

CHALLENGES FOR WORKERS IN THE AGE OF FISSURED JOBS AND JOINT EMPLOYERS

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The decades-long assault on the power of American workers continues to erode their position under employers; declining unionization rates, the proliferation of noncompete and arbitration clauses, and outsized employer power plague labor markets today. An increasingly fissured workplace is yet one more challenge our most vulnerable workers must grapple with in the current labor market (Weil 2014). Companies, particularly in high-growth service-sector jobs, have sought to reduce the costs of labor-intensive work by contracting out more noncore jobs. For example, a company may contract a janitorial services firm to clean its office building rather than manage and employ its own janitorial staff. As a result, many of today's most vulnerable workers have inadequate access to legal rights and protections against the companies that profit from their labor. In order to provide robust protections to workers and check the power of employers relative to their employees, policymakers will need to reimagine labor law for today's labor market.

The problem with fissured work is twofold. First, US labor law, specifically the National Labor Relations Act (NLRA), was built on a traditional understanding of the employee-employer relationship and has not adapted to the ways that businesses have changed their approach to labor. As such, legal protections fall short, perpetuating the structural disadvantages against workers and leaving workers with little leverage to push back against outsized employer power.

Second, these newly popular employment relationships are often designed specifically to minimize employer liability for workers and avoid the costs of unionized staff. From a business perspective, contracting out labor allows companies to shed the costs associated with hiring and managing their own staff and to reduce the costs of employee wages and benefits. However, this point of view misses how such changes systematically disadvantage workers in their employment relationships.

This issue brief dissects the subcontracted labor relationship by explaining the importance of defining an employer and by outlining the legal and structural obstacles that workers face as a consequence of these shifting employment relationships.



WHO IS AN EMPLOYER?

Companies have muddied the employee-employer relationship by inserting intermediaries between themselves and their workers. As a result, the increased degrees of separation between a client company (the company hiring a contractor for services) and workers (who work for the contractor) makes defining an “employer” much harder. Under current US labor law, the contractor, or direct employer, is legally recognized as the employer of such workers, but how the client company, or secondary employer, is involved is much murkier.

Since the 1940s, US labor law has used a relatively narrow definition of employment rooted in the common law “master-servant” relationship.¹ That “control test” for employment originated out of a need to determine whether masters should be held responsible if their servants inflicted harm on a person, given that a master *controlled* their servants.

Under more complicated employment relationships, such as with subcontracted work, the legal interpretation of “employee” and “employer” has varied depending on precedent set in court cases and National Labor Relations Board (NLRB) case law. To define the relationship between client companies and workers, federal labor agencies may instead use the label “joint employer,” which holds both the direct employer (the contractor) and the secondary employer (the client company) jointly responsible to workers (Ruckelshaus 2017). Here, the role of control in understanding employer and employee sets the foundation for who should then be considered a joint employer. For example, National Labor Relations Board (NLRB) standards for the joint employer classification weigh the level and exercise of control an “indirect” employer has over a worker.

Much of the struggle between workers and client companies, in fact, has revolved around the task of defining and labelling these companies as joint employers so that they may be held legally responsible to their contracted workforce. But companies have been largely successful at arguing that they should not be considered employers in such situations. The “joint employer” classification is, therefore, not a simple fix and does not necessarily ensure that the company will be held fully responsible for those workers as an employer. Additionally, primarily using control to determine who an employer or joint employer is, is a poor fit for two major reasons.

First, as mentioned above, the control test arose from a need to determine a master’s liability to an injured third party. In employment law, however, it is the workers, not third parties, who are seeking protection (Zatz 2011; Andrias and Rogers 2018). It’s not clear that

¹ In this dynamic, the master employs the servant, who acts as the master’s agent in taking some action to the master’s benefit. In this dynamic, the masters, importantly, directs and **controls** the servant in their activities (Weil 2014, 183-192).



this test is the best fit for employment law, and it should be reexamined for its relevance to labor relationships today.

Second, focusing on control overlooks the role that economic power plays within and across firms (Zatz 2011). In the case of subcontracted work, workers are not only economically dependent on their direct employer, the contractor, but are also dependent on client companies who seek their services. Given that subcontracted jobs are often low-wage jobs, the reach of employer influence over workers is an important consideration in figuring out how to provide subcontracted workers the legal rights they need.

The employee-employer relationship needs to shift away from the simplistic, two-dimensional constraints of traditional legal understandings to reflect 21st century changes in firm structure. Adapting labor law to include broader assumptions and definitions of employees and employers, as well as incorporating an understanding of how employer economic power affects the employee-employer relationship, would help to ensure that protections are adequately applied and not easily skirted by companies.

NLRA and NLRB Joint Employers

In 1935, Congress enacted the NLRA to legally protect the rights of workers and employers. Lawmakers intentionally used expansive definitions for the terms “employee” and “employer” to include a wide range of employment relationships under the act (Becker 1996).² Despite lawmakers’ original intent, successive NLRB cases have changed and shaped the interpretation of these definitions, in addition to the joint employer classification, narrowing the scope and application of who is an employer or a joint employer.

The current standard for determining joint employer status relies on a 2015 NLRB ruling in *Browning-Ferris Industries of California, Inc.*, where the NLRB decided that court precedents set since the 1982 case of *Browning-Ferris Industries of Pennsylvania, Inc.* unreasonably narrowed the NLRB’s joint-employer standard in a way that did not reflect the recent rise in contingent work. In this ruling, the NLRB reinstated the “right to control” standard from 1982, which, among other factors, looks at the *right* of an indirect employer to control work conditions, regardless of the actual *exercise* of that control (NELP 2015; NLRB 2018).

For example, if a contract between a client company and contractor specifies that the client company has the right to control the work environment or manage employees, the client

² The NLRA defines each, stating that an employer “includes any person acting as an agent of an employer, directly or indirectly,” and that employees “include any employee, and shall not be limited to the employees of a particular employer unless [the Act] explicitly states otherwise” (NLRA Section 8).



company may be found to be a joint employer, regardless of whether the client company actually made any decisions on those work conditions, as in the case of *Akima Global Services, LLC* (Pasternak and Perera 2016).

The Trump administration has made efforts to return to a narrower standard and reverse the results of 2015 BFI case. In September 2018, the NLRB submitted a proposal to return to stricter standards for the joint employer classification, though a final decision has yet to be made.



FIGURE 1 The “lead company” in this graphic (Ruckelshaus et al. 2014) refers to what is described as the “client company” in this issue brief.

It is important to note that the issues workers face in joint employment relationships may also arise in other fissured work structures. Though this brief attempts to address the broad challenges stemming from a range of employment relationships outside of the traditional employee-employer understanding, the primary focus is on subcontracted labor (i.e., when companies use intermediaries to contract workers through temp agencies or other multilayered contracting structures, see Figure 1). Other work situations raise many similar questions about defining employers, working under joint employers, and coping with skirted labor protections. In particular, these issues confront independent contractors, where individual workers or entities are contracted to perform work, or franchises, where franchisors lease a brand to a franchisee, who then employs staff directly (Ruckelshaus et al. 2014; Weil 2014).³

³ For more information on independent contractors, franchises, and the different ways that fissuring in the workplace may manifest, see the ACS report, *Redefining Employment for the Modern Economy*, by Roosevelt Institute Fellow Brishen Rogers.

Why Is It Important to Define an Employer?

The joint employer classification is controversial because of its legal implications for companies that contract out labor. These client companies often hold the power in their contracting relationships but bear little legal responsibility to subcontracted workers. Unions seek to label these companies joint employers to 1) legally require the company to participate in negotiations over bargaining agreements, 2) make the company culpable in labor law violations against workers, and 3) give workers access to more lawful protest actions against the company.

- 1. Negotiating a bargaining agreement:** If found to be a joint employer for bargaining, a joint employer must participate in bargaining proceedings and will be responsible for overseeing and upholding the terms outlined in the negotiated agreement. Client companies who are not deemed joint employers, however, do not have to bargain or ensure that the contract terms are being met, leaving more room for evasion of labor law.
- 2. Labor law violations:** Joint employers can be held responsible for workplace and labor law violations against jointly overseen employees, including subcontracted staff members. Ensuring that secondary employers are held legally responsible provides a secondary check on work conditions and incentivizes stricter compliance with labor law.
- 3. Primary and secondary protest:** Workers can take a variety of actions against an employer to protest unfair labor practices and leverage the power of collective action, such as boycotting, striking, or picketing. The legality of such actions against “neutral” third parties, however, is much more tenuous.

The NLRA has specific provisions protecting parties that simply do business with the primary employer from secondary action, because these parties are considered neutral to the labor dispute (Statute 29 U.S.C. 158(b)(4) 2012). Without a joint employer classification, secondary employers can limit the location and activities of workers’ protests (Casebeer 2008). However, client companies are hardly neutral in a labor dispute.⁴ Such companies may directly, or indirectly, dictate many aspects of the labor conditions that workers bargain over.

If, however, a client company is deemed a joint employer with the direct employer of the subcontracted employees, these workers may then lawfully protest the client company in

⁴ The NLRB does note that not every secondary employer is neutral and states that under the ally doctrine “an asserted neutral may be so closely related to a primary as to make primary and lawful union conduct aimed at the asserted neutral” (NLRB n.d. 2).



the full spectrum of actions that are allowed against employers, rather than in the restricted ways secondary boycott laws dictate.

STRUCTURAL BARRIERS TO ORGANIZING ON THE JOB

Beyond what is specifically codified in labor law, the structure of the subcontracted labor industry can also disadvantage workers and unions in their pursuit of better wages, benefits, and working conditions.

Competition between contractors requires contracting companies to keep labor costs low, particularly given that the biggest cost to contracting firms is labor itself. Contracting agreements often also carry provisions that allow for termination of the agreement with short notice.⁵ As contractors are always wary of being outbid by competitors, the market remains incredibly competitive and keeps downward pressure on prices. This means that workers have little to negotiate over as wage margins are already incredibly small (Shamir 2016).

The option to terminate contracts with short notice also allows client companies to avoid employing unionized subcontracted staff by quickly replacing contractors who have unionized staff with other contractors who do not (Becker 1996).

The Successorship Issue

A client company, Yellow Inc., contracts out for its security needs. They have an agreement with a contractor, Blue Security, to provide security staff at Yellow Inc.'s office. Suppose Blue Security's employees then decide to unionize and negotiate a bargaining agreement that raises wages and benefits and requires better work conditions. The costs of these terms are invariably passed on to Yellow Inc., which, as a joint employer, must recognize and remain compliant with the newly enacted bargaining agreement.

Yellow Inc. has the option to terminate its agreement with Blue Security on short notice, which allows it to seek a contract with a new contractor, Green Services, which does not have unionized staff. Green Services, in fact, can offer lower prices because it can pay its nonunionized staff lower wages and fewer benefits. Yellow Inc. has just successfully evaded a unionized workforce. Though labor law prohibits the avoidance of unions as a primary motivator for such action by employers, intent is incredibly difficult to prove, thereby rendering this rule ineffective at preventing union avoidance.

⁵ Short notice is often around 30 to 45 days.



Labor law also includes rules that require the successive contractor recognize a union if the contractor retains a significant number of the previous contractor's staff in the transition (NLRB n.d.). Though the intent of this rule is to prevent the evasion of organized labor, it arguably incentivizes the successive contractor to avoid hiring any of the previous contractor's staff members, who may now be out of a job. Such provisions provide inadequate, patchwork solutions to a persistent and structural issue.

Many past organizing campaigns have encountered these problems directly, such as the Justice for Janitors campaign, run by the Service Employee International Union (SEIU) California division. In the early 1990s, the janitorial industry in the Los Angeles area largely comprised contracted services, rather than direct hires at office buildings. In the campaign's early stages, the SEIU used a building-by-building organizing strategy, but that soon proved ineffective specifically because of the successorship issue. Building owners quickly ended contracts with unionized contractors and sought contracts with nonunionized contractors instead. As a result, the campaign had to refocus on an industry-wide strategy to effect any change (Waldinger et al. 1996). Though the campaign was ultimately successful, the workers and SEIU had to overcome large structural hurdles created by the opaque, subcontracted labor relationship. Given that US unions are organized by shop, or company, as opposed to at the industry level, workers will continue to struggle to organize under subcontracted employment relationships without industry-wide movement.

Subcontracted employment relationships give employers an easy strategy to avoid unionized staff with few serious legal ramifications, while also clearly disadvantaging workers and creating a landscape where organizing is not sustainable. Without addressing these structural issues, labor law will not adequately provide the legal rights subcontracted workers need.

CONCLUSION

Legislatures and policymakers must reexamine the current framework through which the US interprets and understands the law, and consider bold and innovative solutions put forth by academics and advocates.⁶ As many legal scholars have demonstrated, the rules governing our employment relationships need to be modernized to reflect fundamental shifts in the structure of the employee-employer relationship. Without these amendments, labor law cannot identify or effectively address the challenges that arise from these changes. Organizing efforts and worker power will continue to be undermined by companies seeking

⁶ Including those laid out in "Rebuilding Worker Voice in Today's Economy" by Kate Andrias and Brishen Rogers, or "Seven Strategies to Rebuild Worker Power for the 21st Century Global Economy" by Todd Tucker.



to cut costs at all costs, even to the detriment of workers. Labor law has the capacity to adapt to a changing economy, as it has done in the past, but until we reform the rules that shape power dynamics between employers and employees, workers will continue to be left out and left behind.

⁷ For more legal scholarship on how to start reconceptualizing labor law, see “Beyond Classification: Tackling the Independent Contractor Problem Without Redefining Employment” by Noah D. Zatz.



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