

# *Precarious Labor in Labor Law and Policy*

The Challenge of Precarious Labor Conference  
Washington, D.C.  
December 5, 2016

# Subcontracted Labor: The New “Sweating” System



# Examples of Subcontracted Work



# Worker protections policy options– Overview

- Cover the **worker**: as an “employee,” or simply cover regardless of label.
- Cover the **company**: as an “employer,” or simply cover as responsible entity.
- Cover the **job**: sector-specific inclusions or regulation.

# Policy option #1: Cover the Worker

- ✓ **Enforce and enact laws for covered “employees” under broad definitions in federal and state labor and employment laws.**
- USDOL A.I. on independent contractors highlights suffer or permit to work.  
[http://www.dol.gov/whd/workers/misclassification/ai-2015\\_1.htm](http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm). Concludes that most workers are employees under FLSA.
- NLRB’s independent contractor = ULP memo
- State “ABC” laws creating a presumption of ‘ee status.  
<http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf>

Examples of covered employees: Uber and Fedex drivers; construction drywallers, home care workers, port truckers



# Policy Option #1 (cont.): Independent contractor vs. Employee

## Am I my own boss?

Workers who run their own independent business.

Employers often impose and abuse the label, creating a 1099 model. Illusory flexibility.

- **NOT JUST A QUESTION OF WHETHER THE COMPANY HAS THE RIGHT TO CONTROL THE WORK.**
- Also look to whether the worker has an opportunity for profit or loss based on a capital investment in the business.
- Does the work require specialized skill and independent initiative?
- Is the work an integrated part of the business engaging the worker?

# Policy Option #1 (cont): Why Does Misclassification Matter?

Table 1. Worker Protection Laws	
Employee	Independent Contractor
Minimum wage and overtime	None
Workers' compensation	None, or worker pays
Unemployment insurance	None
Anti-harassment <sup>10</sup> and discrimination	None
Right to form a union and collectively bargain <sup>11</sup>	None
Employer-provided retirement benefits	None

# Policy Option #1 (cont.): What does misclassification cost?

**Table 2. Costs to Worker**

Employee	Independent Contractor
Employer and worker each pay 7.65% of payroll for FICA and FUTA. Employer generally makes payroll deductions. <sup>12</sup>	Worker pays entire 15.3% self-employment rate. <sup>13</sup> Worker also usually responsible for quarterly tax filings.
Employer pays workers' compensation taxes.	Worker responsible for insurance (or costs arising from workplace injuries).
Employer usually cannot deduct from pay any required work expenses such as uniforms, materials, etc.	Worker responsible for operating costs such as gas, tools, etc.



# Policy Option #2: Cover the company

- ✓ Enforce or enact broadly-defined labor and employment laws against “joint” employers.
- See: USDOL 2016 A.I. on joint employment:  
[https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.htm](https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm).
- See: NLRB decisions in *Browning Ferris*; *Miller & Anderson*, and *McDonald's*.
- See: OSHA emphasis on temp and staffing PLUS lead company accountability.
- See: **CA'S AB 1897: NO FINDING OF “EMPLOYER” STATUS REQUIRED.**

## Policy Option #2 (cont.): Who's the boss?

- Joint employment means one or more entities or individuals fit definition of “employer”.
- All labor and employment laws permit more than one responsible employer.
- Intended to ensure compliance.
- Different question than employee v. independent contractor.

# Policy Option #3: Cover the job

- ✓ **Enforce or enact laws that simply cover a job sector, regardless of the labels or contract terms.**
- **PA Construction Workplace Misclassification Act.** creates rebuttable presumption of employee status for workers in construction industry for UI and WC purposes.
- **Stop-Work Orders.** (CT, PA, DE ) Authority to stop ongoing work on construction projects when misclassification detected, including in contracted workplaces.
- Note industry-backed carve-outs that do the opposite: TNC laws in +12 states.

# Federal-State Initiatives

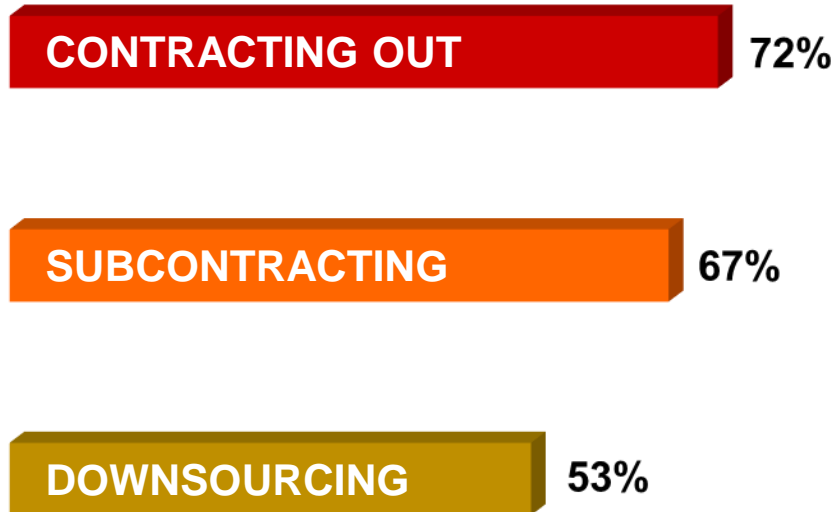
- **The USDOL Misclassification Initiative:** MOU between the DOL and the IRS providing for information-sharing to reduce misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.
  - Over half of the states have signed MOUs with the Wage and Hour Division.
- Almost half of the states have enacted laws to study the problem, and to find ways to improve law enforcement through inter-agency **task forces**, as well as increasing tax revenue collections.  
<http://www.nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf>.

# **COMMUNICATING WITH THE PUBLIC ON CONTRACTING OUT**

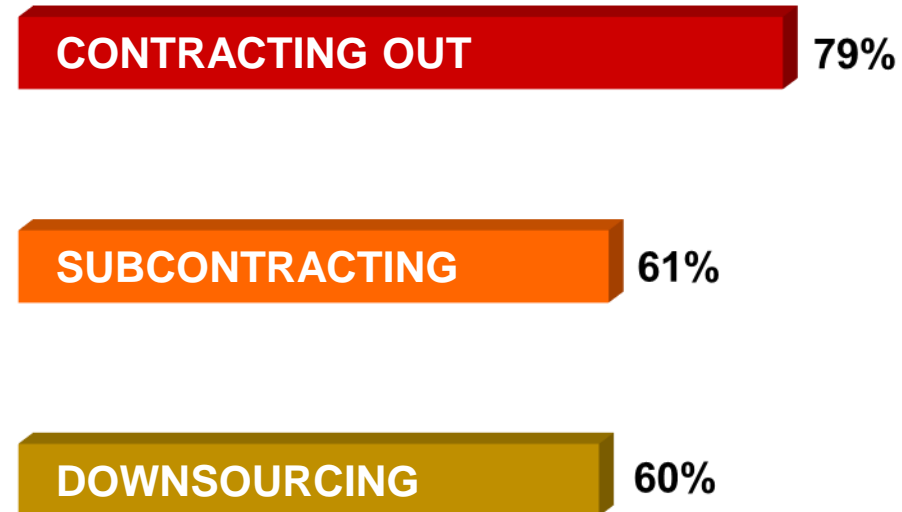


# Naming the Problem: “Contracting Out”

*This describes the shift away from direct permanent jobs very/fairly well:*

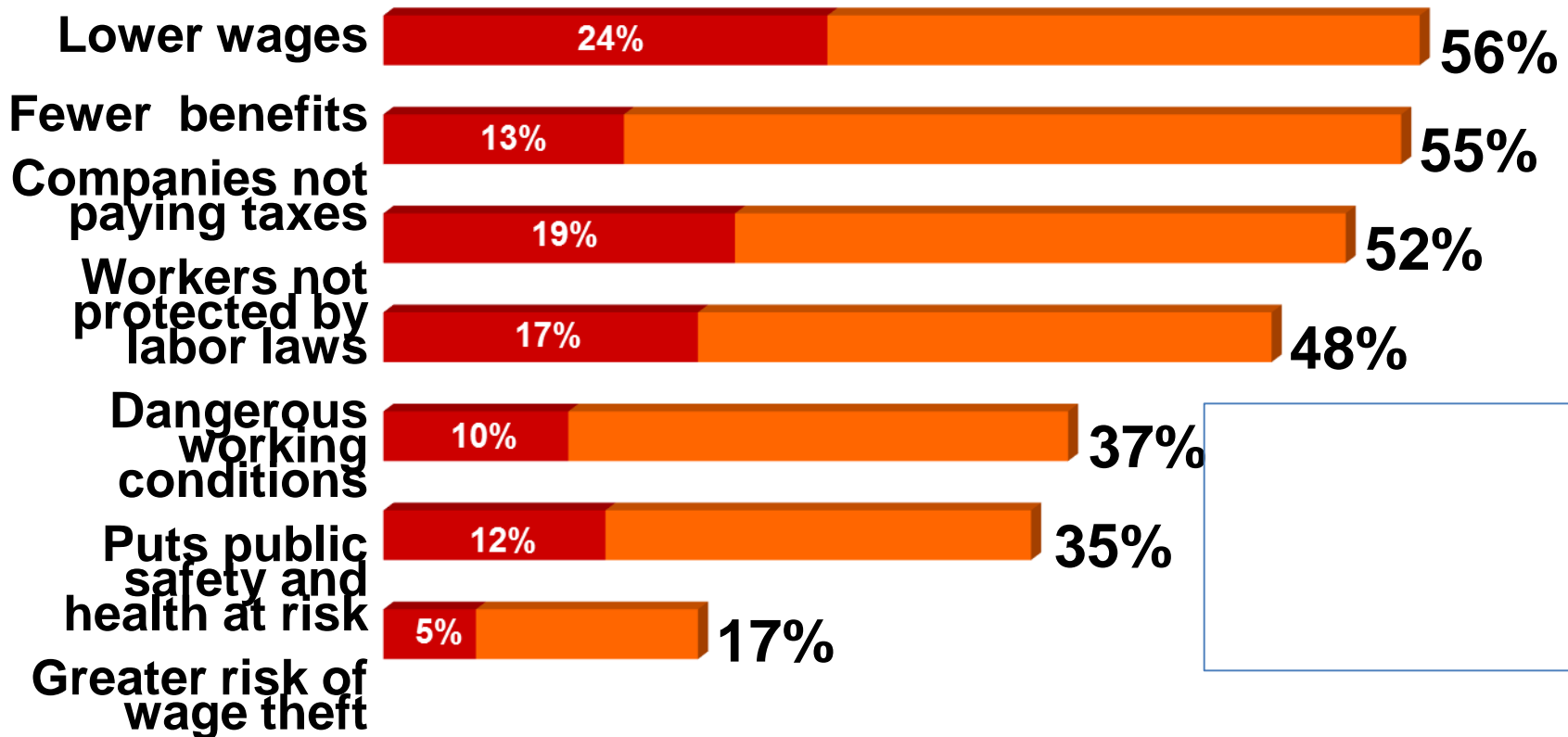


*This does the best/second-best job of raising concerns about the situation:*



# Ranking Concerns about Contracting Out

■ Biggest concern ■ Second-third biggest concern



## **KEY MESSAGE POINT:**

**Contracting out is about decisions made by corporations and CEOs, not choices made by workers.**

## **KEY MESSAGE POINT:**

**Some contracting out is valid. It is wrong when done to avoid legitimate responsibilities, or motivated by greed.**

# Concerns about Misclassification of Employees as Independent Contractors

- 53%** When workers are illegally misclassified as independent contractors, they are **not covered by minimum wage, overtime, health and safety, or workers' compensation** regulations, and are **not eligible for unemployment** insurance.
- 52%** By using workers misclassified as independent contractors, **companies shift risks and costs onto the worker**. Independent contractors receive **no workers' compensation or disability** benefits if they are injured on the job, have **no right to the minimum wage**, and **no unemployment benefits** if they are laid off.
- 50%** Companies misclassifying workers as “independent contractors” **reduce or eliminate workers' future Social Security** retirement benefits and often means they are **not covered by workers' compensation or unemployment insurance**.

\*9-10 ratings on a zero-to-ten scale, 10 = extremely serious concern



# Voters Worry About Rise in Temporary Employment, Especially “Perma-temp” Positions

■ Very bad change in workplace over past few years    ■ Mostly bad change

**Companies eliminating permanent jobs, using workers from temp or staffing agencies**



**Companies eliminating permanent jobs, using subcontractors**



**More people working as long-term temps rather than permanent employees**



**Companies contracting out work to other companies rather than hiring people directly**



**More people working through temp/staffing agencies rather than hired directly**



# Resources

“Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy,” (NELP, Sept. 2015),  
<http://www.nelp.org/publication/rights-on-demand/>.

“Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It” (NELP, May 2016)  
<http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.

“Who’s the Boss: Restoring Labor Standards Accountability in Outsourced Work,” (NELP 2014), <http://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/>.

NELP webpage on the on-demand economy:

<http://www.nelp.org/campaign/turning-gig-jobs-into-good-jobs/>

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