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# **From Orchards to the Internet: Confronting Contingent Work Abuse**

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Subcontracted Worker Initiative

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**From Orchards To The Internet:  
Confronting Contingent Work Abuse**

This report, its Appendices, and related materials are available on the National Employment Law Project Web site at <http://www.nelp.org/swi>.

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This report on the Subcontracted Worker Initiative (SWI) is generously supported by the Ford Foundation and the Rosenberg Foundation. With support from the Ford Foundation, NELP and FJF convened the first SWI Strategy Forum in late 1999, in Washington, DC. The participants at the national Strategy Forum recommended holding similar conferences at a regional level. The Rosenberg Foundation provided the financial support to hold the West Coast SWI Strategy Forum, in Berkeley, California, in early 2001. We express our thanks to both foundations.

The directors of the SWI are Catherine Ruckelshaus, the Litigation Director at the National Employment Law Project, and Bruce Goldstein, Co-Executive Director at the Farmworker Justice Fund, Inc. The project directors thank their office colleagues, particularly Shelley Davis, FJF's Co-Executive Director, Jim Williams, NELP's Executive Director, and Allison Palmer, NELP's Administrative Assistant. The directors thank Sarah E. Massey, NELP's Communications Director, for coediting this report. The SWI directors are grateful in particular to Naomi Zauderer, the Campaign and Organizing Liaison at NELP, for her extensive assistance in organizing the conferences and coediting this report.

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We deeply appreciate the assistance of the many worker advocates, especially the worker organizers, who helped plan and attended the SWI Strategy Forums, prepared papers to be included in this report, and provided other invaluable assistance. Their commitment and creativity are inspiring.

We dedicate this report to subcontracted workers in all occupations whose working conditions are not what they should be.

Catherine Ruckelshaus and Bruce Goldstein, Codirectors, Subcontracted Worker Initiative  
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## Preface – What is the Subcontracted Worker Initiative?

The Subcontracted Worker Initiative (SWI) project of the National Employment Law Project (NELP) and the Farmworker Justice Fund, Inc. (FJF) seek to improve wages and working conditions for workers who are recruited, hired, or employed through labor contractors, temp agencies, labor leasing firms, or other labor intermediaries. NELP and FJF convened the SWI to examine a broad range of strategies and tactics, including worker organizing, public education, media campaigns, coalition-building, lobbying, and enforcement of labor laws through government action and private litigation.

A fundamental premise of the SWI is that subcontracted workers may be employed under widely divergent conditions, but frequently have more in common with each other than they have recognized. Labor subcontracting occurs in diverse occupations, economic sectors, and geographic areas. The SWI brings together worker advocates from across a broad range of occupations to analyze the mechanisms by which subcontracting, as compared to more “standard” employment relationships, operates to the detriment of workers. The SWI also encourages worker advocates across categories to recognize that many effective strategies can be adapted to their own occupational or economic settings. In addition, the project promotes collaboration among worker advocates across the nation on campaigns to empower all subcontracted workers to improve their job terms and government policy.

This report synthesizes the discussions of two working conferences, the Subcontracted Worker Initiative Strategy Forums, and references and summarizes the papers that were prepared for and by participants. The first SWI Strategy Forum occurred in November 1999 in Washington, DC and included advocates active at the national level on contingent-worker issues as well as several working locally in diverse industries across the country. A regional conference occurred in Berkeley, California, in April 2001, and included worker advocates from the Pacific Northwest, California, and Arizona. The variety of backgrounds among the conference participants led to wide-ranging discussions about employer practices, government policies, and the responses of labor organizations. Participants in each conference received a set of papers written by their SWI colleagues examining problems and policy issues in numerous industries. At the first SWI Forum, the papers described in rich detail the composition of the subcontracted labor force in the following industries: garment, agriculture, hotel, day labor, home care, public sector, computer programming, chicken processing, taxi, and janitorial. Each sector had its own variations of subcontracting arrangements. At the Berkeley SWI, participants received these materials as well as new papers on subcontracting in the timber, garment, janitorial, and day labor industries.<sup>1</sup>

The SWI Strategy Forums facilitated the sharing of effective strategies to prevent wages and working conditions from deteriorating due to labor subcontracting. The conferences also demonstrated the need to expand collaboration among the various subcontracted worker groups to promote a national agenda for organizing and empowering contingent workers. The authors hope this report is a helpful step on the way to these important objectives.

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<sup>1</sup> The participants of both SWI Strategy Forums and the industries they represent appear on the lists in Appendix B. Each of the conference papers are available on the National Employment Law Project Web site at <<http://www.nelp.org/swi>> and are summarized in Appendix A.

## Executive Summary

The Subcontracted Worker Initiative grew out of the recognition that migrant farmworkers, office-building service workers, garment workers, and computer programmers, among others, share common, detrimental experiences: extensive use by their employers of labor subcontracting. *From Orchards to the Internet: Confronting Contingent Work Abuse* extracts from the Subcontracted Worker Initiative several key issues regarding employers' practices and contingent workers' strategies:

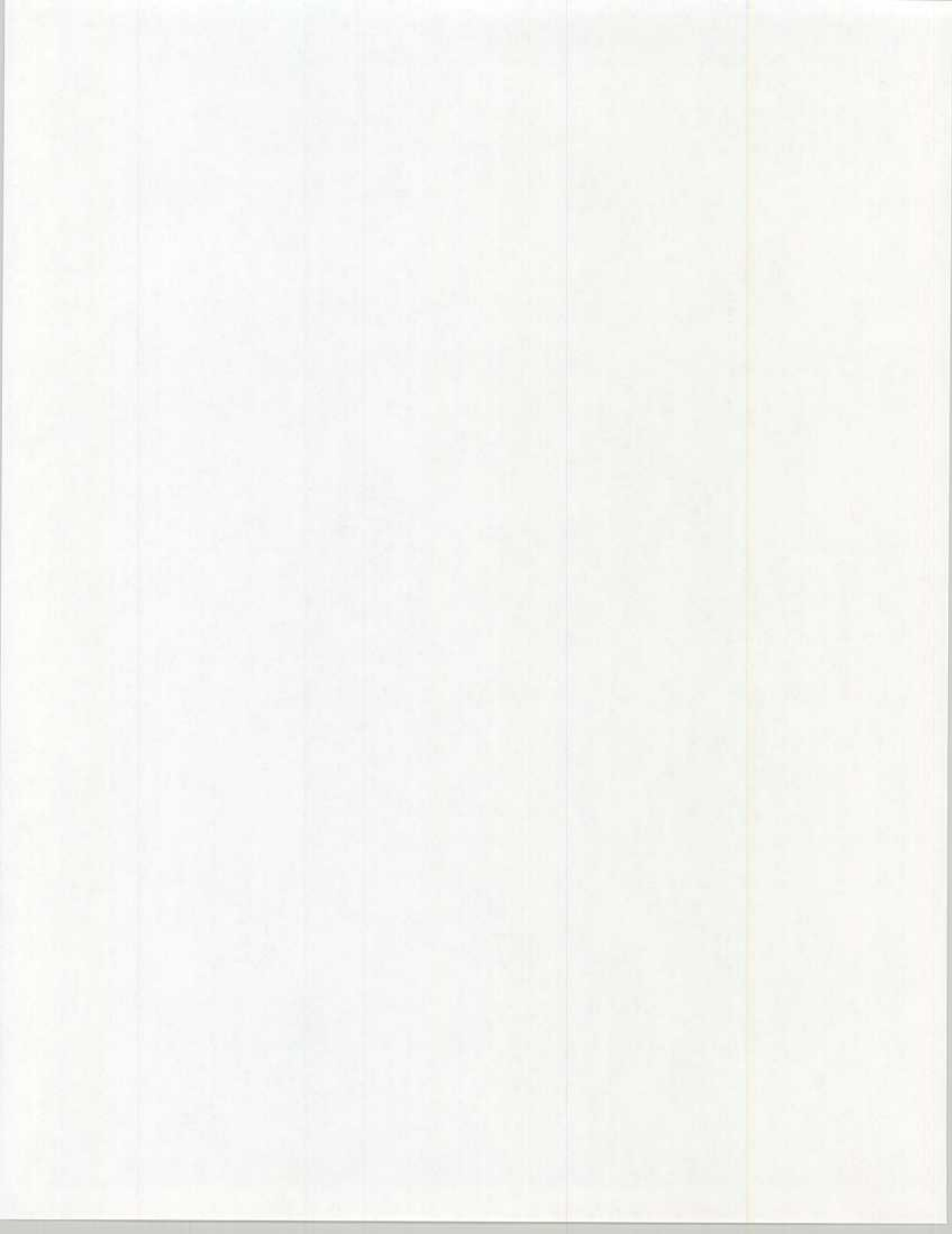
### Characteristics of Subcontracting

- Labor subcontracting in its various forms affects a significant portion of today's workforce. Subcontracting includes the use of temporary help agencies, labor contractors, labor leasing firms, and outsourcing. The subcontractor may be used by the larger company to perform all or part of a project that requires production of goods or provision of services. Labor subcontracting can also entail an outsourcing of human resource functions, such as recruitment, hiring, payroll, and transportation.
- Labor subcontracting has a substantial and often negative impact on the job terms and economic status of many workers. Although subcontracting affects workers at all socioeconomic levels, the most harmful impact tends to be on low-wage employees.
- Those subcontracted workers suffering the worst conditions are likely to be immigrant workers (both documented and undocumented) and "guest workers" (who technically are "nonimmigrants" employed in temporary jobs under temporary visas).
- These employer practices are not new phenomena; they have a long history, especially in apparel, building services, and agriculture. There is much to be learned from earlier efforts to reform "sweat shops" and other labor subcontracting systems.
- Recently, the use of temporary help agencies and other contingent-worker practices have increased in volume. In addition, they have spread to new sectors, such as high-tech, transportation, and health care, some of which have relatively high wage rates.
- The use of temp agencies has moved far beyond the notion of a temporary clerical worker who fills in during a permanent employee's sick leave or vacation, or for a special, short-term project.
- Labor subcontracting often is used in an effort to reduce labor costs by using a subcontractor who will pay workers less than the larger company would have paid. In many cases, the subcontractors are not paid enough to comply with their legal obligations toward workers or to pay a court judgment.
- Subcontracting also impedes worker organizing, which is an effective method for workers to achieve economic and political bargaining power.
- Many employers engaged in subcontracting seek to avoid minimum wage, overtime, and other legal responsibilities applicable to "employers," by characterizing the subcontractor as the sole "employer." The reality in many cases is that the subcontracting company retains substantial control over the work

performed by subcontracted workers because it will not take the financial risk of entrusting its business plans to labor contractors.

### Strategies for Subcontracted Workers

- The sharing of workers' experiences and strategies across economic sectors is valuable because the employers' labor subcontracting mechanisms and the effects on workers frequently are similar across economic sectors.
- The strategies utilized by worker advocates to address contingent workers' needs frequently are adaptable even though the worker advocates differ in their organizational mission and represent workers in varying industries, occupations, locations, and socioeconomic status.
- Development of multisector coalitions to ameliorate the harms of labor subcontracting can substantially advance the interests of contingent workers in all sectors and should continue.
- Several public policy responses to contingent-work arrangements are needed. Generally, where two or more entities share responsibility for determining whether a person is employed and the nature of that employment, those entities should be treated as "joint employers." Joint employer status promotes greater accountability among businesses that use labor intermediaries and helps to ensure that workers enjoy the employment protections to which they are entitled. Although the definition of employment under some laws is broad enough to lead to a joint employer finding, some labor laws and regulations should be revised and broadened.
- More resources are needed for public and private enforcement of legal obligations of companies engaged in labor subcontracting. In some sectors, weak enforcement of labor rights in the context of labor subcontracting has contributed to widespread illegality.
- Labor organizing leading to collective bargaining can be an effective method of addressing contingent workers' needs, but success requires labor unions to overcome many obstacles, including legal barriers, fear among workers with tenuous immigration status, lack of cooperation among labor advocates, limited resources, and inadequate public recognition of the need for contingent-worker reforms.
- Worker advocates should consider possible support from employers. Law-abiding, decent-paying employers should be encouraged to recognize their self-interest in preventing other firms from gaining an unfair competitive advantage in the marketplace by using exploitative labor subcontracting to cut labor costs.
- Congress must be urged to grant legal immigration status to undocumented immigrants and severely limit the use of "guest worker" visas. Workers who are in unauthorized immigration status or possess a temporary work visa have less economic and political bargaining power to protect themselves from abusive employment practices, join labor unions, seek labor law enforcement, or secure support among legislators for public policy reforms.
- Contingent-worker advocates should continue and increase their collaborative efforts to build strong public support for improving the working conditions of subcontracted workers.





## Introduction: What is Subcontracting? – A Primary Category of Contingent Work

“Contingent” or “nonstandard” work arrangements encompass many categories of work. *From Orchards to the Internet: Confronting Contingent Work Abuse* specifically investigates *subcontracted* work arrangements, which are defined to include: (1) contracting-out, including outsourcing the production of goods or the acquisition of services; (2) use of labor contractors, temporary help agencies, employee leasing companies or other intermediaries to provide or supervise labor; and (3) misclassification of workers as “independent contractors” rather than employees. These and other forms of reconfiguring the workforce have allowed firms to enjoy short-term competitive advantages at the expense of workers’ wages, benefits, and working conditions.

Contracting-out core functions of a business is not a new phenomenon. Before the turn of the last century, clothing manufacturers supplemented their factory production by using nominally separate entities to sew and press the garments, the most labor-intensive phase of producing clothing.<sup>2</sup> Similarly, farm owners long have utilized farm labor contractors, or crewleaders, to “handle” the labor force needed to harvest the crops. Many employers have used these mechanisms in an effort to avoid liabilities imposed on employers by state and federal labor laws, and to suppress union organizing.

Current examples of subcontracting abound.<sup>3</sup> The strike by the United Parcel Service (UPS) workers in 1997 centered on their status as “permanent” temporary employees. A landmark lawsuit against Microsoft under federal pension law won the right to retirement program participation for misclassified “independent contractors” and “temporary” computer programmers in 1999. In addition, Washington State fined Labor Ready, one of the largest day labor firms in the country, \$734,000 for consistently misclassifying workers in order to reduce its workers’ compensation contributions.<sup>4</sup> Grocery delivery workers in New York City, who were told they were independent contractors and made less than \$2 an hour, have sued their worksite employers as well as the contracting companies who recruited them, for minimum wage and overtime violations, settling with one employer for \$3 million dollars.<sup>5</sup> In addition, three class-action lawsuits have been brought on behalf of migrant tree-planters against major timber companies, who claim that they cannot be held

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<sup>2</sup> Bruce Goldstein and Catherine Ruckelshaus, “Lessons for Reforming 21<sup>st</sup> Century Labor Subcontracting: How 19<sup>th</sup> Century Reformers Attacked ‘The Sweating System,’” in Proceedings of the 53<sup>rd</sup> Annual Meeting of the Industrial Relations Research Association (New Orleans, LA, Jan 2001), also found at <<http://www.nelp.org/swi>>.

<sup>3</sup> Examples of literature describing the growth of organizational subcontracting and reconfiguration in the legal, political, and economic press abound. See, e.g., Françoise Carré, Marianne A. Ferber, Lonnie Golden, and Stephen A. Herzenberg, Eds., *Nonstandard Work: The Nature and Challenges of Changing Employment Relationships* (Champaign, IL: Industrial Relations Research Association, 2000); Anne Kalleberg, Edie Rasell, et al., *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (Washington, D.C.: Economic Policy Institute, 1997); U.S. General Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce* (June 2000); Sharon R. Cohany, “Workers in Alternative Employment Arrangements: A Second Look,” *121 Monthly Labor Review* 3 (November 1998) and Steven Hipple, “Contingent Work: Results from the Second Survey,” *121 Monthly Labor Review* 22 (November 1998). Bureau of Labor Statistics, U.S. Dep’t of Labor, Summary No. 87-88, *Business Contracting-Out Practices*, 2, 1-8 (1987) (revealing increased incidence of subcontracting in almost all industries between 1979 and 1986).

<sup>4</sup> AFL-CIO Building & Construction Trades Department, “Washington State Nails Labor Ready with \$734,000 Fine,” in *Temp Workers Deserve a Permanent Voice @ Work*, Mar. 1, 2001.

<sup>5</sup> Steven Greenhouse, “Spitzer to Sue Supermarket Over the Wages of Deliverymen,” *The New York Times*, Jan. 13, 2000: B1 and “Deliverymen to Get \$3 Million to Settle Wage Case,” *The New York Times*, Dec. 8, 2000: A1.

responsible as “employers” for the failure of their tree-planting contractors to pay legally required wages.<sup>6</sup> These are but five high-profile examples.

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

[C]ontingent [work] arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnerable sectors of the workforce. . . . The expansion of contingent work has contributed to the increasing gap between high and low-wage workers and to the increasing sense of insecurity among workers. . . .<sup>7</sup>

Labor subcontracting has increased in volume and has expanded to new industries and to new functions within industries. While not a new phenomenon, the temporary help industry has grown in the last decade. Many more entry-level jobs, such as poultry processing, janitorial and hotel jobs, are being subcontracted out.<sup>8</sup> Not only is subcontracting prevalent among low-wage and immigrant laborers, but it has also infiltrated higher-paying, U.S. citizen-dominated industries, such as computer programming and the public sector. Across sectors, many subcontracted workers experience inequality, reduced job security, and fewer benefits overall than their permanent, non-contingent counterparts.<sup>9</sup> Thus, nonstandard employment has spread beyond the recent immigrants that historically have been subjected to sweatshop practices.

New examples of subcontracting illustrate increasingly complex contingent arrangements, including more instances of multiple layers of labor intermediaries. Professor Françoise Carré suggested during the first conference that the increased prevalence of subcontracting and its growing complexity may reflect structural changes in the nature of employment relationships that prove to be long-lasting.

There are numerous commonalities in the structure of subcontracted industries and the subsequent impact on workers. For example, in their paper on the garment industry, UNITE Counsel Max Zimny and Brent Garren note that “[f]ashion renders apparel a

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<sup>6</sup> Steven Greenhouse, “Migrants Plant Pine Trees but Often Pocket Peanuts,” *The New York Times*, Feb. 14, 2001: A16.

<sup>7</sup> U.S. Department of Labor, “Commission on the Future of Worker-Management Relations, Final Report” 1995, Dec. 13, 2001 <[http://www.ilt.comell.edu/library/e\\_archive/gov\\_reports/dunlop/DunlopFinalReport.pdf](http://www.ilt.comell.edu/library/e_archive/gov_reports/dunlop/DunlopFinalReport.pdf)>.

<sup>8</sup> Examples from the media coverage of horrendous conditions for poultry and meatpacking workers, home care workers and day laborers give a flavor of the sweatshop conditions endured by many subcontracted workers. *E.g.*, Eric Schlosser, *Fast Food Nation*, Houghton Mifflin (2001); Christopher Thome, “Episcopal Priest Fights to Aid Poultry Industry Workers,” *Chicago Tribune*, Metro Section, March 2, 2001 (relates stories of poultry workers’ poor pay, dangerous work and unpaid overtime); Sara Rimer, “Home Aides for Elderly in Short Supply,” *The New York Times*, Jan. 30, 2000, p. A12 (documenting low pay and dangerous job conditions); V. Dion Haynes, “Day Laborers Work for Acceptance,” *Chicago Tribune*, Aug. 11, 2001, p. 1 (documents day laborers’ fight for decent wages and dignity).

<sup>9</sup> D. van Jaarsveld and L. Adler, “A Discussion of Organizing and Legal Strategies in a High Tech Environment: The Microsoft-WashTech/CWA Case and S. Meriam’s “Fighting Privatization: Strategies and Lessons from the Field,” papers presented at the SWI Forums and available at <<http://www.nelp.org/swi>>.

perishable commodity.”<sup>10</sup> This observation makes an important connection with the work of subcontracted farmworkers who harvest fruits and vegetables. The necessity for “just-in-time” sewing of garments and rapid-response harvesting of crops in these labor-intensive industries may explain some of the evident similarities in the way labor contractors are used. Workers in both industries report especially low wages and unsafe and unhealthy working conditions, coupled with a difficulty recovering unpaid wages against their employers.

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

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

When the workers are undocumented immigrant workers, such as is the case for a significant portion of timber, garment, agricultural, janitorial and day laborers, they are even more likely to be underpaid with no benefits and are unlikely to come forward to complain of unfair working conditions. Employers in these and other sectors, including meat processing and home care, seek out undocumented workers from particularly vulnerable communities to ensure that their workforce is compliant. When organizers begin to make headway, employers in the agricultural industry in California simply recruit workers from a different ethnic group, including Mixtecos and other indigenous workers of Mexico, who do not speak Spanish and who have little in common with their Spanish-speaking compatriots working in the United States.<sup>11</sup> When questions arise as to compliance with immigration law, these businesses usually claim that the labor intermediaries are responsible for verifying that employees are authorized to work.

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<sup>10</sup> Max Zimny and Brent Garren, “Protecting the Contingent Workforce: Lessons from the Women’s Garment Industry,” paper presented at SWI Forums and available at <<http://www.nelp.org/swi>>.

<sup>11</sup> See e.g. Zabia, et al., “Mixtec Migrants in California Agriculture,” California Institute for Rural Studies, 1993. and Ruiz, Vargas “Indigenous Farmwork Populations,” *Farmworker Justice News*, Vol. 13, No.1 Fall, Winter 2001: 6 and available at <<http://www.fwjjustice.org>>.

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

“Independent contractor” janitors in Los Angeles pay larger contractors for the privilege of cleaning certain floors in buildings managed by yet another corporate interest on behalf of the building owner and in some cases, even subcontract out sections of floors to other family members or individual workers.

In the California strawberry fields, some farmworkers are characterized as independent business people investing in growing a crop on their own plot of land. The reality is that they are sharecroppers. They tend a small portion of a corporate farmer’s land, having virtually no opportunity for real profit (despite much downside risk), and virtually no autonomy to exercise independent judgment because that might jeopardize the marketability of the farmer’s crop.

- In the home healthcare industry in Los Angeles, prior to a successful union-organizing drive, healthcare workers were treated as independent business people with no “employer,” despite the economic powerlessness of their position and the obvious fact that they worked for someone else.

Now that we have outlined the major categories of subcontracted work arrangements, we will summarize the harm experienced by many subcontracted workers.

## Chapter 1: What are the Problems that Subcontracted Workers Confront?

Subcontracted work arrangements frequently produce substantial, negative consequences for the working conditions and economic status of workers regardless of the socioeconomic level or particular nature of the job in question. Some statistics may be helpful: while 75% of standard full-time workers have employer-sponsored health insurance, only 9% of temps do. The U.S. Department of Labor's Bureau of Labor Statistics found that upwards of 53% of temporary workers would prefer to be permanent hires.<sup>12</sup> There is strong public support for getting parity and equal job conditions for nonstandard workers; a recent poll found that 68% surveyed said that it was unfair that part-time, temporary and contract workers receive unequal treatment on the job, and 60% would vote for Congressional candidates who support workplace reforms to provide nonstandard workers with equal pay and benefits.<sup>13</sup>

The most exploited subcontracted workers are recent immigrants and nonimmigrant "guest workers" hired on temporary visas. Many newly arrived foreign nationals lack the education, knowledge of the English language, and familiarity with American labor laws to feel comfortable demanding improved job terms or labor law enforcement. In many circumstances, the jobs with the worst conditions are those that have been subcontracted out and the workers with the least bargaining power accept such jobs.<sup>14</sup> Even when they possess significant skills and education and perform middle-class jobs, many foreign nationals working in the United States—especially the several million who lack authorized immigration status and the tens of thousands who work on temporary visas as guest workers—justifiably believe that they must accept poorer job terms than citizens and long-standing immigrants.

The guest workers, including temporary foreign agricultural workers on H-2A visas and computer programmers on H-1B visas, are the ultimate contingent labor force. The employer—often through trade associations or contractors called "body shops"—arranges the temporary visa, which lasts only as long as the temporary job with which it is associated. Generally, when the job ends, the worker must go home. In many instances, the workers have paid large sums of money to contractor-recruiters to obtain these jobs. In these circumstances, employees are often too fearful of losing their jobs and being deported to challenge unfair or illegal employment practices. For seasonable jobs that recur annually, the worker must hope that the employer decides to arrange for his or her visa in the following year. Many H-1B visa holders hope that as the six-year limit on their temporary visa expires, their employer will apply on their behalf for a permanent labor certification that would result in actual immigration status. Few guest workers want to jeopardize their chance at U.S. citizenship by seeming disloyal to the employer that must sponsor their immigration application.<sup>15</sup>

<sup>12</sup> Bureau of Labor Statistics, "MLR: The Editor's Desk," US Department of Labor, Dec. 22, 1999.

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

<sup>14</sup> Philip L. Martin and J. Edward Taylor, "Merchants of Labor: Farm Labor Contractors and Immigration Reform," *The Urban Institute* (1995): 5 ("Immigrant farm workers employed by FLCs [farm labor contractors] soon learn that they are at the very bottom of the U.S. job ladder. . . . FLCs traditionally recruit and employ new and illegal immigrants.")

<sup>15</sup> Christine MacDonald, "Visas at Risk in Tech Slump: Foreign Workers Forced to Leave U.S.," *Boston Globe*, Sept. 2, 2001: 1; Rachel Emma Silverman, "Short Stay: For Foreign Workers Here on Special Visas, Tech Bust Hits Hard," *Wall Street Journal*, Jun. 21, 2001: A1. and Barry Yeoman, "Silence in the Fields," *Mother Jones*, Jan-Feb. 2001: 40.

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

### **Welfare-to-Work and Temp Work**

Ellen Bravo, 9to5, National Association of Working Women

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

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

Solutions require changes both in enforcement of existing laws and new protections for temp and other contract workers. Minimum standards are needed to ensure temps are not charged exorbitant fees for transportation and safety equipment and that they receive accurate job descriptions and fair treatment. Temp agencies can take these steps voluntarily by signing the National Alliance for Fair Employment (NAFFE) Code of Conduct.<sup>16</sup>

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

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

<sup>16</sup> See NAFFE Web site at <<http://www.fairjobs.org>>.

investment and reputation by retaining and exercising substantial control over the work performed by subcontracted workers. In the apparel industry, retailers and major manufacturers engage subcontractors to produce garments and disclaim responsibility for the mistreatment of the workers who produce those goods, yet frequently they send inspectors to the contractors' shops and factories to ensure quality control.<sup>17</sup> At Microsoft, "permatemps," who do not receive the benefits accorded to "employees," work alongside permanent employees and are subject to the same supervision to assure quality control.<sup>18</sup> Such companies want the benefits of ensuring the quality of the workers' performance to maximize their own profits but want to claim that labor contractors are solely responsible for ensuring the quality of the workers' treatment on the job.

### The Labor Contractor

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

Various state and federal laws have required labor contractors to obtain a license, demonstrate solvency, maintain insurance and comply with basic labor standards.<sup>19</sup> Compliance by labor contractors, however, often is the exception, not the rule. Government agencies are denied the resources needed to police the many contractors. Workers frequently cannot even locate their contractors to serve them with a summons for a lawsuit. If caught violating the law, the contractors' punishment is negligible. It sometimes takes years for prosecutors to bring criminal charges against contractors, even when it is for violence or debt peonage. If barred from receiving a license after numerous violations, the contractor often has family members or friends who "front" for him or her and obtain a license to continue the business. Even when caught, bankruptcy proceedings often provide the contractors with a way out. Meanwhile, the larger businesses can profitably escape sanction by using one abusive labor contractor after another.

Observers have noted for many decades that labor contractors can be both perpetrators and victims. In many settings, labor contractors need not acquire significant capital or skills to operate a business. Entry into the market is not difficult. Of course, that means that competition among contractors for customers can be fierce. Such contractors compete for business with low bids that depend on driving labor costs lower and worker productivity higher. Many contractors do not earn enough money to pay business expenses, take a profit and comply with minimum wage, overtime, workers' compensation premiums,

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<sup>17</sup> E.g., *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

<sup>18</sup> See "A Discussion of Organizing and Legal Strategies in a High Technology Environment: The Microsoft-WashTech/CWA Case" by Danielle D. van Jaarsveld and Lee H. Adler presented at SWI Forums and available at <<http://www.nelp.org/swi>>.

<sup>19</sup> See, e.g., *New York Labor Law* § 341 *et seq.*, *Migrant and Seasonal Agricultural Worker Protection Act*, 29 U.S.C. § 1800 *et seq.*, *Cal. Labor Code* § §1695.7; 2673.1.

### **Temp Work in Silicon Valley**

Bob Brownstein, Working Partnerships USA

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

In boom times, the vulnerability of temporary workers is not as obvious because there may be a plethora of work. However, during a downturn, the situation for temporary workers worsens dramatically. They have more difficulty finding work and the time between jobs increases, due both to fewer jobs overall, and to increased competition as more people seek employment through temporary help agencies. They also are more likely to lose benefits they may previously have accessed through an employed spouse or parent, as employers are more likely to drop dependent health coverage during an economic downturn.

Working Partnerships USA (WPUSA) has developed a multipronged strategy to address the situation for temporary workers:

One: research the nature of temporary work, its integral role in the new economy, and the negative effect on workers;

Two: WPUSA devised a Membership Association that provides a space for workers to organize, to access training and affordable health benefits. Training is particularly important to temporary workers for two reasons. One, employers that offer access to training on-site would not make it available to temporary workers; second, training through the membership association provides a way to show that they have recognizable skills—when training results in a certificate, workers can advocate for higher wages based on their increased skill set.

Three: devise and advocate for a Code of Conduct that provides standards for basic employment conditions such as a living wage and access to affordable and portable health benefits; this strategy grew from the context in which we recognized that temporary workers initially could not legally organize into a collective bargaining unit. WPUSA and its members presented the Code of Conduct to the Santa Clara County Board of Supervisors in December of 2001 to adopt and implement for county workers and the temporary agencies they contract with;

Four: together with the Code of Conduct, WPUSA developed its own professional staffing service, both to exemplify the capacity of a business model to succeed taking the high road, and also to raise the bar and provide a competitor that could attract temporary workers and put pressure on other low-road agencies to improve conditions.



unemployment compensation, Social Security deductions, and other basic standards. Often the contractor ekes out a profit and ignores its other financial obligations. The larger business benefits by keeping labor costs low at the expense of workers.

### Subcontracting and Worker Organizing

Subcontracting also impedes worker organizing, which is an effective method for improving workers' bargaining power. As the experience of the hotel and restaurant industry points out, subcontracting often represents an effort to end collective bargaining and eliminate a union's presence.<sup>20</sup> Changing the identity of the "employer" of the workers can disrupt a longstanding union shop. In many cases, the contractor's lack of bargaining power with the larger company means that it lacks the resources to negotiate decent job terms. As suggested by Rachael Cobb in the paper on home healthcare workers, a business or a government entity that contracts out work to numerous separate locations can substantially interfere with worker-to-worker communication and union organizing.<sup>21</sup> Subcontracted workers are also susceptible to threats by their bosses of losing the subcontract with the larger company and their jobs if they unionize and demand higher wages. Indeed, nothing prevents a company from discriminating against subcontractors that are unionized.

As the paper by Ruckelshaus, Norton, Garren, and Goldstein on the legal framework for contingent workers points out, union organizing has been hindered by some decisions under the National Labor Relations Act (NLRA), which grants collective bargaining rights to nonsupervisory workers in nongovernmental, nonagricultural employment.<sup>22</sup> In some instances, workers are characterized as "independent contractors" who are not "employees" and therefore are not entitled to NLRA protections. Where workers are "employees," the larger entity may claim, too often successfully, that it is not the "employer" and that the contractor is the sole employer. Even when both the larger company and the labor contractor (or temp agency) are considered to be employers of the workers, the National Labor Relations Board (NLRB) has not always made both entities legally responsible for the illegal conduct.<sup>23</sup> Recently, however, the NLRB has issued some decisions that may make it easier to hold the worksite employer responsible.<sup>24</sup>

The spread of subcontracting can quickly become prevalent even when some employees would prefer to remain in standard employment relationships. When one business succeeds in reducing its labor costs by using subcontracted labor, competing companies can feel pressured to do the same to maintain their business and workers at such companies can be negatively affected. The next chapter discusses methods to prevent the use of labor subcontracting from causing a "spiraling-down" in wages, benefits, and working conditions.

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<sup>20</sup> See "Outsourcing in the Hotel and Restaurant Industry," pp. 4-6, available at <<http://www.nelp.org/swi>>.

<sup>21</sup> For a discussion of the organizing struggle in Los Angeles, see Rachael Cobb's "Background Memo: Unionizing the Home Care Workers of Los Angeles County," at <<http://www.nelp.org/swi>>.

<sup>22</sup> See Goldstein, Ruckelshaus, Norton, and Garren, "Subcontracting: the Legal Framework," available at <<http://www.nelp.org/swi>>.

<sup>23</sup> See *Bultman Enterprises, Inc.*, 332 NLRB 445 (Sept. 25, 2000).

<sup>24</sup> *M.B. Sturgis*, 331 NLRB No. 173 (Aug. 25, 2000).

## Chapter 2: How to Ameliorate the Problems of Subcontracted Workers?

The problems confronting subcontracted workers can be addressed through greater enforcement of existing labor and employment laws, new legislation at the state and local level, and worker organizing. In general, enforcement of existing law requires holding the primary employer responsible for the wages and working conditions of subcontracted employees. The test for establishing joint employer status can be met more easily under some federal laws than others. Where federal law is inadequate, state and local legislative reform can be helpful. The prospects for subcontracted worker organizing will be discussed in Chapter 3.

### Using Existing Protections

More than one hundred years ago, policymakers and reformers sought to control the worst aspects of labor subcontracting by regulating it. Garment contractors were required to register for a license and comply with state public health and child labor laws. Manufacturers in some states were ordered to keep records of the contractors used and to cease using contractors that subjected workers to sweatshop conditions. A century later, the federal Farm Labor Contractor Registration Act of 1963 and its replacement, the Migrant and Seasonal Agricultural Worker Protection Act of 1983 [29 U.S.C. § 1800], extended a similar scheme to sweatshops in the fields. In recent years, states once again have sought to regulate garment contractors with bonding and registration requirements. Other state regulations include licensing, testing, disclosures to workers, and civil and criminal penalties for labor contractors that violate the law. For the most part, such systems have been recognized as inadequate and, at best, as only one part of the solution. When one labor contractor is put out of business for mistreating workers, another contractor steps into its place and is subject to the same economic pressures from the contracting business that caused the problems in the first instance.<sup>25</sup>

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

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

<sup>25</sup> Goldstein and Ruckelshaus, “Lessons From History.”

Examples of legislation taking a broad approach to employer status include the Fair Labor Standards Act, which establishes the minimum wage, overtime pay requirements, child labor restrictions, the Migrant and Seasonal Agricultural Worker Protection Act, the Equal Pay Act, the Family and Medical Leave Act, and state child labor laws. Unfortunately, because courts in recent years have not always recognized and clearly stated the striking breadth of this standard (and because penalties for violations are low), many employers choose to litigate these issues to the detriment of workers with few resources. Some inroads have been made in enforcement actions in the agriculture and garment industries, where workers have successfully established that both the contracting business and the labor intermediary are their employers and owe them wages and other workplace protections.<sup>26</sup>

Many state and federal laws use the traditional common-law standard to define an employment relationship, which is quite restrictive. Under the common law of master and servant or agency, a business does not "employ" a worker unless it controls both the outcome of the worker's performance and the manner in which the work is performed. When a labor contractor or temp agency pays the worker and is claimed to have the power to hire and fire, courts often conclude that the contracting company does not employ the worker. This narrow standard is applied under the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act (ERISA), the Occupational Safety and Health Act, the Social Security Act, and other laws. There have been important victories even under this standard, including by "permatemps" who successfully litigated under ERISA for fringe benefits that Microsoft had granted only to permanent "employees." In addition, some agencies, such as the NLRB and OSHA, have used their administrative authority to incorporate a limited form of the "joint employer" concept into their interpretation of the common-law standard. *Bultman Enterprises, Inc.*, 332 NLRB 445 (Sept. 25, 2000), *M.B. Sturgis*, 331 NLRB No. 173 (Aug. 25, 2000).<sup>27</sup>

### State and Local Legislation and Advocacy

At the state level, creative coalitions of grassroots organizations and labor unions have taken on the challenge of changing the laws that fail to protect the subcontracted workforce.<sup>28</sup> Several states have established commissions to evaluate application of their laws to subcontracted workers. Other states have proposed comprehensive legislation that would afford equal pay and benefits to nonstandard workers.<sup>29</sup>

Make sure that legislation has strong enforcement mechanisms, in particular, the right of workers themselves to bring court cases to enforce the law.

Some states have passed legislation affording temp workers the right to know the terms and conditions of their assignments. A few states have resurrected decades-old comprehensive

<sup>26</sup> Goldstein, Ruckelshaus, Norton, and Garren, "Subcontracting: the Legal Framework," pp. 6-9 and at <<http://www.nelp.org/swi>>; *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998), *Antenor v. D&S Farms*, 88 F. 3d 925 (11<sup>th</sup> Cir. 1996).

<sup>27</sup> *Sam Hall + Sons, Inc.*, 8 OSHSAs. (BNA) 2176 (1980).

<sup>28</sup> Many of these groups have formed a new national network, the National Alliance for Fair Employment (NAFFE). NAFFE's Web site is <<http://www.fairjobs.org>>.

<sup>29</sup> For a comprehensive survey of model state and local laws covering nonstandard workers, see, Emsellem and Ruckelshaus, "Workplace Equity for 'Nonstandard' Workers: Grassroots Organizers Campaign for Model State Legislation," National Employment Law Project Nov. 2000 at <<http://www.nelp.org/swi>>.

legislation regulating the temp industry that had been amended in response to the temp industry's demand for exemption. George Gonos's paper explains the history of the temp industry's hugely successful campaign to deregulate itself.<sup>30</sup> A handful of state laws require that specific contracting sectors (namely garment and agriculture) have joint responsibility for payment of wages to the workers under certain circumstances. Comprehensive day-labor legislation has been passed in a number of states, regulating hiring halls and ensuring that workers who work on day jobs get pay and workplace protections.<sup>31</sup>

### **Subcontracting in the Garment Industry**

By Katie Quan, Center for Labor Research and Education – Institute of Industrial Relations, University of California, Berkeley

Since the 19th century, the garment industry has been based upon a multitiered structure of firms, where the “manufacturers” of the garments actually only perform two main functions: the designing and later, the selling, of the products. The middle part of the process, the actual manufacturing, takes place in various subcontracting shops: in cutting shops, fabric treatment shops, sewing shops, and pressing shops.

This fragmentation has led to a highly competitive system, one where many subcontractors bid for a few production contracts, based largely upon lowering their prices. For manufacturers, this has meant the ability to exact greater and greater profits by encouraging subcontractors to bid against each other. The contractors, in turn, try to mitigate their losses by lowering labor costs. However, the workers in the subcontracting shops have no one to exploit, and thereby become the exploited.

The globalization of the apparel industry has intensified the fragmented and competitive nature of the production system, and this has led to a worldwide web of sweating.

In response to global sweatshops, labor advocates have adopted various strategies, including union organizing and consumer campaigns. The American garment and textile workers union, UNITE, has recently begun to develop bilateral relationships with garment unions in Southeast Asia in an effort to deal more effectively with multinational garment corporations. Global consumer campaigns have focused on exacting accountability for labor conditions in contracting shops from the manufacturers and retailers. The combination of union organizing and consumer pressure recently led to the organizing success of a group of Mexican workers, where university administrators and students prevailed upon Nike to persuade its contractor to rehire workers who had been fired for protesting spoiled cafeteria food. As a result, the workers were able to form an independent union with a new collective bargaining agreement.

<sup>30</sup> George Gonos, “Never a Fee! The Miracle of the Postmodern Temporary Help and Staffing Agency,” *Working USA: The Journal of Labor and Society*, Vol. 4, No. 3; Winter 2000-01: 9.

<sup>31</sup> See NELP, “Drafting Day Labor Legislation: A Guide for Organizers and Advocates,” Apr. 2001 in this volume and on NELP’s Web site <<http://www.nelp.org/swi>>.

It is possible to simply state that independent contractors are covered under certain state laws so that they are eligible for workers' compensation or other state remedies.

There are other legislative mechanisms for imposing accountability on businesses that subcontract for labor. In California, UNITE and the United Farm Workers each have proposed legislation to make companies jointly liable with contractors for labor law violations, in those specific industries, regardless of whether the manufacturer or grower can be characterized as the "employer" of the contractors' workers. The resulting legislation regulating the garment industry did not go as far as the unions wanted, but it represents an important first step.<sup>32</sup>

The concept of a "living wage" is an old one that is being applied today.<sup>33</sup> Workers performing jobs for businesses that have contracts with the federal government are entitled to the prevailing wage, usually the union wage scale, and other standards required by the Davis-Bacon Act, the Service Contract Act, and other laws. Many "living wage" ordinances are local versions of the same requirement.<sup>34</sup> The government may engage a contractor and avoid employer status itself, but the implications are that it will have to pay the contractor enough to ensure a "living" (if not a government-level) wage and that it will terminate the contract if the workers do not receive the proper wage and other protections.

More resources are needed for public and private enforcement of existing legal obligations. In addition, law reform is needed to promote greater accountability among businesses that use labor intermediaries. For some businesses, accountability for labor standards will remove the incentive to use labor contractors and will lead to treating both the labor contractor and the workers as the firm's employees. Where contractors are used, the larger companies would be more likely to train contractors and monitor their labor practices and pay enough for the contractors to comply with the law. These would be modest, but important, improvements for working people.

Federal and state departments of labor develop their own enforcement plans and interpretations of the legislation. Advocates need to press government agencies to recognize the importance of bringing cases that establish joint employers status and responsibilities when labor law violations occur. When government officials adopt interpretations that do not implement the legislative intent of the law, advocates may need to bring lawsuits against governments to force agencies to implement the law properly.

<sup>32</sup> Katie Quan, "Legislating Sweatshop Accountability," (Berkeley, CA: University of California, Berkeley):7-8, and available at <<http://www.nelp.org/swi>>.

<sup>33</sup> Lawrence B. Glickman, *A Living Wage: American Workers and the Making of Consumer Society*, (Ithaca, NY Cornell University, 1997).

<sup>34</sup> Janice Fine, "Community Unionism in Baltimore and Stamford," *Working USA*, Vol. 4, No. 3, :59-70.

## Chapter 3: Labor and Community Organizing, Recent Developments and Future Directions

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

### Temporary Workers

From 1990 until the NLRB's decision in *Sturgis* in September 2000, it was nearly impossible for temporary workers to join the union at their worksite. *Sturgis* eliminated the requirement that temporary workers obtain the consent of both employers (the temp agency and its customer) in order to join a worksite bargaining unit.<sup>35</sup> The decision means that temporary workers assigned to one company can now unite with permanent employees to fight for better pay and benefits, provided that they can demonstrate that they share a "community of interest."

Temp workers can be part of the same bargaining unit as permanent employees.

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

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

<sup>35</sup> M.B. Sturgis, 331 NLRB No. 173 (Aug. 25, 2000).

for benefits, and commit agencies to taking a neutral stance in organizing drives.<sup>36</sup> The problem with these codes is that it can be difficult to enforce them.

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

## Day Laborers

Substantial efforts have been made to ameliorate the serious problems faced by day laborers. The media has focused attention on the immigrant workers who gather at a local 7-11 convenience store or a parking lot, waiting for small housing contractors, landscapers, farm labor contractors, or individual homeowners to drive up and hire them for a few hours at a relatively low wage rate, with few questions asked.<sup>37</sup> The papers in this report, however, reveal a far more complex system.

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

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

These centers, which have been established in a number of cities and towns, can take two forms: workers centers or nonprofit day labor pools. Workers centers help day laborers defend their employment rights and, in some cases, provide a safe, harassment-free environment in which day laborers can find work so that they do not have to wait on street corners. Workers centers that organize day laborers include the Workplace Project in Hempstead, NY, the Day Labor Project of the Chicago Coalition for the Homeless, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), Casa de Maryland in suburban Washington, DC, and CASA Latina's Day-Workers Center in Seattle.<sup>38</sup> In contrast, nonprofit day labor pools, such as Primavera Services in Tucson, serve as the employer of the day laborers, thereby providing a positive alternative to exploitative day labor firms. The workers center model is more prevalent in immigrant communities, while the nonprofit model is more geared towards serving the needs of American-born homeless workers with multiple barriers to employment. Among other things, these groups have been successful in recovering unpaid wages and eliminating unreasonable deductions from workers' paychecks for transportation and equipment. Obstacles for the day laborer

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<sup>36</sup> See NAFFE Web site, at <<http://www.fairjobs.org>>.

<sup>37</sup> Charlie LeDuff and David M. Halbfinger, "Wages and Squalor for Immigrant Workers," *The New York Times*, May 21, 1999:

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<sup>38</sup> See Arthur Rosenberg's "Manual Day Labor in the United States" in this report and at <<http://www.nelp.org/swi>>.

projects include severe community pressure, often expressed through zoning ordinance disputes and complaints about the presence of undocumented workers in public places.<sup>39</sup> In November 1999, a National Day Labor Organizing Network was established.

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

## Agriculture

The many migrant farmworkers who are hired through labor intermediaries experience poorer wages and working conditions and less job security than those who are hired directly by the farm operator. Increasingly, farm owners have used labor contractors to bring in crews of undocumented workers with the hope of insulating themselves from sanctions for immigration-law violations. Representatives of the United Farm Workers Union and Pineros y Campesinos Unidos del Noreste (PCUN), Oregon's farm labor union, articulated these problems at the SWI Forums. Many attendees were surprised to find great relevance for nonagricultural workers in the experiences of the farmworker advocates.

A fundamental struggle exists over the nature of the agricultural labor supply. Employers have sought legislation to transform the farm labor force into a mass of foreign "guest workers," holding a restricted, temporary "nonimmigrant" status and few labor rights. Employers of guest workers—the ultimate "contingent" workers—frequently use labor contractors and other labor intermediaries. Farmworkers, with support from a coalition of labor unions, churches, student groups, ethnic organizations, civil rights advocates, and antipoverty groups, are pressing for a new legalization program to convert undocumented workers into legal immigrants with more enforceable labor rights.

The harm to subcontracted agricultural workers is exacerbated by farmworkers' exclusion from many labor laws. At the federal level, farmworkers lack the right to organize a labor union free from reprisals by their employer because they are excluded from the National Labor Relations Act (NLRA). The NLRA exclusion also denies farmworkers an administrative structure to establish collective bargaining, although California state law grants these rights to farmworkers.

Since 1963, federal law has required farm operators to utilize only licensed labor contractors. In 1983, Congress adopted a new law that strengthened the argument that an employer and a farm labor contractor are "joint employers." Employers have responded to courthouse victories by farmworkers with repeated attacks in Congress against the modest protections of this law, which is called the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). Farmworkers and their allies have thus far fended off these attacks but have been unable to correct weaknesses in the law or substantially expand enforcement efforts.

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<sup>39</sup> Charlie LeDuff, "Tensions Persist After Suffolk Vote on Immigrant Workers," *The New York Times*, Sept. 2, 2000: B6.



Farm labor unions have long sought to bargain directly with the farm owners, rather than allow a shifting of responsibilities for employment conditions to fly-by-night labor contractors. The California state collective bargaining law supports this goal.<sup>40</sup> In addition, farmworker unions have sought (at times, successfully) multipartite collective bargaining in which the farm operators and the produce-processors, to whom they sell their crop, negotiate over wages and working conditions on the farms. Such efforts have been effective at Campbell's Soup at pickle processors.<sup>41</sup>

The agricultural unions have also used boycotts and union label campaigns to apply pressure to growers and processors. While the boycott of California table grapes came to an end in 2000, boycotts continue against Pictsweet mushrooms in Ventura County, California and Mt. Olive Pickles in North Carolina. A ten-year boycott of NORPAC frozen foods in Oregon was ended in February 2002, as the agricultural union and the growers announced an agreement that will result in labor relations guidelines for farm workers and farmers. The use of labels is a positive version of the boycott. Both labeling and boycotting enlist the consumer in the fight for economic justice. The difference is that labels encourage consumers to buy certain products, while boycotts discourage purchase of certain products. In addition to the United Farm Workers' Black Eagle for produce from union farms, new labels are coming into being, such as the RUGMARK label for carpets produced in Nepal, India, and Pakistan without child labor.

## Poultry

Poor conditions and low pay have made it difficult for poultry processing plants to retain workers. Thus, they frequently resort to hiring workers through temporary agencies.<sup>42</sup> While the workers in the plants are often hired through temp agencies, those who catch the chickens in order to transport them to the plants are often misclassified as independent contractors. These problems can be addressed through collective bargaining agreements that prohibit the use of temp agencies and ban the artificial redefinition of employees as independent contractors. The United Food and Commercial Workers (UFCW) recently initiated an industry-wide campaign to organize poultry workers. On July 6, 2000, UFCW Local 27 won an NLRB-supervised election to represent chicken catchers at Perdue Farms, in the Delmarva Peninsula in eastern Delaware, Maryland, and Virginia. The 69 workers are the first Perdue employees to vote for a union. Perdue had argued that the catchers were independent contractors, but a federal district court ruled that they are "part of the production line" and therefore Perdue employees.<sup>43</sup>

All unions can negotiate with the employer over contracting out work, but in the garment industry, it is also permissible to restrict outsourcing to only unionized firms.

<sup>40</sup> Marilyn Edid, "Farm Labor Organizing: Prospects and Trends" (Cornell University, ILR Press, 1994): 52.

<sup>41</sup> Edid: 58.

<sup>42</sup> On Dec. 19, 2001, the U.S. government indicted Tyson Foods, Inc., the world's largest poultry processor, for conspiracy to smuggle undocumented workers into the U.S. Jan. 8, 2002, <<http://news.findlaw.com/cnn/docs/tysonfoods/ustyson1201ind.pdf>>.

<sup>43</sup> See *Heath v. Perdue Farms*, 87 F. Supp.2d 452, (D.Md.Feb. 24, 2000).

## Garment Workers

The garment industry, which was featured in Jacob Riis's exposé *How the Other Half Lives* (1890), gained early notoriety for abuses associated with the use of "the middleman, the sub-contractor," also known as the "sweater" because he "sweated" his profit out of the workers.<sup>44</sup> In many ways, we are engaged in the same struggles today as the garment workers of a century ago.

The garment industry is exempt from the National Labor Relations Act's ban on secondary boycotts.

In the recent past, garment manufacturers have been held responsible for wages owed by their contractors. When Lucky Sewing, a contractor for Jessica McClintock, declared bankruptcy while owing 12 garment workers over \$15,000 in back wages, Asian Immigrant Women Advocates (AIWA) in Oakland, CA, decided to hold McClintock, Inc. responsible. They launched the Garment Workers Justice Campaign by writing a public letter to Jessica McClintock in September 1992, requesting that she pay the workers their back wages and give them a new, two-year contract to continue sewing for McClintock, Inc. AIWA also appealed directly to a middle-class constituency through an advertising campaign.

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

Anti-sweatshop campaigns across the country have benefited greatly from student-led groups on many large campuses. Meanwhile, efforts by the Clinton White House to encourage an international code of conduct in the garment industry generated controversy because the compromises necessary to gain support of government agencies and private companies were too extreme for many labor and community groups.<sup>45</sup>

## Janitorial

In its sixteen-year history, the SEIU's Justice for Janitors campaign has organized tens of thousands of office-cleaners in major cities throughout the country, using an industry-wide, community-based strategy. The challenge in organizing contract janitors is to find a way to prevent the building owners from replacing a recently organized contractor with a less expensive, unorganized contractor. The Justice for Janitors campaign has developed a two-pronged solution: 1) raise wages across the industry all at once, and 2) involve building owners and property managers in the process. Abandoning an exclusive focus on individual worksites, organizers sought out workers and supporters in neighborhoods, community organizations, churches, and soccer leagues. The outpouring of support from working people, community and religious leaders, consumers, and small businesses was crucial to the success of the campaign. In addition, SEIU found ways to hold building owners publicly accountable for their contractors' low wages and poor working conditions. While workers engaged in demonstrations, street theater, vigils, and hunger strikes, SEIU

<sup>44</sup> Jacob Riis, *How the Other Half Lives: Studies Among the Tenements of New York*, (New York: Sagamore Press, 1957): 89.

<sup>45</sup> Steven Greenhouse, "Banishing the Dickensian Factor," *The New York Times*, July 9, 2000: 4.

contacted shareholders, tenants, boards of directors, and lenders to get them to encourage building owners to hire responsible contractors.<sup>46</sup>

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

At the same time that SEIU was waging its Justice for Janitors Campaign, Korean Immigrant Worker Advocates (KIWA) was fighting the worst industry practices. Not only were some janitorial companies classifying workers as independent contractors, but they were also forcing these "independent contractors" to pay for the "contract" to clean a specific building, KIWA reports.

### **Sub-Subcontracted Workers**

Paul Lee, Korean Immigrant Worker Advocates

In the Los Angeles janitorial industry, contractors obtain cleaning contracts from building managers and then divide those contracts floor by floor and subcontract each floor to individual janitors. Not only is this system exploitative, it is similar to a pyramid scheme. In order to get the "right" to clean and the keys to the spaces, workers sometimes pay up to two and a half times the value of the janitorial contract. Many times, they start to clean the building and are laid off even before they complete the work. In this instance, the contractor gets paid by the building owner and retains the fee paid by the worker.

Many times, cleaners work for weeks or months and do not receive their pay. Because the contractors and the workers are classified as independent contractors, they are not covered by wage and hour laws. The individual janitors sometimes bring in a helper to assist them. When they do not get paid, neither will the helper.

The first approach that Korean Immigrant Worker Advocates (KIWA) uses to assist the workers is to take them directly to the building owner or manager who let the original cleaning contract. Generally, the building managers are not aware that their contracts are being sold and they see the benefit in hiring directly the team that has actually been conducting the cleaning work. They will terminate the contract with the scamming operation and then hire the janitors. Another approach that KIWA uses is to conduct publicity campaigns around the nasty contractor. KIWA hosts press conferences and pickets to draw attention to the contractors and the buildings that employ them.

Often, the only legal option the janitors who buy the contract have is to file a civil lawsuit in small claims court. The maximum payment awarded is \$5,000. If the case is appealed by the defendant, the plaintiffs usually drop the case because they lack the funds necessary to pursue the case to a higher court. KIWA has asked the District Attorney to prosecute those who sell their contracts under theft of labor or

<sup>46</sup> For more information about this campaign, see Meg Casey-Bolanos's "Justice for Janitors: The SEIU's Campaign to Raise Standards for Contract Janitors," at <<http://www.nelp.org/swi>>.

intent to defraud. Yet, there needs to be tougher enforcement of labor laws in general for these practices to end.

## Homecare Workers in California

In 1987, the SEIU set out to organize homecare workers in Los Angeles County. Despite the absence of a common worksite, the organizers signed up 15,000 workers and had a founding convention with 1,500 people by January 15, 1988. However, they were hampered by the fact that there was no entity acting as the employer. Homecare workers turned their timesheets into the county and received their paychecks from the state. The elderly and disabled clients themselves were entirely responsible for finding and hiring the people who cared for them. In a 1987 decision, the California state court ruled that the individual clients were the sole employers.

While appealing that decision, SEIU turned to the state legislature. In 1992, California passed a law directing counties to create a public authority (PA), which would serve as the employer of record when homecare workers voted to join a union. While PAs were quickly established in some counties, there were struggles over the form the PA would take in others.<sup>47</sup>

## High-Tech and White-Collar Workers

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

In the 1990s, the IRS started to more aggressively investigate the misclassification of workers as independent contractors. The United States Department of Labor's lawsuit against Time Warner is one example.<sup>48</sup> The industry responded by compelling those who had previously been independent contractors to work through third-party "payroll" agencies. This time, the impact on the workers was far worse. These subcontracted workers lost the ability to negotiate their wages directly with the primary employer. Moreover, their hourly wage, after subtracting the payroll company's "markup," was reduced below that of regular employees. In general, subcontracted high-tech workers do not have any healthcare or pension coverage, and they no longer have the tax advantages of independent contractors. This is the world of permatemps.

While high-tech workers are better off than most other temp workers, most high-tech subcontracted workers earn significantly less than permanent employees doing the same work. Microsoft permatemps struck a blow against this disparate treatment in a class action

<sup>47</sup> For a discussion of the organizing struggle in Los Angeles, see Rachael Cobb's "Background Memo: Unionizing the Home Care Workers of Los Angeles County," at <<http://www.nelp.org/swi>>.

<sup>48</sup> "Time Warner is Sued by U.S. in Employee Benefits Case," The New York Times, Oct. 27, 1998: C25.

lawsuit in which Donna Vizcaino was the named plaintiff. In its third review of the facts, the 9<sup>th</sup> Circuit Court of Appeals ruled that Microsoft could be considered a joint employer of workers hired through contracting agencies.<sup>49</sup> This ruling has opened the door for permatemps to recover the pension benefits they have been denied.

In 1998, a group of Microsoft permatemps formed WashTech/CWA to organize high-tech workers in new and innovative ways. While WashTech has devoted much of its attention to Microsoft permatemps, it is also organizing at other Seattle-based, high-tech companies, and its membership includes independent contractors and full-time regular employees.<sup>50</sup>

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<sup>49</sup> See *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9<sup>th</sup> Cir. 1999).

<sup>50</sup> See "A Discussion of Organizing and Legal Strategies in a High Technology Environment: The Microsoft-WashTech/CWA Case" by Danielle D. van Jaarsveld and Lee H. Adler presented at SWI Forums and available at <<http://www.nelp.org/swi>>.

## Conclusions and Recommendations for the Future of Subcontracted Worker Organizing

The increasing prevalence of labor subcontracting has a substantial negative impact on wages and working conditions. Subcontracting has a long history, especially in apparel, building services, and agriculture. In attempting to improve subcontracted employees' wages and working conditions, a great deal can be learned from comparing strategies across industries and from earlier efforts to reform "sweatshops." In general, these strategies involve changing the law, improving enforcement of the law, and organizing workers to improve conditions beyond what the law requires. The effectiveness of each strategy is maximized to the extent that both the primary employer and the subcontractor are held accountable for wages and working conditions. With the spread of subcontracting into more industries, there is an opportunity to gain strength from multisector coalition-building. In addition, advocates and organizers must build strong public support for defending the rights of subcontracted workers.

### Research and Education

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

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

### International Work

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

recruitment and transportation networks to supply them with a constant flow of new job applicants.<sup>51</sup>

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

Use of international law to protect workers inside the United States is challenging, but it is growing and should be expanded. Human Rights Watch recently issued an important report that could serve as a major precedent, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards" (2000).<sup>52</sup> An international group of advocates seeking to protect orchard and warehouse workers in Washington State and promote union organizing have filed a case under the North American Agreement on Labor Cooperation (NAALC), NAFTA's "labor side agreement," which obligates the United States, Mexico and Canada to enforce their own labor laws. In addition, Mexico has used the NAALC machinery to seek an investigation into the treatment of Mexican citizens working at a large egg production facility in Maine. There are also efforts in Congress to incorporate respect for basic labor standards in future international trade agreements, as well as a heightened role for the International Labor Organization of the United Nations. As international labor standards and organizing expand, worker advocates must continue these efforts to minimize abuses associated with labor subcontracting.

## Immigrant Workers

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

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<sup>51</sup> On Dec. 19, 2001, the U.S. government indicted Tyson Foods, Inc., the world's largest poultry processor, for conspiracy to smuggle undocumented workers into the U.S. Jan. 8, 2002, <<http://news.findlaw.com/cnn/docs/tysonfoods/ustyson1201ind.pdf>>

<sup>52</sup> Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards" (2000), available online at <<http://www.hrw.org>>.

The AFL-CIO's recent policy statements on immigration reflect the recognition that workers who have no meaningful legal status in this country cannot adequately protect themselves from abusive employment practices and may be too fearful of retaliation to cooperate with labor unions, government agencies, legal services and others attempting to help them enforce their rights. In addition, supposed "employer sanctions" under U.S. immigration law have not stopped the hiring of undocumented workers, but have enabled some employers to respond to union organizing by threatening to seek INS enforcement. Thus, labor unions should organize immigrant workers, and immigrant workers should be granted a status that minimizes their vulnerability to exploitation. Immigration programs are to be preferred over guest worker programs because they free workers from dependence on an individual employer and the threat of withdrawal of the worker's visa.

The authors hope that this report and the Subcontracted Workers Initiative Strategy forums encourage worker advocates, government officials, corporate managers, and the public to address subcontracted workers' needs effectively.



## Appendix A: Summaries of Subcontracted Worker Initiative Strategy Forum Papers

*These papers are available in full on the National Employment Law Project's Web site at [www.nelp.org/swi](http://www.nelp.org/swi), unless otherwise noted.*

### **"Working on the Margins, California's Growing Temporary Workforce"**

By Sundari Baru, Ph.D., Center on Policy Initiatives

The United States is experiencing unprecedented economic prosperity. Unemployment rates are at historic lows, inflation appears to be curbed, and new millionaires are being created almost daily. However, this prosperity has not guaranteed job security for all workers. This paper discusses a dramatic rise in what can be seen as "nonsecure" employment, or nonstandard work arrangements, that do not provide the stability and benefits of regular, full-time work. \*Available at the Center on Policy Initiatives Web site at [http://www.onlinecpi.org/temp\\_report/CPI-TempWorkers.pdf](http://www.onlinecpi.org/temp_report/CPI-TempWorkers.pdf).

### **"Justice for Janitors: The SEIU's Campaign to Raise Standards for Contract Janitors"**

By Meg Casey-Bolaños, Service Employees International Union (SEIU)

Most commercial office janitors do not work directly for the owners of the office buildings they clean. Instead, they work for cleaning contractors who in turn are hired by property managers who serve as agents for building owners. While the building owners ultimately control the finances, most building owners wish to distance themselves from the day-to-day operations of the properties. Property managers are therefore charged with hiring contractors to service the building while keeping operating costs as low as possible. This paper serves as a brief summary of the structure of the commercial real estate industry, the challenges this structure presents, and some of the strategies of the SEIU employees.

### **"Unionizing the Homecare Workers of Los Angeles County"**

By Rachael V. Cobb, Massachusetts Institute of Technology

The over ten-year struggle of the Service Employees International Union (SEIU) to unionize 75,000 homecare workers in Los Angeles County is a story of persistence, political strategy, and coalition-building. The result was a critical success for the labor movement, demonstrating the feasibility of organizing low-wage, minority, largely female service workers in disparate geographic areas. How did this effort, against all odds, succeed? This overview documents the challenges—legal, legislative, and political—SEIU encountered and eventually overcame, over its more than ten-year effort to organize the homecare workers of Los Angeles County.

### **"The Role of Immigrant Labor in a Changing Economy"**

By Lucia Duncan

Despite its origin as a nation of immigrants, the U.S. has historically maintained an inconsistent stance towards immigrants. Regardless of their valuable contributions to the creation of the U.S. as an economic superpower, immigrants have been, and continue to

be, perceived as threats to native workers and society. With the increased migrations of recent decades, resulting from the globalization of production, the widening disparity between the first and third worlds, and the expansion of international, sociopolitical networks, immigrants have been cast by popular perception as threats to national sovereignty. This paper explores the demand for immigrants in low-wage labor markets in the U.S. and the configuration of their work.

**“The Feudal Lord in the Kingdom of Big Chicken: Contracting and Worker Exploitation by the Poultry Industry”**

By Deborah Thompson Eisenberg, Public Justice Center, Maryland

This paper reviews the poultry processing industry, a \$22-billion-plus-per-year industry that employs about 240,000 workers, located mostly in small, rural towns, scattered across the Southeastern United States, from the Delmarva peninsula to Texas. The profitability of the industry has skyrocketed over the past decade. In that time, the dollar value of poultry production has more than doubled and the demand for chicken has surpassed the consumption of all other types of meat in the U.S. At the same time, exports of poultry have increased by over tenfold. The booming productivity of the poultry industry has been built on the backs of low-wage workers, but workers have not equally shared in the prosperity. While the poultry industry's profits have soared and workers now prepare more birds per hour than ever before, the real average wage for hourly poultry processing workers has actually declined. Likewise, the average daily compensation for chicken catchers has fallen and they have no benefits, as poultry companies have attempted to transform catchers into “independent contractors” rather than employees.

**“Organizing for Workplace Equity: Model State Legislation for ‘Nonstandard’ Workers”**

By Maurice Emsellem and Catherine Ruckelshaus, National Employment Law Project

This publication collects enacted state and local legislation pertaining to nonstandard workers. The laws featured include states laws creating study commissions to research the contingent workforces, laws aimed at contracting out in the garment and agricultural industries, and proposed legislation aimed at providing workplace equity for nonstandard workers.

**“Subcontracting: The Legal Framework”**

By Bruce Goldstein, Farmworker Justice Fund; Cathy Ruckelshaus, National Employment Law Project; Larry Norton, Texas Rural Legal Aid and Community Justice Project; and Brent Garren, UNITE, the Union of Needletrades and International Textile Employees

This paper describes the law in the United States as it applies to nonstandard or contingent workers. The authors explain that for contingent workers to get the protections of law, they must be in an employment relationship with some entity or entities. Federal laws are grouped by how broadly they define the employment relationship and leading case interpretations of the primary labor and employment laws are included. State laws, where there is the most room for ensuring coverage of contingent workers, are highlighted briefly. The authors make suggestions throughout the paper for increasing coverage of contingent workers under U.S. labor and employment laws.

### **“A Lesson For Reforming 21<sup>st</sup> Century Labor Subcontracting: How 19<sup>th</sup> Century Reformers Attacked The Sweating System”**

By Bruce Goldstein, Farmworker Justice Fund

Subcontracting out work is an old phenomenon. Up until about 70 years ago, subcontracting labor was commonly known as “the sweating system” and its victims worked in “sweating shops.” The quintessential subcontracted worker was the garment worker toiling in tenements in New York City during the last two decades of the 19<sup>th</sup> century. But the problem was much more widespread. The sweating system existed in many other areas, including Chicago, Cincinnati, Indianapolis, Philadelphia, and Boston. The “sweated trades” included production of a wide variety of garments as well as cigars, artificial flowers, dolls, nut-cracking for confectioneries, brushes, and purses. As we attempt to assist contingent workers in the 21<sup>st</sup> century, there is much to be learned from the reform efforts during the late 19<sup>th</sup> century and early 20<sup>th</sup> century to ameliorate conditions in the “sweatshops.”

### **“The Temporary Help and Staffing Firm as a ‘General Subcontractor’”**

By George Gonos, State University of New York at Potsdam

What a fabulous trick – subcontracting without separate facilities or equipment, or separate supervisors – right in your own home shop. (Do it yourself, practically!) With the *temporary help formula*, the association of marginal jobs with marginal outside firms became unnecessary. Subcontracting was brought inside the parent company’s shop, into the core firms and industries, and spread throughout the economy. With its operating principles fairly well legalized and widely legitimated through years of political struggle, the temporary help and staffing industry (THSI) could subcontract any segment of the workforce, in any business enterprise, overnight. (No muss, no fuss.)

### **“Subcontracting in the New York City Taxicab Industry”**

By Daniel W.E. Holt and Jennifer Paradise, National Employment Law Project

During the last three decades, the taxicab industry has undergone structural changes that have profoundly negative implications for cab drivers. While historically, the industry has varied considerably from city to city, the rise of subcontracting since the 1970s has meant that, despite local differences in industry structure, drivers increasingly face similar problems regardless of where they work. Indeed, the embrace by taxi industry owners across the country of the so-called leasing model of industrial restructuring has diminished the geographical diversity that once characterized the sector. This paper focuses primarily on the taxicab industry in New York City. Since each city organizes and regulates its own taxicab industry, some elements of the New York example may be more relevant for comparative purposes than others. Although New York’s taxicab industry may be unrivaled in its complexity, that very complexity, encompassing as it does many elements found in other cities’ industries, makes it a good case study.

### **“The Effects of Immigration and Globalization on the U.S. Garment Industry”**

By Mark Humowiecki and Lung-Chi Lee, National Employment Law Project

Since the 1970s, the United States garment industry has seen a resurgence of sweatshop conditions. The system of subcontracting creates tremendous competitive pressures on the

lowest rung of production, the contractors, who compete with each other for business by bidding down contracts, resulting in wages that are often below the legal minimum. There are three other significant factors that help to explain the existence of glaring labor abuses in the domestic garment industry. First, U.S. garment producers are under extreme competitive pressure from foreign production as a result of the increasing globalization of production due in part to NAFTA and other free trade agreements. The upcoming elimination of all tariffs and quotas in 2005 will exacerbate these pressures, forcing U.S. garment producers to further cut costs through lower wages or else lose business to competition from overseas. Second, because a significant percentage of garment workers are undocumented immigrants, United States immigration policy contributes to the vulnerability of garment workers to exploitation. Third, there has been a significant concentration of industry power within a small group of retailers that has forced garment manufacturers to change their production practices in order to lower prices and increase responsiveness to consumer demand. As a result, retailers are squeezing out even more of the value of clothing and forcing contractors to pay below minimum wage.

This paper examines several of the responses that workers and their advocates have undertaken to stem the decline in labor standards in the U.S. garment industry. These strategies include legislation, litigation, worker center organizing, and codes of conduct.

#### **“Fighting Privatization: Strategies and Lessons from the Field”**

By Sarah A. L. Merriam

In recent years, the mantra of “smaller government” has become a familiar political refrain, and privatization, the practice of engaging private companies to provide governmental services which once were provided by civil servants, is enjoying widespread popularity. At the federal level, more than 400,000 jobs have been cut since the first Bush administration; states, counties, and municipalities are following suit. While privatization causes many of the same problems as private sector subcontracting, the fight to stop the hemorrhaging of public jobs is both more urgent and more winnable. It is more urgent because privatization is even worse for workers in general and the economy as a whole than similar shifts within the private sector. It is more winnable because it is the government, and not private industry, which is directly and undeniably responsible for the crisis, thus providing organizers with a target that has to win reelection. This paper outlines some of the dangers of privatization and the ways in which unions and workers can, first, lay the foundation for an effective fight against attempts at privatization; second, defeat specific privatization initiatives; and third, deal effectively with privatization when it does take place.

#### **“Drafting Day Labor Legislation: A Guide for Organizers and Advocates”**

By National Employment Law Project

This abbreviated guide was prepared to assist grassroots organizers and state advocates who are considering campaigns to adopt day labor legislation. The Illinois day labor law (the “Day Labor Services Act”) enacted in 2000 provides an ideal starting point to evaluate the options available when drafting the particulars of a bill. This document thus compares the Illinois law with the other state day labor statutes (Arizona, Florida, Georgia, and Texas), highlighting the model provisions of each. Where appropriate, this guide also discusses recommended provisions found in laws

regulating the temp industry, farm labor contractors and other available sources of model state and federal legislation.

**“Legislating Sweatshop Accountability”**

By Katie Quan, Labor Policy Specialist, Center for Labor Research and Education – Institute of Industrial Relations, University of California, Berkeley

This paper studies the passage of California's AB 633, the Sweatshop Accountability Bill, in 2000. It shows how the system of subcontracting led to sweatshops and how in the early part of the 20<sup>th</sup> Century, the apparel union solved these problems by reducing employer competition and negotiating manufacturer-contractor joint liability. It then traces the history of California garment worker advocates to pass state legislation to provide joint liability. Finally, it describes AB 633 and the current dispute over the regulations for its implementation.

**“Manual Day Labor in the United States”**

By Arthur Rosenberg, Florida Legal Services

No job certainty, low pay, minimal benefits, and exploitation characterize manual day labor in our country today. The restructuring of our economic system into a service economy and the efforts of employers to avail the costs of permanent employees have led to a marked increase in temporary employment. In general, temporary employment can be distinguished by impermanency, hazards in our undesirability of the work, the absence of fringe benefits, and limited governmental protections. While temporary employment is often painted as an innovative adjustment to the new economic conditions, it may reintroduce into the workplace uncertainty and arbitrariness long regarded as unfair to working people.

**“Day Laborers in Southern California: Preliminary Findings from the Day Labor Survey”**

By Abel Valenzuela Jr., Ph.D., Center for the Study of Urban Poverty Institute for Social Science Research, University of California, Los Angeles

This report examines data from the Day Labor Survey (DLS). It presents descriptive data on a host of indicators that allow us to empirically assess day laborers and their work for the first time. The data presented are preliminary in the sense that they have not been analyzed more thoroughly and comprise only one part of the larger Day Labor Project. In addition, most of the findings are purposefully presented in this report descriptively. The primary objective of this report is to present original findings about a highly visible yet relatively unknown (at least in the social-scientific sense) labor market phenomenon in Los Angeles and elsewhere.

**“A Discussion of Organizing and Legal Strategies in a High-Technology Environment: The Microsoft-WashTech/CWA Case”**

By Danielle D. van Jaarsveld and Lee H. Adler, Cornell University School of Industrial-Labor Relations

The descriptions and analyses reported in this paper flow from the authors' field study of high-end contingent workers conducted primarily at Microsoft Corporation's corporate headquarters in Redmond, Washington. Extensive interviews with union and rank-and-file

activists, “temporary employment” agency representatives, Microsoft managers, and the legal team challenging Microsoft’s “permatemp” strategy have left us with some understanding of the complexities of organizing in the high-technology industry (high-tech). Although high-tech contingent workers differ from their low-wage counterparts in educational level, skill level and wage-earning power, high tech contingent workers are vulnerable to many of the same forces that affect contingent workers in other industries: job insecurity, fewer benefits, and lower levels of compensation. Employer motivations for utilizing contingent workers in high-tech workplaces and the difficulty of coordinating suitable union organizing responses are consistent with most of the industries examined by this Subcontracted Worker Initiative Strategy Forum.

### **“Outsourcing in the Hotel and Restaurant Industry”**

By Matthew Walker, Director of Research & Education, Hotel Employees and Restaurant Employees International Union, and law student Nathaniel Norton

The recent economics of hotel and casino operations have driven operational changes in several departments including food and beverage (“F&B”), housekeeping, laundry, janitorial, airport shuttle service, and valet. Subcontracting or outsourcing has been one among several changes that employers have pursued in an effort to boost operating profit. According to a study conducted by the Hotel Employees and Restaurant Employees Union (HERE), subcontracting affects locals representing 85% of HERE’s total membership. This paper focuses on the subcontracting or outsourcing of food and beverage operations in hotels and casinos.

### **“Sweatshops in the Fields: Contingent Workers in Agriculture”**

By Robert A. Williams, Florida Legal Services

This paper examines the current labor system in the fruit and vegetable industry that (1) emphasizes temporary jobs, (2) encourages subcontracting for labor management, and (3) recruits workers in a manner that results in the chronic oversupply of labor. These labor practices are more prevalent in agriculture than in other industries, even immigrant industries. In fact, the agricultural industry furnishes the model for a low-wage exploitative industry which is now surfacing in other sectors of the economy. There are two reasons why these practices are so pervasive in agriculture. First is the nature of the worker if the work itself, and the second is the fact that historically, agriculture has been exempt from governmental regulations and social insurance programs that discourage these practices.

### **“Protecting the Contingent Work Force: Lessons from the Women’s Garment Industry”**

By Max Zimny, General Counsel and Brent Garren, Associate General Counsel, ILGWU Legal Department

The spread of “contingent” work throughout the economy, including subcontracting, licensing, franchising, and leasing employees, has seriously undercut labor standards and the right to organize. Contingent workers have their terms and conditions of employment controlled by an entity which is not their direct employer and which frequently escapes responsibility for these conditions under current labor law. The garment industry has long relied extensively on the “integrated process of production” (or the “outside system of production”), in which the garment producer, known in the industry as a “jobber”, employs

no assembly workers. Rather, it produces its garments through subcontractors, which are referred to as contractors in the garment industry. The contracting system, when left uncontrolled by unionization, results in the massive spread of sweatshops, in which minimum wage, overtime, child labor protections, health, sanitation, and safety standards, and rights to engage in concerted activity are routinely ignored.

## Appendix B: Subcontracted Worker Initiative Strategy Forum Participant Lists and Resources

### SWI Strategy Forum Participant List

November 18-19, 1999

Lee Adler  
Cornell University  
School of Industrial & Labor  
Relations  
Ithaca, NY

Paul Anderson  
Communication Workers of America  
Washington, DC

Bill Beardall  
Equal Justice Center  
Austin, TX

Fran Bernstein  
American Federation of State,  
County & Municipal Employees  
Washington, DC

Mike Blain  
Washington Alliance of Technology  
Workers (WashTech)  
Seattle, WA

Jennifer Brand  
NY State Attorney General's Office -  
Labor Bureau  
New York, NY

Ellen Bravo  
9to5, National Association of  
Working Women  
Milwaukee, WI

Mario Bueno  
United Workers  
Committee/Progreso Latino  
United Campaign for Permanent  
Jobs  
Central Falls, RI

Dr. Francoise Carré  
Radcliffe Public Policy Institute  
Cambridge, MA

Meg Casey-Bolaños  
Service Employees International  
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Rachael V. Cobb  
Massachusetts Institute of  
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Cambridge, MA

Tim Costello  
Campaign on Contingent Work and  
National Alliance for Fair  
Employment  
Boston, MA

Richard Cunningham  
NJ Industrial Union  
Council/Education & Training  
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Michael Fanning  
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International Union of Operating  
Engineers & Participating  
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Julie Farb  
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Bruce Goldstein  
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Domingo Gonzalez  
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Carlos Gutierrez  
CASA de Maryland, Inc.  
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Bill Hoerger  
California Rural Legal Assistance  
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Roy Hong  
Korean Immigrant Worker  
Advocates  
Los Angeles, CA

John Howley  
Service Employees International  
Union  
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Mara Manus  
The Ford Foundation  
New York, NY

Katherine McFate  
The Rockefeller Foundation  
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Nadia Marin-Molina  
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Pineros y Campesinos Unidos del  
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Union  
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Lowell Peterson  
Meyer, Suozzi, English & Klein  
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Wade Rathke  
ACORN/ SEIU, Local 100  
New Orleans, LA

Lynn Rhinehart  
AFL-CIO General Counsel's Office  
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Erica Rios  
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Christina Roessler  
French American Charitable Trust  
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Arthur J. Rosenberg  
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Cathy Ruckelshaus  
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Sigmund Shen  
National Mobilization Against  
Sweatshops  
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Young Shin  
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## Appendix C: Fact Sheets: Strategies and Structures by Industry

A primary purpose of both Subcontracted Work Initiative Strategy Forums was to discover parallels in the structure of subcontracting from one industry to another and determine how strategies to combat subcontracting in one industry could be transferred to others. In order to make this information easily accessible, we have distilled it into a series of one-page summaries on the structure of subcontracting in each industry and the strategies employed to combat it. The industries we examine are: agriculture, day labor, garment, high-tech, home care, hotel and restaurant, janitorial, poultry processing, public sector, taxi, and temp agencies. In breaking down the structure of each industry, we look at misclassification of employees as independent contractors, the presence of public funds, government regulation of the industry, ethnic composition, and the impact of subcontracting on the workers. Strategies for combating subcontracting include passing state and local legislation, advocating for agency enforcement and regulatory reform, litigating to enforce existing laws, collective bargaining, and devising new ways to organize outside the context of the National Labor Relations Act.