey Public Contracts Act to require the companies that provide military apparel and food to pay a living wage, comply with overtime and other basic protections and abide by labor-peace safeguards to guarantee workers' rights to freedom of association, and institute robust workplace monitoring systems coordinated across government purchasers.

**Earned Sick-Day Policies** – the federal government should require federal contractors and concessionaries to provide earned sick days to their employees.

**More Rigorous Screening** – Federal contracting statutes and the Federal Acquisition Regulations instruct government agencies to contract with “responsible contractors.” This requirement is minimal, however, defining contractors' responsibilities as: (1) financially able to fulfill the contract and (2) adhering to the law. Even with such low standards, many federal contractors do not meet the second criterion yet are not barred from the system. The federal government should institute a rigorous system of legal compliance review to ensure that its contractors are in full compliance with workplace laws. These systems should (1) establish a preliminary “prequalification” phase to make responsibility review the first step in the bidder process, not the last; and (2) require public disclosure of firms seeking to bid or prequalify to bid, to allow the public to provide information relevant to the firms' record.

### **MODEL POLICY: Connecticut's Standard Wage Law**

For more than 10 years, [Connecticut's Standard Wage Law](#) has guaranteed that employers operating at state facilities provide their employees fair wages and benefits. The measure requires employers in state-linked buildings that provide food, building, property or equipment services to pay their employees a standard wage and benefits package roughly comparable to the rates under the Service Contract Act. The Connecticut law fills many of the gaps left open by federal law. For example, workers at food service franchisees such as McDonalds and Dunkin Donuts, located in state office buildings, at state university campuses, and at the Hartford-Bradley Airport, are all covered. In fact, fast-food concessionaires that serve military personnel at the Bradley Air National Guard Base are covered by the Connecticut wage law even as employees of similar federal facilities enjoy no meaningful wage and benefits protections. Furthermore, the law covers some employers under contract with the state even if the space in which they operate is leased, rather than owned by the state.

## **II. How has the policy worked in practice?**

Many states and cities across the country have used these policies successfully in a wide variety of settings, some of them over many years:

Los Angeles and Berkeley California and the State of Connecticut have all extended good jobs standards to lessees and concessionaires operating at government-owned or linked facilities. New York City enacted a package of living wage and prevailing wage expansions that extended the existing city and state prevailing wage standards for government-contracted building service workers to apply to large city leases where the city rents 50 percent or more of the space in a private building.

More than 120 cities and counties and the state of Maryland have enacted living wage laws that require businesses with city (or state) contracts to pay a higher wage. Other states, including Connecticut, New York and New Jersey have enacted similar measures using prevailing wage laws. Most of these living wage policies require employers to contribute between \$1.50 and \$4.50 per hour for benefits or pay the worker the equivalent in higher wages.

Many cities have adopted worker retention policies for city contractors as part of their living wage policies. Other cities and states have instituted worker retention requirements more broadly for private employers in key industries where transitions in contractors or ownership can result in mass lay-offs. California and other counties and states have retention laws that protect janitorial and security staff of large office buildings; San Francisco and Los Angeles have them for workers employed at supermarkets; there are



retention policies for service contractors and concessionaires operating at the Los Angeles, San Francisco, San Jose and Oakland airports; and San Diego has a work retention policy for employees of service contractors and concessionaries at large city-linked facilities such as convention centers and stadiums.

At least a dozen airports including JFK, Atlanta, Miami, Phoenix, and Settle use labor peace policies. Some, such as LA, use such policies for concessions; others, like the San Jose Airport use them for service contractors; and others, such as San Francisco, use them for both.

More than 7 states, 60 cities and counties, and 118 school districts have adopted sweat-free procurement measures, which generally include these provisions: a living-wage; compliance with overtime and other basic protections; safeguards for organizing rights; and a system for monitoring compliance.

Connecticut, San Francisco, Seattle, Portland, and Washington, D.C. guarantee earned sick days for most or all employers, and many living wage laws guarantee that workers employed by city contractors receive a minimum number of earned sick days.

California, Massachusetts, Connecticut and Illinois have all adopted legal compliance review processes for various categories of publicly funded construction projects. Los Angeles also has a comprehensive “responsible contractor policy” (RCP) that extends these best practices to service contracting.

### **III. What are the limitations of the policy? What are lessons learned for new drafters?**

While the proposed administrative reforms are well within the President’s broad executive authority to promote “efficiency and economy” in contracting, opponents may challenge the President’s authority to undertake further reforms. Additionally, legislative reforms, such as amending the Service Contract Act, may not be possible with the current Congress.

### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Anastasia Christman, et al, NELP, Taking the Low Road: How the Federal Government Promotes Poverty-Wage Jobs Through its Contracting Practices (2013), available at <http://www.nelp.org/page/-/Reports/NELP-Taking-Low-Road-Federal-Contracting.pdf?nocdn=1>

Soaring Poverty at the Philadelphia International Airport: How Low Wage Airport Jobs Keep Philadelphia #1 For Poverty (2013).

**Summary of Connecticut General Statute 31-57f, Connecticut Department of Labor, available at: <http://www.ctdol.state.ct.us/wgwkstnd/StandardWageGuide/2-Summary31-57f.htm>.**

## Contracted Work Policy Option #7:

### Policy: Insert transparency into the supply chain.

#### I. What is the policy?

In September 2010 California Governor Arnold Schwarzenegger signed into law Senate Bill 657, the California Transparency in Supply Chains Act. The purpose of the Act is to “provide consumers with information regarding [companies’] efforts to eradicate slavery and human trafficking from their supply chains” and to “educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains.”

Any company that is subject to the Act (retailers or manufacturers with worldwide gross receipts above one hundred million dollars), must disclose its actions, if any, in five separate categories: (1) verify its product supply chains to evaluate and address risks of human trafficking and slavery, and disclose if the verification was *not* conducted by a third party; (2) audit its suppliers to evaluate their compliance with the company’s standards for human trafficking and slavery in its supply chains, and disclose if these audits were *not* independent and unannounced; (3) require its direct suppliers to certify that materials used in the company’s product comply with the laws regarding human trafficking and slavery of the country or countries in which they are doing business; (4) maintain internal accountability standards and procedures for employees or contractors failing to meet company standards regarding human trafficking and slavery; and (5) train company employees and managers with direct responsibility for supply chain management on human trafficking and slavery, particularly on how to mitigate such risks within supply chains. The five categories of disclosures must be posted on a company’s website with a conspicuous link from the homepage. A list of retailers and manufacturers must be submitted to the Attorney General by the tax board annually.

#### II. How has the policy worked in practice?

At least two non-profit groups have written studies criticizing the Act and suggesting best practices that companies should follow. In 2011, Verite issued a white paper, called “Compliance is Not Enough,” outlining best practices under the law. The report stressed that a company must look very closely at supplier practices at every step of the supply chain and all through the worker’s tenure at a subcontractor. “It is impossible to identify

the hidden and insidious abuses of human trafficking and forced labor unless a company examines all aspects of workers' employment, from the moment of recruitment to on-site employment, across the entire supply chain. If companies are serious about eradicating trafficking and forced labor, they must also look beyond their first-tier suppliers to ensure that businesses deep in their supply chains are mirroring their own commitments.”

Some of the best practices put forth by Verite include (1) conducting confidential off-site interviews of workers, (2) ensuring these efforts become part of the way a company does business, integrating the avoidance of exploitation with mechanisms for hiring workers, sourcing suppliers, and measuring business success, and (3) engaging in targeted assessment, prevention, and remediation efforts.

A report by the Alliance to End Slavery and Trafficking (ATEST), "[Beyond SB 657: How Businesses Can Meet and Exceed California's Requirements to Prevent Forced Labor in Supply Chains](#)," provides guiding principles and comprehensive lists of best practices under each of the subjects of the California law -- audits, accountability, verification, certification and training -- for companies required to comply with the law. ATEST is researching and comparing disclosures that have been posted on the website of hundreds of companies and intends to issue a further report on these efforts.

#### EXAMPLES OF CORPORATIONS' DISCLOSURES:

Nestle: <http://www.nestleusa.com/About-Us/Supply-Chains-Act.aspx>

Raytheon:

[http://www.raytheon.com/rtnwcm/groups/public/documents/content/CA\\_transparency\\_supply\\_chain.pdf](http://www.raytheon.com/rtnwcm/groups/public/documents/content/CA_transparency_supply_chain.pdf)

General Electric: <http://www.gecitizenship.com/reports/california-transparency-in-supply-chains-act/>

Hewlett-Packard:

<http://www.gecitizenship.com/reports/california-transparency-in-supply-chains-act/>

The Gap:

<http://www.gapinc.com/content/csr/html/OurResponsibility/governance/SB657.html>

### III. What are the limitations of the policy? What are lessons learned for new drafters?

Weaknesses of the California Supply Chain Transparency Act include that it only directs corporations to disclose the efforts that they are making to fight trafficking, but does not require any particular action be taken. In addition, the exclusive remedy for a violation of

the Act is an action brought by the Attorney General for injunctive relief – there is no private right of action and no damages are available. Further, it applies only to companies with worldwide gross receipts above one hundred million dollars. Finally, the Act only applies to a company’s direct supply chain and is limited to manufacturing and retail, not to service sector industries or service employees working in manufacturing plants, like janitors, security personnel and landscapers, where the companies could verify its labor supply chains.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Jonathan Todres, *The Private Sector's Pivotal Role In Combating Human Trafficking*, 3 CALRC 80 (2012)

Because the California law is a new model, the closest analogues are in voluntary codes of conduct and in the various other international models that we discuss in our policy analysis of codes of conduct.

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## Contracted Work Policy Option #8:

### Policy: Impose liability for “insufficient” contracts.

#### I. What is the policy?

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 contractor to comply with applicable labor laws. Plaintiffs must show that the person hiring the subcontractor “knows or should know” of the contract’s insufficiency in funds. The statute applies to construction, farm labor, garment, janitorial, security guard, and warehouse contractors.

Section 2810 subdivision (b) provides a rebuttable presumption that a contract is in compliance with Section 2810 if the contract is in writing and contains all of the required provisions in subdivision (d).<sup>24</sup> The presumption may be rebutted by a showing that the person or entity knows or should know that the contract was financially insufficient. In determining knowledge Section 2810 permits inquiry into the contractor’s “familiarity with the normal facts and circumstances of the business activity engaged in,”<sup>25</sup> and the

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<sup>24</sup> *Id.* at (b), (d), (d)(7). Subdivision (d) requires the contract to contain the following provisions, in writing and in a single document: (1) The name, address, and telephone number of the person or entity and the construction, farm labor, garment, janitorial, security guard, or warehouse contractor through whom the labor or services are to be provided; (2) A description of the labor or services to be provided and a statement of when those services are to be commenced and completed; (3) The employer identification number for state tax purposes of the construction, farm labor, garment, janitorial, security guard, or warehouse contractor; (4) The workers' compensation insurance policy number and the name, address, and telephone number of the insurance carrier of the construction, farm labor, garment, janitorial, security guard, or warehouse contractor; (5) The vehicle identification number of any vehicle that is owned by the construction, farm labor, garment, janitorial, security guard, or warehouse contractor and used for transportation in connection with any service provided pursuant to the contract or agreement, the number of the vehicle liability insurance policy that covers the vehicle, and the name, address, and telephone number of the insurance carrier; (6) The address of any real property to be used to house workers in connection with the contract or agreement; (7) The total number of workers to be employed under the contract or agreement, the total amount of all wages to be paid, and the date or dates when those wages are to be paid; (8) The amount of the commission or other payment made to the construction, farm labor, garment, janitorial, security guard, or warehouse contractor for services under the contract or agreement; (9) The total number of persons who will be utilized under the contract or agreement as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations; and (10) The signatures of all parties, and the date the contract or agreement was signed.

<sup>25</sup> *Id.* at (i)(1).

contractor’s knowledge of “additional facts or information that would make a reasonably prudent person undertake to inquiry” into the sufficiency of the contract.<sup>26</sup> Further, the statute imposes liability if the person or entity fails to “request or obtain any information from the contractor that is required by any applicable statute or by the contract” between the parties.<sup>27</sup>

Plaintiffs may bring a claim under subdivision (g)(1), which establishes a cause of action in favor of the employees “aggrieved” by a violation of subdivision (a). Subdivision (g)(1) requires plaintiffs to plead and prove they were “injured as a result of a violation of a labor law or regulation in connection with the performance of the contract or agreement.”<sup>28</sup> An employee proven to have been aggrieved by a violation of subdivision (a) may file an action for damages to recover his or her actual damages or \$250 per employee for an initial violation and \$1,000 per employee for each subsequent violation, whichever is greater.<sup>29</sup> In addition, “upon prevailing in an action brought pursuant to this section, [an employee] may recover costs and reasonable attorney fees.”<sup>30</sup> Homeowners and employment covered by a collective bargaining agreement are exempt from the provisions of Section 2810.<sup>31</sup>

## II. How has the policy worked in practice?

The leading case brought under Section 2810 is *Castillo v. Toll Brothers, Inc.* The case involves a group of workers who brought two class action suits against Toll Brothers., Inc., a developer of large-scale residential projects.<sup>32</sup> The plaintiffs were employees of two of Toll Brothers’ subcontractors who allegedly failed to pay overtime, provide meal and rest breaks, issue accurate wage statements and keep accurate payroll records, and outright refused to pay wages.<sup>33</sup> The plaintiffs sought to hold Toll Brothers liable under Section 2810 by arguing that Toll Brothers knew or should have known that its contracts with the subcontractors were insufficient to allow compliance with the applicable labor law.

The central issue of *Castillo* was what wage standard to use in determining whether “sufficient” funds existed under Section 2810. Defendant Toll Brothers argued that “funds sufficient to allow the contractor to comply with all applicable... laws” means minimum

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<sup>26</sup> *Id.* at (i)(2).

<sup>27</sup> *Id.* at (i)(3).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at (c) (stating that subdivision (a) does not apply to “a person who enters into a contract or agreement for labor or services to be performed on his or her home residence, provided that a family member resides in the residence or residences for which the labor or services are to be performed for at least a part of the year.”).

<sup>32</sup> *Castillo v. Toll Bros., Inc.*, 197 Cal. App. 4th 1172, 1181 (2011); *Hernandez v. Toll Bros., Inc.*, 2010 WL 1747457. The Court of Appeal examined both cases in *Castillo*.

<sup>33</sup> *Id.*

wage.<sup>34</sup> According to the plaintiffs, the “sufficiency” of the contract should be measured by the workers’ regular rate of pay or the “prevailing wage” of that activity.<sup>35</sup> The court ruled in favor of Toll Brothers, holding that employers are only obligated to comply with minimum wage laws since there is no general law requiring employers to pay their workers the prevailing wage for a certain skill.<sup>36</sup> Pointing to legislative history, the court noted that Section 2810 as proposed was aimed to eliminate contracts in the “underground economy” that fail to provide for even the most basic labor standards.<sup>37</sup> Thus, the court disagreed that the law was intended to guarantee market rate wages for workers in specific trade.<sup>38</sup> On a practical level, the court favored using minimum wage as the standard since it creates a bright-line test, which is especially valuable in an industry with varying wage standards.<sup>39</sup>

In determining whether the entity “knows or should have known” of the insufficiency of the contract, the court ruled that the inquiry covers both the contracting party’s actual or constructive knowledge of insufficiency *and* actual insufficiency.<sup>40</sup> The court rejected Toll Brothers’ argument that the contracting party should only be liable if he or she has genuine knowledge that a contract is insufficient at the time it is executed. The court reasoned that such a restrictive definition would “defeat the obvious purpose of 2810, since it would allow a contracting party to evade liability under 2810 by cultivating ignorance in its contract relations.”<sup>41</sup> This is especially important to encourage contractors like Toll Brothers to investigate the sufficiency of the contracts instead of employing a “don’t ask, don’t tell” strategy to avoid liability.<sup>42</sup>

Another important case under 2810 is *Hawkins v. TACA International Airlines, S.A.*<sup>43</sup> The case involves a group of workers who brought a class action against three airlines for underfunding contracts.<sup>44</sup> The plaintiffs were employed by the airlines’ subcontractor who

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<sup>34</sup> Cal. Lab. Code § 2810 (West).

<sup>35</sup> The plaintiffs submitted evidence establishing the local average hourly wage for carpenters in 2009 was \$29.32. Plaintiffs argued that as skilled labor, they would not have accepted a job that paid only the minimum wage. See *Castillo* at 1186.

<sup>36</sup> *Id.* at 1192 (2011).

<sup>37</sup> *Id.* at 1193-1194.

<sup>38</sup> *Id.* at 1195.

<sup>39</sup> *Id.* at 1194.

<sup>40</sup> *Id.* at 1196.

<sup>41</sup> *Id.* at 1198.

<sup>42</sup> *Id.* at n.15 (“A statutory interpretation that would reward contracting parties for looking the other way with respect to their legal obligations would plainly undercut the intent of the Legislature.”).

<sup>43</sup> *Hawkins v. TACA International Airlines, S.A.*, 223 Cal. App. 4th 466, 478–79 (2014); see also *Vasquez v. USM, Inc.*, 2014 WL 296939 (N.D. Cal 2014) (denying defendant’s motion to dismiss Section 2810 claim because plaintiff pointed to specific contract amounts, language, and requirements which were insufficient to pay minimum wage and overtime); *Calop Business Systems Inc. v. City of Los Angeles*, 2013 WL 6182627 at \*21 (C.D. Cal 2013) (holding that contractors and employers lack standing to bring Section 2810 claim since the law is “designed to protect employees from unscrupulous employers who do not pay required wages.”)

<sup>44</sup> *Hawkins v. TACA International S.A.*, 223 Cal. App. 4th at 468.



allegedly failed to reimburse employees for required uniforms, keep and provide accurate payroll records, and pay wages and overtime.<sup>45</sup> As in *Castillo*, plaintiffs here sought to hold the airlines liable under Section 2810 by arguing that the airlines knew or should have known that its contracts with the subcontractor were insufficient to allow compliance with applicable law.

The issue in *Hawkins* was whether the plaintiffs needed copies of the contract in order to allege sufficient facts. The plaintiffs made general allegations of a Section 2810 claim without obtaining copies of the contract. The plaintiffs argued that “fact pleading” is not required by the statute, and the airlines failed to establish that “an employee would have access to private contracts between the employer and its customers”.<sup>46</sup> The court held that the plaintiffs needed the contracts and could have obtained them.<sup>47</sup>

### III. What are the limitations of the policy? What are lessons learned for new drafters?

Subdivision (b) of Section 2810 provides a “rebuttable presumption” that the defendants did not violate the statute as long as the contracts comply with the requirements listed in subdivision (d). In other words, Section 2810 places the burden on plaintiffs to show that defendants entered into the contracts knowing, or should have known of, the insufficiency. As long as the general contractor complies with the requirements under subdivision (d), the plaintiff has to prove that the general contractor knew or should have known of the contract’s insufficiency. However, because of the nature of construction and other contracting businesses covered by Section 2810, it is sometimes 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.

A new drafter should consider creating a clearer and more detailed safe harbor provision. The statute’s wage and knowledge standards can be ambiguous in determining whether the contractor is liable for labor violations. As evident in *Castillo*, in addition to the provisions required by subdivision (d), the contract should also state the rate of pay, approximate hours to be worked weekly by the workers, and the costs of any benefits to be provided to the workers (along with who would bear those costs), in order to allow for a better evaluation of the contract’s sufficiency. In addition, any amendments to Section 2810 should provide for automatic disclosure by the contractor of any contracts with subcontractors.

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<sup>45</sup> *Id.* at 471.

<sup>46</sup> *Id.* at 475

<sup>47</sup> *Id.* at 477–76.

## **IV. Other resources: states with analogous laws and articles or reports about the policy.**

The Department of Industrial Relations published a “California Labor Code Section 2810 Checklist” to help businesses/contractors comply with the new contract requirement. Department of Industrial Relations, *California Labor Code Section 2810 Checklist*, available at [www.dir.ca.gov/dlse/labor\\_code\\_2810.doc](http://www.dir.ca.gov/dlse/labor_code_2810.doc).

Walter & Prince LLP, *Yet Another Sleeping Liability Trap: Labor Code section 2810* (March 1, 2004), available at [http://www.walterlaw.com/e-zine\\_voll\\_5.html](http://www.walterlaw.com/e-zine_voll_5.html).

Weinberg Roger & Rosenfeld, *Labor Code Section 2810 Protects Workers by Entitling Them to Sue the Entity that Contracted with their Employer if their Boss doesn't Pay Wages Owed*, available at [http://www.unioncounsel.net/developments/private\\_sector/castillo\\_v\\_toll\\_bros\\_inc\\_&\\_labor\\_code\\_section\\_2810.html](http://www.unioncounsel.net/developments/private_sector/castillo_v_toll_bros_inc_&_labor_code_section_2810.html).

Kamping-Carder, Leigh, *Toll Bros. Wins On Contract law, But Wage Suits Revived*, Law360 (July 29, 2011), available at <http://www.law360.com/articles/261248/toll-bros-wins-on-contract-law-but-wage-suits-revived>.

Hunter & Williams, *By the Company You Keep: California's Joint Employer Presumption for Janitor, Security Guard, Garment and Construction Services Arrangements*, available at [http://www.hunton.com/files/Publication/b0cbc8bb-64eb-48cf-b662-ce88cf5ad943/Presentation/PublicationAttachment/92195e7b-bb4e-4605-a7f8-81d4dae2eee2/By\\_the\\_Company\\_You\\_Keep\\_9.08.pdf](http://www.hunton.com/files/Publication/b0cbc8bb-64eb-48cf-b662-ce88cf5ad943/Presentation/PublicationAttachment/92195e7b-bb4e-4605-a7f8-81d4dae2eee2/By_the_Company_You_Keep_9.08.pdf).

## Contracted Work Policy Option #9:

### Policy: Codes of Conduct.

#### I. What is the policy?

For our purposes, codes of conduct are private agreements entered into by companies, often at the behest of worker advocates, to abide by certain minimum protections for workers. Codes of conduct may target a specific corporation (i.e. Foxconn), or a specific sector (i.e. Worker Rights Consortium and garment work; Coalition of Immokalee Workers/Fair Foods Standards Council and tomato growers in Florida). In the subcontracting context, worker rights organizations have used codes of conduct as a mechanism to extend accountability for workers throughout an entire supply chain, or to limit subcontracting as a practice itself (FIFA Code of Conduct). The success of such codes of conduct, however, often depends on enforcement mechanisms external to the codes themselves. A few notable examples are described below, although the examples discussed here are hardly exhaustive.

The Florida-based Coalition of Immokalee Workers' Fair Food Code of Conduct has organized tomato buyers to give purchase preference within the supply chain to tomatoes supplied by growers who can demonstrate socially responsible practices that meet or exceed the standards in the Code of Conduct. The Code specifies prices per pound, pay slips and recordkeeping, and specifies consequences for violations of the code, including refusal by buyers to purchase crops from the grower.

In light of the recent collapse of the Rana Plaza clothing factory in Bangladesh that resulted in the death of more than 1,200 workers, a number of garment companies have signed an Accord on Fire and Building Safety, which legally binds apparel retailers to allow independent building and fire safety inspections in factories. The agreement covers all suppliers for the companies, and the remediation provisions of the accord require that supplier factories “maintain workers’ employment relationship and regular income during any period that a factory” is closed for renovations; and that “any workers whose employment is terminated as a result of any loss of orders . . . are offered employment with safe suppliers.”<sup>48</sup> The agreement has a strong enforcement mechanism that includes a

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<sup>48</sup> Accord on Fire and Building Safety (2013), available at [http://bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf).

steering committee, dispute resolution process, safety inspection procedures, and steps to require compliance. Many U.S. companies, however, declined to sign the accord.<sup>49</sup>

Worker rights organizations have also used codes of contract to try and limit the practice of subcontracting itself. In September 1996, the ITGLWF, FIET and the ICFTU concluded an agreement with the Federation Internationale de Football Association (FIFA) in the Code of Labour Practice for Production of Goods Licensed by the Federation Internationale de Football Association (FIFA). The code specified that employers should attempt to provide regular and secure employment for workers, and refrain from the excessive use of temporary or casual labor. The code also specified that *obligations to employees arising from the regular employment relationship should not be avoided through the use of labor-only subcontracting arrangements, or through apprenticeship schemes.*<sup>50</sup>

Other models include International Franchise Agreements (IFA). These are agreements signed between multinational companies and global unions to ensure companies' respect for core labor rights as articulated by the International Labor Organization. Intended scope of "core labor rights" include freedom of association and collective bargaining; prohibition on forced labor; elimination of child labor; and elimination of discrimination. Approximately 100 IFAs have been signed between multinational corporations and global unions. These agreements often oblige the multinational corporation to require its suppliers and sub-contractors to respect core labor rights in their operations. IFAs have developed in response to failure of codes of conduct that depend on enforcement by the multinational corporation. Most IFAs do not include detailed provisions on monitoring compliance or resolving disputes over breaches of agreement. Viewed as a tool to increase collaboration between labor and corporations, enforcement depends on the relative strength of the parties. There is no global enforcement mechanism where complaints of a violation of an IFA can be heard.

In Australia and New Zealand, the "Clean Start" Initiative provides an additional model of an effective code of conduct. Launched as a trade union initiative in the cleaning and security services industries, unions emphasized the benefits of a responsible approach to hiring contractors in the industry. The initiative is based on a set of ten principles, including obligations on contractors and requirements on lead companies that outsource services. The principles state that owners and unions will support appropriate cleaning ratios, good jobs capable of attracting a stable workforce, training, and education. A good

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<sup>49</sup> Steven Greenhouse, *U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh*, NY Times, May 22, 2013, available at: [http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html?pagewanted=all&_r=0).

<sup>50</sup> Andrew Bibby, Int'l Labour Office, *Responsible Contracting: An Approach Aimed at Improving Social and Labour Practices in the Property Services Sector*, WVP.282 (2011), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/publication/wcms\\_172950.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_172950.pdf).

number of cleaning contractors in several Australian states and a majority nationally have now signed up to the Clean Start collective agreement.

## II. How has the policy worked in practice?

Because codes of conduct are extra-legal mechanisms, often with explicit language preventing any binding agreements, there are few legal rulings that have applied codes of conduct. Enforcement typically depends on the strength of the parties and the monitoring and sanctions in place in the case of non-compliance.

## III. What are the limitations of the policy? What are lessons learned for new drafters?

The most obvious limitation to codes of conduct is that they may have few to no enforcement mechanisms to ensure accountability to the enumerated standards. Some are merely an “ethical commitment.” Although adherence to such a code of conduct can be tracked through auditing and benchmarking, the efficacy of such mechanisms varies.

The European Union has recognized the importance of encouraging responsible contracting, and recently attempted the creation of dialogues between industry and labor that encourage a “responsible approach” to outsourcing. One such example is a Model Responsible Contractor Policy, which covers adherence to ILO core conventions and applicable labor laws, payment of a living wage, maintenance of a safe and healthy work environment, and recognition of collective organizing and agreement. Results of such initiatives have been limited. As the property services sector division of UNI Global Union, an international trade union federation in Europe, has reported, client companies have declined to adopt such policies.<sup>51</sup>

However, codes of conduct may prove more effective where independent monitoring, strong enforcement mechanisms and economic incentives and consequences are present for employers. For example, the Worker Rights Consortium (WRC), an independent labor rights organization conducts investigations of working conditions in factories around the world in the garment industry. Under its “designated suppliers program,” universities can require licensees to source university logo apparel from supplier factories that have been determined through independent verification to abide by protections outlined in codes of conduct. If a source fails to meet criteria, it could lose its status as a designated supplier, losing its license to provide products.

The Fair Food Code of Conduct’s enforcement power stems from agreements by buyers that they will give preferential treatment to growers that have met labor standards

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<sup>51</sup> *Id.*

specified in the Code of Conduct, or refusal to purchase from those who have violated the Code. The Fair Food Standards Council has also established an independent monitoring and enforcement body to ensure compliance.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Van Liemt, Gijsbert 2000 “Codes of Conduct and International Subcontracting: a “private” road towards ensuring minimum labour standards in export industries” in: R. Blanpain (ed.) *Multinational Enterprises and the Social Challenges of the XXIst Century* (Kluwer Law International).

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## Contracted Work Policy Option #10:

### **Policy: Create inter-agency taskforces to study and combat abuses in subcontracting.**

#### **I. What is the policy?**

State-level multi-agency taskforces or commissions document the prevalence, patterns and impact of subcontracting and pool and focus resources from various enforcement agencies to more effectively combat violations in subcontracted work structures. Taskforces include members from the Departments (or divisions) of Labor, Revenue, Unemployment Insurance, Occupational Safety and Health, Workers Compensation, Licensure, and the Attorney General; allow for information-sharing across these bodies; and carry out the following functions: (1) identify the violators through information-sharing, oversight, and fraud detection programs, (2) conduct targeted investigations in industries with the most substantial subcontracting abuses, and (3) employ multi-agency enforcement sweeps to uncover violations in high-violation jobs where contingent structures predominate.

#### **II. How has the policy worked in practice?**

Many states and the federal government have already set up taskforces and commissions to identify and remedy independent contractor misclassification abuses; some of these include a focus on the “underground economy” as well, which could include multi-tiered contracting structures. The US Department of Labor Employee Misclassification Initiative coordinates with individual states to investigate and litigate against multi-state employers with rampant independent contractor and contracted work violations. It also employs an incentive program that rewards states with the most success in detecting and prosecuting unscrupulous employers.

These taskforces<sup>52</sup> could either be broadened to also target abuses in contracted work situations, or new taskforces could be set up, incorporating practices that could be

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<sup>52</sup> The following states have established taskforces or commissions: California, Cal. Unemp. Ins. Code § 329; Connecticut, Public Act 08-156; Iowa, Exec. Order No. 8; Maine, Exec. Order No. 23 FY 08/09 (since repealed); Maryland; Exec. Order No. Executive Order 01.01.2009.09; Massachusetts, Exec. Order No. 499; Michigan, Exec. Order No. 2008-1; Nevada, 2009 Nev. Stat. 100; New Hampshire, 2008 N.H. Laws 378; New York, Exec. Order No. 17; North Carolina, EO 125; Oregon, Chapter 845 Oregon Laws 2009; Rhode Island, 2008 R.I. Pub. Laws 372; Tenn. Code Ann. § 50-6-919; Utah, U.C.A. § 13-46-201; Washington, 2009 Wash. Laws. 432.

particularly effective in uncovering and addressing violations in contracting. Massachusetts's taskforce, for example, targets the "underground economy" and includes a focus on subcontracting schemes. Among the best practices in use are:

**Research Studies** – state-commissioned research studies on contracted work structures, either generally or in specific industries rife with subcontracting abuses, can develop better information on the depth, scope and patterns of violations to help build the case for reforms and better target enforcement efforts. The Massachusetts Joint Enforcement Taskforce recently commissioned a research study to determine and analyze the current state of the underground economy, including current problems, statistics, policy considerations, lost revenues, and the impact on legitimate businesses, individual workers, and various business sectors.<sup>53</sup> The study is funded with a portion of the proceeds from the state's settlement with FedEx Corp. for misclassifying drivers as independent contractors.

**Coordinated targeted enforcement** – unannounced, coordinated inspections targeting high violation industries can efficiently harness agency resources to uncover abuses at worksites with multiple contractors, such as warehouses that engage multiple staffing agencies, even absent complaints by individual workers. Sweep teams review records; question the employer about the workforce, payroll, wage and hour practices and unemployment insurance and workers compensation coverage; speak with workers while their employer is being interviewed; and share information and documents obtained during the sweeps. Individual agencies can then pursue audits, stop work orders or other actions; cases showing evidence of fraud and illegality are evaluated for criminal referral.

- **NEW YORK:** The New York taskforce's sweeps have uncovered numerous wage and hour, workers compensation, unemployment and tax violations at construction worksites, sometimes among as many as a dozen contractors per site.<sup>54</sup> Sweeps have also targeted other industries and parts of the state rife with abuses, including urban retail strips.

**Solicitation of public information** – on-line complaint forms and hotlines give workers and advocates better means to report suspected violations and facilitate the filing of complaints. The Connecticut taskforce created a [website](#) with background information on independent contractor abuses and a complaint form for workers and the public. New York's taskforce maintains a confidential, 24/7 hotline in the DOL's Employer Fraud Unit

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<sup>53</sup> [Massachusetts Joint Enforcement Task Force on the Underground Economy and Employee Misclassification: 2011 Annual Report](#), page 8. The study is expected to be published in the summer of 2014.

<sup>54</sup> See [2013 Annual Report of the New York Joint Enforcement Task Force on Employee Misclassification](#), available at <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf>.



for anyone who knows about or suspects violations.<sup>55</sup> These tools could be expanded to help identify and report violations in subcontracting contexts.

**Stop Work Orders and Debarment** – Some states have increased penalties for independent contractor and other wage and hour abuses, such as allowing for the issuance of stop work orders (SWO) and debarment from public contracting.<sup>56</sup> SWOs can be particularly helpful for workers in contracted work structures because they halt activity at the construction site, imposing consequences for the general contractor (or potentially other end users) for violations at the site. Debarment from public contracting against employers that knowingly or negligently enter into insufficient contract with subcontractors that violate wage and hour laws would discourage them from such practices. These penalty provisions are typically only recoverable by a public enforcement agency. SWOs can better protect workers through a provision like California has, providing for compensation for work lost due to the imposition of the order.

- **CONNECTICUT:** The CT Taskforce has put its state’s stop-work provisions to good use, issuing 181 SWO’s during Fiscal Year 2012-2013.<sup>57</sup> In CT, SWOs halt all activity at a cited company’s worksite and result in a \$300 civil penalty for each day the company does not carry workers’ compensation coverage as required by law.<sup>58</sup> CGSA § 31-76a allows the Department of Labor Commissioner to issue a SWO against an employer after finding that the employer has failed to comply with workers’ compensation payments, misrepresented employees as independent contractors, or provided false information to the insurance company to obtain a lower premium rate. A SWO may be served at a place of business or employment by posting a copy of the Order in a conspicuous location and remains in effect until a finding of employer’s compliance or after a hearing is conducted. Employers who violate the order are subject to a \$1,000 penalty for each day of the violation.
- **CALIFORNIA:** Cal. Labor Code § 3710.1 allows the Director of Industrial Relations to issue and serve a SWO on an employer who fails to pay workers’ compensation. Employees affected by the order are entitled to compensation for a maximum of ten days of lost pay.

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<sup>55</sup> See the NYSDOL webpage [Employer Misclassification of Workers](#), scroll down to “Report Fraud”.

<sup>56</sup> See generally, Connecticut, CGSA 31-76, available at: <http://www.cga.ct.gov/2001/pub/Chap558.htm#sec31-76a.htm>; California, Cal. Labor Code 3710, available at: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=03001-04000&file=3710-3732>; Massachusetts, General Laws c. 152, §25C, available at: <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter152/Section25c>.

<sup>57</sup> <http://www.ctdol.state.ct.us/wgwkstnd/activities/wgrptFY13.pdf>.

<sup>58</sup> See <http://www.ctdol.state.ct.us/communic/2012-8/WageRecovery2012.pdf>.

**Advisory Councils** – Advisory councils comprised of key stakeholders, including union representatives, workers’ rights and immigrant advocates, business and business association representatives, state legislators, and municipal officials provide crucial guidance to the taskforces. The Massachusetts Taskforce’s Advisory Council focuses on (1) public policy related to the taskforce’s enforcement capacities and legislative improvements in the area of underground economy enforcement, (2) education of employees, businesses, community-based organizations, and community leaders on the problem of the underground economy and misclassification; (3) information regarding specific, ongoing violations of employment law that may be identifiable in various communities throughout the state.<sup>59</sup> These efforts could be broadened to address issues in contracted work structures.

**Fraud detection programs** – In situations where traditional inspections are not practical or effective in detecting payroll fraud, and to supplement traditional inspections, strategic analyses of employer information across multiple state data sources can identify violations. Particularly helpful in contracting situations, some fraud detection programs analyze the revenue-to-labor ratio to determine whether a contract contained sufficient funds to comply with applicable laws. The California Taskforce’s **Forensic Investigation Program**, for example, analyzes revenue-to-labor ratios typical for certain industries, and conducts other internal and external database analysis, income tax return analysis, and interviews with workers to uncover noncompliance and underground economy activities. Massachusetts’ Department of Unemployment Assistance uses similar **fraud detection technology** to compile employer information data from a variety of state agencies to identify major violators across all industries.

### **III. What are the limitations of the policy? What are lessons learned for new drafters?**

State legislators and agencies may be receptive to employer arguments that taskforces will attack small businesses. Advocates should be sure to explain to policy-makers such as agency staff and legislators that they are targeting only the abuses that occur when companies use the subcontractors to hide behind their responsibility to the workers. As long as the subcontracting company is following all the rules, there will be no intervention.

Enforcement agencies may resist a mandate to collaborate with other agencies by arguing that state and federal privacy laws restrict their ability to share information. To avoid this potential hurdle, the task force can be accompanied by a specific legislative authorization for the participating state agencies to share pertinent information.

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<sup>59</sup> [MA Joint Enforcement Task Force on the Underground Economy and Employee Misclassification 2010 Annual Report.](#)

Independent contractor taskforces and labor enforcement agencies have experienced funding cutbacks recently as states seek to reduce spending. Some states have entirely defunded their taskforces. Advocates can argue that taskforces have returned hundreds of millions of dollars to the states in unpaid taxes and unpaid wages to workers, resulting in a net gain.<sup>60</sup>

Finally, staff assigned to the taskforce on top of their regular duties in their “home” department or division may feel too strapped to adequately focus on taskforce activities. An ideal policy would mandate the creation of several new positions dedicated to the taskforce and would authorize sufficient funding.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

The taskforce reports describe their enforcement efforts and results and may be helpful in conceiving of policies targeted at contracted work situations. These include:

California Employment Development Department, Annual Report: Fraud Deterrence and Detection Activities, report to the California Legislature (June 2013), *available at* [http://www.edd.ca.gov/about\\_edd/pdf/Fraud\\_Deterrence\\_and\\_Detection\\_Report13.pdf](http://www.edd.ca.gov/about_edd/pdf/Fraud_Deterrence_and_Detection_Report13.pdf).

*State of Connecticut Joint Enforcement Commission on Worker Misclassification, Annual Report, Prepared for the Honorable Dannel Malloy, Governor and the Labor and Public, Employees Committee of the General Assembly (December 2011).*

Massachusetts Department of Labor, *Joint Task Force on the Underground Economy and Employee Misclassification 2012 Annual Report (August 2013)*, *available at* <http://www.mass.gov/lwd/eolwd/jtf/annual-report-2012.pdf>.

*New York Annual Report of the Joint Enforcement Task Force on Employee Misclassification, (February 1, 2013)*, *available at* <http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2013.pdf>.

*Washington 2013 Annual Report to the Legislature: Partnering to Prevent Fraud and Abuse in the Workers' Compensation System (2013)*, *available at* <http://www.lni.wa.gov/ClaimsIns/Files/WCFraud/FY2013FraudAnnual.pdf>.

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<sup>60</sup> See, National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs (2012 update); available at [http://nelp.3cdn.net/0693974b8e20a9213e\\_g8m6bhyfx.pdf](http://nelp.3cdn.net/0693974b8e20a9213e_g8m6bhyfx.pdf).

## Contracted Work Policy Option #11:

**Policy: Third-party liability based on negligence standards to hold end user firms of goods and services liable for wage and hour violations by contractors throughout their supply chains.<sup>61</sup>**

### I. What is the policy?

Third-party liability based on negligence standards derived from tort law would hold end user firms of goods and services to a duty of reasonable care to prevent wage and hour violations throughout their supply chains.

In general terms, a defendant is negligent if it (a) owed the plaintiff a duty of care, (b) breached its duty of care, and (c) its breach caused the plaintiff's injuries. Negligence laws generally apply a "reasonable care" standard: a defendant is liable if it failed to take precautions that a "reasonable" party in like circumstance would take to prevent such harms, Rest. Torts (2d) § 283.

In determining whether an end user firm breached this standard, a court might examine whether the end-user knew or should have known of potential violations, how much power it had to deter violations, and whether it took reasonable steps to do so, up to and possibly including monitoring suppliers for compliance. In determining whether the firm knew or should have known of the violations, a court could ask whether it knew or should have known that the primary wrongdoer was judgment proof, whether the contract included sufficient funds to ensure compliance with workplace laws, and whether the defendant was a frequent or major purchaser of such goods or services. Knowledge could also be established if workers and advocates made public information about ongoing violations or a firm's past history of violations, or brought such information directly to representatives of the company. To determine a firm's ability to deter violations, a court could examine the length and nature of the relationship between the end user firms, the primary wrongdoer and intermediaries, as well as the company's size and power within the relevant market. Finally, in determining whether the company had taken reasonable precautions to prevent the violations, a court could look at whether it required written

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<sup>61</sup> Much of this policy summary is taken from Brishen Roger's *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Empl. & Lab. L. 1 (2010).

certification of compliance, with what frequency, what information it required and how it evaluated the certification; whether it encouraged compliance via holdbacks, penalties or rewards; contracted only with well-capitalized contractors; and implemented a bona fide monitoring program including payroll audits and unannounced site visits.

An obvious benefit to this standard is that liability does not rest on showing the existence of an employment relationship between the end user firms or intermediaries and workers.

Such a policy could be used in any sectors/ industries where large corporations' sourcing practices create conditions in which violations are likely or even inevitable, but where the corporations could deter violations at low cost through monitoring and contractual incentives. This might include, for example, retailers that demand such low contract prices for goods that suppliers cannot meet wage and hour standards. The standard could also be useful in janitorial, construction and other sectors where companies' pressures on ever-lower bidders similarly make minimum wage and overtime compliance impossible.

Courts could hold parties within a given chain liable for violations incurred in the production of goods or services that entered their chain, then apportion damages among supply chains based on a percentage of goods purchased.

## II. How has the policy worked in practice?

Several Fair Labor Standards Act (FLSA) cases have included negligence chains. Most recently, the U.S. District Court for the Central District of CA ruled that Walmart could be added as a defendant to a class-action lawsuit brought by temporary warehouse workers. The plaintiffs package and handle boxes exclusively for Walmart at a warehouse managed by a third-party logistics company. The plaintiffs contend that under California law, they satisfy the multi-factor test for finding a legal duty of care, which largely rests upon whether public policy favors the creation of such a duty.<sup>62</sup> The court rejected Walmart's arguments that the negligence claims were preempted by the FLSA and by the California Labor Code, and agreed that Walmart owed the workers a "duty" to exercise reasonable care in the selection of a warehouse operator. *Carrillo v. Schneider Logistics*, C.D. Cal. No. 11-8557 CAS.

Overall, negligence claims in FLSA suits have had mixed results. Third-party liability for workplace violations could also be established in the following ways:

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<sup>62</sup> See *Rowland v. Christian*, 69 Cal.2d 108, 113 (1968), superseded by Cal. Civ. Code §847 (factors include: 1) foreseeability of harm; 2) degree of certainty that plaintiff suffered injury; 3) closeness of connection between defendant's conduct and injury suffered; 4) moral blame attached to defendant's conduct; 5) policy of preventing future harm; 6) burden to defendant and consequences to community of imposing duty; and 7) availability, cost, and prevalence of insurance).

(1) Congress could add a new section to the FLSA making clear that it holds firms to a duty of reasonable care to ensure FLSA compliance within their supply chains, regardless of their employment relationship with aggrieved workers, and instructing courts to refer to the factors discussed above. Similarly, state legislatures could revise their wage and hour laws to implement a new test for third-party liability.

(2) Congress could enact a law clarifying that the FLSA does not preempt state tort claims. Alternatively, courts could rule that the FLSA does not preempt state tort claims. Workers who brought tort-based suits would probably try to show that the end user firm had a duty towards the worker, which included the duty to take reasonable precautions against entering a contract that did not include sufficient funds to enable compliance, and to monitor for and sanction misconduct. These types of claims have been brought in recent years with mixed results: while initially some courts allowed them to proceed, more recently courts have tended to hold them preempted.

(3) Courts could, on their own, adopt these two factors explicitly into their tests for joint employment status under the FLSA: (a) whether particular facts indicated that a user firm had the power to prevent violations, and (b) whether it took reasonable steps to do so.

(4) Courts could interpret FLSA's definition of "employer" to extend liability well beyond the user firm/contractor relationship.<sup>63</sup>

### III. What are the limitations of the policy? What are lessons learned for new drafters?

Workers have had a hard enough time winning standard joint-employer cases, so convincing courts to reinterpret the law to extend the FLSA's reach even further seems unlikely, absent new interpretive guidelines from US DOL.

Also, as mentioned above, several courts have rejected negligence theories. For example, a similar theory of negligence was rejected in *Flores v. Albertson's, Inc.*, 2003 WL 24216269 (C.D. Cal. 2003), a case brought by janitorial service workers against several supermarket chains, on the ground that the FLSA preempted the state law claim that a third party was negligent in not preventing a contractor from committing FLSA violations.

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<sup>63</sup> See Contracted Work Policy Options: Bring "joint employer" cases against multiple parties using broadly-defined labor and employment statutes (included with these materials).

Getting Congress to pass a worker-friendly amendment to the FLSA is unlikely given current politics. Some state legislatures might be more open to enacting such a policy, especially states that have already passed contractor licensing laws.

Opponents might argue that this policy would encourage garment manufacturers and other production firms to move to other countries with lower wages. Other firms that cannot move their operations – like building services, security and logistics – could attempt to reduce costs by mechanizing operations and reducing their workforce. Opponents may argue that the policy harms small businesses in particular, because they won't have the resources to set up monitoring mechanisms. Firms that are already operating close to the margins may be forced out of business.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Empl. & Lab. L. 1 (2010).

Restatement 2d Torts.

##### **Wage and Hour Cases with negligence claims:**

*Carrillo v. Schneider Logistics*, C.D. Cal. No. 11-8557 CAS (May 13, 2013) (described above).

Other cases with positive treatment of negligence claims include *Bureerong v. Uvawas*, 959 F. Supp 1231 (C.D. Cal. 1997) (allowing tort action to proceed) and *Paukstis v. Kenwood Golf & Country Club, Inc.*, 241 F. Supp. 2d 551, 559-60 (D. Md. 2003) (allowing claims for negligent supervision by firm of individual who violated FLSA).

Courts rejected negligence claims in *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191-92 (4th Cir. 2007) (overview of other courts' treatments of issue, finding "obstacle preemption"); *Flores v. Albertson's Inc.*, No. CV01-00515PA (C.D. Cal. Dec. 8, 2003) (FLSA preemption, summarized above); and *Chen v. Street Beat Sportswear, Inc.*, 364 F.Supp.2d 269, 293 (E.D.N.Y. Apr 06, 2005) (dismissing negligence per se claims as "duplicative" of FLSA claims).

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## Contracted Work Policy Option #12:

**Policy: Ensure pension fund real estate investment does not drive down prevailing wage standards among building service and other contracted workers.**

### **I. What is the policy?**

Many Taft-Hartley and public employee retirement plans have adopted responsible contracting practices at the plans' properties and real estate developments, using Responsible Contracting Policies (RCPs) to guide their selection of contractors that provide building operations, hotel management and other services to real estate properties and developments that the plan owns or controls. RCPs direct plan staff to select "responsible contractors," defined as contractors or subcontractors that provide high quality services and pay workers a "fair wage" and "fair benefits," which may include employer-paid family health care coverage, pension benefits and training and apprenticeship programs. Wage and benefits standards are generally evaluated in comparison to local market standards. RCPs can help safeguard organizing rights for workers employed at fund projects through requirements that parties associated with fund properties adopt a position of neutrality in the course of a union organizing campaign or other union activity. Complaints issued by the NLRB against a company, or other evidence that the contractor has broken labor law, may be grounds for a contractor's disqualification. RCPs also often have a general requirement that property managers and contractors observe all applicable laws.

Plans may additionally be able to encourage investment partners to make responsible contracting decisions at properties in which they invest or are a partial owner, where they lack outright control over contractor selection.

Sample language from [The CalSTERS Responsible Contractor Program](#):

#### **DEFINITION OF A RESPONSIBLE CONTRACTOR:**

Responsible Contractor, as used in this Policy, is a contractor or subcontractor who pays workers a fair wage and a fair benefit as evidenced by payroll and employee records. "Fair



benefits” are defined as including, but are not limited to, employer-paid family health care coverage, pension benefits, and apprenticeship programs. What constitutes a “fair wage” and “fair benefit” depends on the wages and benefits paid on comparable real estate projects, based upon local market factors, that include the nature of the project (e.g., residential or commercial; public or private), comparable job or trade classifications, and the scope and complexity of services provided.

**SELECTION PREFERENCE OF A RESPONSIBLE CONTRACTOR:**

If Initial Requirements A through D (see Section III. above) are satisfied, CalSTRS expresses a strong preference that Responsible Contractors be hired.

## II. How has the policy worked in practice?

Pension fund responsible contracting policies have played a key role in high-profile organizing campaigns in combination with other strategies.

Retirement funds play a role in Build Up NYC, a campaign led by the NY Construction Trades Council, SEIU 32BJ, and the Hotel Trades Council aimed at getting major real estate developers in New York City to build and operate using responsible contractors that do not undermine union labor standards. Pension funds are leveraging their investment in the Starwood Capital luxury condo-hotel development at Brooklyn Bridge Park to encourage the use of responsible construction contractors. Once construction is complete, the retirement funds would work with the unions to ensure the use of responsible building services contractors.

CalPERS played a role in safeguarding the Houston Janitors master contract, when several leading building contractors attempted to dilute key contract provisions as a step to moving the work to non-union. CalPERS began an investigation to determine whether this behavior violated its RCP. The contractors rescinded their demand before the investigation was complete.

These policies also play an important role during organizing campaigns. Funds have been able to successfully intervene to halt contractors’ union busting that violates RCP neutrality language.

## III. What are the limitations of the policy? What are lessons learned for new drafters?

Retirement Funds control the contracting process only in real estate projects they fully own or control. Even in projects or properties where a Fund has less than full ownership or control – where it has assets invested in a comingled fund managed by another party –fund

staff can still intervene in the contracting process by alerting partners to the risk of contracting with particular firms that have a history of bad labor practices.

RCPs cannot legally mandate the use of union contractors; they can only require the use of contractors with a demonstrated ability to provide high quality services, without specifying whether the contractors are unionized, on the grounds that those firms will enhance the value of the funds' properties. In practice, unionized contractors are much more likely to qualify as "responsible contractors." And although funds cannot reject a firm solely on the basis that its workers do not have a union, they can reject contractors that have had Unfair Labor Practice charges filed against them or are otherwise interfering with workers' organizing rights. In regions where unions are actively organizing building service workers, such a requirement can screen out contractors that have been an obstacle to organizing efforts. Programs like CalPERS Neutrality Trial Responsible Contractor Program (see below) may facilitate such a process.

A strongly-worded RCP is not effective unless unions closely monitor contractors' compliance with RCP standards and work closely with fund staff to alert them to problem contractors.

On the other hand, a strong relationship between unions and fund staff can go a long way even where RCP terms do not apply, because funds that have adopted RCPs are generally motivated to use their role to promote the union's broader goals of raising labor standards. They will also want to avoid the reputational risk of being linked to a contractor with labor violations.

Monitoring the quality of contractors and making this information readily available to funds is a real challenge because of the large number and high turnover of contractors in most markets. To help ease information flow, SEIU recently launched an online [Responsible Contractor Guide](#) with a searchable database of the major building services contractors. Contractors are evaluated on five main criteria, including wages and benefits, workplace safety, support for labor rights and collective bargaining, grievance procedures, and adherence to green cleaning practices, and will be coded green, yellow or red to according to their performance. Union staff will update the database regularly to provide a real-time snapshot of the contractors in major markets around the country. The database also encourages contractors to proactively remedy violations or improve standards to win a green code and gain an advantage in the selection process, also helping to expand the pool of responsible contractors.

Although RCPs originated with pension funds, they may also be used in other non-pension fund contexts. RCPs may be adopted by real estate owners that want to commit to responsible contracting. RCPs may also be adopted by businesses that outsource work.

For example, a retailer can require adoption of RCPs by not only its facility service vendors but also its suppliers, warehouses, and distribution providers. See Policy Option # 9.

#### **IV. Other resources: states with analogous laws and articles or reports about the policy.**

Unions and Funds are refining RCP language on neutrality and improving methods for enforcing this policy. The California Public Employees' Retirement System (CalPERS) Neutrality Trial Responsible Contractor Program is an effort in this direction.

Excerpts from CalPERS Neutrality Trial RCP:

**Neutrality** – If a labor organization lawfully attempts to organize a Manager's, Delegate's, or Sub-Delegate's employees, or if such employees themselves lawfully attempt to organize, their employer shall remain neutral, as set forth below. If that employer is a Delegate, the Manager that hired the Delegate also shall remain neutral. If that employer is a Sub-Delegate, the Delegate that hired the Sub-Delegate and the Manager that hired the Delegate also shall remain neutral. Neutrality only is required as to employees of an employer subject to the NTP [Neutrality Trial Program] who provide maintenance, operation, or other property-related services (e.g., food services) at an RCP Investment pursuant to an RCP Contract that is not an Exempt Contract. Neutrality is not required as to employees providing professional services (e.g., accounting or property management services) or construction services.

To remain "neutral" means not to take any action or make any statement that will directly or indirectly state or imply any support for or opposition to the selection by employees of a collective bargaining agent, or preference or opposition to any particular union as a bargaining agent. Nothing in this policy obligates Managers or Delegates to enter, or prohibits them from entering, into private neutrality, labor peace or other lawful agreements with a labor organization represent workers at a RCP Investment.

A Manager, Delegate, or Sub-Delegate shall notify employees with respect to whom the NTP requires it to remain neutral that it has agreed to be neutral, by providing the following notice to such employees in writing in any reasonable manner: "As required by our contract to provide [type of service] at [name of building], [name of contractor] has agreed to remain neutral if our employees who provide such services choose to join or form a union. This means that [name of contractor] will not do or say anything that either supports or opposes employee selection of a union."

## Contracted Work Policy Option #13:

### Policy: International Models Addressing Contracting.

#### I. What is the policy?

This section examines comparative national and international policies that address subcontracting. It briefly outlines policies that 1) establish joint and several liability up the supply chain, either at the national or sectoral level; 2) regulate temporary and staffing agency employment; 3) prohibit subcontracting in certain contexts, and 4) strictly regulate use of public funds in subcontracting. These policies provide strong national protections for contracted workers, either broadly or in specific industries. This list is not comprehensive nor exhaustive, but merely provides a starting point for deeper investigation.

##### International Models on Joint Liability

National policies that address contracted labor include statutes that extend responsibility or liability up the supply chain, either at the national or sectoral level, and specific wage liability instruments limited to certain groups of workers (e.g., agency workers or undocumented workers). Many countries have adopted some legal mechanism of joint liability between lead user companies, main contractors, and subcontractors.

In the Netherlands, user companies of temporary labor are held liable for the payment of the statutory minimum wage and minimum holiday allowance to hired temporary agency workers. A client company and the temporary work agency are jointly and severally liable for the debt of the temporary work agency for workers' minimum wage payments.

In Spain, there is statutory liability system for minimum wage that binds all contractors in the chain in all sectors; the construction sector has additional requirements for end user clients and contractors. Article 42 of the Workers Statute applies to all clients and contractors in the chain. Most sector agreements contain clauses limiting subcontracting. Spain has passed limits on the number of levels of subcontracting in the construction industry, and has established transparency conditions for subcontracting enterprises.

In Germany, Section 14 of the Arbeitnehmer-Entsendegesetz (Posted Workers Act or "AentG"), establishes that a principal or intermediate contractor is liable as a guarantor for unpaid wages of a subcontracting company's employees across the whole chain. In

**Austria, Section 7(2)(2) of the Arbeitsvertragsrecht-Anpassungsgesetz (Employment Contract Law Adaptation Act or “AVRAG”), holds contractors liable for safeguarding that all workers, whether or not they are under a collective agreement, are paid a collectively-agreed upon wage.**

**In France, Article L8232-1 and Article L8222-2 of the Labour Code establish joint liability of an “order provider” (main or intermediate contractor) and the client (maître d’ouvrage) with respect to a subcontractor’s workers. Clients may be held jointly and severally liable with either the principal contractor or subcontractor for failure to fully pay workers.**

**In Norway, Section 13 of the General Application Act (GAA) extends joint and several liability to the entire subcontracting chain. Although the client—the end-user or consumer—is not included in this liability, the main contractor and all subcontractors involved are liable, no matter how involved the entity was in completing the assignment covered by the contract with the main contractor. Any employee not paid or fully paid on the date due may hold any party responsible in the liability chain, whether or not it is superior to his or her employer.**

**In South Korea, the Labour Standards Act (LSA) was revised in 2007. It now stipulates that if a subcontractor in the construction industry fails to pay wages owed to a worker, the direct “upper-tier contractor” shall take joint responsibility for paying wages to the worker. The law also provides that if a general contractor subcontracts construction work resulting in two or more tiers of intermediaries, a worker may demand that the general contractor pay an amount equivalent to the wages that the subcontractor should have paid. A general contractor, regarded as the employer, must pay employment and social benefit insurance. Construction workers now receive electronic cards to report to social security authorities. Severance pay schemes are calculated according to days of work performed in the industry, not for a particular employer.**

**According to one summary of national laws on subcontracting, rules on joint and several liability are very common outside the United States, in countries as diverse as Brazil, Panama, Indonesia and Turkey.<sup>64</sup>**

### **Regulation of Temporary Work Agencies (“TWA”)**

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<sup>64</sup> Donald C. Dowling, Jr., Global HR Hot Topic—February 2014: International Outsourcing and Offshoring: An Employment Law Checklist, available at : <http://www.whitecase.com/newsletter/022014/hrhottopic-international-outsourcing-and-offshoring-an-employment-law-checklist/#.U0wzcPldWkE>.

The organization for Economic Co-operation and Development (OECD) ranks its members annually on certain policy measures. In 2012, the U.S. came in second to last of 44 countries in the measure of direct and explicit regulation of temp agencies.<sup>65</sup>

Laws in many countries establish limits on temporary employment. In Europe, the European Parliament has issued a Directive requiring that temporary workers receive the same basic working and employment conditions as those received by direct employees. Temporary workers must also be informed of any openings in the user firm in order to find permanent employment.<sup>66</sup>

Many OECD member countries regulate how and when Temporary Work Agencies (TWAs) can operate, including by limiting temporary work to meet temporary or seasonal need or extraordinary circumstances, limiting temporary assignments to a certain time-frame, requiring that temporary workers receive the same working and employment conditions as those received by direct employees, requiring the TWA to set aside a deposit to guarantee the sums due to the workers, and requiring that the temporary worker be informed of any openings in the user firm to help the worker find permanent employment.

In Brazil, temporary work is legal only to meet a temporary or seasonal need or to cope with an extraordinary workload increase. Temporary assignments cannot exceed three months, with renewals only as authorized by the Ministry of Labor and Employment. The temporary worker has to receive equal pay and equal treatment on working conditions, and agency must be registered with the Ministry of Labor.<sup>67</sup>

Similarly, in Indonesia, employers are not allowed to use temporary workers hired through a labor supplier to carry out their enterprises' main activities, but only in supporting services or activities that are not directly related to the main production process. The law states that "supporting services shall include cleaning services, catering services for employees/laborers; security services; supporting services in the mining and oil industry; and transportation services for employees/laborers. The Ministry of Manpower and Transmigration recently issued a ruling letter confirming that these are the only circumstances in which outsourcing of the labor supply is permitted.

In Chile, a TWA may not place employees at a user firm in the following circumstances: (i) to perform positions entailing the representation of the user firm, such as managers, assistant managers; (ii) to substitute employees of a user firm who have gone legally strike

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<sup>65</sup> <http://www.oecd.org/els/emp/oecdlabourmarketpolicies-employmentprotectionlegislation.htm#>.

<sup>66</sup> Directive 2008/104/EC of the European Parliament and of the Council. Chapter II: Employment and Working Conditions Art. 5–6.

<sup>67</sup> OECD EPL Database, 2013, <http://www.oecd.org/els/emp/brazil.pdf>.

within a collective bargaining process; and (iii) to place the employee at the disposal of a third TWA. Furthermore, if the TWA arrangement is found to be illegal, the host employer will be deemed to be the workers' employer.

In Chile, TWA workers can be employed only to replace workers on leave, for extraordinary events e.g. exhibitions, conferences, for new projects or expansion into new markets, when starting a new business, to cover occasional increases in workload, or for urgent and precise work requiring immediate performance without delay (e.g. conducting repairs).<sup>68</sup>

In South Korea, the set-up of a TWA requires administrative approval, which should be renewed every three years. With regard to worker dispatch services (the business of providing temporary agency workers), a report must be made to the authorities every six months.<sup>69</sup>

In New Zealand, if an agency employs someone on a contract for a fixed term, they must have genuine reasons based on reasonable grounds for making the employment temporary.<sup>70</sup>

### Prohibitions of and Restrictions on Subcontracting

In addition to regulating how TWAs operate, many countries have prohibitions and restrictions on what kind of work can be outsourced. Several countries restrict outsourcing of a business's "core functions" or "main activities" as opposed to ancillary activities. Brazil is particularly tough in enforcing this law—in one Brazilian case, an employer was assessed a US\$1.5 million fine for illegal outsourcing. In addition, a São Paulo labor court once rejected the outsourcing of janitorial services as not "ancillary," reasoning that "corporate structure cannot function without cleaning." (São Paulo 2d Region Labor Court, 27 Aug. 2002).

### Limitations on Public Procurement

Several countries have public procurement policies that address subcontracting, including requiring contractors to guarantee compliance with general labor standards by every subcontractor below them, barring subcontractors that have demonstrated a history of labor standards violations, requiring all employers in the public project to be jointly and

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<sup>68</sup> OECD EPL Database, 2013, <http://www.oecd.org/els/emp/child.pdf>.

<sup>69</sup> <http://www.oecd.org/els/emp/korea.pdf>

<sup>70</sup> OECD EPL Database, 2013, <http://www.oecd.org/els/emp/NewZealand.pdf>

severally liable for ensuring compliance, and requiring that contractors guarantee that the funds provided are adequate and sufficient to the labor and safety measure costs.

Both Austria and Belgium, for example, have public procurement rules requiring contractors to guarantee compliance by every subcontractor with general labor standards. Under Austria's Section 19(1) of the Federal Act on Public Procurement 2006, public contractors may only hire authorized subcontractors, and bars those that have demonstrated serious professional misconduct. In Belgium, the Act of December 24, 1993, Article 40, provides that a contracting authority may impose conditions of performance that must comply with basic conventions of the ILO.

In Ireland, under Section 10 of the Construction Registered Employment Agreement (REA), contractors may engage only 'approved' subcontractors that are compliant with the REA and relevant tax, social welfare and health and safety legislation. Public contracts for goods and services include model clauses to ensure that a principal contractor will ensure that all subcontractors act in accordance with good industry practice and comply with applicable employment legislation.

Italy has established joint liability in the context of public procurement in the construction sector. In order to be awarded a public contract, an entity must fulfill contribution duties, indicated by a Single Insurance Contribution Pay Certificate (Italian acronym: DURC). As a result, employers in the construction sector must abide by the applicable collective agreements. Under Article 118, paragraph 6 D.lgs.163/06, a contractor is jointly and severally liable to ensure the observance of applicable collective agreements by any subcontractors with any employees involved in the public works project. If an employer defaults in a case of non-payment of wages, the client authority may pay outstanding contributions directly to the National Insurance Institute, deducting the equivalent by the amount due to the contractor (or subcontractor) as compensation for the works or services executed (Article 4, D.P.R. 207/10).

## **II. What are the limitations of the policy? What are lessons learned for new drafters?**

These are some of the best practice models for drafters to learn from:

- Reregulation of the temporary employment sector, to ensure that workers nominally employed by temporary and staffing agencies are entitled to equal treatment with workers who are directly employed in a business, limitations on the duration of temporary work, joint liability of user firms and temporary agencies, and prohibition of subcontracting in certain circumstances.



- **Limiting subcontracting of a business’ “core” activities.** This model has been successfully employed in several countries, but the question of which activities form the “core” of a business has been a difficult one to address.
- **Imposing time frames on temporary employment.** This model has also been used in several countries. Some advocates say that the result has been more and more workers laid-off or pushed into the informal economy once the term of their employment ends.

### **III. Other resources: states with analogous laws and articles or reports about the policy.**

In addition to the sources listed here, see Yves Jorens et al, **Study on the Protection of Workers’ Rights in Subcontracting Processes in the European Union (2012)**. This helpful recent study discusses subcontracting policies in EU member states, which recommends the introduction of a system of joint and several liability for the protection of workers’ rights.