

## Misclassification: Workers in the Borderland

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*“Employers' treatment of workers as nonemployees to avoid compliance with mandatory labor standards has become a worldwide epidemic” (Goldstein, Linder, Norton and Ruckelshaus, 1999).*

*“There is little doubt that the use of non-standard forms of employment (casual, temporary, self-employment) and the recruitment of labor through intermediaries (agency-labour, labour-only subcontracting) have become common practice in many industrialized countries. Employment practices in many developed countries are now approaching those of the developing countries” (ILO 2007).*

The employment relationship in the United States has been severely undermined by the growth of contingent employment. The leading scholar of this phenomenon, Arne Kalleberg, characterizes this development as “the rise of polarized and precarious employment systems.” Kalleberg goes on to say that this polarization has led to

Pervasive job insecurity, the growth of dual-earner families, and 24/7 work schedules for many workers. More opportunities for entrepreneurship and good jobs have arisen for some, while others still only have access to low-wage and often dead-end jobs. These changes in work have, in turn, magnified social problems such as poverty, work-family conflicts, political polarization, and disparities by race, ethnicity, and gender (Kalleberg, 2011, 1).

At last count, in 2005, according to the U.S. General Accounting Office, almost one-third of the U.S. workforce, or 42.6 million workers, was contingent. This means, by the GAO definition, that they are in a work arrangement that is “not long-term, year-round, full-time employment with a single employer. “ Contingent workers, according to the GAO, can be “temporary workers, independent contractors or part-time workers” (GAO, 2006). Independent contractors make up the largest group of full-time contingent workers. (GAO 2006, 11).

Independent contractors are an understudied group of contingent workers, in part because the distinction between an employee and an independent contractor is unclear. The Fair Labor Standards Act of 1938 defined an employee, but did not define independent contractor status. According to Supreme Court Justice Wiley Blount Rutledge, writing in 1944, “few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing” (Quoted in Rubinstein 605). Prof. Mitchell Rubinstein adds, in a recent law journal article, that “the law is in a complete state of disarray with regard to the definition of employee. Therefore, it should come as no surprise that the definition of employer is also often unclear” (Rubinstein, 606).

Thirty states have laws defining independent contracting. In addition, the federal Internal Revenue Service defines the practice. Usually, these definitions contain three elements. First, does the company exercise “behavioral control” of the worker?

Does the business have the right to control aspects of the worker’s job. The more a business has the right to exercise control, the more likely it is that a worker is an employee” (Smith et al.)

The second criteria for independent contractor status, “financial control,”

looks at how much a business controls the economic aspects of a worker’s job. Facets of this examination include the degree of a workers’ financial investment in his or her work; the worker’s opportunity for profit and loss; how the worker is paid; whether the worker has unreimbursed expenses; and whether the worker provides services to multiple businesses. This aspect of the IRS test measures whether a worker has a “truly separate business. (Smith et al.)

The third dimension of independent contractor status is “type of relationship.” This dimension examines

how closely the worker is integrated into the business and the permanency of the relationship between the worker and the business. Facets of this examination include whether the performed work is central to the business operation; whether the worker has an ongoing or exclusive relationship with the business; the presence of a written contract and its relationship to how the parties work together; and whether the business provides benefits (Smith et al.).

While some independent contractors are truly independent, high-paid professionals, working in Silicon Valley, Hollywood, and the New York financial industry, and enjoying the flexibility of their various relationships with the companies that give them assignments, many are low-paid workers who are misclassified as independent contractors (Barley and Kunda). While no one knows the full extent of the problem, the U.S. Department of Labor is currently undertaking research to provide a clearer picture. The problem of misclassification is not small, however. A study of the New York state workforce in 2005 found that 10.6% of the private sector workforce was misclassified as independent contractors (Donahue et al.) A study done for the U.S. Department of Labor in 2000 reported that as many as thirty per cent of employers misclassified some of their employees as independent contractors (Lalith de Silva et al., cited in Ruchelshaus 2013).

Some of the employers who misclassify their employees do so in error, which is perhaps not surprising, given the vagueness of the statutes defining employment, and the complexity of the case law. However, in 2010, Deputy Secretary of Labor Seth Harris, testified to the U.S. Senate that according to the Department's experience, "much worker misclassification is intentional." (Harris). Employers do this, Harris reported, in order to reduce labor costs by 30%, in part by not making required contributions to unemployment insurance and worker compensation funds. He added

Misclassification as independent contractors also increases the opportunities for tax evasion, and some take advantage of those opportunities, with a resulting loss of Federal and state revenue. Too many workers are being deprived of overtime premiums and minimum wages forced to pay taxes their employers are legally obligated to pay and are left with no recourse if they are injured or discriminated against in the workplace. Misclassification is no mere technical violation. It is a serious threat to

workers and the fair application of the laws Congress has enacted to assure workers have good, safe jobs.

Harris also pointed out that misclassification harms honest employers as well, putting them at a competitive disadvantage (Harris).

### The Construction Industry

According to recent studies in Massachusetts and New York, misclassification is most common in the construction industry (Carre and Wilson, Donahue et al.). The New York study found that 14.8% of construction workers were misclassified as independent contractors in the years 2002-5 (Donahue et al.

5). According to Patricia Smith, then New York State's Commissioner of Labor,

One of the most common violations we see, particularly on upstate construction sweeps, are multi-layered "subcontracting" in trades such as drywalling, roofing, masonry and painting. The prime contractor on a project will subcontract work to a company that is registered for UI and Workers' Compensation. That company supervises and controls all of the work in a particular trade. However, the subcontractor will then hire crews of workers either on a permanent or a temporary basis and designate the foreman of the crew as a second-tier subcontractor. The subcontractors on these cases and the crews they hire are often from out-of-state which makes the process of recovering underpayments more difficult. The workers on these crews are rarely on the books for tax or benefit purposes. They are also subject to labor standards violations, such as unpaid wages, overtime violations, and deductions for items like food and hotel rooms. (Smith)

The Massachusetts study, released in 2004, had strikingly similar results as the New York investigation – both found about one in seven construction workers misclassified - but it added a historical dimension, namely that "(t)he prevalence of misclassification has increased over the years since 1995 and so has the severity of impact" (Carre and Wilson, 2). Going even further back, a Department of Labor Study conducted in 2000 found that from 1984-2000, the percentage of workers misclassified as independent contractors had increased from 15% to 30%. (Estafiou). According to Ross

Eisenbrey, vice president of the Economic Policy Institute, “(t)here’s just a general increase in lawlessness among employers” (Eisenbrey quoted in Estafious).

A recent article in Bloomberg News cited the case of George Perry, a 57 year-old construction worker in Dayton, Ohio, who accepted misclassification as an independent contractor on a project building a homeless shelter under a federal grant, because “I felt my back was up against the wall. I have a family. My fiance was in school. I’m the only bread winner” (Estafiou).

### Port Trucking

The port trucking industry is another business sector in which misclassification is rife. Ironically, the passage of the bill that opened the way for independent contracting in the trucking industry, the Federal Motor Carrier Act of 1980 was hailed by liberals and the business community alike as a triumph of policy reform. Senator Kennedy and Ralph Nader led the reformers who charged that trucking regulation meant high rates for consumers and monopoly profits for businesses. Large shippers lobbied Congress for an end to the rate setting and route planning which limited competition and drove up the cost of freight transport. Civil rights organizations argued that deregulation would lower the barriers that impeded African-Americans from gaining a just share of decent trucking jobs. Despite these high hopes, deregulation wrecked the drayage industry.

Before 1980, trucking companies had to get a license from the Interstate Commerce Commission to haul freight to and from the ports. The ICC limited the number of trucks to assure stability; the resulting rate structure was sufficient for companies to make stable profits while providing workers with decent incomes with benefits. The International Brotherhood of Teamsters organized and bargained for most of the port truckers, who received wage and benefit packages comparable to those of autoworkers, steelworkers, and over-the-road truckers.

All this changed with deregulation. New companies entered the industry, hiring their drivers non-union. Established companies faltered. Some went non-union, others went out of business. The firms that triumphed established a new business model. They sold all or most of their trucks to the drivers, then contracted with them on a per-load basis. The emerging independent contracting model meant trucking companies had few fixed costs, had no responsibility for workers' compensation or unemployment insurance fund contributions, paid no social security taxes, and were able to obtain drivers' services without paying for health care costs or pension plans (Bensman 2009).

Thirty-four years after deregulation, according to the National Employment Law Project's 2012 study, "The Big Rig," of which I am a co-author, ten surveys of drivers at seven ports reveal that 82% of workers in the industry which hauls containers from ports to warehouses are misclassified as independent contractors. According to the NELP report,

Industry analysts identify independent contracting as the industry's dominant business model which sets standards for all port drivers. Few other industries rely on anywhere near this proportion of independent contractors. Through independent contracting agreements, leases, and other employment arrangements, trucking companies make drivers responsible for all truck-related expenses including purchase, fuel, taxes, insurance, maintenance, and repair costs. Port truck drivers work long hours for poverty-level wages. Among surveyed drivers, the average work week was 59 hours. (Smith et al. 7)

Furthermore, a survey of port truckers at the ports of New York and New Jersey revealed that drivers were able to work for only one trucking company, and were prohibited from making deliveries for other companies. In many cases, the drivers were assisted in leasing their trucks by the trucking companies, which then kept the leases in their own possession. The trucking companies obtained insurance for the drivers and billed them for it on their weekly pay checks. In some cases, the companies did not actually enroll the drivers in an insurance program until after the port trucker got into an accident (Bensman and Bromberg).

In California, the courts have found five port trucking companies guilty of misclassification, in line with the NELP findings. In 2008, then Attorney General, now Governor, Jerry Brown filed a lawsuit against Pacifica Truck, a port trucking company at the ports of Los Angeles and Long Beach. The suit charged the company with “unlawfully classifying its workers as 'independent contractors,' circumventing state employment taxes and ignoring labor laws that guarantee workers’ compensation and disability benefits” (Office of the Attorney General 2010). In February 2010, then California Attorney General Jerry Brown, now Governor of California, announced at a news conference that

We’re sending a clear message that if you cheat your workers, we’re coming after you. Pacifica Trucks claimed that its workers were independent contractors in order to avoid paying the Social Security, Medicare and workers’ compensation benefits to which they are entitled under state law. This judgment validates our continuing effort to ensure that all employees are protected (Office of the Attorney General, 2010).

#### Package Delivery

Another industry where the misclassification of employees is a critical issue is the package delivery industry, in which United Parcel Service treats its workers as employees, while its competitor, FedEx Ground, treats its 27,000 delivery drivers as independent contractors. Numerous lawsuits in various jurisdictions have found Fed Ex guilty, while others have exonerated the company. One result of the ongoing litigation is that Fed Ex has changed its rules for deploying parcel delivery drivers to make them appear to conform to state employment regulations and laws (Bensman 2010) Despite these changes, the most recent court ruling in this series of cases, issued in Massachusetts July, 2013, known as Schwann, et al. v. FedEx Ground Package System Inc., upheld the suit’s contention that

“(n)otwithstanding their vital work and the fact that FedEx trained and supervised the deliverers and wrote the policies they had to follow, the company deemed them independent contractors and required them to purchase or lease their trucks as well as

buy their own gasoline and uniform.” The court issued a summary judgment that FedEx was guilty of misclassifying its delivery drivers as independent contractors (Prochillo).

### Misclassification in Other Employment Sectors

Misclassification of independent contractors occurs in many other employment sectors. Cathy Ruckelshaus, the leading American expert on misclassification, told a U.S. Senate Committee that misclassification occurs frequently in day labor, janitorial and building services, home health care, agriculture, poultry and meat processing, home-based work and the public sectors. (Ruckelshaus 2013). The list of industries is probably considerably longer. For example, when David Socolow, then New Jersey’s Commissioner of Labor and Workforce Development, testified to the U.S. House of Representatives in 2007, he reported that 38% of employers randomly selected in the state misclassified workers. These firms operated in a wide variety of industries, with a “significant pattern of violation in food processing plants, courier services, dental assistants, waitresses, nail salons, nurses, secretaries and landscaping” (Socolow).

### Impacts of Misclassification on Workers

To be a misclassified independent contractor is to live in precarity. Precarity, as defined by Kalleberg in his Presidential address to the American Sociological Association, means

uncertain, unpredictable, and risky from the point of view of the worker. Resulting distress, obvious in a variety of forms, reminds us daily of such precarity. The Bureau of Labor Statistics (BLS) estimates (and likely underestimates) that more than 30 million full-time workers lost their jobs involuntarily between the early 1980s and 2004 (Uchitelle 2006). Job loss often triggers many unpleasant events, such as loss of health insurance and enhanced debt. Mortgage foreclosure rates have increased fivefold since the early 1970s (Hacker 2006). U.S. personal bankruptcy filings are at record highs (Leicht and Fitzgerald 2007), and nearly two-thirds of bankruptcy filers reported a job problem (Kalleberg, 2008).

In line with Kalleberg’s definition of precarity, misclassified workers earn low incomes, and they experience economic insecurity. In addition, they are vulnerable to on-the-job injuries and

employment-related health impacts. The International Labour Organization characterizes them as part of a “growing number of workers whose employment relationship is unclear and who are consequently outside the scope of the protection normally associated with the employment relationship” (ILO 2005).

Take the case of port truckers. According to a survey I did with a colleague, Yael Bromberg, in 2008, the median wage of misclassified independent contractors at the ports of New York and New Jersey was \$28,000 per year, without health insurance or pension benefits. That amounts to a shade less than \$10 per hour. If the median independent contractors’ household of three people tried to live on the drivers’ income, the family would be living below what The Poverty Research Institute of Legal Services of New Jersey defines as the “true poverty threshold” for New Jersey, \$32,484. Nearly three-quarters of the independent contractors’ families were without health insurance. One quarter of their families received no medical care at all because they could not afford it (Bensman and Bromberg, 2008).

Many drivers (35%) reported that they had been forced to drive with unsafe chassis, exposing their trucks and themselves to on-road accidents. Injured drivers are not entitled to workers’ compensation benefits, because as independent contractors, not employees, they do not qualify. Moreover, drivers reported receiving no compensation from their companies when they were injured. Drivers reported that they suffered from high levels of stress, high blood pressure, and asthma, as well as work-related chronic health conditions and injuries. The economics of their relationship to trucking companies means that independent contractors drove old trucks that released high levels of pollutants into the truck cabs and the surrounding environment. The most dangerous element of diesel engine emissions is the particle of 2.5 microns or less in diameter. These fine particles are coated with over 40 dangerous substances, and when passed into the bloodstream through the lungs, cause asthma, lung cancer, and heart disease. Health studies indicate that the truckers’ heart and lung conditions, caused by exposure to vehicle exhaust, result in elevated mortality rates. (Bensman 2008).

Carre' and Wilson did not attempt to determine the income of misclassified construction workers, but they did find that workers suffered several dimensions of precarity.

These include the lack of access to unemployment insurance, and to appropriate levels of worker compensation insurance. They entail liability for the full Social Security tax (rather than half for employees). They also include the loss of access to health insurance, and other employer-based social protection benefits. If injury strikes, it can be catastrophic for the worker (Carre and Wilson, 2004).

The Fiscal Policy Institute's 2007 examination of the construction industry in New York City reveals a similar picture of precarity among misclassified workers. It found that

Workers ... are paid very low wages, are denied the protections of universal social insurance programs (workers' compensation, unemployment insurance, disability), do not have health coverage or retirement benefits, are not able to join a union, and rarely are they entitled to paid sick leave, holidays or vacations. Working in the underground construction economy is like working in the 19th century when it comes to labor rights, protections and employment standards (Fiscal Policy Institute, 2007).

Furthermore, this report suggested that misclassified independent contractors in construction suffered from very high rates of work-related fatalities. The fatalities were associated with companies that were small, non-union, and that provided little safety training. (Fiscal Policy Institute, 2007).

The findings on the hazardous nature of work in misclassified port trucking and construction labor are well summarized in the International Labor Organization's investigation of The Employment Relationship in 2005:

Another dimension of the lack of labour protection is the neglect of training, including training for work in environments where there are inherent risks. Enterprises can be reluctant to engage in training for workers who will probably not be with them for long. The user enterprise is unlikely to train the workers supplied by another firm, except for very specific purposes. Untrained workers are more vulnerable to accidents in the workplace and can hamper the competitiveness of the enterprise....The lack of labour protection can also impact on the health and safety of third parties and of society in general. Some accidents, such as those caused by heavy vehicles or major accidents in

industrial plants, have caused damage to the environment, as well as injuries and fatalities to third parties (ILO 2005).

### Impact of Misclassification on Government Revenues

In addition to harming millions of workers, misclassification also starves government treasuries of revenue in “unpaid and uncollectible income taxes, payroll taxes, and unemployment insurance and workers’ compensation premiums” (Ruckelshaus 2013). Catherine Ruckelshaus’ testimony to the U.S. Senate in November, 2013, contains a comprehensive enumeration of these losses. One study she cites, by the General Accounting Office, estimated that the Federal Treasury lost \$2.72 billion in 2006 alone (GAO, 2009). Studies on revenue loss by the states of Massachusetts, New York, and California revealed that each of these states suffered significant drains on their income tax receipts, and their unemployment insurance and workers’ compensation funds (Ruckelshaus 2013). For example, the New York State Joint Enforcement Task Force in 2012 “discovered over \$282.5 million in unreported wages; and assessed over \$9.7 million in unemployment insurance taxes” (Ruckelshaus 2013).

### Recent Governmental Actions to Curb Misclassification

Over the past fifteen years, state and federal government departments have begun efforts to improve enforcement of employment laws. To some extent, these efforts have been in response to pressure from labor unions which have mounted political and legal campaigns to enhance enforcement so as to raise work standards and enable misclassified independent contractors to join unions. In Massachusetts, Mark Erlich of United Brotherhood of Carpenters Local 40 played a key role in spurring legislative action. In California, it was the Teamsters Union, backed by Change to Win and a coalition of community, faith-based and environmental groups, that provoked

then-Attorney General Brown to initiate investigations into misclassification and legal proceedings against cheating employers.

Throughout most of the country, state enforcement efforts have been responses not to substandard work conditions but rather to government loss of revenue. The state reforms fall into three categories. First, there are laws that create the presumption that a worker is an employee rather than an independent contractor unless the employer can overcome that presumption by demonstrating that the worker is truly independent (Ruckelshaus, 2013). The latest, and most comprehensive of these efforts, was a New York state law on misclassification passed in early January, 2014. Second, there are laws confined to the construction industry that codify uniform standards for employment classification in all state legislation regulating the construction industry (Ruckelshaus 2013). Third, there are laws creating a state commission or task force to coordinate enforcement by several agencies. The New York Joint Task Force cited earlier in this paper is a prominent example of this type of reform effort. Its former chair, Patricia Smith, was later appointed by President Obama to head the federal Labor Department's Office of Solicitor of Labor.

In addition to these legislative efforts, the Office of the Attorney General in California has been prominent in bringing lawsuits against companies that misclassify their employees. Under Attorney General Jerry Brown, the Office won five cases against port trucking companies. After Brown was elected Governor, in 2010, the California legislature passed, in 2011, new legislation on worker misclassification, which was hailed at passage as the strictest and most comprehensive piece of legislation in the nation.

Passage of this legislation brought about a flurry of lawsuits claiming back wages and other remedies for misclassification.

#### Federal Reform of Misclassification Enforcement

Prior to 2009, the Federal Department of Labor did not target cases of misclassification per se. Instead, the Department, with limited resources, attempted to identify workers who were denied the wages due to them. Nowhere in the Department's records was the term "misclassification" used, and specific industries that misclassified employees as independent contractors were not categorized as such. At a Joint Hearing on The Misclassification of Workers as Independent Contractors, before two House of Representatives subcommittees, managers of the Department of Labor were grilled about the meager results of their enforcement efforts. Multiple Representatives suggested, during questioning, that the Department do more to focus its efforts on misclassification and to coordinate its enforcement activities with the Internal Revenue Service and other agencies (Subcommittee on Health, Employment, Labor and Pensions 2007).

In 2009, enforcement efforts became a priority of the Vice President Joe Biden's DOL Misclassification Initiative, a program of his Task Force on the Middle Class). Under the new Secretary of Labor, Hilda Solis, the DOL signed a Memorandum of Understanding with the Internal Revenue Service, according to which the agencies would "work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws." The next step was for the Department's agencies to sign Memoranda of

Understanding with state Commissioners of Labor. To date, 15 states have signed such agreements (U.S. Department of Labor Wage and Hour Division).

At first, enforcement actions by the DOL lagged, inhibited by lack of resources (Hananel). From 2011 to 2013, the Department of Labor's own account reported "the collection of 97% of back wages or over \$18 million for almost 20 thousand misclassified employees." (U.S. Department of Labor, cited in Givner and Kaye 2014). However, the long-delayed confirmation by the U.S. Senate of Thomas Perez to be Secretary of Labor in the summer of 2013 suggested to most observers that the Department's enforcement agenda would be beefed up. This belief was based on Perez' record as Maryland's Secretary of Labor, in which post he aggressively pursued employers who misclassified employees to avoid paying minimum wages and overtime.

The business community pushed hard against Perez, and its resistance caused Senate Republicans to hold up his confirmation for two years. After he was finally confirmed in July, 2013, Perez announced that misclassification constitutes workplace fraud, and he vowed to make combating the practice a priority of his Department. Similarly, when President Obama, on Sept. 15, 2013, nominated David Weil, a pioneer in strategic labor law enforcement, to be administrator of the Department of Labor's Wage and Hour Division, a post that had been vacant since Obama acceded to the Presidency, Republicans in the Senate once again mounted opposition. (Rocheleau). Leading business advocates claimed that Weil was biased against employers. A column in The Wall Street Journal characterized Weil as a "union lackey {who} dislikes certain industries, including retailers, homebuilders, janitorial services and fast-food outlets" (Kissel). Echoing these charges, Republican Senators blocked Weil's confirmation until

he was finally confirmed on a 51-42 vote on April 28. Weil, a Professor at Boston University and co-director of The Transparency Policy Project at Harvard University's John F. Kennedy School of Government, has advised the Wage and Labor Division for years, and was a prime mover of Massachusetts' campaign to enforce labor laws in the construction industry. He defended himself at his Senate confirmation hearings by asserting his commitment to creating a level playing field for honest employers (U.S. Senate, 2013).

In recent months, the campaign against misclassification has renamed its target "payroll fraud." Thus, when Sen. Robert Casey, Democrat from Pennsylvania, introduced a bill on misclassification on November 11, 2013, he named it "The Payroll Fraud Prevention Act." The Senate has not yet taken up the bill, and it is doubtful that this reframing of the issue will succeed in prompting Congressional action.

### Conclusion

Misclassifying employees as independent contractors is one method that employers use to disguise the existence of an employment relationship. According to the ILO,

A disguised employment relationship is one that is lent an appearance which is different from the underlying reality, with the intention of nullifying or attenuating the protection offered by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise, or by giving it another form. Disguised employment relationships may also involve masking the identity of the employer when the person designated as the employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship, and above all without any responsibility toward the workers (ILO 2005).

Misclassification occurs frequently both because the laws defining the employment relationship are opaque and because the motivation to misclassify is strong. Employment

legislation does not clearly define an employer or an employee. There are multiple jurisdictions that regulate employment relationships, and these jurisdictions use various and sometimes contradictory definitions. Case law is inconsistent.

While the opacity of the definition of independent contracting causes some employers to misclassify workers as independent contractors, much misclassification is intentional, because employers have much to gain by denying their responsibilities. It is generally estimated that companies reduce their wage costs by 30% by avoiding unemployment and worker compensation contributions, social security taxes and overtime payments. Furthermore, employers who misclassify are free to discriminate against workers without legal interference, and may find it easier to withhold wages.

The practice of disguising employment relationships has become very common in the United States. Studies have shown that as many as one-third of employers misclassify employees as independent contractors, and that many other employers use multiple levels of subcontracting to obscure their responsibility. While many independent contractors are high paid and truly independent, the large majority of independent contractors work in low-wage industries and suffer from precarity. They earn low wages without benefits. They are not protected by employment laws. They do not have pensions or health insurance. They are subject to unpredictable or frequent layoffs, and lack unemployment insurance coverage. They receive little or no training, so they have limited chances for advancement. They often work long hours without overtime pay. They are subject to wage theft.

As is true of many contingent workers, misclassified independent contractors often work in dangerous conditions, and are exposed to unhealthy substances. They suffer inordinate

numbers of accidents, and suffer from high levels of stress. Their health outcomes are generally poor.

The extent of misclassification is currently unknown because regulators have lacked the will and the resources to quantify the practice. State level studies have estimated that one-third of employers misclassify their employees and that ten percent of employees are misclassified. In some industries, such as construction, port trucking, and parcel delivery, the practice is much more frequent. Patterns of misclassification have been identified by state regulators in a wide variety of industries. The U.S. Department of Labor Wage and Hour Division is currently undertaking a comprehensive study in conjunction with several government agencies. This study may yield a more definitive count.

Misclassification not only adversely impacts workers, it also drains governments of revenue. State and federal treasuries lose income tax revenues. In addition, state unemployment insurance and workers' compensation funds are deprived of contributions. In total, the lost receipts total billions of dollars annually.

As state and local governments began to suffer from fiscal stringency at the end of the twentieth century, some turned to enforcing employment laws as a means of enhancing revenue. They passed legislation defining independent contracting and misclassification, and they began mounting enforcement efforts. In the wake of the new legislation, lawsuits against employers for wage theft became more frequent, with mixed outcomes. In the last five years, three states passed comprehensive legislation on independent contracting; the most recent law was passed by the New York state legislature in 2014.

After a Congressional oversight hearing in 2007 which exposed the passivity and underfunded nature of U.S. Department of Labor action, the federal government began stepping

up its regulation. President Obama's appointee as Secretary of Labor promised vigorous enforcement, and began negotiating partnerships with federal and state agencies to combat misclassification. Fifteen states have signed Memorandums of Understanding with the federal Labor Department. Vice President Biden launched a Misclassification Initiative which succeeded in increasing funding for the Wage and Hour Division of the Department of Labor. President Obama's second appointee to be Secretary of Labor was someone with a strong record enforcing regulations against wage theft and misclassification on the state level. At his confirmation hearings, he pledged to enhance enforcement of labor laws.

Business and Republican opposition to such regulation has mounted. Republican Senators delayed confirmation of Secretary Perez for months. Business advocates have vilified President Obama's nominee to administer the Wage and Hour Division, which has been without a leader for more than four years. Senate Republicans to date have refused to allow the nomination to come to a vote.

Misclassification of employees, and employer disguising of the employment relationship is a world-wide phenomenon. The International Labor Organization has taken up the issue and recommended new regulations and enforcement enforcements. So far, its efforts have been thwarted by business opposition. As a result, the standard employment relationship, as it emerged in Fordist economies in the twentieth centuries, is being undermined. The legislation passed throughout the world to regulate that relationship is becoming outdated and inadequate. Workers find themselves in an ill-defined borderland, a grey zone, where confusion reigns, standards are shifting, lowering, or disappearing, and abuse is rampant. While the flexibilization of work is creating new opportunities for innovation and entrepreneurship, for most workers, the result is a retreat to the conditions prevailing before

regulation began, a jungle of insecurity and exploitation. As Katherine Stone and Harry Arthurs demonstrate in their new edited volume, the effort to redefine the employment relationship, to prevent abuses new and old, and to encompass technological changes in the work environment, is in its infancy (Stone and Arthurs).

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