

Eliminating Structural Drivers of Temping Out: Reforming Laws and Programs to Cultivate Stable and Secure Jobs

How temp and staffing agencies get special treatment under the law to create insecure low-wage jobs—and what we can do about it

Regardless of how a business chooses to structure its relationship with its workers, work should be a place where we are treated fairly and with respect and are safe and supported. A good job enables us to join with our co-workers to build a fairer, more just workplace, to provide for ourselves and our families, and to have the stability necessary to plan our lives.

For many temporary help and staffing agency workers, however, these principles are very different from their lived experience. **Temporary help and staffing agency workers, otherwise known as “temp workers,”¹ are hired by temp agencies² and assigned to worksites run by companies known as “host employers.” They work for the host employer, often with and alongside the host employer’s permanent workforce. This business model—through which the host employer supervises its temp workers but does not directly employ them—means that host employers control many working conditions without being responsible for them.** The model creates a second-tier workforce of temp workers who do the same work as permanent workers but for less pay, nearly non-existent benefits, and no job security. And it divides permanent and temp workers from each other, which weakens their ability to build collective power in their workplace.

This brief explores how certain structural drivers of temping out—laws and government programs that give special treatment to temp agencies—subsidize and perpetuate the creation of low-wage, insecure jobs and the degradation of workplace conditions generally. The low labor costs resulting from degraded workplace standards, in turn, entice host employers to temp out more and more of their work, while the structural absence of legal responsibility allows them to plead ignorance to unfair, illegal, or dangerous workplace standards for their temporary workers. The brief recommends policy solutions that would eliminate these subsidies and promote stable living-wage jobs.

In our democracy, laws should safeguard the people, not powerful corporate interests. It's time we pass laws that protect the interests of working people and make good jobs for temp workers a reality. By working in concert, on and off the job, we can all thrive in a just and inclusive economy centered on people and the common good.

Background

Over the last 40 years, the U.S. labor market has gradually shifted from long-term jobs with employer-sponsored benefits and high unionization rates to shorter-term, increasingly precarious jobs with lower wages, fewer benefits, and more obstacles to collective worker action. One aspect of this trend is employers' increasing reliance on a second-tier workforce comprised of temporary workers obtained through temp agencies. Since the Great Recession in 2009, temporary agency jobs have grown faster than overall private sector work.³

The temp agency industry operates as a triangular employment relationship where the temp agency acts as the employer of record for temp workers, even though the host employer determines the assignments and supervises the workers. Temp agencies compete on the one major cost they can control—labor costs. The competitive pressure drives down wages and incentivizes cutting corners through violating labor standards like minimum wage and health and safety laws. At the same time, host employers, because they are not the employer of record, can often plead ignorance to their temp workers' unfair or illegal working conditions. This system, which “insulates the host companies from workers' compensation claims, unemployment taxes, union drives, and the duty to ensure that their workers are citizens or legal immigrants,” allows host companies to control many working conditions without being responsible for them.⁴

Temp workers may do the same work as permanent workers but for less pay, nearly non-existent benefits, and no job security.

As a result, temp agencies and host companies can more easily exploit temp workers—who are disproportionately people of color—and consign them to a second-tier employment status. While Black workers comprise 12.1 percent of the overall workforce, they comprise 25.9 percent of temporary help agency workers; Latinx workers are 16.6 percent of all workers, but 25.4 percent of temporary help agency workers.⁵ Temp workers endure substantial wage and benefit penalties compared to permanent direct-hire workers. The wage penalty is stark in several large employment sectors—46 percent in education-related occupations, 28 percent in construction occupations, 27 percent in production occupations, and 24 percent in logistics occupations.⁶ Temp workers are especially vulnerable to illegal conduct such as wage theft, unsafe working conditions, and discrimination.⁷ These conditions exacerbate occupational segregation, income inequality, and the wealth gap for people of color.

The “hyper-precarious” nature of temp employment increases the vulnerability of the temp workforce and heightens the risk of exploitation.⁸ **Temp workers know that they can be terminated from an assignment or lose out on opportunities to transition to permanent employment if they complain about unfair work conditions. Yet they can also languish in the same position for several months or even years—working side-by-side with permanent employees—without ever being offered a permanent position.** This division in the workforce hurts both temp workers, who are afraid to advocate for themselves for fear of jeopardizing their chance at a permanent position, and permanent

workers, who see the temp workers as a threat to their job security and higher wages and benefits.

This system is not an accident. **For decades, temp agencies and host employers have fought to limit their responsibilities to their workers. Starting in the 1950s, for example, the temp industry conducted a successful state-by-state lobbying campaign to exempt itself from state employment agency laws,** which required employment agencies to disclose their fees and thereby made public the difference between what a temp agency paid a worker and the amount it billed the host employer.⁹ In New Jersey, the temp industry lobbied for a rule requiring temp workers to report to their agency at the completion of each assignment in order to be eligible for unemployment insurance benefits; after extensive push back from worker advocates, the rule was revised.¹⁰ By allowing temp agencies to hide the fees they charge to host employers and to impose barriers on workers seeking benefits, states have enabled the exploitation of temp workers.

This paper explores how four different federal or state programs—the Work Opportunity Tax Credit, unemployment insurance, workers’ compensation, and paid sick leave—can exclude temp workers from their protections and thereby provide special treatment to the temp industry. It discusses ways to reform these programs so that they are accessible to temp workers and promote stable, living-wage temp jobs. By raising standards in the temp industry, we will improve conditions for all workers.

Laws and Programs That Subsidize the Temp Industry

Certain laws and government programs subsidize the temporary staffing industry and thereby subsidize the creation of low-wage, precarious work. This section discusses these laws and programs and how they can be reformed to support the creation of permanent employment rather than dead-end temp jobs.

A. Work Opportunity Tax Credit

In 1996, Congress passed the Work Opportunity Tax Credit (“WOTC”), a program that provides a tax credit to employers for each new employee who falls within one of 10 targeted groups. These include individuals who have faced barriers to obtaining or maintaining employment, such as individuals with felony records, welfare recipients, and disabled veterans.¹¹ As discussed below, the WOTC has been a significant source of revenue for temp agencies, even though the jobs provided through the tax credit tend to be low-wage, dead-end assignments with very high turnover.

For most categories of workers, the WOTC is a tax credit for the employer equal to 40 percent of up to \$6,000 of an employee’s first-year wages—that is, a maximum credit of \$2,400. In order for the employer to receive the full 40 percent credit, a WOTC-certified employee must work at least 400 total hours during the first year of employment. If the employee works at least 120 hours but fewer than 400 hours, the amount of the credit falls to 25 percent.¹² Thus, for an employer to obtain the reduced 25 percent credit, a WOTC-certified employee must only engage in about three weeks of full-time work; for an employer to obtain the maximum 40 percent credit, the employee must be engaged in about 10 weeks of full-time work. This means that the WOTC provides no incentive for employers to retain their workers for more than a few months.

Available data indicate that turnover is very high for WOTC-certified workers. Although the number of WOTC certifications has risen sharply in the past five years, from 1.3 million in 2014 to 2.2 million in 2018,¹³ the average amount of the subsidy per worker has fallen sharply. The average per-worker subsidy in 2018 was only \$698, far below the maximum credit of \$2,400.¹⁴ The low subsidy rate suggests that most workers are staying at these jobs for very short periods of time. An employee paid \$12 per hour, for example, would need to work a total of only 260 hours for the employer to obtain a \$780 tax credit. This echoes a 2011 report by the Center for Law and Social Policy, which found that “the overwhelming majority of [WOTC] subsidies are claimed by employers in high turnover occupations.”¹⁵

Some temp agencies rely heavily on the WOTC as a source of revenue. According to the public filings of TrueBlue, one of the few publicly-traded temp agencies focused on entry-level jobs, the difference between the statutory federal income tax rate of 21 percent and TrueBlue’s effective tax rate of 13.1 percent in 2018 was primarily due to the WOTC.¹⁶ During fiscal year 2018, TrueBlue realized \$1.1 million in tax benefits from the prior year WOTC.¹⁷ Similarly, Kelly Services, the eighth-largest staffing agency worldwide, has claimed \$167 million in tax credits from the WOTC since 2010, which amounts to 39 percent of the company’s net earnings during this period.¹⁸

The WOTC provides an enormous subsidy to some temp agencies and encourages the growth of low-wage, dead-end temp jobs. Even worse, the WOTC does nothing to incentivize the retention of WOTC-certified temp workers beyond the few months necessary to capture the full credit, nor does it encourage temp agencies to provide WOTC-eligible temp workers with training and a pathway to good-paying, stable employment.

Recommendations. The WOTC should be amended so that it creates incentives for employers to provide a pathway to stable employment with living wages and benefits. These amendments include the following:

- Eliminate the partial credit for workers employed for fewer than 400 hours in a year;
- Require an employer to retain a WOTC-eligible worker for at least one year to be eligible for the credit;
- Require that temp agencies pay their workers a wage equal to that paid to permanent workers performing similar work for the host employer in order to be eligible for the credit;
- Require temp agencies to provide WOTC-eligible workers with training for permanent positions at host companies;
- Provide an additional credit for host companies that hire temp workers permanently; and
- Eliminate the credit entirely for temp agencies and other employers that have a poor track record for retention and training.

B. Unemployment Insurance

The unemployment compensation program—a partnership between the federal government and the states—serves as a critical component of our social safety net, “offer[ing] an economic line of defense against the ripple effects of unemployment.”¹⁹ It provides monetary benefits for unemployed workers while they search for a new job and, in doing so, acts as an economic stabilizer and stimulus during economic downturns.²⁰ Although the federal government sets a national framework and basic requirements of the program through the Social Security Act and the Federal Unemployment Compensation Act, states have wide

latitude in setting program specifications through state law, such as eligibility and disqualification provisions, weekly benefit amounts, and maximum weeks of benefits.²¹

As shown in **Table 1** below, under all 12 state unemployment insurance (“UI”) laws that NELP analyzed,²² the temp agency is generally considered the employer of its temporary workforce for UI purposes and thus is responsible for providing this benefit to its workers. In a couple of states, however, the length of a temp worker’s assignment for a particular host employer is considered when determining responsibility for providing unemployment insurance. For example, Mississippi UI regulations state that if a temp worker has continuously worked for the same client for one year, the employer-employee relationship would be determined in accordance with common-law principles governing the “master-servant” relationship.²³ This provision takes into account the realities of the employment relationship, though it may discourage long-term assignments.

State	Temp help service firm is responsible for UI	Failure to contact temp agency upon completion of assignment may constitute UI disqualification
California	Y (with limited exceptions)	N
Illinois	Y	N
Minnesota	Y	Y
Mississippi	Y (with limited exceptions)	Y
Missouri	Y	Y
New Jersey	Y	Y
New York	Y	N
North Carolina	Y	N
Ohio	Y	Y
Pennsylvania	Y	Y
Tennessee	Y	N
Washington	Y	N

Temp agencies can game the UI system. The determination of UI premiums is based on an employer’s “experience rating,” which in turn is based on factors bearing a direct relation to unemployment risk. Employers with the lowest risk of unemployment should pay the least amount of unemployment taxes, and employers with a higher risk should pay higher unemployment taxes.²⁴ The primary factor used to measure unemployment risk is the number of claims made by former employees against the employer’s account in recent years.

Other factors are the size of the employer's payroll, the difference between contributions paid into the system and benefits paid out, and variations in payroll over time.²⁵

The triangular employment relationship enables temp agencies to game the UI system and allows host employers to avoid responsibility to their temp workers. Temp agencies that have laid off a significant number of workers can shut down and re-open under a new name to reset their experience rating and keep costs low, a practice known as State Unemployment Tax Act ("SUTA") dumping. And host employers can cycle through temp workers as frequently as they would like without negatively affecting their own experience ratings.

Temp workers face UI eligibility barriers. The eligibility requirements for unemployment insurance may be difficult for temp workers to meet. The basic requirements to receive unemployment benefits in all states are the following:

- The employee must be involuntarily unemployed—this means that an employee cannot have quit work, unless for an important reason;
- The employee must establish "monetary eligibility" by working and earning a certain amount of wages or by working a certain number of hours;
- The employee must be able and available for work and actively seeking work; and
- The employee must not refuse offers of "suitable work" without good cause.²⁶

The first eligibility criteria—involuntary employment—may pose problems for temporary workers, who often cycle in and out of short-term assignments. In six of the 12 states analyzed, temp agencies may require temp workers to contact them within a certain time frame after their assignment has terminated and communicate their availability for a new assignment (see **Table 1** above); failure to do so can be considered a "voluntary leaving work issue," which disqualifies the temporary worker from UI benefits.

In a recent case in Pennsylvania, for example, a temp worker applied for unemployment benefits after his temp agency notified him that his assignment had ended and did not offer him a new one. The agency had a policy requiring workers to check in with the agency within 48 hours of completion of an assignment and every day thereafter or else be deemed to have voluntarily quit. Although the temp worker had been provided with the policy at the time of hiring, he had forgotten about it and did not receive a reminder when notified of his assignment termination. Nevertheless, the court ruled that he was ineligible for benefits.²⁷

The second criteria—the monetary eligibility requirement—may be difficult for temporary workers to meet given their low wages and intermittent assignments. Eligibility for UI is determined based on the claimant's earnings in the "base period." The base period in most states is the first four of the last five completed calendar quarters before the effective date of the initial claim.²⁸ For example, if the UI claim begins in April 2019, the standard base period is January to December 2018. In states using the standard base period, a worker filing a UI claim cannot use wages earned in the current calendar quarter (the "filing quarter") or in the most recent quarter prior to filing (the "lag quarter"). The standard base period may disadvantage temp workers who, because of their intermittent work assignments, may have worked more hours just prior to filing a UI claim.

Another aspect of the monetary criteria that temp workers may find difficult to meet is the wages threshold. Different states have set the threshold at different levels, with some being

easier to meet than others. New Jersey requires that claimants earn at least \$200 per week during 20 or more weeks in the base period, or at least \$10,000 total during the base period. A temporary worker in New Jersey earning the state’s minimum wage of \$11 per hour would need to work a minimum of 18 hours per week for at least 20 weeks of the base period, or work a total of 909 hours during the entire base period, to qualify for UI benefits. A temporary worker with long gaps between assignments will have a difficult time meeting these requirements.²⁹

Ohio’s wages threshold is even more onerous. In Ohio, a worker must have worked at least 20 weeks and earned an average weekly wage of at least \$269 during the base period to qualify for UI benefits.³⁰ That means a temporary worker making the state minimum wage of \$8.70 per hour would need to average 32 hours of work per week to be eligible for UI benefits. Unless a low-wage temporary worker had steady, near full-time employment during the base period, the worker would likely not qualify for unemployment benefits.

The third eligibility requirement—that UI claimants cannot refuse offers of “suitable work” without “good cause”—may trap temporary workers in a cycle of poorly paid, dead-end gigs. Although the definition of suitable work varies by state, it typically takes into account the claimant’s location, skills, experience, and past earnings. In many states, the longer a claimant is unemployed, the more expansive the definition of suitable work becomes, and the claimant will need to expand her search beyond her normal trade or occupation and be willing to accept work at a lower pay rate in order to remain eligible for benefits.³¹ In North Carolina, for example, for weeks one through ten of the benefit period, whether work is suitable is based on a consideration of the following factors: the degree of risk involved to the claimant’s health, safety, and morals; the claimant’s physical fitness and prior training and experience; the claimant’s prospects for securing local work in his or her customary occupation; the distance of the available work from the claimant’s residence; and the claimant’s prior earnings. After the tenth week of a benefit period, however, any employment offer paying 120 percent of the individual’s weekly benefit amount will be considered suitable work.³²

These narrow definitions of suitable work make clear that temp workers have to continue accepting temporary, dead-end assignments at the same or even lower pay or lose their UI benefits. This system locks them into a cycle of consecutive temporary assignments and makes it difficult for them to transition into regular employment with higher pay and better employment protections.

Recommendations. State unemployment insurance programs should be amended to ensure that temporary workers do not face unfair barriers to receiving unemployment compensation, and further ensure that the UI system provides a pathway to more stable employment. Such changes include the following:

- Prohibit temp agencies from conditioning UI eligibility on whether a temp worker has communicated her availability for work;
- Establish several different alternate base periods for temp workers, including an alternate base period that is 18 months long, to account for the frequent job interruptions that befall temp workers;

- Establish a minimum amount of earnings that is realistic for a low-wage temp worker with a fluctuating schedule to meet, such as at least 300 times the state’s hourly minimum wage during the relevant base period;³³
- Alternatively, eliminate the threshold earnings-based eligibility requirement, and instead impose a reasonable minimum hours-based eligibility requirement, such as an average of 10 hours per week, so that lower-wage workers are not penalized for earning less money; and
- Eliminate declining wage rates that constitute suitable work for workers already being paid poorly.

C. Workers’ Compensation

Workers’ compensation is one of the oldest social insurance programs and was founded on the no-fault principle: Employers assume responsibility for providing insurance to cover medical treatment, rehabilitation, reimbursement for some part of lost wages for workers injured on the job, and death benefits for workers killed on the job. In exchange, employees give up their right to sue their employer for injuries in most circumstances. This is known as the exclusive remedy rule.

In the past few decades, temp work has shifted from clerical and other office work to more hazardous industries, such as construction, manufacturing, and logistics. This shift has made access to workers’ compensation more important than ever for temp workers.

Temp work has shifted from clerical and office work to more hazardous industries, such as construction, manufacturing, and logistics.

Recent studies have found that temp workers face increased risk of injury as compared to permanent workers in similar occupations. According to a study that analyzed workers’ compensation claims in Ohio from 2001 to 2013, temp workers had higher injury rates than permanent workers.³⁴ A similar study of workers’ compensation claims in Washington State from 2011 to 2015 found that temp workers experienced twice the rate of injury as permanent workers.³⁵ Finally, a *ProPublica* analysis of workers’ compensation programs found that in California and Florida, the two largest states analyzed, temp workers had about a 50 percent greater risk of being injured on the job than permanent workers. The findings were even more stark for severe injuries. In Florida, for example, temps were about twice as likely as permanent employees to suffer crushing injuries, dislocations, lacerations, fractures, and punctures and three times as likely to suffer an amputation.³⁶

According to the Occupational Safety and Health Administration (“OSHA”), new workers are at greater risk of injury, and most temp workers are “new” multiple times a year.³⁷ The increased risk is partly because new workers are less familiar with safety procedures and protocols. Temp agencies and host employers can exacerbate this risk by failing to adequately train temp workers. According to the Washington State study referenced above, 40 percent of temp workers said they never received safety training, and an additional 35 percent said they only received training at the start of the new job; by contrast, 25 percent of permanent workers reported no safety training, and an additional 20 percent reported training only at the start of employment.³⁸ Temp workers were also less likely to be screened for previous work experience in the tasks they were expected to perform than permanent workers.

The triangular employment relationship also puts temp workers at risk for injury because it diminishes both the temp agency’s and the host employer’s accountability. Temp workers may not know which party is responsible for safety training and for injuries on the job. OSHA has expressed concern that some host employers use temporary workers as a way to avoid their obligations under the Occupational Safety and Health Act and related laws; that temp workers get placed in the most hazardous jobs; that temp workers are more vulnerable to workplace hazards and retaliation for reporting these hazards than permanent workers; and that temp workers are not given adequate safety and health training or explanation of duties by either the temp agency or the host employer.³⁹

Because workers’ compensation programs are run by each state, the particulars of the program—including employer funding requirements and employee eligibility requirements—vary by state. As discussed below, some features, which are present in many or all states, incentivize placing temp workers in hazardous positions and allow both temp agencies and host employers to avoid accountability for serious injuries.

In every state except Texas, all employers (with narrow exceptions, such as for very small employers in a few states) must obtain workers’ compensation insurance for their employees. According to our analysis of 12 states’ workers’ compensation systems, in 10 of the states, employers can choose any insurance company that is licensed in the state to provide insurance. The remaining two states—Ohio and Washington—operate a state fund as the insurer for workers’ compensation claims. (See **Table 2.**) The state fund collects premiums from all covered employers and pays out compensation to the injured workers. Employers in all 12 states can also choose to be self-insured; self-insured employers are typically large companies with sufficient financial resources to compensate their injured workers.

Table 2. Workers’ Compensation Systems by State			
State	System	State	System
California	Private Insurance	Illinois	Private Insurance
Minnesota	Private Insurance	Mississippi	Private Insurance
Missouri	Private Insurance	New Jersey	Private Insurance
New York	Private Insurance	North Carolina	Private Insurance
Ohio	State Fund	Pennsylvania	Private Insurance
Tennessee	Private Insurance	Washington	State Fund

In all 12 states, the temp agency and the host employer are technically considered jointly responsible for providing workers’ compensation insurance to temp workers employed at the host employer if certain conditions are met, including that the host employer has control over how the temp worker performs the work.⁴⁰ Critically, regardless of which party is primarily liable, once workers’ compensation insurance is provided by one party, then the

other party has no additional workers' compensation obligations, and *both parties* are protected from civil suits by the injured worker arising out of the workplace injury.⁴¹

In practice, the temp agency typically provides workers' compensation insurance coverage to its temp employees, thereby absolving the host employer of any obligation to provide workers' compensation coverage to these workers *and* insulating the host employer from negligence lawsuits brought by temporary workers injured on the job.⁴² This system creates a disincentive for the host employer—the party that has primary control over the unsafe conditions that caused the temp worker's injury—to make its workplace safer for temp workers.

Other aspects of the workers' compensation system further diminish the host employer's accountability for unsafe working conditions and workplace incidents that injure temp workers. An employer's workers' compensation premium is based on its experience rating, which, in turn, is based on each employee's risk classification (which is based on an assessed health and safety risk of the employee's occupation) and the number of workers' compensation claims brought by other employees in recent years. The prospect of an elevated experience rating leading to higher premiums provides a financial incentive for employers to implement safety measures in the workplace. But this incentive system breaks down in the triangular employment relationship. Because the temp agency provides the workers' compensation insurance, a temp worker's injury only affects the temp agency's workers' compensation experience rating—not the host employer's—even though the host employer has the ability to control workplace conditions and to invest in safety to prevent workplace injuries.⁴³

Because temp agencies typically provide the workers' comp coverage, host employers who control the working conditions have less incentive to make their workplaces safer for workers.

The host employer can also avoid other costs stemming from a temp worker's injury. The host employer can simply substitute in a new temp worker for an injured temp worker with no recruitment and little training costs. If the temp agency's rates increase in response to a rise in its experience rating, the host employer can simply switch to a temp agency that offers lower rates. According to the Washington State workers' compensation study, "competition for clients was noted by all [temp] agency managers as being a factor limiting the conditions they could impose on host employers." This means that temp agencies are loathe to pass along any of the costs arising out of their workers' injuries to the host employer.

The system also incentivizes cheating so that temp agencies lower their workers' compensation premiums. In 2001, for example, a Washington statewide audit of Labor Ready found that the temp agency had reported the wrong risk classification for many of its workers, which artificially lowered its workers' compensation premiums. Labor Ready had incorrectly reported that workers were engaged in grounds maintenance, which had a 40 cents per hour premium rate, when they were actually engaged in construction work, which had a \$1.20 per hour premium rate.⁴⁴ Because many temp agencies assign workers to a wide range of occupations in many different industries, they can more easily avoid detection of occupation reporting errors than host employers working in one high-risk industry like construction or logistics. And smaller temp agencies that have accrued high experience ratings because of a large number of workers'

compensation claims can dissolve their business and start anew, and enforcement is unlikely to catch up.

Recommendations. State workers' compensation programs should be amended to provide the right incentives for host employers so that they invest in training and safety measures that minimize safety risks for all workers, including temp workers. Such changes include the following:

- Require the host employer to be responsible for providing workers' compensation to its temp workers and prohibit the host employer from contracting otherwise with a temp agency;
- Require that the host employer's workers' compensation premiums be based on an experience rating that includes the workers' compensation claims filed by its temp workers; and
- Require that a host employer's experience rating be based in part on the safety investments—such as trainings and safety equipment—provided to temp workers.

D. Paid Sick Leave

Eleven states and the District of Columbia have passed laws requiring employers to provide paid sick leave to their workers. Two of these states—Connecticut and Maryland—explicitly exclude temp workers from coverage, and Michigan's law, which exempts "variable hour" employees, likely excludes temp workers as well.⁴⁵ Vermont's paid sick leave regulations also suggest that temp workers are exempt from coverage.⁴⁶ The remaining jurisdictions with these laws—Arizona, California, Massachusetts, New Jersey, Oregon, Rhode Island, Washington State, and the District of Columbia—do not exclude temp workers from eligibility for paid sick leave.

However, at least one state's paid leave law—Rhode Island—explicitly treats temp workers differently from those in more standard arrangements. While Rhode Island allows employers to require a full-time worker to wait until 90 days after her start date to make use of these benefits, a temp worker in the state can be asked to wait 180 days before she can access her earned sick time.

In every state that has a paid sick law, employees accrue earned sick time based on the number of hours worked. The accrual rates vary across states. In Oregon and Arizona, for example, an employee accrues an hour's worth of paid sick leave for every 30 hours worked, whereas in Vermont the accrual rate is one hour for every 52 worked. Slow accrual rates can make it more difficult for a temp worker with an intermittent work schedule to accrue leave. The result is that temp workers may accrue earned sick time at a lower rate than workers in standard arrangements.

Some states also have waiting periods—most often 90 days—until new employees (both permanent and temporary) can start using paid sick leave.⁴⁷ These waiting periods create an eligibility barrier for temp workers because of their very high turnover. According to the American Staffing Association, the average temp worker's tenure is about 10 weeks.⁴⁸ In states with a 90-day waiting period, these workers would never become eligible for paid sick leave even if they have accrued it.

Even worse, in all states, it appears that the eligibility and accrual requirements do not roll over to host employers when temp workers are converted to permanent employees. This means that a temp worker who has worked at the same host employer for several months or years—and thus has satisfied the waiting period and accrued sick leave—loses all accrued paid leave and must restart the waiting period if she accepts a permanent position at the host employer.⁴⁹

In addition, in some states, employers or state agencies may require documentation of a worker's illness to prove she had a legitimate reason to take paid sick leave. Because temp workers are less likely to have health insurance, they may not be able to access the healthcare necessary to secure this documentation.⁵⁰

Lastly, it is important that paid sick leave laws make clear that both temp agencies and their host employers cannot retaliate against temp workers who take leave. The Family and Medical Leave Act (FMLA)—a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons—is a good model. It holds secondary employers—such as temp agencies—liable for retaliating, discriminating, or interfering with an employee's exercise of her FMLA rights.⁵¹

Recommendations. To ensure that temp workers can take advantage of paid sick benefits, states should design these programs in the following ways:

- Ensure that temp workers are included in paid sick leave coverage;
- Eliminate waiting periods for paid sick leave eligibility;
- Establish faster accrual rates—such as one hour for every 30 worked—so that temp workers can accrue a reasonable amount of paid leave;
- Allow temp workers who accept permanent employment with a host employer to roll over accrued leave and waive any waiting period;
- Prohibit employers from conditioning paid sick leave on a doctor's note or other medical verification of illness; and
- Prohibit both temp agencies and host employers from retaliating, discriminating, or interfering with a temp worker's rights under the law.

Conclusion

Regardless of where we work and for whom, work should be a place where we are treated equitably, paid fairly, are safe and secure, and can join together with our co-workers to build democracy in the workplace.

Our workplace laws and government programs must be inclusive if these principles are to become a reality. These laws and programs must be crafted so that our most vulnerable workers—people of color working low-wage temp jobs—can access protections, enforce their rights, and hold all responsible parties accountable for violations. They must also be crafted to encourage and prioritize living-wage permanent employment over low-wage temporary work. By raising standards in the temp industry, we will improve conditions for all workers.

Endnotes

¹ For purposes of this paper, temp workers are workers hired and employed by temporary help agencies or staffing agencies—otherwise known as temp agencies—to work for client businesses for a limited period of time. The temp workers are employed by their temp agency even though the client business usually directs and supervises their day-to-day work.

² For purposes of this paper, a temp agency is an establishment primarily engaged in supplying workers to client businesses—otherwise known as host employers—for limited periods of time. These workers are considered the employees of the temp agency, even though direct supervision of the workers is usually provided by the client business.

³ In the decade following the Great Recession, from June 2009 to June 2019, temporary help agency work—as measured by both aggregate weekly hours and total number of jobs (part-time and full-time)—grew faster than overall private sector work. Aggregate weekly hours grew 3.68 times faster in the temporary help agency sector than in the private sector, and temp agency jobs grew 3.89 times faster.³ In 2018 and 2019, temporary jobs supplied by temp agencies reached a new high of 3.2 million in the U.S., about 2.1 percent of the overall.

⁴ Michael Grabell, *The Expendables: How Temps Who Power Corporate Giants are Getting Crushed*, PRO PUBLICA, June 27, 2013, <https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed>.

⁵ National Employment Law Project, *America's Nonstandard Workforces faces Wage, Benefit Penalties, According to U.S. Data*, June, 7, 2018, <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

⁶ NELP analysis of Occupational Employment Statistics, NAICS 561320, 2017, available at <https://www.bls.gov/oes/tables.htm>.

⁷ Laura Padin, *Lasting Solutions for America's Temporary Workers*, National Employment Law Project, Aug. 2019, <https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf>.

⁸ See Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMPL. RTS. & EMPLOY. POL'Y J. 285 (2009).

⁹ *Id.*

¹⁰ National Employment Law Project, *Mending the Unemployment Compensation Safety Net for Contingent Workers*, Oct. 1997, <http://stage.nelp.org/wp-content/uploads/2015/03/Compensation-Safety-Net-for-Contingent-Workers.pdf>.

¹¹ See Internal Revenue Service, *Work Opportunity Tax Credit*, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> (last viewed Dec. 3, 2019).

¹² Congressional Research Service, *The Work Opportunity Tax Credit*, Sept. 25, 2018, at 1 <https://fas.org/sgp/crs/misc/R43729.pdf>.

¹³ U.S. Dept. of Labor, WOTC Performance Reporting Data, <https://www.doleta.gov/business/incentives/opptax/performance-reporting/>.

¹⁴ Chris Schwartz, *The Work Opportunity Tax Credit*, Blue Pencil Strategies, July 2019.

¹⁵ Elizabeth Lower-Basch, *Rethinking Work Opportunity: From Tax Credits to Subsidized Job Placements*, Center for Law and Public Policy, “Nov. 2011, <https://www.clasp.org/sites/default/files/publications/2017/04/Big-Ideas-for-Job-Creation-Rethinking-Work-Opportunity.pdf>.

¹⁶ TrueBlue, Inc., Form 10-K, Feb. 22, 2018, at 68.

¹⁷ *Id.*

¹⁸ Chris Schwartz, *The Work Opportunity Tax Credit*, Blue Pencil Strategies, July 2019.

¹⁹ U.S. Dep't of Labor, Unemployment Compensation, Federal State Partnership, May 2019, at 1 <https://oui.doleta.gov/unemploy/pdf/partnership.pdf>.

²⁰ Economists Alan Blinder and Mark Zandi estimate that during the peak of the last recession, every dollar spent in UI benefits generated \$1.61 in economic activity.

²¹ U.S. Dep't of Labor, Office of Unemployment Insurance, *Unemployment Compensation: Federal-State Partnership*, May 2019, <https://oui.doleta.gov/unemploy/pdf/partnership.pdf>.

²² The 12 states were chosen based on the following factors: large or growing number of temporary workers concentrated in low-wage, blue-collar industries; significant overrepresentation of people of color in temp work; opportunities for legislative policy changes or on-the-ground organizing; and geographic diversity.

²³ 20 Miss. Admin. Code Pt. 101., R. 610.00.

²⁴ Unemployment: Federal-State Partnership, *supra* note __, at 10. <https://oui.doleta.gov/unemploy/pdf/partnership.pdf>.

²⁵ *Id.*

²⁶ National Employment Law Project, *Temp Work and Unemployment Insurance – Helping Employees at Temporary Staffing and Employee Leasing Agencies*, August 2001, <https://www.nelp.org/wp-content/uploads/2015/03/Temp-Work-and-Unemployment-Insurance.pdf>.

²⁷ *Thiessen v. Unemployment Comp. Bd. of Review*, 178 A.3d 255 (Penn. Commonwealth Ct. Jan. 18,

²⁸ Center for American Progress, National Employment Law Project & Georgetown Law Center on Poverty & Inequality, *Strengthening Unemployment Protections in America*, June 2016, at 52, <https://s27147.pcdn.co/wp-content/uploads/Report-Strengthening-Unemployment-Protections-in-America.pdf>.

²⁹ Ohio Dep't of Jobs and Family Services, Workers' Guide to Unemployment Insurance, at 14, <http://www.odjfs.state.oh.us/forms/num/IFS55213/pdf/>.

³⁰ A majority of states have established alternate base periods for workers who do not have sufficient wages in the base period to establish a UI claim. California adopts an alternate base period that is the last four completed calendar quarters prior to the beginning date of the claim so include the “lag quarter” in the calculation. So, for example, if the claim begins in April 2019, the alternate base period is Apr 2018 to Mar 2019. In addition to adopting this alternate base period, New Jersey has a third method of determining the base period that consists of the three most recently completed calendar quarters preceding the date of the claim plus the weeks in the filing quarter up to the date of the claim; this means that both the lag quarter and the filing quarter wages are taken into consideration. Adopting alternative base periods that take into account wages earned in recent weeks and months means that a temporary worker who have had gaps in assignments may still be able to meet the eligibility requirements.

³¹ See, e.g., New Jersey Dep't of Labor and Workforce Development, Division of Unemployment Insurance, *FAQ: Factors that Affect Your Weekly Benefit Rate* (“An offer of work is suitable if it is reasonably similar to your previous work experience in location, type of work, and pay, including benefits. The longer you remain unemployed, the more willing you must be to expand your work search. You may need to consider offers outside your normal trade or occupation, and to accept work at a lower pay rate in order to remain eligible for benefits.”).

³² N.C. ST. § 96-14.9 (f).

³³ Center for American Progress, National Employment Law Project & Georgetown Law Center on Poverty & Inequality, *Strengthening Unemployment Protections in America*, June 2016, at 43 and <https://s27147.pcdn.co/wp-content/uploads/Report-Strengthening-Unemployment-Protections-in-America.pdf>

³⁴ I. Al-Tatawneh et al, *Comparative Analyses of Workers' Compensation Claims of Injury Among Temporary and Permanent Workers in Ohio*, AM. J. IND. MED. 2020, <https://doi.org/10.1002/ajim.23049>.

³⁵ Michael Foley, *Factors Underlying Observed Injury Rate Differences Between Temporary Workers and Permanent Peers*, AMER. JOURNAL OF INDUSTRIAL MEDICINE, Aug, 2017.

³⁶ Michael Grabell, Jeff Larson, & Olga Pierce, *Temporary Work, Lasting Harm*, PRO PUBLICA, Dec. 18, 2013, <https://www.propublica.org/article/temporary-work-lasting-harm>.

³⁷ Occupational Safety and Health Admin., *Policy Background on the Temporary Worker Initiative*, July 15, 2014, <https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative>.

³⁸ Michael Foley, *Factors Underlying Observed Injury Rate Differences Between Temporary Workers and Permanent Peers*, AMER. JOURNAL OF INDUSTRIAL MEDICINE, Aug, 2017.

³⁹ https://www.osha.gov/temp_workers/.

⁴⁰ In some states, this is called the “borrowed servant” or “special employer” doctrine.

⁴¹ In California, for example, one employer can enter into “a valid and enforceable agreement with the other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured the payment of compensation [under the workers' compensation law]. . . .” CA LABOR § 3602(d)(1). There are narrow exceptions to the protection from civil lawsuits, such as if the injury was caused a willful physical assault by the employer. CA LABOR § 3602(b)(1).

⁴² For example, in *Burrell v. Streamlight, Inc.*, No. 908 EDA 2019, 2019 WL 5797514 (Pa. Superior Ct. Nov. 7, 2019), the court held that a temporary worker's negligence lawsuit against the host employer—a manufacturing company where the worker was injured—was barred by the exclusive remedy provision of the state's workers' compensation act because the manufacturing company was the temporary worker's employer under the borrowed employee doctrine. See also Michael Grabell, *How To Improve Temp Worker Safety*, PRO PUBLICA, Dec. 13, 2013, <https://www.propublica.org/article/how-to-improve-temp-worker-safety> (“When a company contracts a temp firm, the agency picks up those costs for the workers it assigns even though it has little or no control over job sites. . . . If a temp gets injured, the host company doesn't pay the medical bills or increased premiums – the temp agency does.”); Minnesota Dep't of Labor & Industry, *Workers' Compensation Insurance Coverage and Liability: Temporary and Leased Employment Situations*,

https://www.dli.mn.gov/sites/default/files/pdf/infosheet_temp_leased_employment.pdf (“Between themselves, joint employers may arrange for which of them will obtain workers’ compensation insurance coverage for their joint employees, and any workers’ compensation benefits owed to the joint employees would be paid by that policy. Often it is the general employer, or temporary agency, that has contractually agreed to provide the coverage for its temporary employees.”).

⁴³ “While lacking a financial incentive to train temporary employees, employers do have a financial incentive to contract out their most dangerous jobs. For many employers, the state’s workers’ compensation premiums are experience-rated, meaning that, in general, employers with fewer claims pay lower premiums. In theory, this experience rating provides some financial incentive for employers to invest in safety to prevent injuries and lower insurance premiums. By assigning workers employed by a staffing agency to the most dangerous tasks, host employers may hope to avoid higher premiums.” Occupational Safety and Health Admin., *Addressing Inequality: The Costs of Failing to Protect Workers on the Job*, June 2015, https://www.osha.gov/Publications/inequality_michaels_june2015.pdf.

⁴⁴ Washington State Dep’t of Labor and Industries, *Labor Ready Audit Finds \$734,000 Workers’ Compensation Owed*, Feb. 27, 2001.

⁴⁵ <https://www.ctdol.state.ct.us/wgwkstnd/PSL%202014%20revised.ppt>, <https://www.mcguirewoods.com/client-resources/Alerts/2018/1/Maryland-Adopts-Paid-Sick-Safe-Leave-Law>.

⁴⁶ Vermont’s earned sick leave rules state that an individual is exempt from coverage if that individual “(i) works on a per diem or intermittent basis; and (ii) works only when he or she indicates that he or she is available to work; and (iii) is under no obligation to work for the employer offering the work; and (iv) has no expectation of continuing employment with the employer.”

<http://labor.vermont.gov/wordpress/wp-content/uploads/Earned-Sick-Time-Rules.pdf>

⁴⁷ These states are California, Massachusetts and Washington.

⁴⁸ American Staffing Association, *Staffing Employment Sets Record High in 2018*, March 14, 2019, <https://americanstaffing.net/posts/2019/03/14/staffing-employment-sets-record-high-in-2018/>.

⁴⁹ Seattle has passed a paid sick leave ordinance that addresses this problem. The ordinance requires that, if a joint employment relationship exists between a temp agency and a host employer, the host employer must honor a temp worker’s accrued leave if it hires the employee permanently. City of Seattle Paid Sick and Safe Time Ordinance, Questions and Answer, at 12, <http://www.seattle.gov/Documents/Departments/LaborStandards/PSST%20QA%20%2006-29-18.pdf>.

⁵⁰ National Employment Law Project, *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

⁵¹ Dep’t of Labor, Fact Sheet #28N: Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28n.pdf>.

Acknowledgments

Several people helped with the research that formed the basis for this policy paper. Thank you to Chris Schwartz for his research and analysis of the Work Opportunity Tax Credit, Shilie Lin and Chloe Gao for their research on states’ unemployment insurance and workers’ compensation laws, and Eliza Schultz for her research on states’ paid leave laws.

© 2020 National Employment Law Project. This report is covered by the Creative Commons “Attribution-NonCommercial-NoDerivs” license fee (see <http://creativecommons.org/licenses>). For further inquiries, please contact NELP (nelp@nelp.org).