

EXECUTIVE SUMMARY

The rise in the number of nonstandard workers results from major changes in the United States economy, its business practices, and labor market dynamics. It affects millions of workers in very significant ways: from their job security, to their access to and portability of benefits, to their training and career advancement, to their protection under labor, employment and discrimination laws, and finally, to the wages they take home each week. Staffing strategies that use subcontracted or contingent work – strategies that once characterized only some low-wage workers such as garment and agriculture – have now spread to virtually every area of industry, including high technology and finance.

Unlike in other countries, social welfare and worker protective laws in the United States generally protect only those workers who are classified as “employees.” Thus, workplace benefits, such as unemployment compensation, workers’ compensation and Social Security retirement benefits, are available only to those who fit the specific definition of “employee” under a particular law. Entitlement to a myriad of workplace rights, including the protections of wage and hour laws, health and safety laws, discrimination laws and the right to organize and collectively bargain, also hinges on a specific definition of “employee.”

California has nearly two million workers employed in some form of nonstandard work. Depending on the category of nonstandard worker, California contains between fifteen and twenty percent of all nonstandard workers in the country.¹ In 1999, 12.1 percent of the California workforce was employed in nonstandard work, compared to 9.15 percent of the country.²

The number of jobs in one sector of the contingent workforce, the temporary help industry, more than doubled in the period 1991 through 1998, at a time when the number of jobs overall in California grew by just ten percent.³ In California, as in other states across the country, employers stand to save between fifteen and thirty percent of payroll costs when they use labor intermediaries, rather than hiring workers themselves directly.

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In a study of misclassification of workers as independent contractors, California rated first among all states studied in the proportion of workers misclassified as independent contractors for purposes of unemployment compensation.⁴

As in other states, contingent workers in California frequently fall behind their non-contingent co-workers in terms of wages and benefits. Many industries that rely heavily on contingent workers have also been identified as frequent abusers of wage and hour and other laws. This report is called “Contingent Rights,” because, as will be seen, enforcement of the labor rights of these

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nonstandard workers is contingent on many things: the terms of the law, the courts, the will of the agencies that enforce their rights, and the sophistication of their employers in evading the law.

This report focuses on the definitional issues that determine whether or not a particular worker laboring in a particular industry is protected by a particular labor and employment law. It includes a general overview of the main areas of California law that protect workers, our specific findings and some recommendations for the state of California.

SPECIFIC FINDINGS

Gaps in California law.

This report makes the following findings regarding gaps in the labor and employment law protections of workers:

- California’s laws use different definitions of “employee” for different state laws. Unscrupulous employers can more easily misclassify workers as “independent contractors” where definitions are narrow.
- California courts have never applied the broad definition of “employee” under wage orders adopted by the California Industrial Welfare Commission. There is good reason to believe that California legislators intended that the most liberal standard, that of “suffer or permit” to work, be the governing standard under the wage orders.
- California unemployment compensation law uses a test for employee status that can be easily manipulated by employers wishing to designate their workers as “independent contractors.” In fact, a study commissioned by the US Department of Labor found that, among the states studied, California had the most frequent misclassification of workers, involving nearly thirty percent of audited firms.
- Industry-specific “special” UI rules regarding the temporary help industry mean that when it comes to qualifying for UI benefits, temp workers are subjected to more stringent standards than other workers. Additionally, the transfer of UI payroll taxes from worksite employers toward a temporary help agency has an ill effect on the experience-rated system and on the balance of employers who must pick up the tab.
- Although the California discrimination law generally protects “persons⁵,” the state agency enforcing the law uses its own definition of the term “employ” under the Act. California courts have never directly addressed the definition of this term.
- It is not clear that joint liability of the worksite and labor intermediary employers can be established under the California discrimination law.

Advances under way in California:

California advocates are already making important efforts to protect contingent workers. These include:

- Establishment of a Joint Administrative Task Force intended to discover misclassification of workers by their employers.
- Several legislative proposals intended to address the inequities for temporary and subcontracted workers under the unemployment compensation system;
- A “responsible contracting” bill that would have covered subcontracting in agricultural, garment, construction, janitorial and security guard industries, but was vetoed in 2002;
- Some of the country’s most successful organizing campaigns around contingent work and contingent workers, in the home health care, garment and janitorial sectors.
- A newly commissioned study of underreporting of workers’ compensation premiums in the taxi industry.

There are many remaining challenges faced in California and elsewhere around the country. What is needed is a strategy that combines several approaches, including legislative and administrative changes, litigation, community and labor organizing in a way that protects workers across industries and in many contexts.

SUMMARY OF RECOMMENDATIONS

The complexity of issues surrounding misclassification of workers as “independent contractors” and the use of labor intermediaries invites a strategy involving legislative policy, litigation, and organizing campaigns. Advocates in California have already passed and proposed legislation, litigated cases, and engaged in organizing campaigns that have made a difference. This paper acknowledges those changes and suggests other approaches that may close some of the gaps identified in the Summary of Findings noted above. Although we focus on policy changes, these cannot be divorced from the many successful organizing campaigns that have improved, and will continue to improve the lives of nonstandard workers in California. The changes that we suggest can be part of this overall strategy.

Legislative changes:

A comprehensive proposal that advocates should consider is whether there is one statutory model that could be applied universally. For the test of “employment,” adoption of the “suffer or permit” test should be considered.

A proposal that would apply joint employment rules to all labor protective laws would harmonize the law and ensure that the true workplace employer does not escape liability through the use of a labor intermediary. Language specifying that a worksite employer is not relieved of employer status by contracting out would achieve this result. Additionally, California could consider legislation that would penalize engaging in various types of conduct that undermines labor protections: terminating an employee, limiting the term of his or her employment, or misclassifying an employee to avoid compliance with labor and employment laws.

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A slightly less comprehensive proposal, focused on particular industries that abuse subcontracting, was embodied in the 2002 legislative proposal on “responsible contracting,” vetoed by Governor Davis.

California should take a different approach for the purposes of provisions that require the payment of taxes and involve experience rating, including the workers’ compensation and unemployment compensation laws. Statutory changes such as those proposed for unemployment compensation and adopted for workers’ compensation, that make certain that experience ratings for taxes are properly assigned, should be expanded to other industries.

California should consider pay equity legislation that would make it illegal to pay less in wages and benefits after a worker has been employed for a specific period of time and include automatic conversion to permanent work.

California should re-regulate its temp industry. The employment agency law should be amended to cover all employment agencies without regard to whether they charge a fee to the client company or the worker. The framework of the employment agency law – including bonding requirements, record keeping mandates, agency fee limitations, and other industry standards – should apply to all temporary placement firms and be expanded as necessary to respond to current abuses. In addition, agency enforcement roles should be clarified, and workers given a clear mechanism for agency enforcement of their rights.

Agency enforcement:

California’s Employment Enforcement Task Force, whose job it is to identify misclassification among employers, is a model for the country. The work of the task force should be continued and expanded, and additional sectoral studies, such as that recently commissioned for the taxicab industry, should be considered.

Search for ways in which state agencies can, in an efficient manner, use existing tax reports to track down abusers of the system.

Private Litigation:

This report has identified several areas in which litigation might achieve a result that would expand workers’ access to the protection of labor laws. These areas include:

- Clarify “suffer or permit” standard for proof of “employee” status under wage and hour laws;
- Joint employer liability under unemployment compensation laws; and
- Clarify a broader definition of employee and joint liability under FEHA.