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WORKING BEYOND THE REACH OR
GRASP OF EMPLOYMENT LAW

by

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Working Beyond the Reach or Grasp of Employment Law

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How well does labor and employment law protect the most vulnerable workers in today's United States? This chapter surveys the field by emphasizing the formal reach and the practical grasp of our system of labor regulation. Employment law¹ reaches out to regulate only specific work arrangements; it does not apply to all firms and all workers. Among those within this reach, many nonetheless slip through the law's grasp as a result of imperfect enforcement.

Public debate about employment law rarely considers these issues of the scope of employment coverage and the effectiveness of employment law enforcement. Instead, it typically focuses on substantive rights: what employers must do for their workers, or not do to them. If workers are mistreated or deprived—if we see the damage inflicted when employers take the gloves off—then the natural legal reform is to strengthen substantive labor rights. The national legislative agenda of the Democratic Party largely reflects this approach: At the top of today's (and yesterday's) list are minimum wage increases, paid sick leave and expanded family leave, and enhanced union organizing rights.

Focusing on gaps in formal rights risks overlooking another mechanism that can lead to substandard labor conditions: workers' exclusion from the benefits of labor protections already on the books. Indeed, one paradox of today's labor market is that working conditions at the bottom have deteriorated (Bernhardt et al. 2008) even as substantive legal rights have expanded or, at worst, stagnated over the past several decades.² Some explanation lies in labor practices that exploit these limitations of reach and grasp. An increased minimum wage may do little for a home health aide classified as an independent contractor or a "companion," not an employee, or for a janitor employed by a fly-by-night subcontractor who vanishes at the first sign of legal trouble.

This chapter surveys how workers fall beyond the reach or grasp of the employment law protections most relevant to low-wage workers. I provide a framework uniting what often have been distinct inquiries into, on the one hand, the challenges to employment law coverage posed by new ways of structuring labor and, on the other, problems of employment law enforcement (Barenberg 2003; Foo 1994; Stone 2004). Insofar as employers benefit when these protections do not “stick,” one way or another, exploiting limitations in coverage and enforcement may be alternative strategies.³ Attention to these limits encourages us to analyze employment law as a partial method of regulating work.

The chapter also surveys emerging legal strategies that challenge this partiality. Some seek to extend the reach or strengthen the grasp of existing regulatory forms, but others experiment with legal vehicles that rely less heavily on employer–employee relationships as the foundation of worker protection. These innovations in regulating work reinforce the idea that employment law is but one institutional approach to worker protection, and they invite critical reflection on and imagination of an array of reform possibilities that share employment law’s substantive goals but not always its traditional means.

Workers Beyond Employment Law’s Reach: Limited Coverage

Employment regulation in the U.S. has three basic structural features. First, workers and their employers acquire obligations to one another through legally binding contracts. For the most part, these obligations simply are whatever both parties agree to. If they agree, these obligations can be quite extensive, but they also can be quite minimal if the parties do not agree to more. Second, an array of employment laws passed by legislatures selectively supersede these contractual agreements. A statute may require an employer to pay at least a minimum wage, notwithstanding an employee’s agreement to a lower one. When there is no statute directly on point, however, the contract governs.⁴ Third, and most important here, these laws apply to a specific type of contract for work, employment contracts between employers and employees.

This chapter addresses these statutes that regulate employment contracts and form the core of “labor and employment law.” Rules governing relationships between employers and individual employees generally are known as “employment law,” while “labor law” regulates employers’ relationships to employees engaged in collective action, most significantly through labor unions that engage in collective bargaining.⁵ Broad characterizations of labor and employment law also include employment-based “social insurance” programs like unemployment compensation and Social

Security retirement and disability benefits. These programs typically function like mandatory employer-provided wage insurance benefits. Employers pay a per-employee payroll tax or insurance premium to a third party, which later pays the employee if she or he no longer can work for a paycheck.

I refer to these three types of statutes collectively as “employment law,” both for brevity and to highlight that the employer–employee relationship is their common foundation. To simplify matters, I also focus on federal statutes that apply throughout the U.S. and create a legal “floor” for labor protections. State or local laws cannot lower this floor, but they may raise it because there usually is no federal ceiling. Thus, a state cannot authorize an employer to pay wages below the federal minimum, but it can require employers to pay wages above it.⁶

By focusing on contractual employment relationships, employment law apparently takes as its starting point a labor market organized through bargaining between workers and firms. Statutory employment law then selectively constrains the results of that bargaining to correct deficiencies that general contract law does not address (Davidov and Langille 2006). Employment relationships are those where these deficiencies occur, and employment statutes address the specific ways in which these deficiencies manifest themselves. Not included within this understanding of employment law are other legal regimes—such as property law, trade and immigration policy, and the criminal justice system—that also shape working conditions by influencing the size of the labor force and the relative bargaining power of workers and employers, among other things (Barenberg 2003; Western and Beckett 1999).

This section addresses employment law’s limitation in scope to harms arising within an employment relationship. These limits of “coverage” have two components: one focusing on the employee status of the worker harmed, the other on the employer status of the party responsible.

First, workers lie beyond the formal reach of employment law when the harm in question arises outside of an employment relationship. Although the terms “worker” and “employee” often are used interchangeably, reflection quickly produces many examples of people engaged in activities that are centrally organized around work but do not fit easily into the narrower relationship denoted employment. No one would doubt that “self-employed” small-business owners or family farmers work, and the same is true historically of peasants, apprentices, and slaves. Although the label “worker” might be jarring, most would see work as at least one component of unpaid volunteering, housework, or child care.

Equating work and employment relies on the notion that most work is organized through large, stable, vertically integrated firms that hire out of a labor market and then provide long-term employment with a single employer. Alternatives to this “Fordist” model of organizing labor, which always have existed but may be proliferating (Stone 2004), lead to work performed outside of *any* employment relationship. Because not all workers—in this broad sense of those engaged in concerted productive labor—are employees, not all workers have rights under the employment laws. Of course, whether this domain of legally unprotected work is troubling depends on whether the practice of work itself calls for legal protections and on just where the line is drawn between employment and unprotected work.

The second limitation of employment law coverage is that, even if the worker is employed by *someone*, that employer may not be the party responsible for the harm in question. Employment law, however, generally will not hold such a third party legally responsible either (Fudge 2006). Employment law can protect employees fully from work-related harms only if it is their employers who cause those harms. That premise, too, is satisfied most easily within a Fordist system, and less so in a world of transient employment with unstable firms or complex agglomerations of subcontractors.

Workers But Not Employees

Workers may be classified as nonemployees in three basic ways: as “independent contractors” working outside an employer, as too powerful within an organization to merit protection, and as working in a “non-economic” relationship. In addition are some quite specific and ad hoc legally defined exceptions.

Working outside the firm: Independent contractors. The employee/independent contractor distinction is the most prominent limitation on employment law coverage. Independent contractors do not receive employment law protections, except in some forms of social insurance. Many workers in low-paid, often dangerous jobs are classified as independent contractors unprotected by employment laws, notwithstanding common associations of “independent contractor” or “entrepreneur” with a highly skilled, well-paid craftsperson or freelancer (Valenzuela 2001). Construction day laborers, street vendors, taxi drivers, and home health care aides frequently are independent contractors, though individual cases often are disputed and the proper classification depends on the details of work organization. Serious questions about employment status typically arise when the worker has short-term or nonexclusive relationships with putative employers, receives payment directly from customers

or on a task (rather than time) basis, or operates with little or no day-to-day supervision.

The core consideration underlying the employee/independent contractor distinction is the nature and degree of control the putative employer can exercise over the worker. Workers subject to less control are more “independent.” That said, substantial uncertainty and disagreement surround exactly how and where to draw this dividing line, and indeed over the utility of the employee/independent contractor typology itself (Davidov 2006). The precise rules and definitions vary across statutes and usually are both complex and vague (Linder 1999). Most statutes incorporate the most stringent test—the common-law or agency test—under which the crucial feature of employment is the employer’s right to control how tasks are performed. This approach contrasts the employee following a foreman’s orders or an assembly line’s pace with the craftsperson or professional exercising independent judgment. A more inclusive approach to defining employment is the “economic realities” standard developed under the Fair Labor Standards Act (FLSA), which regulates minimum wages and overtime. Relative to the common law, the FLSA takes a more functional approach, disregards matters of organizational form, and emphasizes the employer’s power over the economic conditions of work, not necessarily the details of how it is performed. An employment relationship may arise when the employer controls payment rates or essential equipment or when it matches workers with customers on an ongoing basis, as with taxi drivers, building cleaners, and home health care workers (Goldstein et al. 1999).

The fact sensitivity of the employee/independent contractor distinction makes it difficult to assess whether the law has been growing more or less stringent. A major Supreme Court decision in 1992, however, narrowed the definition of employment—or limited its potential to expand—by adopting the common-law approach for all statutes that do not explicitly provide their own definition of employment, as the FLSA does (*Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 [1992]). In particular, the court rejected what is known as a “purposive” approach, in which employment’s definition would depend on the specific purposes of the statute in question. Although many commentators favor a purposive approach, specifying its content is difficult because doing so requires a theory of who needs or deserves a given statute’s protection. Employer control provides such a principle, though whether it is the right one is another matter.⁷

Regardless of whether legal doctrine has changed, independent contracting and disputes over it appear to be growing (Kalleberg 2000). This trend comports with broader changes in organizational practice, which

have tended—quite incompletely, it should be emphasized—to move away from long-term employment in firms with extensive internal labor markets or job ladders and toward less certain employment built on expectations of career advancement through lateral movement among firms (Stone 2006).

Working above the line: White-collar exemptions. Most employment statutes do not protect workers at the very top of a firm's hierarchy. At the extreme, these individuals are treated as employers themselves because they control the firm, not vice versa. But even when workers fit the general definition of an employee—as would be the case, for instance, with upper-level managers who are clearly subordinate to a CEO—they may be excluded from statutory protections. These exceptions can extend quite far down the organizational hierarchy when the line between managerial and production jobs blurs, as with fast food restaurant “assistant managers” who lead a crew of line workers but perform many of the same tasks (General Accounting Office 1999).

The two most important such exceptions are the “white collar” exclusions from the FLSA overtime premium requirement and the supervisor exclusions from the National Labor Relations Act (NLRA) protections for labor organizing and collective bargaining. Recent developments have broadened both, through new FLSA regulations issued by the U.S. Department of Labor (USDOL) and major decisions by the Supreme Court and National Labor Relations Board (NLRB) (Billings 2004; Fabrizio and McGolrick 2006). Moreover, changing corporate work practices put pressure on the Fordist distinction between line workers and management, as high levels of standardization and centralized control reduce managerial authority and “team” management approaches incorporate front-line workers into organizational decision making (Barenberg 1994; Levine and Lewin 2006).

Working outside the market. When productive work is organized outside conventional market mechanisms but within institutions that also have ordinary employees or compete with those that do, courts struggle with whether employment relationships exist (Zatz 2008). In cases involving prison labor, participants in welfare work programs, trainees and students, and rehabilitation of individuals with severe disabilities, employers have argued, often successfully, that the employment laws do not apply because these are non-economic relationships. They are non-economic because they are embedded in a broader institutional arrangement structured by important nonfinancial goals rather than by market competitiveness. The counterarguments typically focus on the workers' economic dependency on the employer and the functional interchangeability between these workers and ordinary employees. That is, these

“nonmarket” workers can be substituted for “market” workers, as appears to have happened in New York City, where “workfare” workers replaced unionized public parks workers, and in Colorado, where state prisoners recently have replaced noncitizen agricultural workers (Frosch 2007; Greenhouse 1998). The law in this area is mixed and quite unsettled.

Similar considerations appear to motivate some explicit statutory exclusions of specific workers. For instance, many statutes limit or eliminate protection for domestic workers and personal care attendants, something seemingly explained in part by the association of this work with the family domain (Boris and Klein 2006; Silbaugh 1996; Smith 1999); in *Long Island Care at Home v. Coke* (127 S. Ct. 2339 [2007]), the Supreme Court recently upheld a broadly exclusionary interpretation of the FLSA provisions in this area. This “nonmarket” character also is linked to the race and gender composition of specific occupations, especially those historically associated with household roles of wife and servant (Stanley 1998; Tomlins 1995). A similar analysis may apply to the many exclusions of agricultural workers, though these have narrowed since the New Deal (Linder 1987).

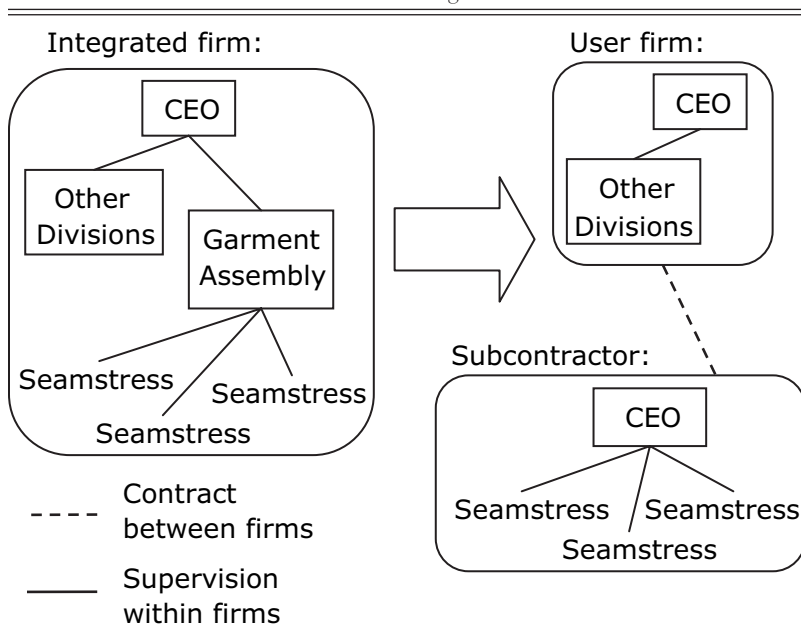
Miscellaneous limitations on coverage. Some industries have obtained seemingly ad hoc carve-outs from certain statutes, especially the FLSA, which includes exemptions for employees of movie theatres and small newspapers (29 U.S.C. §213[a][8], [b][27]). More generally, smaller employers often are excluded from coverage, though the exact threshold and mechanism varies greatly by statute. Virtually all private employers are covered by the NLRA, for instance, but only about 10% are covered by the Family and Medical Leave Act (Cantor et al. 2001); employment discrimination statutes and the FLSA lie in between.

The Disintegrating Employer

Whether a worker is a covered “employee” is only half an analysis of formal employment law protections. The other half, which has received less systematic attention, is identifying the employer (Fudge 2006). The employer is the entity (or entities) that employment law holds responsible for violating an employee’s rights. The Fordist paradigm of the large, stable, vertically integrated employer can disintegrate in three ways that create difficulty identifying the employing entity: vertically, horizontally, and temporally.

Vertical disintegration and subcontracting. Subcontracting is vertical integration in reverse: A “user” firm chooses to contract with a supplier for goods or services rather than keep production in-house (Figure 1). Subcontractors thus are structurally analogous to independent contractors, except that they are firms with their own employees rather than

FIGURE 1
Vertical Disintegration



individual workers. Were they brought inside the user firm, they would be an organizational unit rather than an individual employee.

The legal analysis largely tracks this organizational analysis. If the subcontractor is controlled by the user firm, then so too are the subcontractor's employees, who become the user's employees as well. The crucial complication is that the law does not require that an employee have only one employer. Instead, the subcontractor may be sufficiently independent of the user to remain a legally distinct entity responsible for employment law compliance, and yet the user may exercise sufficient power over the subcontractor's employees that the user is an additional "joint" employer. The legal standards for identifying such joint employment relationships draw heavily on the principles applicable to the employee/independent contractor distinction (Becker 1996; Lung 2003). Thus, the strongest cases for joint employment typically involve users that sometimes directly supervise or monitor their subcontractor's employees, especially if they work on the user's premises. Otherwise, joint employment under the FLSA might still be found, albeit with difficulty, if the subcontractor is tightly integrated into the user's business and lacks the ability to shift its operations to another user. In either

scenario, the emphasis is on function over form, which is what allows a worker to be jointly employed by a firm that is formally separate but functionally in control.⁸

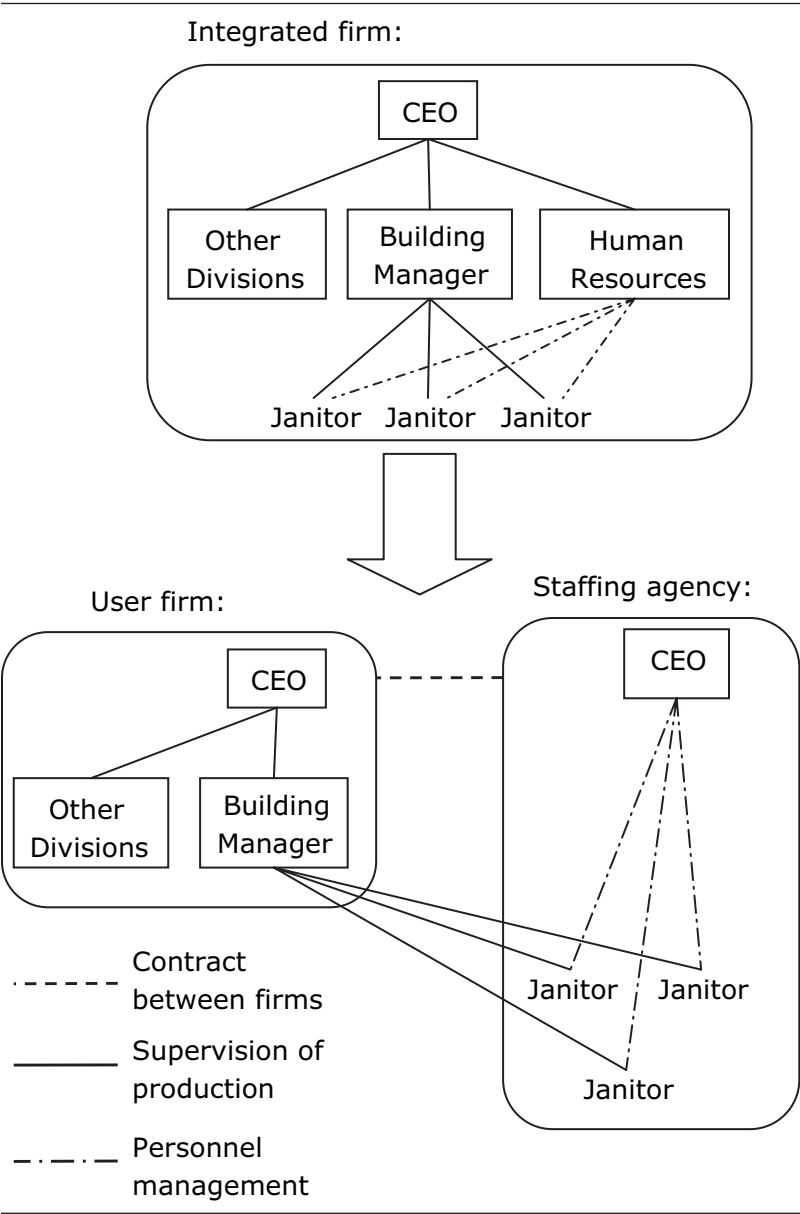
At first glance, subcontracting may seem irrelevant to how well employment laws protect employees: why should it matter to the worker whether firm A or firm B is legally responsible as the employer, so long as it is one or the other? In fact, subcontracting does affect legal labor protections. One mechanism is that the two firms may vary in their susceptibility to enforcement action (for instance, one might be bankrupt), a point further discussed below. Additionally, identifying the employer often interacts with questions of formal coverage discussed above. If a 500-employee firm subcontracts to a 5-employee firm, size thresholds may mean that a worker receives protection only if the larger firm is deemed to be her or his employer. Relative to the user firm, a subcontractor also might have a stronger or weaker claim of a “noneconomic” relationship to its workers (cf. Weiss 2001).

The subtlest effects of subcontracting arise when there are firm-specific legal obligations, which are pervasive in labor law. If firm A's employees work pursuant to a collective bargaining agreement (CBA), then the firm's legal obligations under the agreement can be modified only through negotiation with the incumbent union. If, however, work is outsourced to firm B, then that firm may provide less advantageous terms to *its* employees and need not bargain with them collectively if no union is in place. Moreover, if firm B's employees later *do* unionize and demand higher wages that lead firm B to demand a higher fee from firm A, firm A can end its relationship with B and move on to a new, non-union contractor C. Consistent with this dynamic, deunionization and subcontracting (as well as independent contracting) often go hand in hand (Milkman 2006).

Although the topic is complex, U.S. labor law generally protects employers' ability to shift between inside and outside production and to shift among outside producers (Higgins et al. 2006). For instance, so long as it is motivated by financial concerns, including cutting labor costs, a firm may transfer work from its employees to a subcontractor (or threaten to) during the term of a CBA.

Similar dynamics may arise with other firm-specific obligations, such as payroll tax rates for social insurance. Through a system known as “experience rating,” these tax rates may be higher for firms whose employees more often claim benefits, such as firms that frequently lay off workers who then claim unemployment insurance. In this regard, one notable recent development is passage of federal legislation attacking “SUTA [State Unemployment Tax Act] dumping,” in which a firm

FIGURE 2
Horizontal Disintegration



lowers its unemployment taxes by shifting work to a nominally different firm without a history of layoffs and thus a better experience rating (Stettner, Smith, and McHugh 2004).

Horizontal disintegration and the staffing industry. Firms disintegrate horizontally when they split traditional management functions between two or more firms. Temporary-service firms pioneered this organizational form, in which the worker reports directly to multiple masters. In contrast, the typical subcontractor stands between the worker and the user on almost all issues—hiring and firing, scheduling, payment, work supervision—and the question in essence is whether the user nonetheless pulls the strings. A temporary-service or staffing agency, however, typically screens, recruits, and hires an employee, who then is assigned to a specific user client. The employee continues to be paid by the staffing agency and to deal with it on matters that might otherwise have been addressed to the user firm's human resources department. This employee, however, remains subject to day-to-day supervision by the user firm and might be indistinguishable from the user's direct employees for many purposes.

In conjunction with the user firm's agreement to pay the staffing firm for its services, the result is a triangular employment relationship among two firms and one worker (Figure 2). There are many variations on this structure, and there is no intrinsic connection to short-term work (Davidov 2004), which in any event is common even outside triangular arrangements (Stone 2006).

This diffusion of control sometimes leads to claims that the worker is an independent contractor, because the user firm does not set pay and the staffing firm does not supervise. Borrowing from the subcontracting scenario, however, courts often apply the concept of joint employment. Both firms are employers if each one exercises substantial employer prerogatives and if, in combination, these would establish an employment relationship were they a single firm (Davidov 2004; *Schultz v. Capital International Security, Inc.*, 466 F.3d 298 [4th Cir. 2006]).

Horizontal disintegration puts pressure on the idea that an employer is responsible for *all* aspects of an employment relationship. The Equal Employment Opportunity Commission (1997), for instance, takes the position that even when a staffing firm jointly employs a worker with a user firm, the staffing firm nonetheless may not be liable for discriminatory decisions made entirely by the user firm. In a number of areas of state law, especially payroll tax liability, the staffing industry has pushed aggressively and successfully for laws and regulations making staffing firms the exclusive legal employer, even though the user would be deemed a joint employer for other purposes (Gonos 1997).

Horizontal disintegration poses particularly acute challenges for labor law because a traditional collective bargaining relationship operates between one union and one employer and encompasses all terms and conditions of employment (Stone 2004). Collective bargaining within triangular employment requires bargaining either with one employer over a subset of issues or with multiple employers that have overlapping but not identical workforces. The NLRB has issued conflicting rulings in this area, most recently in *Oakwood Care Center*, adopting a position that makes unionization virtually impossible for triangular employees who work side by side with direct employees of the user (176 L.R.R.M. [BNA] 1033 [2004]).

Temporal disintegration and successor firms. A final dimension of firm structure is temporal, and this too may disintegrate when ownership and control of the firm or its assets pass between hands over time or the organization simply dissolves. These shifts may affect employment law enforcement if there is no firm from which to seek a remedy after the fact. Usually, however, a firm's temporal instability will not affect employment law coverage because most employment rights neither require any length of employment nor confer rights to future conduct by the employer.⁹ Someone who works for only one week still has an FLSA right to be paid for that week.

Like subcontracting, though, temporal disintegration may affect firm-specific obligations in the collective bargaining and social insurance contexts (Becker 1996). Two common scenarios involve a shift between two subcontractors doing the same work for a single user firm, such as an office building that switches security contractors, or a shift in ownership and control of one firm. For the most part, the successor firm is not legally required to abide by any CBA in place with its predecessor. Not only does this nullify any job security guarantees in the CBA, but it also allows the successor to undercut the CBA's terms with regard to wages and working conditions for whatever members of the predecessor's workforce it retains. Moreover, because firms begin with a presumption against unionization, the successor employer may not need to recognize the union that was in place at its predecessor. In that case, not only can it impose terms less favorable than the preceding CBA, but it can do so unilaterally, without bargaining with the union.

Workers Beyond Employment Law's Grasp: Limited Enforcement

Even when workers face harms within the reach of employment law—harms inflicted by an employer on its employees and in violation of substantive legal standards—this formal reach may exceed the law's

practical grasp. Enforcement failures permit substandard conditions to persist and thereby constitute a second general mechanism depriving workers of employment law protections.

Enforcement failures arise out of two classes of employer behavior: evasion and defiance. Insofar as employment laws require more of employers than they would otherwise provide, employers have obvious incentives for noncompliance. Economic models weigh the costs of compliance against the expected costs of noncompliance, the latter being a function of both the risks of detection and the costliness of any subsequent remedies (Weil 2005).¹⁰ This framework suggests two employer approaches to noncompliance: evading detection through the manipulation or suppression of record-keeping, and defying legal mandates by simply integrating noncompliance into ordinary business operations and accepting expected remedies as a cost of doing business. The preceding discussion of coverage also can be integrated into this framework: Employer practices that reorganize a labor force to reduce employment law coverage essentially make it cheaper to comply with the fewer employment law obligations that remain.

Evasion and Documentation

Two common forms of evasion undermine systems of documentation that provide the foundation for employment law enforcement. First, employers *misclassify* workers by keeping a full panoply of official documentation that, if accurate, would demonstrate employment law compliance but that instead conceals underlying violations. Second, employers participate in the *informal economy* by failing to incorporate their employment relationships into legally mandated documentation systems, thereby shifting their workers “off the books.”

Misclassification and informality both strike at the recordkeeping practices upon which employment law enforcement relies. Documentation maintained by employers and information reported to public entities, especially tax authorities, identify the firm’s employees, their periods of employment, and some of the conduct (particularly compensation) regulated by law. The FLSA requires that employers keep records of employees’ wages and hours, and less detailed information on employees’ earnings must be reported to state and federal tax authorities in the course of complying with payroll tax obligations. Title VII requires certain employers to record and report the race and sex composition of their workforce, and the Occupational Safety and Health Act mandates records on workplace illness, injury, and exposure to hazards. Many employers, especially large ones, maintain personnel records much more extensive than required by law.

Misclassification. The most basic form of evasion is for an employer to deny an employment relationship with a worker and thereby assert that the worker's complaints lie beyond the scope of employment law. The possible forms of misclassification track the limits on employment coverage discussed above.

Again, the most prominent issue is independent contractor misclassification, in which the firm records and reports its payments to the worker for services rendered but nonetheless classifies the relationship as one between customer and contractor, not employer and employee. The firm issues an IRS Form 1099 reporting the income but does not pay or deduct payroll taxes and does not record working hours and hourly wages. Such a practice is not intrinsically suspicious, because legitimate independent contracting relationships are quite common. As a result, a superficial review of company records would not reveal any violations. Moreover, an employee without sophisticated understanding of employment law might well accept the employer's classification as authoritative, especially if it was explicit from the outset and the employee signed documents acknowledging independent contractor status. Available evidence suggests that misclassification of employees as independent contractors is quite common (Donahue, Lamare, and Kotler 2007).

Important forms of misclassification also occur at other boundaries of employment coverage. Recently, lawsuits alleging misclassification under the FLSA white-collar exemptions from overtime premiums have surged in number and prominence, often resulting in very large damages or settlements with major corporations (Levine and Lewin 2006). Employers may also misclassify workers as "trainees," who are not covered under many statutes, as occurred in one prominent recent case involving labor trafficking (*Chellen v. John Pickle Co.*, 344 F. Supp.2d 1278 [N.D. Okla. 2004]).

Even when a firm carries workers on the books as nonexempt employees, there remain opportunities for misclassification that relate to substantive compliance rather than the fact of coverage. For instance, compensable time may be recorded incorrectly when employees must perform work "off the clock" that is not reflected in company records, and nominal wages may be inflated when they are offset with illegal "deductions" for transportation, tools, or uniforms provided by the employer (McHugh 2001). These are, in essence, forms of misclassification of time and expenses.

Informality. Firms also may evade detection by failing to keep official records, at least with respect to a particular kind of information. Thus, instead of misclassifying an employee as a contractor and

filing a 1099, the employer might simply pay the worker in cash and not report the transaction to government authorities, though it might still keep its own separate set of books.¹¹ Or, instead of recording an employee as working a 40-hour week and then requiring an additional 8 hours of unrecorded work, an employer might not maintain payroll records at all. Such unrecorded or unreported transactions are characteristic features of the informal economy, though scholars vigorously dispute how best to define and characterize it (Portes and Haller 2005).

Like misclassification, informality stymies detection of labor violations and determination of subsequent eligibility for social insurance protections. For instance, an unemployment insurance applicant may be denied benefits because the administering agency has no record of prior employment. In addition, informality erects evidentiary hurdles in the event that an enforcement agency or individual employee does seek legal redress. No documentation may be available establishing that the employee worked for the employer at all, let alone the precise period of time, or detailing the weekly hours and wages that were paid. The major legal response to this problem is that, at least in the FLSA context, once employers are shown to have violated recordkeeping requirements, a series of presumptions allow employees to establish their working time and wages with very little evidence and place a heavy burden on employers to rebut this evidence.

Defiance

Even when an employer violates labor standards in plain view, the existing system of enforcement may do little to stop it. First, noncompliance in plain view leads to enforcement actions only when someone bothers to look, and then to follow up. Second, enforcement action may lead to a remedial action insufficient to deter the underlying violation, especially when most violations go unremedied. Third, remedies themselves may go unenforced, primarily because they necessarily come after the fact and so may be ineffectual if the employer has dissolved or become insolvent. In all these regards, employer and regulatory conduct must be viewed as of a piece: The feasibility of defiance depends in large part on the intensity of regulatory activity.

Detection and adjudication. Enforcement agencies use two basic methods to detect possible labor violations: proactive monitoring and reactive investigation of complaints. Once a possible violation has been detected, further action is required to obtain a binding legal judgment and accompanying remedy. All of these tasks require substantial time and resources, especially for personnel. These resources generally must come from public budgets. As with police and prosecutors, civil regulatory

agencies usually cannot recoup their costs from employers who violate the law, even in situations where private litigants would be able to seek payment of their attorneys' fees. Even as the workforce has grown, as have the number of workplace laws requiring enforcement, enforcement agencies' staffing and budgets have stagnated or shrunk over the past several decades, with shorter-term shifts depending on party control of legislative and executive branches (Bernhardt and McGrath 2005; Occhialino and Vail 2005). These agencies can inspect only a tiny fraction of covered establishments, and when they do, they find violations at high rates, especially with regard to wages and workplace safety (Santos 2005; Weil 2005).

Enforcement by private litigants faces its own distinctive challenges. Litigation usually is too expensive for low-wage workers to finance representation by an attorney. The prospect of recovering \$5,000 in lost earnings may be too little to make the expense and hassle of a lawsuit worthwhile, even though it could be half a low-wage worker's annual income.¹² Aggregating small claims into a single lawsuit can change this calculus, and this is the classic function of class action litigation. Recently, however, class actions have faced new restrictions throughout the legal system, and some developments threaten to nearly eliminate them in employment discrimination law specifically. These procedural questions have been central to the massive *Dukes v. Wal-Mart, Inc.* pay and promotion sex discrimination lawsuit on behalf of Wal-Mart's low-wage women workers (509 F.3d 1168 [9th Cir. 2007]), and they may yet be resolved by the Supreme Court as the suit proceeds. Additionally, for historically idiosyncratic reasons, the FLSA does not permit class actions at all, instead allowing only a procedurally cumbersome "collective action" that requires each worker to opt into the lawsuit. This restriction does not apply to state wage-and-hour laws, and there has been a sharp growth recently in class actions brought under these state laws, often in combination with more limited FLSA claims (Finkel 2003).

Remedies. Low enforcement rates provide important context for an analysis of remedies. A remedy that fully compensates an individual employee for harm suffered may be grossly inadequate to deter the employer if only a fraction of violations yield such a remedy (Weil 2005). For the most part, the monetary remedies for employment law violations are limited to one or two times the employee's lost wages.¹³

Weak remedies have been identified as an important culprit in underprotection of the NLRA right to organize (Weiler 1990). This is somewhat counterintuitive, because a relatively high proportion of all violations should receive regulatory attention, given that unions have the information and motivation to identify violations and pursue claims

beyond that of an individual aggrieved employee.¹⁴ Unlike a wage-and-hour case, however, an employer's gain from firing union activists may far exceed the compensation lost by individual workers fired for organizing. Instead, the employer may successfully disrupt an organizing campaign that might otherwise result in much more costly CBAs or strikes, and that moment will long have passed by the time the individual worker receives a remedy.

Collection. Just as a substantive legal mandate does not automatically lead to compliance, a court judgment awarding damages does not automatically lead the employer to pay. Large, ongoing firms generally do pay, however, because they have substantial, identifiable assets that can be frozen or liquidated to satisfy a judgment. The story may be quite different for smaller, unstable firms, especially ones operating in the informal economy. These firms may have no identifiable assets at all, may enter bankruptcy when facing a judgment, and may simply disappear, possibly to reopen under a new name. This pattern has been especially well documented in the garment industry (Foo 1994).

An Example: Unauthorized Noncitizen Workers

Each topic discussed above bears much richer development, and many of them receive it in other chapters of this volume. By bringing together these different mechanisms through which workers may lack employment protections, an overview facilitates analysis of how these mechanisms interact. Without attempting to be comprehensive, this section suggests some such interactions by analyzing an important illustrative case: employment law protections for noncitizen workers who lack legal authorization to remain in the U.S. and to hold employment here, or “unauthorized noncitizen workers.”¹⁵ Unauthorized noncitizen workers disproportionately are low-wage workers and make up a substantial and growing fraction of the low-wage workforce (Capps, Fortuny, and Fix 2007).

Immigration Status and Employment Law Coverage

Under current law, a worker's immigration status is irrelevant to whether that worker is an “employee” covered by employment laws. The Supreme Court directly addressed this issue under the NLRA in the 1980s, and lower courts consistently have extended this precedent to other statutes, including the FLSA (Fisk and Wishnie 2005).

Notwithstanding their coverage, unauthorized noncitizen workers still receive limited employment law protections. Most importantly, the Supreme Court's 2002 decision in *Hoffman Plastic Compounds* (535 U.S. 137) held that an unauthorized worker could not receive the

standard NLRA remedy of back pay for lost wages after his employer violated the NLRA by firing him for union organizing. *Hoffman's* exact scope remains uncertain, but unauthorized workers generally still do receive compensation for underpayment of work actually performed, as well as remedies other than lost wages.

Hoffman's reasoning is analogous to the arguments against employment law coverage for prison labor and other “nonmarket” work. The court downplayed the economic relationship between employee and employer and gave precedence to matters of immigration policy, emphasizing the worker’s possibly criminal conduct (Fisk and Wishnie 2005). Consistent with the highly racialized history of treating unauthorized workers, especially those from Mexico, as both a second-class labor force and a criminal menace (Ngai 2004), the social status of the workers appears to be driving the scope of employment protections, rather than employment protections responding to workplace vulnerability or recognizing the status claims enabled by work.¹⁶

Immigration Status and Access to Enforcement

One common argument for granting unauthorized noncitizens full employment rights is that denying them these rights will make them a more attractive workforce for employers and thereby harm authorized workers. This basic point can be generalized to account for other limitations in coverage and enforcement addressed by this chapter. Thus, even if unauthorized status does not itself reduce employment rights, employers might still prefer unauthorized workers if they more easily fall beyond the reach or grasp of employment law for other reasons.

An unauthorized workforce might lead to underenforcement if unauthorized workers are less inclined to participate in enforcement proceedings that involve both confrontation with their employer (or former employer) and exposure to government authorities. That seems plausible because unauthorized workers’ immigration status provides employers a ready justification for firing or refusing to hire them and exposes the worker to possible deportation (Bosniak 2006; Shaviro 1997; but cf. Milkman 2006). This hypothesis is borne out by employers’ opportunistic invocation of work authorization to fire workers involved in organizing campaigns, retaliatory threats to report to immigration authorities workers who assert employment rights,¹⁷ and, less directly, many employers’ perception that recently arrived workers are less likely to resist employer demands, display “attitude,” and complain about illegal or unfair treatment (Mehta, Theodore, and Hincapié 2003; Waldinger and Lichter 2003).

Immigration status acquires direct legal significance in the enforcement process when investigation or litigation prompts inquiries into

work authorization. Because work authorization affects remedies after *Hoffman Plastic*, employers and enforcement agencies ordinarily would want to ascertain authorization status to determine how much back pay is at issue. Revealing unauthorized status, however, imperils an employment law plaintiff's ability to stay employed and remain in the U.S. Because this danger might deter unauthorized workers from participating in enforcement activities, a number of courts have limited inquiries into immigration status until late stages of litigation; if early success yields a settlement, those inquiries need not ever occur (Cunningham-Parmeter 2008).

Interaction Between Coverage and Enforcement

Employment law coverage and enforcement interact strongly because unauthorized noncitizen workers cannot be employed legally. Employers must document their employees' work authorization and may not employ those who lack it. Therefore, hiring unauthorized noncitizen workers requires either avoiding (or concealing) an employment relationship or evading enforcement through false documentation (that is, misclassifying workers as authorized) or nondocumentation (that is, informality).

This observation sheds light on the ubiquitous subcontracting of labor-intensive services within industries with many unauthorized noncitizen workers. Particularly prominent has been outsourcing of building maintenance services by office buildings and by major retailers like Wal-Mart (Clelland 2000; Greenhouse 2003; Milkman 2006). By severing an employment relationship, subcontracting allows the user firm to utilize a worker's labor without running afoul of employment-based immigration restrictions and labor standards and also without engaging in misclassification or informality. For instance, a small janitorial subcontractor might operate on a cash basis without payroll or work authorization documentation when a large retail chain could not feasibly have an in-house janitorial division operating in the same fashion. In addition, such a subcontractor might maintain assets insufficient to satisfy many judgments against it.

In such circumstances, subcontracting does more than just shift the employment relationship between firms. That would not benefit the user firm if its savings in expected compliance or liability costs would simply reappear as a component of the subcontractor's fee. If, however, employment law enforcement against the subcontractor is more difficult than against the user, then the subcontractor can violate the law more cheaply than the user, and it can offer this savings as a benefit of subcontracting. The same features of small subcontractors that minimize exposure to employment law also limit other aspects of their operations, including

maintaining a public reputation, acquiring physical capital, taking on substantial debt, and so on. Not surprisingly, then, small unstable firms of this sort often rely on symbiotic subcontracting relationships with larger, more enduring enterprises.

Directly employing unauthorized workers but misclassifying them as authorized also might seem attractive to large, well-established employers. It is compatible with maintaining extensive recordkeeping and widespread misclassification with respect to independent contractor status and white-collar exemptions appears to have occurred at major corporations like FedEx, Microsoft, and Starbucks (Orey 2007; *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 [9th Cir. 1997]). For firms like these, subcontracting may conflict with organizational imperatives toward high levels of centralized monitoring and control. Misclassification, however, becomes riskier when enforcement authorities can readily detect it with available information. Unlike independent contractor status or a white-collar exemption, work authorization generally fits these conditions because it can be determined based on government records of immigration or citizenship status, without inquiring into how a specific employer organizes its workforce. Immigration enforcement increasingly exploits this point through cross-matching of relevant databases, especially Social Security numbers, despite the serious problems with using a Social Security “no-match” as a proxy for unauthorized status (Mehta, Theodore, and Hincapié 2003). More effective detection of misclassification thus may lead to more subcontracting and informality or to substitution of non-employee workers (such as the Colorado inmates mentioned above), rather than simply to substitution of authorized employees.

New Approaches to Expanding Labor Protections

A number of legal developments, often at the state or local level, respond to the problems of limited coverage and weak enforcement. This section provides a framework for analyzing different approaches. Two strengthen existing employment laws by expanding coverage or intensifying enforcement. Two others, however, implicitly challenge the basic model of government intervention into the relationship between employer and employee. One extends responsibility for an employer's labor standards to the employer's customers. Another places more responsibility directly on the state to address workers' problems that might traditionally have been analyzed as maltreatment by employers.

Expanding Employment Law Coverage

The most obvious way to protect workers who fall beyond the reach of employment law is simply to extend that reach and make them

employees. For instance, efforts are under way in Congress to amend the FLSA definition of employment in order to reverse the Supreme Court's recent *Coke* decision excluding many home health care workers. Individual states also often have used state employment law to fill gaps in federal coverage, such as California's enactment in the 1970s of labor law protections for agricultural workers excluded from the NLRA. More recently, California enacted "*Hoffman* fix" legislation to provide full employment protections to unauthorized noncitizen workers, notwithstanding the Supreme Court's *Hoffman Plastic* decision (Cal. Lab. Code §1171.5). Changing the basic definitions of employment, especially the independent contractor/employee distinction, has been the goal of many scholars, government commissions, and activists. The most common reform suggestion is to replace the restrictive common-law test, and its emphasis on control over the production process, with the FLSA's more expansive "economic realities" analysis, which focuses on a worker's economic dependence on the employer (Stone 2006; U.S. Commission on the Future of Worker-Management Relations 1994). There is little indication, however, that such a change is likely in the U.S., though other countries have experimented with intermediate categories such as "dependent contractor."

Another way to expand coverage is to intervene in firm structure and limit the processes of disintegration described above; doing so results in more covered employees using existing definitions of employment. Most notably in home health care and child care, public intermediaries have been established that convert independent contracting into employment relationships (Brooks 2005; Delp and Quan 2002). This government-funded care work occurs in the private home of the person being cared for (especially in the home health aide context) or of the person providing care (especially in the context of family day care providers). These care workers often have been classified either as independent contractors or as employees of the end consumer, not as public employees, despite substantial state influence over compensation levels and other conditions.¹⁸ Recently, several states have created public employers-of-record that receive state funds, pay compensation to care workers, and become entities with which employees can bargain collectively through public sector unions. This model of vertical reintegration rose to prominence with the stunningly successful organization by the Service Employees International Union (SEIU) of more than 70,000 home health care workers in Los Angeles County in 1999 (Delp and Quan 2002).

This intermediary model begins with the goal of establishing an employment relationship and then works backward to create an organizational form with the desired effect. The government's role is essential but

also ambiguous. It acts not only as the employer but also as the paying consumer, and the consumer role provides its leverage over organizational form. Notably, the government does not rely on its regulatory power, as evidenced by the fact that privately funded home health care and child care are not required to use these or other employer intermediaries.

Another structural intervention does take a regulatory approach. California's janitorial contractor worker retention law provides that, when a property owner substitutes one janitorial contractor for another, the successor contractor generally must retain its predecessor's employees for 60 days (Cal. Lab. Code §1061). On the surface, this policy provides job security at a moment when layoffs are particularly likely, but, more significantly, it blunts the combined impact of subcontracting (vertical disintegration) and successorship (temporal disintegration) on unionization and collective bargaining (Becker 1996). A building still can shed a CBA negotiated between its contractor and its janitors by switching to a new contractor, but for both practical and legal reasons, workforce continuity makes it much easier for the incumbent union to establish a collective bargaining relationship with the new contractor, rather than having to start from scratch organizing a new workforce.

Strengthening Enforcement

Current efforts to improve enforcement largely focus outside the legislative arena,¹⁹ on intensifying enforcement activity and using more effective tactics (Campaign to End Wage Theft 2006; Weil 2007). For instance, both private attorneys and nonprofit workers' rights organizations have been bringing large-scale lawsuits for wage and hour violations in low-wage industries like garment production, building services, and delivery. Often these cases have been coordinated with active organizing by traditional labor unions or by independent workers' centers (Milkman 2006; Sachs 2008). These cases also have helped develop precedents rejecting misclassification and applying principles of joint employment. A particularly innovative recent enforcement effort is the Maintenance Cooperation Trust Fund (MCTF), the product of a collective bargaining agreement between SEIU and janitorial contractors in California (Estlund 2005). MCTF monitors wage violations by nonunion competitors and both assists workers in litigation and brings the results of its investigations to the attention of public enforcement agencies.

Within public enforcement agencies, targeted campaigns have sought to achieve enforcement levels sufficient to shift labor standards throughout an entire industry. Such campaigns systematically investigate employers in industries with high noncompliance rates, rather than simply responding to worker complaints. In the 1990s, USDOL targeted the

garment industry in New York City and elsewhere, and more recently the New York state attorney general's office conducted a well-known greengrocer campaign (Estlund 2005; Weil 2005). Both campaigns used the leverage gained from legal remedies for past violations to garner employer agreement to mechanisms making enforcement easier in the future. Other interesting developments in public enforcement include the use of criminal prosecutions for nonpayment of wages (Verga 2005) and, in cases such as *Chellen v. John Pickle Co.* (446 F. Supp.2d 1247 [N.D. Okla. 2006]), the EEOC's pursuit of discrimination claims in tandem with claims for wage and hour violations within low-wage industries highly stratified by race and nationality.

Consumer Power and Consumer Responsibility

Shifting away from direct state enforcement of employer responsibilities, several recent efforts give consumers an important role in setting labor standards. One strategy draws on the high-profile antisweatshop campaigns aimed at U.S. consumers of products manufactured abroad. Such campaigns organize consumer pressure to reward compliance and punish noncompliance with employment law. The reward strategy attracts customers to employers identified as compliant, as the Greengrocer Code of Conduct sought to do by providing labels to participating stores. The punishment strategy targets consumer boycotts or picketing at employers accused of employment law violations, a tactic widely used by workers' centers (Bodie 2003; Gordon 2005).

One way to analyze consumer involvement is as informal sanctions supplementing official enforcement mechanisms. What this analysis leaves out, however, is the burden consumers bear in increased prices, decreased convenience, or other factors. Another way to see these consumer-driven strategies, then, is as spreading responsibility for maintaining labor standards beyond the employer, who shares its costs with consumers. As I noted earlier, the creation of public employer intermediaries has some of this character, too, as the state uses its leverage as a consumer to restructure employment relationships and, crucially, to take on the financial costs of higher labor standards.²⁰

Several new approaches to combatting abuse of subcontracted workers go beyond these essentially self-imposed forms of consumer responsibility. They make subcontractors' customers liable for the subcontractors' employment law violations, rather than using joint employment theories to extend the employment relation up the supply chain. For instance, California's AB633 makes garment manufacturers "guarantors" of their subcontractors' wage-and-hour practices. If unpaid wages cannot be collected from the employing subcontractor, they can

be collected from the guarantor, without needing to establish an employment relationship (Elmore 2001). California also has a “financially insufficient contracting” law that, in specified industries, holds user firms responsible for subcontractors’ violations, but only when the risk of such violations was reasonably apparent from the financial and other terms of the subcontract (Narro 2006). The message of consumer responsibility is quite clear: A user must forgo the lower price it could obtain by doing business with a contractor willing to violate the law. Indeed, such statutes have been called “brother’s keeper laws.” Shifting responsibility to users of subcontractors can provide a more stable, solvent target from which to seek a remedy when a violation occurs. As David Weil’s research shows, extending liability to users also can enlist their capacity for supply-chain monitoring in the service of employment law enforcement (2005).

Furthermore, Illinois recently began applying a customer responsibility model in the area of staffing agencies. The Illinois Day and Temporary Labor Services Act (820 Ill. Comp. Stats. §175) took effect in 2006 and provides extensive protections for nonclerical workers employed by staffing agencies and supplied to user firms known under the statute as “third party clients.” Although these user firms might sometimes be joint employers under general employment law principles, the act bypasses such questions and simply declares that the user “shall share all legal responsibility and liability” for wage and hour violations, without otherwise treating the user as an employer (§175/85).

These consumer-focused approaches build upon an employment-based model but take an important additional step. A user firm is never liable to a worker unless that worker has an employment relationship with another employer (the subcontractor or staffing agency) and that employer violates an employment law. But once such a violation is established, the user firm may bear legal responsibility for the working conditions in question despite not having its own employment relationship to the worker. As a practical matter, these laws treat users as themselves part of the problem when they allow subcontractors to compete for the user’s business by employing illegal labor practices. Doing so places the employer–employee relationship in a broader context in which substandard working conditions are not simply the product of an employer’s power over its employee.

State Provision of Worker Benefits

In principle, the government rather than consumers could act as a “guarantor” of labor standards and provide recompense when employees cannot recover directly from their employers. One element of California’s AB633 antisweatshop statute provides an isolated example of this

approach (Elmore 2001). It uses a portion of garment industry registration fees to create a fund designed to cover unpaid wages that cannot be collected from either employers or guarantors. Although uncommon in employment law, this government payor-of-last-resort role is routine in the social insurance context. Even if an employer fails to pay the required payroll tax, an eligible employee can still receive benefits based on the untaxed employment; the costs are made up through general tax revenues. The difference appears to turn on whether the employer's role is understood as funding a government benefit (the social insurance case) rather than fulfilling its own obligation to a worker (the minimum wage case), even though this distinction may be more formal than real (Shaviro 1997).

When the government or a consumer guarantees the availability of a remedy, it shifts the costs of employer *non*compliance away from workers themselves. An additional step away from employer responsibility shifts the costs of *compliance* from the employer to the state. Many expansions in worker protections are taking just this form. The federal Earned Income Tax Credit (EITC) now supplements a minimum wage worker's annual income by up to about \$4,500, depending on family composition. This additional income is equivalent to roughly a \$2.30 hourly raise for a full-time, full-year hourly worker, but it is a raise delivered and funded by the government rather than an employer. California's new paid family and medical leave program also relies on public funding and benefit delivery.

This chapter's concerns with coverage and enforcement add a new dimension to the important debate over whether the costs of various worker protections, especially any new ones, ought to be placed initially on employers (as with the minimum wage) or the state (as with the EITC). That debate usually assumes that employer-based protections reach all workers. Instead, many workers already fall outside existing protections due to limited coverage or enforcement, and these workers are unlikely to receive the benefits of any expanded employer-based protections. Moreover, some employers might respond to new responsibilities not by cutting jobs or raising prices, as employment law's critics usually argue, but by taking action to narrow their workers' coverage or to evade or defy enforcement. Government-funded protections might mitigate these problems.

Placing compliance costs on the state also opens up the possibility of spreading coverage beyond employment. Indeed, the EITC and many social insurance programs specifically cover independent contractors and other self-employed people in addition to employees (Linder 1999; Zatz 2006). Further extensions to include unpaid household work have been proposed (Staudt 1996). Such expansions are administratively feasible

because the programs do not rely on employers as a funding or delivery mechanism.²¹

These same administrative features also can facilitate shrinking coverage to a subset of employees. Although details vary greatly by program, benefits paid to workers by the state often carry greater restrictions on eligibility for noncitizens. While unauthorized noncitizen workers are entitled to minimum wages from employers, they cannot supplement that income with the EITC, and there have been serious proposals to deny the EITC to many authorized immigrant workers, something currently inconceivable for the minimum wage.

The Future of Worker Protections

This chapter has surveyed how workers come to fall beyond the reach or grasp of employment law protections and the varied ways those protections might be extended. The breadth of available responses should provide cause for some optimism by suggesting new avenues of attack on stubborn problems, such as the difficulties of achieving employment law enforcement against small, informal subcontractors. This flexibility, however, also generates a challenge: How are we to choose among strategies that, were they successful, might yield similar results? This question becomes pressing whenever we consider adopting a new policy, but of course it also applies to existing institutions that might benefit from change.

At a minimum, the preceding discussion makes clear that those of us concerned about how workers fare in a gloves-off economy cannot afford simply to focus on the unjust outcomes and seek to legislate or litigate or organize against them. In a world of shifting organizational forms and imperfect enforcement, issues of institutional design must be front and center. The questions include these:

- Which workers receive the benefit or protection, and how are they identified?
- Who delivers the worker protection or benefit, and who pays for it?
- Who pays to remedy noncompliance, and how does it compare to the cost of compliance?
- Who monitors for noncompliance, and how easy is it to detect?
- Who can seek a remedy, and how?

Although these issues often seem purely pragmatic in nature, sometimes they implicate the most basic questions about why we have employment laws in the first place. This is particularly true for questions about coverage: Who receives and who provides protections? The

controversies surrounding the proper balance between employer and state provision of worker protections illustrate this point.

With regard to the entity responsible for providing worker protections, consider current campaigns for Fair Share Health Care statutes. This policy would mandate that employers either provide a minimum level of health care benefits to their employees or provide an equivalent level of funding to state health care programs that cover low-income workers. One of proponents' rallying cries is that these public programs are "subsidizing" employers' failure to provide health care (Contreras and Lobel 2006). Analogous criticisms have been leveled at the EITC (Bluestone and Ghilarducci 1996).

Such critiques beg the question of who is subsidizing whom. Implicitly, they assume a minimum package of economic resources that workers ought to receive from their employers. When the state supplies that package itself rather than requiring employers to do so, the state subsidizes employers. But what if providing that package (at least to workers) was the primary responsibility of some other entity, such as consumers or fellow citizens? If so, then minimum wage laws would be requiring *employers* to "subsidize" the rest of us who are permitted to evade our responsibility for workers' well-being. Obviously, the analysis might vary by type of protection and by degree. I find, for instance, that my students are taken aback when I suggest that a public education system improperly "subsidizes" employers who fail to pay for their workers' children's schooling, even though the same students often have expansive conceptions of employers' obligations to provide living wages, health care, and paid leave.

Similar questions arise with regard to which workers are covered. When worker protections rest on employers, the problem of unprotected workers reduces to how we distinguish employees from independent contractors or from volunteers, the reach of joint employment doctrine, and so on. Once we consider other vehicles for protecting workers, however, these questions may be reframed: Perhaps the problem is overreliance on employment relationships to target and deliver the protections at issue?

The minimum wage/EITC debate again is instructive. Critics of the minimum wage often claim that the EITC has higher "target efficiency" because it targets workers living in low-income households while the minimum wage applies to low-wage workers regardless of other household resources (Shaviro 1997). One defense simply accepts the targeting as good enough when balanced against other considerations (including who bears the costs). A more fundamental response, though, is that the target efficiency critique begs the question of who should be targeted. If

the minimum wage is not simply an antipoverty device but also, for instance, a means of protecting from exploitation workers who occupy a weak bargaining position in the labor market, then a targeting analysis would look quite different. Even so, one might still go on to ask whether employees are the only workers subject to exploitation, whether employers are the only ones who carry it out, and whether markets for paid labor are the only institutions that create the requisite vulnerability (Folbre 1982; Zatz 2008).

Answering such questions requires engaging the most basic issues of what labor and employment law is for. It is not enough to say that all workers deserve certain protections or to focus only on what those protections should be. We need to understand exactly what makes someone a “worker” and why that matters, exactly how and by whom that protection should be provided, and what should happen next when the protection fails. Paying attention to the full range of ways in which protections already are provided, and avoided, makes clear the need to confront these problems and can both stimulate and discipline our attempts to solve them. In particular, we must face the limitations of employment law and consider responses that lie both inside and outside that familiar framework.

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Endnotes

¹ For reasons I go on to explain, I will use “employment law” as shorthand for “labor and employment law.”

² Relatively new federal statutes include the Worker Adjustment and Retraining Notification (WARN) Act of 1988 addressing mass layoffs and plant closings, the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993. The Civil Rights Act of 1991 also substantially strengthened existing protections against employment discrimination, as have court decisions developing protections against sexual and racial harassment.

³ A third strategy, not addressed here, is placing work beyond the reach of the U.S. law by locating production in another country.

⁴ For this reason, substantive labor standards can fall without either a change in law or a violation of existing law. Cutting a worker’s wage from \$25 to \$10 per hour does not run afoul of a legal minimum wage well below \$10 per hour.

⁵ Workers’ collective action outside of unions also is protected both by the National Labor Relations Act and, in narrower ways, by other statutes (Estlund 2005; Sachs 2008).

⁶ The two major exceptions are in labor law and federal regulation of employer-provided pension and health care benefits, both of which generally preempt any state regulation in the area. State law also typically creates a floor beneath local law but no ceiling above it.

⁷ Guy Davidov has developed the most sophisticated purposive theory in this area, one that builds on the conceptions of control present in the case law (2002).

⁸ Courts and commentators sometimes attempt to square the idea of joint employment with the paradigm of a single integrated employer by identifying joint employment with situations in which subcontracting is a sham, or at least an attempt to evade employment law responsibilities (*Zheng v. Liberty Apparel*, 355 F.3d 61 [2d Cir. 2003]).

⁹ The Family and Medical Leave Act is a notable exception. Not only is coverage dependent on job tenure but the right conferred—reinstatement—is worthless if the firm no longer exists at the end of the leave period.

¹⁰ Although clearly useful, such models do not account for consequences of non-compliance outside the formal legal system—including public, consumer, and labor perceptions of the firm—and for other ways in which legal mandates may affect organizational behavior, including through workers' and employers' beliefs about legitimate or desirable conduct (Albiston 2007). Employers may shape what behavior workers and regulators perceive as compliant, arguably providing a third way to blunt enforcement, one that I do not address here but that is the subject of a burgeoning literature on organizational response to civil rights law (Edelman, Uggen, and Erlanger 1999; Marshall 2005).

¹¹ Employers may later claim that the worker was an independent contractor, making such cases a variant on misclassification.

¹² Mitigating this problem are provisions, common in employment statutes that permit private lawsuits, requiring employers to pay successful plaintiffs' attorneys' fees.

¹³ An important but narrow exception is the FLSA "hot goods" provisions, which essentially permits the USDOL to impound goods produced under substandard conditions. David Weil's research shows how aggressive use of this remedy can produce significantly higher compliance levels (2005).

¹⁴ Researchers typically take the number of reinstatements ordered by the NLRB as a reasonable proxy for the actual number of workers illegally terminated by an employer for union activity (Schmitt and Zipperer 2007). Worker organizations also play an important role in catalyzing enforcement of other employment rights (Sachs 2008).

¹⁵ Using "noncitizen" rather than "immigrant" conveys that those who migrate into the U.S. to work do not necessarily seek to remain permanently (Lopez 1981). "Unauthorized" rather than "undocumented" focuses attention on legal status; unauthorized workers often possess identity documents that do not establish work authorization. "Unauthorized" also avoids linking overly expansive connotations of "illegal" to individuals who, for instance, may legally work outside of an employment relationship.

¹⁶ In this regard, stripping meaningful employment rights from today's unauthorized noncitizen workers resembles the large-scale exclusion of African Americans from New Deal labor protections through statutory excision of agricultural and domestic workers from the category of "employee".

¹⁷ More generally, retaliation against workers for asserting employment rights is another important form of evasion. Employment laws almost always include separate protections against retaliation, but these too are only as effective as their enforcement.

¹⁸ These factors led to an employment classification in one influential case under the FLSA's broad definition of employment (*Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 [9th Cir. 1983]).

¹⁹ Organized labor's federal legislative priority, the Employee Free Choice Act, is a partial exception. One section of the bill would prioritize investigations into and enhance remedies for unfair labor practices during organizing drives and between union recognition and a first contract.

²⁰ A similar dynamic underlies "living wage" laws that selectively raise the wage floor for government contractors and some other recipients of public support (Sonn 2006). These laws are more politically successful than analogous increases in the broader "minimum wage" applicable to all employers. One reason seems to be that the government is acting principally as a consumer. It binds itself, but no one else, to do business only with firms that meet certain labor standards and to accept any increased costs, just like a shopper who only patronizes stores certified as employment-law compliant. Notably, living wage laws typically do not attempt to stop contractors from passing any increased costs back to the government customer.

²¹ Other protections that are more difficult to monetize—like job security—may be hard to deliver in this fashion (Lester 2005).

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