

# NELP

## Post-Katrina Policy Short

Advocating for the working poor and the unemployed

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### Subcontracted Workers: The Outsourcing of Rights and Responsibilities

#### *Subcontracted Workers are Everywhere in the Post-Katrina Region*

Newly-funded corporations with government money and unregulated smaller labor brokers sourcing workers for Gulf Coast clean-up work are using a time-worn system historically pervasive in the garment and agricultural sectors: subcontracting out work that could be done by in-house employees. This tactic can take many forms. Recent examples are:

- No-bid corporations with new government contracts are shipping in disaster relief contract workers to clean up New Orleans streets without providing health and safety training or personal protective equipment to prevent unlawful exposure to toxins and other health hazards;
- Unregulated labor contractors recruit and transport low-wage workers to the disaster area and then fail to pay them for work performed, citing lack of identification or other documents;
- Workers brought in to the disaster areas are told they are independent contractors and are paid by the yard of street they are able to clean, creating a sharecropping structure that yields sub-minimum wages and no overtime pay.

The benefits to the employers are clear: firms stand to gain back the 7.65% of employer-provided federal Social Security and unemployment taxes owing on an employee's salary; health and pension benefits and workers' compensation coverage provided only to "employees" of a firm, and escape responsibility for paying minimum wage and especially overtime pay to workers who are nominally employed by someone else.

In low-wage sectors especially, subcontracted workers are often immigrants and are typically paid in cash, making the direct employers and any workplace rights violations difficult to track down. It's usually not too hard, though, to find the worksite employer to whom the worker reports every day and for whom the worker performs the service. If there's a labor or employment violation, the worksite employer is usually responsible too.

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## **Labels Don't Matter – Subcontracted Workers Have the Same Workplace Rights as Others**

Businesses that try to shield themselves from the responsibility that comes with employing workers by subcontracting cannot escape liability for workplace violations if they legally “employ” the workers. Slapping a name on a worker, like calling him a “disaster relief worker” and having him sign an agreement that states he’s an “independent contractor,” doesn’t change that worker’s status as a covered “employee” under labor and employment laws. Neither does inserting a temp agency in between the worksite employer and the worker, and having the temp agency cut the payroll checks and withhold taxes. Labor and employment laws have their own definitions of who’s a covered “employee” (and thus subject to protections) and who’s a responsible “employer” (and thus subject to responsibilities). See NELP publications,

<http://www.nelp.org/docUploads/pub8%2Epdf> ; <http://www.nelp.org/docUploads/pub42%2Epdf>

Workers who are underpaid can and should seek back pay from their worksite or joint employer if that employer is larger and in a better position to pay unpaid wages.<sup>1</sup> By going up the industrial food chain, workers can also help to hold the contractors with government funds and the worksite employers accountable.

### **State-Based Ideas for Reining In the Worst Employer Abuses**

#### *Accountability for Specific Sectors*

A handful of states, including California, New York and New Jersey, hold businesses in certain sectors with an entrenched subcontracting structure accountable for any wage and hour and other workplace violations occurring in their business.<sup>2</sup> California recently passed a more sweeping accountability law covering janitorial services, and several states have regulated day labor agencies to curb such abuses as over-charging for transportation to work and check-cashing schemes.

<sup>1</sup> For recent examples of successful worker actions against so-called joint employers, see *Ansoumana et al v. Gristedes et al.*, 255 F.Supp. 2d 184 (S.D.N.Y. 2003) (immigrant grocery delivery workers sued labor contractors and grocery and drug store chains for unpaid minimum wage and overtime, netting over six million dollars in damages); *Zheng v. Liberty Apparel*, 355 F.3d 61 (2d. Cir. 2003) (garment workers hired and working in a sweatshop can sue the off-site clothing manufacturer who dictated the production process and ran the business of making the garments).

<sup>2</sup> For a listing of model state and local laws relating to subcontracted and other contingent workers, see <http://www.nelp.org/docUploads/pub17%2Epdf>. NELP’s periodic state legislative round-ups are also available on-line, with proposed and recently-enacted nonstandard legislative provisions. <http://www.nelp.org/nwp/reform/summarynonstan032003.cfm>

### *Provisions to Combat Firms Misclassifying Workers as Independent Contractors*

California and Pennsylvania require all construction site owners to provide workers' compensation coverage for all workers on-site, regardless of whether they are classified as employees or independent contractors. Many states' unemployment compensation acts have broad definitions of "employee," and broadly cover workers classified by their employers as independent contractors.

### *Regulating Temp Agencies*

Several states have provisions requiring temporary help and related labor intermediaries to provide temp workers notice of the terms of their assignments, hours and pay, and prohibiting temp firms from discriminating against temp workers. Some provisions require temp firms to register with the state and post a bond to cover any wage abuses suffered by workers placed by the temp agency at a worksite employer.

### *Tax Authorities Cracking Down*

In recognition of the tax benefits to businesses that misclassify their workers as "independent contractors," some states have begun to focus on enforcement of requirements to pay employment taxes, workers' compensation and unemployment benefit taxes for all "employees." Los Angeles County recently estimated that the explosion in its underground cash economy has created a federal and state tax shortfall of \$1.1 billion a year.<sup>3</sup> Washington state regulatory agencies studied the problem of decreased tax revenues due to employer misclassification and began audits of state workers' compensation and unemployment insurance programs to stem abuses and increase employer participation.

### ***What Can You Do to Hold Businesses Accountable?***

Enforcing existing requirements holding employers responsible for workplace violations is a start, especially when the law in question has an expansive accountability reach, as do wage and hour requirements and most family and medical leave provisions. Following the states that have focused efforts on particularly entrenched sectors with repeat sweatshop violators, like garment and agricultural industry provisions found in California, New York and New Jersey, can also be productive. Local campaigns have succeeded in creating living wage requirements for any worker in a particular job, regardless of the name or status of the direct employer.

Finally, it is important to think and talk about the responsibilities all firms have towards workers in their business. Recognizing the goals of our nation's labor and employment protections and

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<sup>3</sup> Daily News, "Cash Economy Threatens Wages, Tax Base," Monday May 6, 2002. <http://www.dailynews.com/news.articles/0502/06/Dnew01.asp>

honoring our commitment to paying workers at least the minimum wage and overtime, protecting their rights to family and medical leave and a safe and healthy workplace, and protecting their rights to be free from discrimination, requires us all to ensure that employers are held accountable for these standards, regardless of how they structure their business.

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