

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

Authors

Maurice Emsellem
Catherine Ruckelshaus

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National Employment Law Project

55 John St., 7th Floor • New York, NY 10038
(212) 285-3025 • www.nelp.org • (212) 285-3044 (fax)

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I. Introduction

“Nonstandard” workers, often called “contingent” workers, are a fixture in today’s economy. Working in part-time, temporary, contract, day labor, and other nonstandard employment arrangements, these workers now comprise about 30 percent of the workforce. As the studies show, these workers consistently earn lower wages than full-time workers with similar education and background who perform the same jobs. They also lack job security, and they are far less likely to receive health insurance and other benefits. Work in low-quality, nonstandard jobs is particularly common among people of color and women workers. Over half the women working in nonstandard jobs earn less than what it takes to lift a family out of poverty.¹

A recent national poll conducted for the National Alliance for Fair Employment (NAFFE) makes a convincing case that most people have come to identify with the plight of nonstandard workers and want to see them treated more fairly.² Specifically, the poll found that 61% of the public has a personal connection to the problems of nonstandard workers, either because they themselves worked in a contingent job or they knew someone who did. Over two-thirds (68%) of the public believes it is unfair that part-time, temporary and contract workers receive unequal treatment on the job. Most significantly, 60% of those polled indicated that they would vote for Congressional candidates who support workplace reforms to provide nonstandard workers with equal pay and benefits.

* The authors of this report are indebted to the many talented organizers and advocates who conceived of the model laws that are featured in this report. We are also extremely grateful to those individuals who provided valuable feedback on the latest edition of the report, especially Professor George Gonos, Gregory Williams and Chirag Mehta.

¹ This profile of non-standard workers is based on the Economic Policy Institute’s report, *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (1997), authored by Arne Kalleberg, Edie Rasell, et al. See also U.S. General Accounting Office, *Contingent Workers: Income and Benefits Lag Behind Those of Rest of Workforce* (June 2000); Ken Hudson, “No Shortage of Non-Standard Jobs”, Economic Policy Institute Briefing Paper (1999); 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).

² The results of the poll, conducted by Lake, Snell, Perry and Associates in January 2000, are reported in the new report of the National Alliance for Fair Employment, entitled *Contingent Workers Fight for Fairness* (2000), available on-line at www.fairjobs.org.

II. Existing Laws Fail to Protect Nonstandard Workers

Despite strong public support for nonstandard workers, the nation's employment laws have not kept pace with the growth in nonstandard work, and in many cases the laws have been used to promote it. Existing laws that should apply to nonstandard workers are often underenforced. Thus, nonstandard workers lack some of the most basic protections of labor and employment laws that apply to permanent, full-time employees.

Frequently, nonstandard workers do not receive minimum wage and overtime pay as required by the Fair Labor Standards Act (FLSA), and they are often denied the right to organize and bargain collectively under the federal labor laws (National Labor Relations Act). Many nonstandard workers also do not qualify for employment-related benefits. For example, they are far less likely than other workers to meet the state qualifying requirements for the unemployment insurance program. They are also less likely to meet the requirements for Social Security retirement and disability benefits. They have more difficulty qualifying for leave under the federal Family and Medical Leave Act (FMLA), and are impeded from earning pensions because of the high minimum participation and vesting standards of the federal pension law, the Employee Retirement Income Security Act (ERISA).³

III. Grassroots Groups Organize to Reform Employment Laws

Recognizing the role that the law has played in denying workplace rights to nonstandard workers, a growing movement of grassroots organizations and labor unions has taken on the challenge of reforming the laws. Starting in the states and communities where they live and work, these groups have directly confronted the structures that deny nonstandard workers their rights to equal treatment on the job. They offer promising new models of organizing and advocacy in support of public policy reforms. These groups have also formed a new national network, the National Alliance for Fair Employment (NAFFE), which is playing a central role helping to forge

³ For a comprehensive analysis of the gaps in federal employment laws denying protection to nonstandard workers, see National Employment Law Project, *Testimony Submitted to the Commission on the Future of Worker-Management Relations* (July 18, 1994), and the joint testimony of NELP and a coalition of labor and grassroots organizations submitted before a special session of the Commission on the Future of Worker-Management Relations, *Statement on Changes in Current Labor Laws Necessary to Address the Critical Needs of the Contingent Workforce* (October 7, 1994). Another resource that focuses specifically on the unemployment compensation system is the National Employment Law Project's *Mending the Unemployment Compensation Safety Net for Contingent Workers* (October 1997).

Profile: The National Alliance for Fair Employment (NAFFE)

Launched in May 2000, the National Alliance of Fair Employment (NAFFE) is a broad network of grassroots organizations, labor unions, advocates and academics who have come together to challenge the working conditions of nonstandard workers. NAFFE issued a report entitled, *Contingent Workers Fight For Fairness*, documenting the impressive work of over 30 organizations around the nation, including many of the state legislative campaigns featured in this report. In addition, NAFFE commissioned a national poll, described above, calling attention for the first time to the public's support for policy reforms benefiting nonstandard workers. Over the next several years, NAFFE will work with groups nationally and in their local communities to build alliances and organize support for national, state and local campaigns. NAFFE staff can be reached at (617) 338-9966, and up-to-date developments (including an on-line version of the NAFFE report) can be found on NAFFE's website (www.fairjobs.org).

new alliances that will bring greater national attention to the cause of non-standard workers.

This publication was prepared to support the state-based organizing and advocacy campaigns of the NAFFE network. It documents successful legislative initiatives and promotes newly-developed policy reforms.⁴ First published in June 1999, this report continues to be a work in progress. It serves as a regularly-updated clearinghouse of the many state laws now on the books and of model bills that have not yet made their way into law. The report also profiles several of the grassroots organizations that have been most actively involved in state campaigns. In addition to providing these resource materials, the National Employment Law Project is available to offer legal advice and other forms of technical support to the NAFFE network and individual groups seeking to develop their state campaigns.

⁴ While this report focuses on the state-based campaigns of the NAFFE-affiliated groups, it is worth noting that there has also been a marked increase in Congressional activity. During the past year, the following bills were introduced addressing the circumstances of nonstandard workers: the Equity for Temporary Workers Act (H.R. 2298), the ERISA Clarification Act of 1999 (H.R. 2299), the Parity for Part-Time Workers Act (H.R. 3708), the Day Laborer Fairness and Protection Act (H.R. 5182), and the Employee Benefits Eligibility Fairness Act of 2000 (S. 2964). In the mid-1990's, a national commission recommended significant labor law reforms related to contingent workers and a bill was introduced in the Senate that contains comprehensive federal legislation. See Commission on the Future of Worker-Management Relations, Report & Recommendations, Chap. 5 ("Contingent Workers") (December 1994); Contingent Workforce Equity Act, S.2504, 103rd Cong., 2d Sess. (sponsored by Senator Howard Metzenbaum).

IV. Model State Legislation Protecting Nonstandard Workers

Starting only a few years ago, grassroots organizations across the country began to aggressively promote legislation at the state level addressing the workplace rights of nonstandard workers. As this report documents, several states have since established commissions to evaluate how their laws apply to nonstandard workers and to recommend legislative reforms. In addition, comprehensive legislation covering all categories of nonstandard work has been introduced in several states, and many more laws have been enacted establishing specific protections for temps, part-time workers, independent contractors, day laborers and other nonstandard workers.

Today's campaigns are linked to a remarkable history of nonstandard worker organizing and state regulatory activity. For example, as far back as the late 1800's, abuses associated with the temp industry made front page news, and by the 1920's statutes regulating the industry were in place in most states. These laws, which strictly limited the fees that could be charged by temp agencies, were challenged in court by the industry. Ultimately, however, the state regulations were upheld as constitutional by the U.S. Supreme Court.⁵ Then, during the 1960's and 1970's, the temp industry waged an all-out campaign (which went largely unnoticed by the media and the general public) to rewrite these state laws. As a result, the entire temp industry is now effectively exempt from state regulation in all but a few states. With the recent resurgence of organizing, the challenge is to raise the profile of these campaigns and build a state movement that can effectively counter the many interest groups that will continue to actively resist state regulation.

A. Mandated State Studies & Commissions

As a first step toward promoting specific state law reforms, several states have enacted or proposed laws requiring their legislatures to study and evaluate the impact of the shift to nonstandard work on their communities.

Current Law

- Rhode Island and North Carolina have enacted laws that require comprehensive studies of nonstandard work. The North Carolina statute requires counties to study the shift from full-time to part-time work and from permanent to

⁵ The authoritative analysis of state regulation of the temp industry is authored by Professor George Gonos of the State University of New York (Potsdam). "The Contest Over 'Employer' Status in the Postwar United States: The Case of the Temporary Help Firms," 31 *Law & Society Review* 81 (1997).

temporary and other nonstandard employment. It also requires examination of the wages, benefits, and protections available to part-time and temporary workers, leased employees, independent contractors and other contingent workers, relative to the wages, benefits, and protections for regular, full-time workers.

The best available state legislative report on nonstandard work was prepared by a Senate committee of the Washington Legislature (drafted by the committee staff as background for a series of bills that were introduced). It provides a concise summary of key policy considerations and recommends a series of progressive state legislative reforms.⁶ State commissions established in New Hampshire and Maine held hearings and submitted recommendations for legislation to address nonstandard work in the unemployment insurance program specifically.

Proposed Legislation

- Tracking the nonstandard workforce: Massachusetts and Washington introduced legislation that would require comprehensive studies of the nonstandard workforce. The Massachusetts Act to Provide a Report on Job Quality would require a research report examining quantitative data on the characteristics of nonstandard jobs, including wages, benefits and training requirements.

First introduced in 1998, the Washington bill would have established a Contingent Work Force Task Force made up of public officials, to be advised and monitored by an advisory board of labor and employer groups. The bill charges the Task Force with conducting a comprehensive study of the growth in nonstandard work and making recommendations for state legislation. As amended in 1999, the bill now establishes a joint legislative committee charged with helping the advisory board prepare a comprehensive study on the contingent workforce. While the bill did not pass this year, the Legislature and the Governor agreed to have the State conduct a study of the nonstandard workforce and consult with a number of key stakeholders ([Appendix B](#)).

⁶ Washington State Senate, Labor & Workforce Development Committee, "Contingent Work in Washington State" (January 5, 1999) (available on-line at <http://www.leg.wa.gov/senate/scs/lwd/reports/RptContWork.htm>).

Profile: WashTech, the Washington Alliance of Technology Workers

WashTech, which stands for the Washington Alliance of Technology Workers, has led a campaign targeting the state's large software industry. The vast growth of the software industry has led to a situation in which hourly and temporary computer workers are now commonly employed as "permatemps." Employers have obtained exemptions from requirements to pay certain computer professionals time-and-a-half for overtime. High-tech nonpermanent workers often receive substandard benefits and face policies and contracts that cap their pay and limit access to basic employment information. High-tech workers organized by WashTech are now pushing for passage of several bills to promote the rights of Washington's burgeoning nonstandard workforce. For more information on these activities and the status of the legislation, refer to WashTech's comprehensive website (www.washtech.org).

B. Comprehensive Protective Legislation

Temporary and leased workers, part-time workers, independent contractors, and day laborers each face unique problems on the job based largely on the distinct relationships that these workers have with their employer or employers. Some state legislative initiatives have addressed these categories of workers with separate proposals aimed at solving their unique concerns. Other state initiatives, described here, have taken a more comprehensive approach that recognizes the gaps in employment laws that affect the entire nonstandard workforce.

Proposed Legislation

- Comprehensive legislation proposed in Connecticut, Massachusetts and Pennsylvania, would provide equal benefits and terms and conditions of employment for all categories of nonstandard workers. The Massachusetts bill, the Workplace Equity Act, would require equal pay for part-time and other nonstandard workers doing the same work as permanent employees. It would also prevent discrimination in benefits against workers in part-time and other nonstandard work, require the state to set standards for state service contractors that employ nonstandard workers, and place caps on the percentage of contingent jobs and the percentage of total payroll which contractors with the state may use to hire workers in contingent jobs ([Appendix C](#)).

Profile: The Massachusetts Contingent Worker Campaign

The Massachusetts Campaign on Contingent Work was formed in 1995 to organize the vast numbers of nonstandard workers around the state. Since then, it has successfully built a broad-based coalition of labor and community groups to support organizing of nonstandard workers in the Boston area and statewide. The campaign has developed a comprehensive strategy which includes a research support project, direct service through a Worker's Center (the Temporary Employee Meeting Place), a monthly newsletter written by and for nonstandard workers, a popular education program, a corporate code of conduct for employers of temp workers, a state legislative campaign that features comprehensive legislation, a "job quality" survey, and legislation targeting part-time workers with particular emphasis on unemployment benefits. For more information, contact Tim Costello or Jason Pramas at (617) 338-9966.

C. Temporary & Leased Workers

1. Temporary Work: Temporary employees face special forms of discrimination on the job.⁷ Many agencies typically fail to provide their workers with an accurate description of their jobs, pay scale, and work schedules. Temporary employees often have little or no control over (or even knowledge of) the duration of a given assignment. Often, they have a hard time qualifying for unemployment benefits once their temporary assignment ends. Finally, temp agencies typically charge their client companies a fee if the client chooses to take on a temp worker as a permanent employee. These "conversion fees" reduce the likelihood that temporary work will provide a path to permanent, standard employment.

As described earlier (at page 5), state efforts to police the temp industry are nothing new. As recently as the late 1960's, most states heavily regulated the temp industry which operated as "employment agencies" and routinely charged placement fees to the workers.⁸ That changed practically overnight (and without much public scrutiny) when a national campaign was mobilized to deregulate the industry. The strategy of the temp industry (organized by the lobbying group now known as the American Staffing Association) was both remarkably simple and incredibly successful.

First, temp firms started marketing themselves as the "employer", which set the stage for the state to exempt "employers" from the statutes that only regulated "employment agencies". Second, the industry shifted from expressly charging the worker a fee to charging the client company instead (though, in reality, the fees are

⁷ For an excellent discussion and analysis of the staffing industry, see Nikolas Theodore & Chirag Mehta, *Contingent Work and the Staffing Industry: A Review of Worker-Centered Policy & Practice* (Center for Urban Economic Development, University of Illinois at Chicago, October 1999).

⁸ This discussion is based on Professor Gonos' research, cited in footnote 5 of this report.

often passed on to the worker, which explains why the temp industry so strongly opposes state disclosure legislation). The state statutes were then amended to exempt agencies that charged anyone other than the worker for the placement service. By the 1970's, all the state laws – which had almost brought down the temp industry -- became effectively meaningless for temp agencies. This phenomenon is illustrated by the Oregon statute, which is summarized in [Appendix D](#).

2. Employee Leasing: In contrast to temp work, leased employees work for an intermediary leasing agency that handles payroll and benefits while the worker remains at the “client’s” worksite. Leased work, which has been around since the early 1970's, often involves large groups of workers who fill a particular job category, usually with no limit on the duration of the job. The pay, benefits and job security of leased workers are typically inferior to those of permanent, core workers. Employee leasing firms argue that they exist to help smaller employers to pay better benefits to their workers by pooling these costs with other employers.

Like temp and subcontracted workers, leased workers are often employed by agencies with little or no resources to compensate workers when the companies are found liable for violations of labor and employment laws. There are also other abuses associated with employee leasing firms. For example, during union organizing drives, employers have been known to shift their workers to an employee leasing firm, then argue that the union’s dispute is with the leasing firm not the employer. Not surprisingly, the former General Counsel of the industry’s lobbying group (now represented by the National Association of Professional Employer Organizations) predicts that the vast growth in employee leasing will “culminate sometime in the next 10 to 50 years at a point when no one will ever again be employed by the people for whom they perform services.”⁹

Not unlike the temp industry, the employee leasing industry has determined that it too can deregulate its industry without generating much public scrutiny. As a result, a growing number of states have now enacted laws that promote employee leasing while also undermining the employment rights of the workers. Significantly, in 1993, the Council on State Governments added employee leasing legislation to its yearly round-up of “suggested state legislation.”¹⁰

Modeled on Utah’s law, the Council’s recommended legislation imposes a registration requirement on employee leasing firms, which is the only positive feature of

⁹ Christopher Cook, “The Downsizing of Labor Rights,” *Z Magazine* (March 1997).

¹⁰ Council of State Governments, *Suggested State Legislation* (Vol. 52, 1993), at pages 124-127.

the bill. However, on the negative side, the legislation designates the leasing firm as the sole employer for the purposes of maintaining benefit plans, paying state unemployment taxes and for any other purpose that the state decides is appropriate. The legislation also provides that the “employment relationship” will be dictated by a written agreement negotiated between the leasing firm and the client company, not the worker. Where adopted, these provisions could make it more difficult to establish “joint employment” liability, thus allowing client companies to evade their responsibility for violations of employment laws.

Current Laws

- Disclosure protections: In 1998, Rhode Island passed the Temporary Employee Protection Act which requires temporary agencies to provide written notice of job descriptions, pay rates, and work schedules to their temporary workers. The Act also created a commission to study issues related to temporary employment. ([Appendix E](#)).
- Limiting temp work in state employment: To maintain quality and cost effective public services, many states have considered legislation regulating the privatization of state and local government functions.¹¹ A leading state in this movement, Maine, has enacted broad protective legislation that includes specific provisions related to state contracts with temp agencies.

The Maine law requires that the state prepare a report for the legislature at the beginning of each new session that documents “All temporary and contracted positions within each agency and bureau of State Government.” The information collected must include the “duration and turnover of each position; the separate costs of each position for wages, benefits, contract fees and administrative costs; and the position title or function.” A Colorado law limits the duration of temp employment with state government to six months.

- Covering temp workers under Living Wage ordinances: The West Hollywood Living Wage Ordinance, enacted in 1997, includes specific provisions related to temp agencies. The ordinance applies to “employers and temporary employment agencies with whom the City consummates a service contract.” Those individuals employed by a temporary employment agency are treated separately under the law, and must receive at least \$9.00 an hour. All other

¹¹ For a summary of these laws, see “State, Local & Federal Laws Related to Accountability in Public Services”, a document prepared by the Public Policy Department of the Service Employees International Union (January 2000).

workers are entitled to \$7.25 an hour when benefits are provided, and \$8.50 an hour when health benefits are not provided by the employer.

- Defining the “employer” status of employee leasing firms: During the past year, several states have enacted laws that apply to the employee leasing industry, defining the relationship between the leasing firm, the on-site employers and the employees.

In Georgia, for example, the law provides that the leasing company reserves the right to direct the work of the employees and that it is considered the sole employer for the purposes of workers’ compensation requirements. This provision has potentially negative consequences for those workers who are better protected when the worksite employer is also liable for workers’ compensation under the doctrine of “joint employment liability.” In Nebraska, a new law provides that the worker is considered the employee of the leasing firm when the leasing firm seeks to access various tax credit programs. A Texas law clarifies that the client companies, not just the leasing firms, will be subject to the requirements of most labor laws.

- Denying unemployment benefits to temp workers: The American Staffing Association (ASA) has lobbied aggressively for the past several years to deny unemployment insurance benefits to temp workers, promoting the “ASA Model Temporary Help Unemployment Insurance Law.” Currently, about half the states apply the ASA legislation, which requires temp workers to accept a new temp assignment offered to them or else be deemed ineligible for benefits because they “voluntarily quit” their job. At least 16 states have adopted the ASA model legislation (Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Michigan, Mississippi, Nebraska, New Mexico, North Dakota, Oklahoma, Rhode Island, Texas). Five states have implemented the ASA model as policy and six others have passed a modified version of the ASA bill.¹²

¹² Some of these state laws may violate federal protections that allow workers, including temp workers, to refuse to accept a job if the “wages, hours, or other conditions of work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.” The U.S. Department of Labor recently issued a guidance applying this federal provision of unemployment law to the temp industry, and advocates are working to enforce the new federal guidelines. See Unemployment Insurance Program Letter 41-98, Change 1 (published at 65 Fed.Reg. 46000, July 26, 2000).

Proposed Legislation

- Re-regulating the temp industry (removing the state exemption that applied to agencies that only charged fees to the workers): In New Jersey, a bill was recently introduced to regulate the growing number of temp firms that have routinely exploited immigrant workers by failing to withhold payroll taxes, thus denying key benefits to the workers. To correct for these abuses, the bill makes the on-site employer “jointly” liable for all state tax obligations, including unemployment insurance and workers’ compensation. The bill also increases the enforcement powers of the state to identify temp firms that have failed to pay their payroll taxes and to collect the unpaid taxes from the agencies.

Significantly, the bill also requires the temp agencies to be licensed, thus removing a provision in the current licensure law that exempts employment agencies that do not charge placement or referral fees to the worker. It also requires the temp agencies to post a \$10,000 bond. Currently, temp firms that charge fees to the employer, not the worker, only have to register with the state and provide a \$1,000 bond. As a result of the proposed requirements, any temp firm that violates the law can be put out of business when the state revokes the firm’s license. Finally, the bill gives the State’s Labor Department increased authority to enact additional rules regulating the temp industry.

- Limiting “conversion fees”: A Rhode Island bill would limit permissible “conversion fees” to cases in which client companies hire as permanent employees temporary workers who have worked for them for less than thirty days.
- Washington’s multiple temp proposals: Several bills were introduced in Washington to address the multiple concerns of temp workers. Legislation was proposed to strictly limit the use of long-term temporary and leased employees in state employment by making it unlawful for a state agency to procure services through a temp or leasing agency for more than three months in a fiscal year. Another bill was introduced that would require staffing agencies to disclose their client billing rates to the temp workers, while also imposing monetary penalties on agencies that violate the notification law ([Appendix F](#)). A third bill would restore the right to overtime pay for high-tech workers who work on an hourly basis.

- Temporary Workers’ Bill of Rights (model legislation drafted for the Labor Ready campaign): As described below, the AFL-CIO, Building & Construction Trades Department has launched a corporate campaign targeting Labor Ready, one of the nation’s largest temp agencies that employs manual laborers. Among a number of other strategies, the union’s campaign includes a state legislative agenda it calls the “Temporary Workers’ Bill of Rights.” This comprehensive legislation includes detailed notice and disclosure requirements, it mandates comparable pay with other non-temporary workers, and it prohibits the agencies from charging excessive rates for safety equipment, meals, clothing and other common charges imposed by the day labor industry ([Appendix G](#)).

**Profile: The Labor Ready Campaign of the
AFL-CIO Building & Construction Trades Department**

Labor Ready, one of the largest providers of temporary construction workers in the country, is the target of an aggressive corporate campaign waged by the AFL-CIO Building and Construction Trades Department and local unions. As a Labor Ready shareholder, the unions have taken their case to the company’s shareholders at their most recent annual meeting in October 2000. The events at the shareholder’s meeting coincided with national rallies and demonstrations publicizing the company’s record, focusing on the several abusive practices. Specifically, the campaign is calling attention to the company’s practice of charging workers unfair check-cashing fees and special fees for transportation and equipment. The company is also charged with underreporting its workers’ compensation obligations by misclassifying manual laborers as white-collar workers. In addition to these organizing actions, the campaign has filed several state lawsuits challenging the check-cashing fees as an illegal deduction from the workers’ pay. As discussed above, the campaign is also promoting a model state law. A request has also been filed with the Securities and Exchange Commission to investigate Labor Ready for its failure to report certain financial transactions. For more information about the Labor Ready campaign, contact Will Collette of the AFL-CIO Building and Construction Trades Department at (202) 347-1461 or access the campaign’s Web site at www.bctd.org/raiseroof/roof.temp.html.

D. Independent Contractors

Unlike other nonstandard workers, independent contractors are categorically excluded from the reach of federal and state employment and labor laws. As a result, employers often deliberately misclassify their temporary, leased and other workers as independent contractors. Even in situations where employers closely control the worker’s performance, they try to skirt employment laws by pressuring the workers to sign “contracts” that label them as independent contractors. In recent years, employer groups have been lobbying state legislatures more actively, promoting changes in state laws defining the status of independent contractors.

Widespread misclassification results in the loss of government tax revenue (costing the federal government literally billions annually),¹³ and the exclusion of workers from various benefits (including unemployment insurance, workers' compensation, Social Security retirement, and other programs). Moreover, many employers who have misclassified their workers are not made to pay their back taxes when caught by the IRS. Instead, as long as the employer can show that it is common practice in the industry to classify the disputed workers as independent contractors, the employer is protected by the "safe harbor" provisions of the tax law.

Due to the high stakes involved in misclassification, for both workers and employers, the legal tests used to determine who gets correctly classified as a contract worker are critical. While creating some confusion, each law has its own test to determine employee status. The Internal Revenue Service (IRS) employs the 20-factor "common-law" test to determine whether a worker is an employee or an independent contractor which is generally subject to manipulation by employers seeking to avoid having to contribute payroll taxes.

In contrast, most employment and labor laws do not rely on the IRS test to determine employee status. The National Labor Relations Board focuses instead on the employer's "right of control" over the work in determining employee status. The same standard has been applied by most courts under the anti-discrimination laws and the Occupational Safety and Health Act (OSHA). The better standard for workers is the "economic reality" test, which was developed by the courts in lawsuits involving the Fair Labor Standards Act (FLSA), the Agricultural Worker Protection Act and the Family and Medical Leave Act of 1993 (FMLA). Considered to be broadest approach available under any of the federal laws, the economic reality test focuses on whether the worker is, in fact, economically dependant on the business. Unlike the other tests, it cannot be easily manipulated by, for example, requiring the worker to file self-employment taxes.

¹³ For a detailed look at the practice of misclassification, including data reported on several states, see Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (February 2000). The Planmatics study found that, in the nine states studied, the percentage of audited employers with misclassified workers ranged from 10% to 30%. Annually, the study conservatively estimates a loss of about \$200 million a year in revenues to the unemployment insurance system alone, and 80,000 workers who went without UI benefits. Official government projections indicate that misclassification will reduce federal tax revenues by \$2.5 billion and \$4.7 billion annually between 1996 and 2004. According to the U.S. General Accounting Office, 38% of employers misclassify their employees to avoid taxes. U.S. General Accounting Office, Pub. No. GAO\GGD-89-107, *Tax Administration Information: Returns Can Be Used to Identify Employers Who Misclassify Employees* (1989).

Current Law

- Broadly defining “employee” in Massachusetts to prevent and penalize misclassification: Massachusetts law broadly defines an “employee” to include “individuals performing any service” unless all three of the following exceptions are met: 1) the worker is “free from control and direction” of the employer; 2) the service provided is performed “outside the usual place of business;” and 3) the worker is “customarily engaged in an independently established occupation, profession or business of the same nature as that involved in the service performed.” The statute specifically prohibits the employer from relying on the failure to withhold taxes as an indication of the individual’s employee status.

The statute also designates who is liable for misclassification by identifying the president and treasurer of a corporation “and any officer or agent having the management of such corporation” as the employer, which makes them individually responsible for violations of the law. The law imposes strong penalties including fines of up to \$25,000 for the first willful violation and \$50,000 for subsequent willful violations. It also authorizes a sentence of imprisonment of up to two years for repeated willful violations. Non-willful violations can be punished with fines up to \$10,000 and imprisonment up to six months. Mass. Ann. Laws Ch. 149 § 148B.

- Prohibiting sham agreements: Texas law provides that a hiring contractor may not wrongfully induce an employee to enter into an agreement stating that he or she is an independent contractor ([Appendix H](#)).
- Home care workers considered employees of state and local agencies: In 1992, California enacted legislation making it possible for publicly-funded home health care workers to become employees of a new government agency, and thus no longer considered independent contractors. The program, which is adopted at the option of each county, creates a local public authority that is considered the employer of the workers for collective bargaining purposes. More than half of the state’s counties, including Los Angeles County, have now established these public authorities.
- This year, an initiative was placed on the Oregon ballot (Measure #99) to create an independent public commission, the Home Care Commission, to serve as the employer of record of home care workers for collective bargaining purposes. With this measure, which passed in November, home care workers are no longer considered independent contractors, and they will have all the organizing rights of

public sector workers. Under the measure, the Commission is also responsible for paying unemployment insurance premiums on behalf of the home care workers.

- Covering independent contractors under health and safety laws: Washington's workplace health and safety law (the Washington Industrial Safety and Health Act) broadly defines "employer" as anyone who "contracts with one or more persons, the essence of which is the personal labor of such person" An "employee" is specifically defined as anyone who is "working under an independent contract the essence of which is his personal labor for an employer" This broadly-worded statute, and similar laws that exist in other states, would cover both independent contractors and subcontractors. Wash.Rev.CodeAnn. Ch 49.17.020.
- Detecting fraud by imposing reporting requirements on employers who hire contractors and by increasing joint agency audits: The key to detecting employers who are misclassifying their workers as independent contractors is for the state enforcement agencies to have ready access to information made available to the Internal Revenue Services, including the federal Form 1099-MISC that businesses are required to file for services performed by independent contractors. Those employers who file large numbers of 1099 forms are more likely to be misclassifying their workers as independent contractors. To beef up the state's enforcement, the California Legislature passed a law requiring all businesses that file Form 1099-MISC to report the name and Social Security number of the independent contractor to the State whenever the payments for services total at least \$600. Connecticut, Oregon and other states are also conducting joint audits, sharing information among the various state agencies making it possible to detect employers that are violating the law. In Indiana, a law was passed in 1999 enabling the unemployment insurance agency to perform joint audits with other state agencies.
- Unemployment insurance activity in the states: While the state tests for determining independent contractor status under unemployment insurance laws are generally favorable to workers, legislation has been introduced in several states that significantly benefits employers. For example, Wisconsin's law was recently amended to provide that an individual will be considered an independent contractor if he or she meets seven of ten specified conditions covering the individual's relationship to or control over his or her business or the services performed. This menu approach permits employers to manipulate the various factors, avoiding the economic reality of the relationship with the worker.

In Oregon, Governor Kitzhaber vetoed legislation in 1999 that would have broadened the independent contractor provisions. The veto message states: “As the number and scope of proposals to erode coverage has increased over the years, I have become progressively more concerned about the cumulative effect of these exemptions. I indicated earlier this session that I thought it was important to have a consistent policy recognizing the importance of an inclusive unemployment insurance program and to put a halt to this unwarranted exclusion of coverage.”

- New York task force proposes a new commission to certify and regulate industries that employ independent contractors: In New York, Governor Pataki established a Task Force on Independent Contractors to recommend changes in the law and in state enforcement measures related to the treatment of independent contractors. The Task Force issued a report recommending, among other things, the creation of a Commission on Independent Contractors that would be charged with approving industry specific independent contractor guidelines and the creation of a Labor/Management Council that would author the industry-specific guidelines and the factors to be considered to establish independent contractor status. Finally, the Task Force recommended creation of a Certification Board that would be charged with certifying that individual businesses and workers are, or are not, independent contractors. The Montana and New Hampshire Legislatures also ordered that state studies be commissioned to evaluate the independent contractors laws.

Proposed Legislation

- Penalizing employers who misclassify their workers to avoid paying benefits: Washington’s proposed Employee Benefits Fairness Act would make it a misdemeanor to misclassify a worker with the intent to avoid providing the worker with employment-based benefits ([Appendix I](#)). Massachusetts, New York, Pennsylvania and Washington introduced bills to address the problems surrounding misclassification of employees as independent contractors and to insure employee access to worker protections and benefits, including unemployment compensation, workers’ compensation, and disability insurance.
- Manipulating the independent contractor test to deny unemployment benefits: California is a state where legislation was recently introduced (and defeated) to allow employers to more easily misclassify workers as independent contractors for the purposes of unemployment insurance laws. Specifically, the California

legislation would have allowed an employer to classify a worker as an independent contractor if it satisfied any 11 of the 20 factors in the IRS “common law” test. This approach invites manipulation by employers to tailor their employment relationships to meet the least onerous of the 20 factors, while avoiding having to address the broader “economic reality” of the employer’s relationship with the workers. In Massachusetts, legislation was introduced to categorically deny unemployment benefits to home health care workers.

- Manipulating the independent contractor test to deny protection under state employment laws: Hawaii also introduced a series of bills related to independent contractor status. Legislation was introduced to move toward the IRS 20-factor test for the purposes of determining independent contractor status under several of Hawaii’s employment laws. In addition, a bill was introduced to create a “safe harbor” for small business employers, thus allowing them to avoid liability for unemployment insurance taxes owed for misclassifying independent contractors. The preface to the bill states: “Many small businesses today, in an attempt to reduce costs, operate their small businesses without employees. Working exclusively with independent contractors, these small businesses are not subject to the employment security law.”

E. Subcontracted Workers

Companies that contract out their work may evade wage liability and other responsibilities towards workers under labor and employment laws. For years, such subcontracting has occurred in the garment industry and the agricultural sector. More recently, the practice has expanded into many more industries, such as janitorial, home care, computer software, food service and taxis, where it has often become the predominant business arrangement.¹⁴ In the absence of “joint employer” liability, subcontracting allows companies to deny workers fringe benefits, to avoid paying Social Security and other taxes, and to use the lack of a direct employment relationship as a defense to claims brought against them under worker protection laws.

¹⁴ The National Employment Law Project and the Farmworker Justice Fund organized a national gathering of groups engaged in efforts to organize subcontracted workers employed in a broad range of industries. A series of papers were prepared for the strategy forum profiling the nature of subcontracted work in the different industries. These papers will be published together with an overview comparing and analyzing the common features of subcontracted work and selected legal and policy reforms that could apply across industries.

Current Law

- Broad worker protections apply to subcontracting in the garment industry: California recently enacted major legislation regulating subcontracting in the garment industry and imposing new standards of liability on garment manufacturers in cases where their contractors fail to comply with employment laws. Specifically, the new law increases the registration fees required of all garment manufacturers, diverting a significant portion of the increase to a fund set up to compensate workers who cannot recover damages from their employers for failure to pay wages or benefits.

Moreover, any garment manufacturer that contracts with an unregistered or unbonded contractor will automatically be held liable for the payment of unpaid wages to the contractor's workers. This provision would apply as well to a "successor" of the garment manufacturer should the company attempt to avoid liability by closing down and setting up shop under a new name. In addition, the legislation authorizes the state to confiscate the property of contractors in selected cases, with the proceeds from the sale of the property to be deposited into the "Back Wages and Taxes Account" that is available to compensate workers for unpaid wages and taxes owed ([Appendix J](#)).

- Penalizing garment manufacturers who do business with unregistered contractors: In 1999, New Jersey amended its law requiring garment manufacturers and contractors to register with the state. The new law now doubles the monetary penalties that apply to manufacturers who do business with non-registered contractors. The state, in appropriate cases, may require manufacturers and contractors to post a surety bond to insure payment of back wages or benefits to their workers.

A New York law enacted in 1998 requires garment contractors to register with the state and attest to compliance with all labor laws. Manufacturers are to be held liable for the unpaid wages of their subcontractors but not in cases where the manufacturer obtains written assurance from the state that their contractors are registered.

- Covering subcontracted workers for workers' compensation: Alaska, Illinois, Pennsylvania and Oregon specify that employers whose work is contracted out are responsible for providing worker's compensation if the workers are not otherwise covered.

- Living Wage ordinances apply to subcontracted workers: Los Angeles, Boston and a number of other cities have adopted Living Wage ordinances that apply to employees of city contractors, subcontractors, and others who work for employers that receive city financial assistance. The Los Angeles ordinance also requires covered employers, contractors and subcontractors to provide health benefits and paid sick leave, vacation, and personal days, as well as additional uncompensated sick leave ([Appendix K](#)).

Proposed Legislation

- Requiring health benefits of state contractors: The Massachusetts Workplace Equity Act would require contractors with the state to pay for health benefits or offer wage surcharges equivalent in value to health benefits.
- Protecting subcontracted workers in the garment industry: New York has introduced legislation to protect subcontracted workers in the garment industry. A bill would impose stricter standards of joint liability on garment manufacturers for certain violations of employment laws. Another bill would make it a misdemeanor for any corporation to knowingly permit an apparel manufacturer or contractor to violate the bonding and registration requirements of the state's labor law.
- Applying international labor laws and wage standards to City apparel contractors: The New York City Council introduced Anti-Sweatshop legislation, which is similar to the procurement resolutions that have passed in over 30 municipalities, including San Francisco, Cleveland and Pittsburgh. The legislation would require the city to enter into contracts with clothing and textile manufactures that adhere to international and U.S. labor, environmental, and human rights laws and with corporations that pay their workers non-poverty wages as defined by federal poverty guidelines. The bill, backed by the garment workers union UNITE!, also includes provisions regulating subcontractors, such as disclosure and reporting requirements imposed on the manufacturer.

F. Part-Time Workers

Part-time workers are often paid at lower rates and receive fewer benefits than full-time workers performing the same work. In most states, part-time workers are also found ineligible to receive unemployment benefits if they are seeking part-time rather than full-time work. In addition, part-time workers often will not qualify for protection

under the Family and Medical Leave Act, ERISA, and other laws with minimum hours-of-work requirements.

Current Law

- Providing unemployment benefits to part-time workers: Many states (California, Colorado, Delaware, Illinois, Massachusetts, Montana, New Jersey, Ohio, and the District of Columbia) have statutes, regulations, or court decisions that specifically allow part-time workers to recover unemployment compensation if, while unemployed, they limit their work search to part-time rather than full-time work. Many more states specifically require part-time workers to seek full-time work or else be deemed ineligible for unemployment benefits.
- Living Wage ordinances apply to part-time workers: The Boston and Jersey City Living Wage ordinances specifically apply to both full-time and part-time employees of contractors, subcontractors, and others entities that receive financial assistance.

Proposed Legislation

- Prohibiting wage discrimination against part-time workers: Bills proposed in California, Connecticut, Massachusetts, Pennsylvania, and Rhode Island prohibit wage discrimination with respect to part-time workers. The Massachusetts bill requires comparable benefits, and the Rhode Island bill provides for pro-rated benefits for part-time workers.
- Model bill providing unemployment benefits to all part-time workers: Comprehensive legislation introduced in Massachusetts seeks to improve access to unemployment benefits for part-time workers. All workers who, for good cause, restrict their work search to part-time work would be eligible for unemployment compensation. Most states that provide unemployment compensation to part-time workers, including Massachusetts, require that workers have a history of part-time employment. The proposed act would also increase unemployment benefits for workers who have lost their jobs but continue to work part-time ([Appendix L](#)).
- Bills providing unemployment benefits to workers who have a history of part-time employment: Several states (Georgia, Maine, New Hampshire, Texas, Washington and Wisconsin) have introduced legislation to allow part-time workers to recover unemployment benefits if they elect to limit their work-search

to part-time rather than full-time work and have a history of part-time work. Wisconsin and New Hampshire established study groups to review specific proposals to accommodate part-time workers.

Profile: Rhode Island's United Workers Committee of Progreso Latino

The United Workers Committee of Progreso Latino, Inc., in Central Falls, Rhode Island, organized its United Campaign for Permanent Jobs with a wide coalition of religious, labor, and immigrant groups across the state in its successful effort to pass the Temporary Employment Protection Act. The law requires temp agencies to provide written notice to its employees that includes pay rate, job descriptions and work schedules. The law also sets up a joint legislative commission to study the employment practices of the temporary industry. Progreso Latino has also proposed a bill to limit "conversion fees", and it has campaigned to provide parity in pay and benefits for the state's part-time workers. For more information about these campaigns, contact Mario Bueno at Progreso Latino: (401) 728-5920.

G. Day Laborers

Many employers insulate themselves from lawsuits and from liability for taxes and benefits by using day-labor pools as intermediaries. Day-labor contractors are notoriously elusive, quietly folding their operations, moving to the next town, and starting up business again, leaving workers who are paid in non-negotiable "script" (instead of cash or a check) with no one to answer their wage claims. The contractors regularly fail to pay Social Security, unemployment compensation and workers' compensation premiums. These intermediaries are usually less solvent than the principle employers. Day-labor pools often recruit workers from homeless shelters and low-income, immigrant communities. They disregard health and safety rules and pay extremely low wages. At the same time, they often charge workers inflated rates for equipment, transportation, and meals.¹⁵

¹⁵ For a comprehensive look at day labor in Atlanta, including background statistical information and individual worker profiles, see The Southern Regional Council, *Hard Labor: A Report on Day Labor Pools and Temporary Employment* (Atlanta, Georgia: 1989). The Center for Urban Economic Development, affiliated with the University of Illinois at Chicago, recently released a report on day labor in Chicago entitled, *A Fair Day's Pay? Homeless Day Laborers in Chicago* (February 2000) (available at <http://data.cued.uic.edu/cued>).

Current Law

- States enact comprehensive day labor legislation: Five states (Arizona, Florida, Illinois, Georgia and Texas) and at least one locality (Atlanta) have passed legislation regulating day labor pools. The Illinois law, which took effect this year, is the broadest of the statutes ([Appendix M](#)) The Florida law is also fairly broad, including many of the same protections included under the Illinois law described below. For a detailed comparison of these laws, see NELP's publication entitled, "Drafting Day Labor Legislation: A Guide for Organizers & Advocates" (November 2000).

Disclosure Requirements: The Illinois law requires day labor agencies to provide the worker with a disclosure statement describing the assignment (including the name and address of the employer, the type of job, the wages per hour, and information related to the availability of transportation, meals and equipment). The law recommends that this information be made available in Spanish and Polish and "any other language that is generally used in the locale of the day labor agency." The day labor agency is also required to provide each laborer with an itemized statement of his or her wages, detailing all deductions made. At the request of the day laborer, the agency is required to hold the daily wages and instead make weekly or semi-monthly payments.

Unlawful charges: The statute also protects against specific abuses often associated with day labor, regulating both the day labor agency and the third-party employer for whom the day laborer is working. Thus, day laborers cannot be charged more than the actual costs for a meal, and the purchase of a meal cannot be a condition of the job. Similarly, day laborers cannot be charged more than the actual cost of transportation provided by the day labor agency or the third-party employer. Any charges for safety equipment and other materials cannot exceed the fair market value of the property. No day labor agency is permitted to charge a check-cashing fee to the worker.

Accommodations: The public areas of the day labor agencies, where all notices are to be posted, are also required to contain adequate seating and access to restrooms and water.

Additional protections: Significantly, the law also provides that the agency cannot restrict the right of the day laborer to accept a permanent position with the third-party employer. In addition, no day labor agency can send a worker to an assignment where there's a strike, a lockout, or "other labor trouble" unless

the worker is notified of the situation (i.e., what's required is notification, not a prohibition on such placements).

Enforcement provisions: Finally, all day labor agencies are required to be registered with the state. The state will make information available to help enforce the law's protections, including a toll free number for day laborers and the public to file complaints, and the state will have the power to revoke the registration of a day labor agency that fails to comply with the act.

Proposed Legislation

- Louisiana and Arizona introduced broad legislation regulating the day labor industry.

Profile: Chicago's Day Labor Organizing Committee/Latino Task Force

As a project of the Chicago Coalition for the Homeless, the Day Labor Organizing Committee/Latino Task Force campaigned to enact state legislation regulating day labor agencies statewide. Enforcing this new model law, which took effect in January 2000, the Task Force was instrumental in shutting down two agencies that were operating without licenses and taking illegal deductions from workers' paychecks. In addition, the Latino Task Force has partnered with Jobs with Justice and the University of Illinois Center for Urban Economic Development to conduct a city-wide survey of 600 day laborers in the Chicago area to document exploitative practices, including discrimination, unpaid wages and overtime, lack of training, dangerous working conditions, and excessive paycheck deductions. The Task Force is now campaigning to pressure Chicago to finance worker-run centers for day laborers where they can wait for work without being harassed. For more information about these campaigns, contact Rey Flores, Latino Task Force, (312) 435-4548 ext. 28 or Sarita Gupta, Chicago Jobs with Justice, (312) 787-5868 ext. 137.