

# **GAMING THE SYSTEM —HOW EMPLOYERS SHORT-CHANGE WORKERS AND GET AWAY WITH IT**

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COMMUNITY LABOR UNITED



Yessenia Alfaro from the Chelsea Collaborative confronts Boston AMC Loews General Manager for owing workers who clean the theater over \$30,000 in wages.

## Good Jobs, Strong Communities

The Good Jobs, Strong Communities Campaign Committee includes:

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CHELSEA COLLABORATIVE  
CHINESE PROGRESSIVE ASSOCIATION  
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Community Labor United (CLU) is the convener of the Good Jobs, Strong Communities Campaign. CLU and its partners work to protect and promote the interests of working class families in Massachusetts. Through coalition building, research and policy development, public education and grassroots mobilization, CLU moves policies that promote quality jobs and sustainable neighborhoods. For more information, contact Executive Director Darlene Lombos: [darlene@massclu.org](mailto:darlene@massclu.org).

## Executive Summary

In Massachusetts and across the country, employers are subcontracting and outsourcing their work and distancing themselves from their responsibilities to their employees. Through practices such as multi-layered contracting, the use of staffing or temporary employment firms, franchising, misclassifying employees as independent contractors, and other means, employers are turning traditionally secure jobs into low-wage poverty jobs. While sometimes these practices reflect more efficient ways of producing goods and services, too often they are the result of explicit employer strategies to evade labor laws and erode worker protections.

## The Problem

The increasing use and misuse of subcontracting and outsourcing practices is a major contributor to the low wages and unsafe working conditions in our economy today. The race to the bottom in business standards and practices has serious repercussions, including:

- **Lower wages:** Subcontracted and outsourced workers are more likely to live in poverty than their directly and permanently employed counterparts.<sup>1 2 3</sup>
- **Vanishing benefits:** In 2014, 59% of Massachusetts employers that do not offer health insurance said the reason was that most of their employees were part-time, temporary, and/or contracted employees.<sup>4</sup>
- **Dangerous working conditions:** OSHA safety regulations do not cover self-employed workers. Employers can ignore safety conditions in the workplace (and avoid

contributing to workers' compensation insurance) by misclassifying their workers as independent contractors.

- **Vulnerable families:** Limited worker income and increased workplace danger coupled with decreased insurance protection leave families vulnerable to accidents, emergencies, and economic shocks.
- **Destabilized communities:** Low-income neighborhoods are filled with workers unable to afford homeownership or rapidly increasing rental prices. High rates of mobility weaken communities, while steady displacement threatens the diversity that defines the city.
- **Unfair business competition:** Responsible employers struggle to compete with companies using illegal business practices to reduce their labor costs.
- **Increased Misclassification or Payroll Fraud:** At least one in seven Massachusetts employers underreport workers or misclassify them as independent contractors.<sup>5</sup> Misclassification costs the state as much as \$259 million annually in payroll taxes and \$87 million annually in unemployment insurance taxes.<sup>6</sup>

Even when labor law violations are uncovered, laws and enforcement mechanisms designed for direct employer-employee relationships are difficult or impossible to apply to multi-layered employment relationships and violators can and do escape without penalty. Furthermore, recent widespread attention to the abuse of subcontracting and outsourcing practices has highlighted the limitations of our existing data collection techniques in providing a focused and comprehensive view of the problem.

## The Solution

Weakly regulated subcontracting and outsourcing models are increasingly being used to circumvent 80 years of labor protections designed for a direct employment relationship model between employer and employee. The Good Jobs, Strong Communities Campaign is working to ensure all businesses play by the rules in Massachusetts and recommends the following interrelated solutions:

- Pass H.1748 and S.966, An Act to Prevent Wage Theft and Promote Employer Accountability. The Act is intended to update our state's labor laws to reflect the reality of these new employment practices by clarifying who is ultimately responsible for upholding fair labor standards in any given workplace.
- Expand resources for the activities of the Council on the Underground Economy (formerly the Joint Task Force on the Underground Economy and Employee Misclassification) in auditing employers at the state level, and increase support for municipalities to replicate and enforce legislation like Boston's Living Wage Ordinance and Wage Theft Executive Order.
- Build new reporting, monitoring, and enforcement mechanisms into existing business licensing and permitting requirements to ensure employers understand and honor their obligations.

- Redesign existing data collection systems to comprehensively track and record subcontracting and outsourcing activity and identify any related illegal practices. The data is necessary not only to better understand the scope and nature of the problem, but also to ensure well-intentioned businesses can avoid contracting with those engaging in unethical or illegal practices, and instead partner with other responsible businesses.

The damage caused by these unethical and illegal employment practices is felt by workers, their families and communities; by responsible businesses; and by the state and its taxpayers. Meanwhile, the benefits, profits and competitive advantage accrue solely to the employers that are allowed to continue gaming the system. The well-being of our Commonwealth depends on our ability to hold those who employ workers and enjoy the fruits of their labor fully accountable for the pay, benefits, and working conditions they control.



A sea of workplace citations “issued” by worker centers and community leaders in March 2015.

## Introduction

In 2011, Host Hotels & Resorts, Inc. (a corporate partner of the Marriott hotel chain) hired a general contractor to renovate guest rooms at Boston's Copley Marriott. The general contractor subcontracted the work to several other companies, and some of that subcontracted work was then further subcontracted, resulting in a multitude of firms working on the project with varying relationships to and degrees of separation from the business entity that originally initiated the work, Host Hotels & Resorts, Inc.

That November, state officials began investigating the Marriott project after the Department of Industrial Accidents issued stop-work orders to several contractors whose workers' compensation insurance was found to be invalid. A state-led multi-agency investigation found that 15 contractors on the project committed a wide array of labor law violations. Companies failed to report over \$1 million in wages to the state and failed to maintain workers' compensation insurance. Workers were misclassified as independent contractors so contractors could avoid paying tens of thousands of dollars in unemployment taxes.

In one case it was found that workers from a church-sponsored rehabilitation program in Philadelphia were paid only four dollars per hour (half the state minimum wage at the time) and were not paid overtime despite being required to work over 60 hours per week. The subcontractor who had hired workers through the church program argued it was the church program's responsibility to guarantee compliance with state law, while the church program claimed it was only helping workers find employment opportunities. The general contractor (who hired the subcontractor)

denied any wrongdoing. And Host Hotels & Resorts, Inc., the business entity that originally initiated the work and ultimately profited from the sub-minimum wages and tax evasion, asserted it had no legal obligation to the workers and should not be held liable for any violations committed by subcontractors.<sup>7</sup>

Because so many layers of contractors were involved in the project, investigators could not determine which entity was responsible for the unpaid wages. At every possible level, all companies avoided accountability for the mistreatment of the workers and evasion of taxes. Despite having found that 15 companies had broken multiple laws, authorities issued penalties to only three subcontractors—stop work orders, the most severe punishment available to them. The investigation summary admitted that “the issue of which entity was legally the employer and responsible for the wages was never resolved.”<sup>8</sup>

This incident is not isolated. In 2014 alone, the state of Massachusetts recovered over \$15.7 million in unpaid unemployment contributions and levied \$1.1 million in fines for failure to carry workers' compensation insurance policies.<sup>11</sup> “Businesses operating outside of the legitimate economy are not paying their fair share, create unfunded liabilities, and have an unfair advantage over law-abiding businesses and their employees,” said Senator Dan Wolf, the Senate Chair on the Joint Committee on Labor and Workforce Development.<sup>10</sup>

Maura Healey, the Attorney General of Massachusetts, stated “the underground economy and employee misclassification undermine workers' rights and our state economy. Companies that misclassify or fail to pay their

employees in accordance with the law not only hurt working families but gain an unfair advantage over their competitors.”<sup>11</sup> Employer accountability in subcontracting and outsourcing relationships is necessary to protect workers and ensure the state and taxpayers are not subsidizing unscrupulous employers trying to game the system.

This report from the Good Jobs, Strong Communities campaign focuses on the growing crisis of wage theft, safety violations, tax evasions and other abuses of subcontracting and outsourcing in Massachusetts. Current state and local laws regulating subcontracting and outsourcing are insufficient. While important steps have been taken to promote employer accountability, there have been notable missed opportunities for progress. An Act to Prevent Wage Theft and Promote Employer Accountability is intended to update our state’s labor laws to reflect the reality of these new employment practices by clarifying who is ultimately responsible for upholding fair labor standards in any given workplace. The well-being of our Commonwealth as a whole depends on our ability to hold those who employ workers and enjoy the fruits of their labor fully accountable for the pay, benefits, and working conditions they control.

## Cheaters on the Rise: The Growth of Subcontracting & Outsourcing

The most common forms of subcontracting and outsourcing include:

1. Using employment services organizations like temporary and staffing agencies and employee leasing companies,

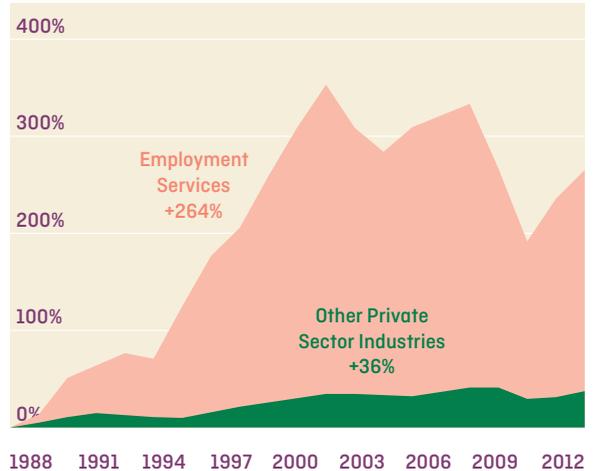


Figure 1: Employment Growth: Employment Agencies vs. All Other Private Industries, 1985–2012. *Source: U.S. Bureau of Labor Statistics, Current Employment Statistics.*

2. Classifying individual workers as independent contractors, and
3. Contracting out pieces of the company’s work to other businesses.

Companies may use these indirect labor relationships legitimately to increase the efficiency of their operations. A company may require specialized services on an infrequent or irregular basis, making it simpler to outsource those services than to hire direct employees, or it may need to replace an absent worker on short notice. However, unless governed by broad and robust protections, these relationships can be misused to abuse workers and cheat the state.

Measuring the growth of subcontracting and outsourcing is limited by several factors. The US Census does not directly count subcontracted

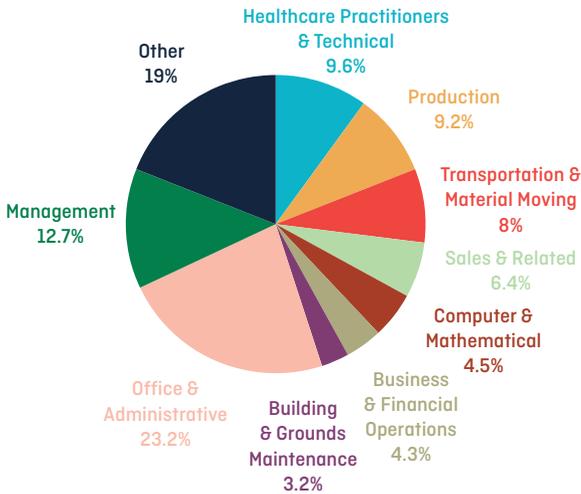


Figure 2: Employment Agency Workers by Occupational Category, Massachusetts. *Source: 2007–2011 ACS PUMS.*

workers, but uses the industry of employment services to count temporary and contingent workers as well as a small percentage of direct employees of employment service and temporary employment agencies. Additionally, workers often do not know what subcontracting company employs them. They may consider their place of work their direct employer and neglect to report themselves as contracted or subcontracted. Finally, one subtype of subcontracted workers, H-2B visa holders, are not counted in the United States census.

Despite these limitations, several research efforts over the past decade have documented a troubling rising trend nationwide in the incidence of wage theft (Kim Bobo's *Wage Theft in America*), employment and labor law violations (Bernhardt et al.'s *Broken Laws, Unprotected Workers*), and

other abuses of subcontracting and outsourcing relationships (Ruckelshaus et al.'s *Who's the Boss?*). Publicly available research documenting these problems in Massachusetts include an examination of wage theft in the residential construction industry (Juravich et al.'s *The Epidemic of Wage Theft in Residential Construction in Massachusetts*), the annual reports on the enforcement efforts undertaken by the state Council on the Underground Economy, and a report summarizing the findings and implications of an analysis of misclassification and unreported compensation in Massachusetts (Rebitzer and Weil's *Technical Advisory Board Report*).

## Increased Use of Employment Agency Workers

From 1985 to 2012, the number of employment agency workers in the United States (NAICS code 561310) increased by 264%. The nature of their work changed radically as well. Clerical work, which represented half of all employment agency positions in 1980, shrank to one-quarter by 2010, while transportation and material handling—largely manual work in packaging, shipping, and handling—rose from 7% to 20% of the workforce.<sup>12</sup>

Brick-and-mortar retailers have adopted lean-inventory practices in which stores only stock goods needed for immediate sale. Internet retailers such as Amazon have ushered in explosive growth in the online purchase and home delivery of goods once bought in stores. Both trends have led to a massive network of distribution centers, each employing hundreds and sometimes thousands of workers. For the 2013 holiday season, Amazon announced that it would hire 70,000 full-time seasonal

## Construction Industry

## Supply Chain: **Before**



In the old days, a **property owner or developer** would hire a single general contractor who had accountability for those who carried out the work. **Workers** were hired directly and protected by their contract with the union.

## Property Services Industry

## Supply Chain: **Before**



**Property services workers** include janitors, security officers, maintenance and custodial workers, stadium and arena workers, window cleaners, and others who provide essential services to buildings. Before the insulating labor structure of subcontracting, **property service workers** were contracted directly by **building owners** and therefore held negotiating power. They were often protected by contracts with a strong union.

*\* Real estate investment company*

Supply Chain: **Now**

Actual labor power is purchased by the jefe or labor broker system, and there are multiple layers of contractors and businesses in the supply chain before we reach the [workers](#). This of course insulates the upper levels of the supply chain from illegal business practices.

Supply Chain: **Now**

Many properties are owned by [real estate and financial investment firms](#), whose main purpose is to make money for their investors. The issues facing [property service workers](#) in individual buildings are no longer of concern to these firms. This new ownership structure and layers of subcontracting mean there is little protection from illegal and exploitative business practices.

workers—a temporary labor force exceeding the entire population of Framingham—to meet increased demand with only a fraction slated to become permanent workers.<sup>13</sup> Figure 2 shows the share of employment agency-based work in Massachusetts for several major occupational categories.

### Growth of Employee Misclassification

The limitations on data available to track the use of subcontracting impose even greater difficulty in tracking misclassified independent contractors. The most recent estimate for construction workers misclassified as independent contractors in Massachusetts was calculated by Carré and Wilson (2004) to be between 150,000 and 250,000 construction workers between 2001 and 2004.<sup>14</sup>

A study commissioned by the Council on the Underground Economy, described by Rebitzer and Weil (2014), noted that one potential indication of an increase in misclassification in Massachusetts is the increase in “the prevalence of contractors who work only for a single business in the course of a year.” In 2001 these single-employer contractors accounted for 66% of all contracted employees, and in 2010 they accounted for 82%. The Massachusetts Independent Contractor Law’s test, which establishes whether a worker is an employee or an independent contractor, recognizes that a true independent contractor would likely have multiple clients. This number, therefore is suggestive of an increase in employees misclassified as independent contractors.<sup>15</sup>



Figure 3: Council on the Underground Economy: Recovered Funds in First 6 Years of Activity. *Source: Council on the Underground Economy, 2014 Annual Report.*

Rebitzer and Weil (2014) also observed that while 15% of employers in the study either misclassified or underreported workers, only 4% of employees in the study were misclassified or underreported, suggesting that those employers that do engage in these violations may be doing so for a substantial portion of their workforce.<sup>16</sup>

### Increased Use of H-2B Workers

Massachusetts now ranks ninth in the nation in the number of H-2B workers it hosts. The H-2B visa program allows U.S. employers to hire temporary foreign workers to meet seasonal demands in non-agricultural jobs. H-2B workers are bound to the company that files the visa petition, a vulnerability that unscrupulous employers, including staffing agencies, can easily exploit. The top ten occupations requested for H-2B workers overwhelmingly overlap with the industries with the highest rates of employment agency jobs. Common H-2B occupations include landscapers, laborers, cooks, waiters/waitresses, cleaners or housekeepers, and construction workers.<sup>17</sup>

## Who Pays the Price When Employers Game the System

While there may be legitimate business reasons for subcontracting and outsourcing work, too many employers do this as a way to reduce or avoid labor costs, to evade payroll taxes, workers' compensation and unemployment insurance premiums, and to dodge their responsibility to maintain a work environment that is healthy and safe for workers. Unfortunately, as greater numbers of employers engage in these practices, everyone else pays for it.<sup>18</sup>

### Cost to the State

Since 2009, the Massachusetts Council on the Underground Economy has brought together enforcement, licensing, and regulatory agencies to coordinate, cooperate, and collaborate to address employee misclassification and its repercussions.<sup>19</sup> Although the Council recovered \$16.5 million in payroll taxes and unemployment insurance in 2014, this is only a tiny fraction of the revenue lost, estimated to be \$346 million in payroll taxes and unemployment insurance annually.<sup>20</sup>

### Cost to the Worker

The most common costs that subcontracted or outsourced employees suffer are lower wages, outright wage theft, lost benefits, and serious injuries from unsafe working conditions.<sup>21</sup> This abuse of employees can lower standards industry-wide as even more conscientious employers are pressured to compete with employers using unethical or illegal employment practices.

Nationwide, temporary workers typically earn less than \$25,000 a year.<sup>22</sup> Employers often charge temporary workers for necessary equipment

## Worker Story

Benilton de Pina Correia:

“ Six months after starting work as a janitor cleaning Boston city-owned buildings for M&M Contract Cleaning, I learned I was not being paid the prevailing wage as required by my employer’s contract with the city. Instead of making \$16.75 per hour I was only making \$10.00 per hour—and I noticed that taxes were never taken out of my checks. My employer had misclassified me as an independent contractor in order to pay a lower wage and avoid paying unemployment insurance and workers compensation.

Sometimes I had to travel all the way to Brockton to pick up my paychecks, and on two separate occasions when I tried to deposit my paycheck it bounced and I was charged fines.

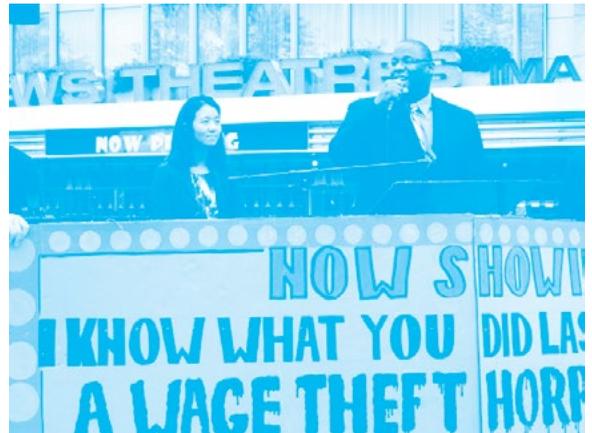
*I still have not been paid back the \$5,462.52 that I am owed.”*

such as safety gear or uniforms, deducting from this number substantially. Studies conducted nationwide and in other states found temporary workers are more likely to live in poverty than their permanently employed counterparts.<sup>23 24 25</sup> Full-time and directly employed workers in service sector industries with high rates of subcontracting or outsourcing (including maids and housekeepers, refuse and recycling workers, healthcare support workers, meat processing workers, and construction laborers) earn more than their temporary worker counterparts.<sup>26</sup> In Massachusetts 41% of employment agency workers are in low-wage occupations. Statewide, relative to workers in other industries, employment agency workers are more likely to be female, non-white, and single female head of household.<sup>27</sup>

Wage theft most often involves employers paying less than the minimum, contracted, or prevailing wage, not paying for all hours worked, and not paying overtime for hours exceeding 40 per week, but wage theft can take many forms—employers may never send the final paycheck, or coerce employees into returning all or part of their paychecks. Wage theft is more prevalent in low-wage work, and contracted or subcontracted workers are particularly vulnerable because of the reduced employer accountability. It is difficult to estimate the full extent of the problem in Massachusetts. The Council on the Underground Economy has uncovered multiple instances of wage theft every year since it began its joint enforcement efforts in 2009.

Nationwide in 2005, only 18% of temporary workers received health insurance from their employers, compared to 52% of permanent workers.<sup>28</sup> In 2014, 59% of Massachusetts employers that do not offer health insurance

said their reason was that most of their employees were part-time, temporary, and/or contracted employees.<sup>29</sup> The scarcity of health insurance coverage among temporary workers is especially troubling because of the dangerous conditions these workers are subjected to on the job. Temporary employment agencies often send workers into dangerous jobs without proper training, equipment, or knowledge about the work or the employers, leaving workers vulnerable to unsafe working conditions.<sup>30</sup> Nationwide, workers who handle refuse and recyclable material have among the highest rates of work-related injury of all occupations, and workers in the construction, fishing and health services industries have among the highest rates of fatal occupational injuries.<sup>31</sup> All of these industries rely on temporary workers and a subcontracted workforce.<sup>32 33</sup>



City Councilors Tito Jackson and Michelle Wu address protesters outside AMC Loews Theater on Boston Common.

Employers misclassifying their workers as independent contractors are not required to offer health insurance, contribute to workers' compensation insurance, or comply with OSHA safety regulations. Workers misclassified as independent contractors can thus easily find themselves unprotected both physically and financially, not only at greater risk for workplace injury but also less likely to be covered by insurance if and when a workplace accident occurs. Even with access to workers' compensation benefits an injured worker still pays nearly 63% of the costs of lost wages and medical expenses out of pocket or with private insurance,<sup>34</sup> losing an average of almost \$31,000 of income over ten years—and misclassified workers without such access can stand to lose more.<sup>35</sup>

#### **Cost to Working Class Neighborhoods**

Residential segregation by income and the use of personal networks to secure work opportunities means workers in the underground economy are likely to be concentrated in low-income neighborhoods and areas. The costs of subcontracting and outsourcing can reverberate strongly throughout these geographic and social communities. Less worker spending due to decreased wages and benefits means less revenue for local businesses, lower rates of homeownership, and depressed local property taxes. This results in decreased public funds available for schools, roads, transit, and other services.<sup>36</sup>

Communities are additionally weakened by increased rates of residential mobility, and by decreased levels of civic engagement from struggling workers and their families. Low-income workers are typically unable to afford homeownership, and rental costs in Boston

have risen steadily for more than a decade. A family must now earn almost \$58,000 a year in order to afford fair market rent for a two-bedroom apartment in Boston.<sup>37</sup> Frequent resettlement disrupts community development. As workers are priced out of their own neighborhoods, the city becomes less diverse by class and race. The ongoing income instability and displacement threaten the diversity that defines the city of Boston.

#### **Cost to Responsible Businesses**

Refusing to provide benefits, evading state taxes, and underpaying workers gives bottom-feeding companies a major competitive advantage when they are bidding against responsible contractors. This is especially true in labor-intensive industries like construction, landscaping, building maintenance, packaging and shipping in which the use of subcontracting and outsourcing is growing fastest. Irresponsible use of these practices knocks the floor out of the labor market and starts a race to the bottom where workers and communities lose.

In Massachusetts, workers formally found to be misclassified by the Attorney General may still collect unemployment and workers' compensation benefits even if the employer did not contribute to those funds. It's important that workers are still able to access this resource, but this system unfortunately creates a "de facto transfer from employers who follow the law to businesses that do not."<sup>38</sup>

## Fair Game: Making All Businesses Play by the Rules

Weakly regulated subcontracting and outsourcing models are increasingly being used to circumvent 80 years of labor protections designed for a direct employment relationship model between employer and employee. Dishonest companies seeking to skirt government regulations to increase their profit margins will find an easy strategy in hiring through intermediaries or misclassifying workers.

Employer accountability can be restored through legislation that holds all entities along the chain of contractors and subcontractors responsible for their workers. The Good Jobs, Strong Communities campaign is working to ensure all businesses play by the rules in Massachusetts by holding all entities in the labor supply chain responsible—from the companies that initiate the demand for the work, to the contractors coordinating the project and the subcontractors who directly hire and supervise workers. An Act to Prevent Wage Theft and Promote Employer Accountability is intended to update our state's labor laws to clarify who is ultimately responsible for upholding fair labor standards in any given workplace.

If the Act to Prevent Wage Theft and Promote Employer Accountability had been active during the investigation of the Copley Marriott case, it would have allowed multiple parties to be responsible for the labor violations perpetrated. The church-sponsored rehabilitation program that supplied \$4-an-hour workers would be accountable for creating and ending the employment relationship; the general contractor and its subcontractor would be accountable for managing the enterprise

internally and externally; and Host Hotels & Resorts, Inc. would be accountable because it directly benefitted from the workers' labor.

## Major Players in the Shell Game of Contingent Employment

Subcontracting and outsourcing, especially when coupled with illegal practices, drives down standards for all workers whether they are outsourced or permanent employees. This happens in practically every industry. The following companies have been highlighted as some of the worst offenders doing business in our state.

### **AvalonBay Communities**

AvalonBay develops, owns, and operates multifamily complexes located across the country. OSHA found 246 safety violations at AvalonBay project sites in the ten years between 2002 and 2012, 185 of which were classified as "serious." In several cases safety violations were found in connection with serious injury and death. 109 of the 246 safety violations found were related to fall protection. In 2007 a worker lost his life in a fall at an AvalonBay project site in Waltham, Massachusetts. In February 2012 a worker at an AvalonBay project site fell twelve feet due to a defectively constructed guardrail even though OSHA had issued a warning just one month previously about dangerous conditions relating to fall protection. AvalonBay's Senior Vice President for Construction has said that while they terminate subcontractors found to be engaging in illegal practices, it is not their policy to terminate subcontractors found to be in violation of OSHA safety regulations.<sup>39</sup>

**Callahan Inc.**

A general contractor based in Massachusetts, Callahan Inc., makes regular use of subcontractors who have been found to engage in illegal and dangerous activities. One regular subcontractor, Universal Drywall, was forced to pay over \$327,000 dollars in 2011 for misclassifying workers as independent contractors in order to evade workers' compensation insurance premiums.<sup>40</sup> They are now being sued a second time for the same offense.<sup>41</sup> Diaz Construction, another regular subcontractor, has accumulated more than \$250,000 in fines for violating OSHA safety regulations and overtime laws. In one case a 26-year-old worker fell to his death while working for Diaz Construction.<sup>42</sup> Metro Walls regularly employs undocumented workers and misclassifies them as independent contractors. Metro Walls company owner Mike Dion has stated publicly that paying fines for violations is more profitable than following the law.<sup>43</sup> Callahan Inc. relies on these subcontracted relationships to increase profits while avoiding being held accountable for these illegal practices.

**Casella Waste Systems**

One of the largest waste collection and disposal companies in the Northeast has a history of failing to provide workers with the health and safety resources critical to the dangerous workplace conditions they face. OSHA has cited Casella for four safety violations over the past year. Although workers can experience cuts and scratches to their eyes and extremities from metal and glass, and they can be exposed to toxic chemicals and bio-hazardous waste, Casella facilities have been found to lack basic first aid stations.<sup>44</sup> <sup>45</sup> Furthermore, by subcontracting its workers Casella can avoid

**Worker Story**

Mario Alvarado:

“ As a janitor for US Kleanway cleaning theaters, the workload was so heavy I often had to ask my wife to help me finish. My wife was never paid for her time, and I was underpaid, receiving only \$100 a day. I didn't get overtime, I didn't get meal breaks, and I wasn't given any health or safety equipment.

When I got together with a group of five other coworkers to demand fair pay and fair treatment, US Kleanways fired all of us on the spot.

*It took a year with the help of Chelsea Collaborative and a coalition of community and labor organizations protesting at AMC Loews Theater to pressure US Kleanways into paying tens of thousands of dollars in the wages and overtime owed to my coworkers and me.”*

paying the workers compensation critical to workers injured on the job. The subcontracted workers also report being required to perform specialized work without receiving the necessary training, including the use of heavy machinery such as forklifts and compressors. In 2005 an employee was killed at a Casella plant after being caught in a conveyer belt.<sup>46</sup>

### Flight Services and Systems

A Cleveland based aviation service provider employing security personnel, skycaps, wheelchair agents, and ground support staff in airports across the country has been involved in a number of labor disputes nationwide. In 2012 FSS was ordered to pay nearly \$53,000 in back wages and penalties after a U.S. Department of Labor investigation found wage and hour violations for 183 airport employees.<sup>47</sup> In January 2013, FSS was cited by the Massachusetts Attorney General's office for failing to provide workers with adequate wages at Boston's Logan International airport. The company was ordered to pay a \$1,250 civil penalty and required to provide thousands of dollars to passenger service assistants.<sup>48</sup>

### Northern Pelagic Group

"Norpel," a seafood processing company in New Bedford, Massachusetts, relies on temporary employment agencies to cut costs and avoid liabilities. Norpel workers who are filtered through agencies like Employment on Demand are treated as temporary workers even though they have regularly worked for Norpel for years, in some cases as many as five years. By using Employment on Demand instead of hiring its workers directly, Norpel saves money by keeping wages low, not offering raises or providing benefits, and avoiding paying unemployment

insurance and workers compensation. Norpel can additionally save costs by keeping workers hired through Employment on Demand "on call" to be paid only if there is work for them. Often workers are summoned into work with less than an hour's notice and are expected to work 12 to 18 hour shifts. Workers who protested wages and working conditions in December 2014 were fired.<sup>49 50 51</sup>

## Starting with the Basic Rules: Existing Massachusetts Laws & Enforcement Tools

The importance of worker protection to Massachusetts citizens and policymakers is evident in the solid array of existing state laws and enforcement mechanisms designed to promote employer accountability in the use



City Councilor Denise Simmons delivers a fiery speech against employers who are gaming the system and cheating workers in Cambridge, MA.



Through the blistering wind and cold, union and community leaders march shoulder to shoulder in support of workers being cheated out of wages by Callahan, Inc.

of subcontracting and outsourcing practices. Unfortunately these laws and enforcement mechanisms are no longer able to address the full scope of negative impacts resulting from the expanded use and misuse of these employment practices. However, they can provide an important foundation for improving and expanding policy.

### **Wage & Hour Laws**

The Massachusetts Minimum Wage and Overtime Laws obligate most employers to pay workers a minimum of \$9.00 per hour, as well as “time-and-a-half” (1½ times their regular hourly rate) for the hours they work that exceed 40 hours per week.<sup>52</sup> The Massachusetts Wage Act provides a basis for workers to recover wages that were promised but unpaid.<sup>53</sup> The wage and hour laws may create a liability not only for the business in violation but also in many circumstances for the individual who operates

the business or personally acts as the employer. Under some circumstances, multiples business entities can be held liable as joint employers.

### **Independent Contractor Law**

The Massachusetts Independent Contractor Law (MICL) is intended to prevent employers from misclassifying workers.<sup>54</sup> Originally passed in 1990, and amended in 2004 in response to the increased use of subcontracting, the MICL consists of three tests (sometimes called the “ABC test”), when determining whether a worker can be legally classified as an independent contractor: “First, that the individual engaged in the activity was free from control and direction in the performance of that activity both in word (contract) and deed (how they actually undertake their work). Second, that the activity provided by the independent contractor represents work outside the usual course of business of the contracting business (i.e. that it is a specialized function not ordinarily undertaken by the business). Third, that the individual engage in the activity is part of a trade, occupation, profession, or business that typically provides such services as independent contracts.”<sup>55</sup>

Although the MICL is one of the strongest in the nation, it is unable to address the problem of subcontracting or outsourcing work to financially insolvent or fly-by-night businesses that hire other workers to perform the work. These businesses often cannot be held accountable for wage theft and other workplace violations even if they may hold sole legal liability.

### **Temporary Workers’ Right to Know Law**

The 2012 Temporary Workers’ Right to Know Law requires temp agencies to provide workers (except those in professional and secretarial

positions) with a written job order, including important specific information about the job to protect workers from being sent into dangerous situations without the proper training or equipment. The law also forbids agencies and worksite employers from charging fees for registration, criminal background checks, and other costs. Additionally, if a worker arrives at a worksite to find there is no work, the agency must refund transportation costs.<sup>56</sup>

### **Joint Enforcement by the Council on the Underground Economy**

The Council on the Underground Economy was created in 2008 “in order to coordinate the Commonwealth’s efforts to eliminate employer fraud and employee misclassification.”<sup>57</sup> Many state agencies have an enforcement interest in the issue of misclassification, which creates unfair business competition for law-abiding employers, results in substantially decreased tax revenues for the state, and exposes consumers to danger through interactions with unlicensed and unregulated businesses. Despite insufficient staffing and funding, the Council on the Underground Economy has made progress. For example, in the first six years of the Task Force, the Department of Industrial Accidents ensured that workers’ compensation insurance premiums were paid for over 40,000 workers.<sup>58</sup>

## Recommendations

To level the playing field for responsible businesses and employers, and to protect public revenues, the Good Jobs, Strong Communities campaign proposes the following additional recommendations. Some measures seek to build on prior successes and ongoing efforts, while others are completely new. With new leadership in the City of Boston and a new Massachusetts legislative session since January 2015, this is the right time to move forward on both municipal and statewide levels to implement the following recommendations:

### **Strengthen Boston’s Living Wage Ordinance**

The Boston Living Wage Ordinance covers any contractor or subcontractor awarded a service contract of at least \$25,000 from the City of Boston and employing over 25 workers. It requires that their full-time workers be paid at least \$13.89 per hour (as of May 2015, adjusted yearly to match cost-of-living increases).<sup>59</sup> The Ordinance was recently updated to designate seats on the Living Wage Advisory Council for workers centers, labor unions, small businesses and other important stakeholders. Mayor Walsh and his administration should work with this Advisory Council to strengthen the Ordinance’s enforcement mechanisms and to ensure it is being implemented to its fullest capacity for the benefit of all workers, residents, and businesses in Boston.

### **Enforce and Replicate the Boston Wage Theft Executive Order**

The Boston Wage Theft Executive Order requires vendors to certify compliance with federal and state wage laws and to disclose past violations

in their application for a city contract, and additionally requires a wage bond, or proof that the contractor has a year's worth of salaries for all their employees. The wage bond requirement makes Boston's Wage Theft Executive Order unique and one of the strongest in the country. Most existing wage and wage-related laws operate on the state level but cities are also well positioned to call attention to the problem of wage theft, to raise employers' awareness of the consequences, and to deter future wage violations by passing municipal wage theft prevention ordinances. Though the executive order is a victory for all of Boston's workers and residents, it should be actively enforced and replicated across the state.

#### **Expand Resources for the Enforcement of Employment and Labor Laws**

The Council on the Underground Economy provides an invaluable service to workers, honest businesses, and taxpayers by coordinating and prioritizing agency efforts to enforce employment and labor law, as well as to expose and dismantle the underground economy. However, the Council remains underutilized and underfunded even as the abusive subcontracting and outsourcing practices it targets continue to spread. The Office of the Attorney General's Fair Labor Division received over 4,100 filed complaints of wage and hour violations in 2014<sup>90</sup> but has been subjected to budget cuts in recent years. Massachusetts must prioritize utilizing and funding the Council on the Underground Economy, the Attorney General's Fair Labor Division and other agencies that combat wage theft, payroll fraud and related labor violations effectively.

## **Worker Story**

Ms. Coronado:

*“ When I went to the McDonalds where I worked to pick up my two paychecks they were not there. I was told they were stolen, and later the owner accused me of cashing the checks and then lying about it.*

Of course, that was impossible—at the time the paychecks were stolen, I was in the hospital after giving birth to my child.

*Not only did the owner deny responsibility for the disappearance of the paychecks, he refused to pay me and actually fired me for trying to claim my own wages. It took two years, with the help of the Worker Center for Economic Justice in filing a claim with the Office of the Attorney General, for me to receive the pay I earned.”*

**Collect and Publicize Information about Businesses that Engage in Workplace Abuse**

Well-intentioned private businesses and public entities have few resources to ensure that they are contracting with reputable, responsible individuals and businesses. Information about bad actors is a matter of public record, but data is scattered among different government agencies, making access to this information complicated and fraught with delays. Individual government agencies need to create user-friendly and readily accessible lists of their enforcement data. This information needs to be consolidated to allow private businesses and public entities to easily check a potential business partner’s workplace compliance history.

**Use Existing Business Registration Requirements to Help Enforce Workplace Protections**

Under state law, all businesses organized as corporations or partnerships are required to register with the Secretary of the Commonwealth. Like municipal licensing and permitting requirements, these existing business registration requirements create opportunities for increasing employer awareness of their obligations, gathering information on employers’ previous workplace violations, and imposing consequences for employers that have violated workplace laws. The Secretary of the Commonwealth should use his administrative authority to use these structures and procedures to help expose the workplace abuses prevalent in contracting and subcontracting, to enhance government and private enforcement of the workplace laws, and to create new sources of information about businesses’ contracting and subcontracting relationships and workplace practices.

**Raise Accountability to the Top**

The most prevalent concern in contracting and subcontracting abuses is the absolved responsibility by the party that ultimately benefits from the labor provided. The Massachusetts Independent Contractor Law (MICL) or a “joint employer” legal theory can be used to hold the ultimate beneficiary responsible for its role in exposing workers to unacceptable abuses in some circumstances, but more often it does not.

Workplace protection laws thus need to be broadened to reflect the new economic reality of a small number of entities higher on the contracting chain that clearly meet criteria for employer responsibility. An Act to Prevent Wage Theft and Promote Employer Accountability is intended to update our state’s labor laws to reflect the reality of these new employment practices by clarifying who is ultimately responsible for



Workers gather in front of construction site to protest payroll fraud and safety violations of General Contractor Callahan, Inc.

upholding fair labor standards in any given workplace. This new statewide legislation, combined with clarification of the definitions of “employer” and the circumstances that create joint employer liability, would ensure that multi-tiered contracting schemes are not used at the expense of low-wage and vulnerable workers, and that all the appropriate business entities that benefit and profit from the work also share responsibility when workplace violations occur.<sup>61</sup>

### **Collect Information on Contracted and Subcontracted Work**

A 2014 study commissioned by the Council on the Underground Economy analyzing the scope and consequences of employee misclassification offered preliminary estimates of the extent of contracting and misclassification and of the impacts on state revenues, legitimate businesses, individual workers, and industries. However, the authors observed that current data collection is insufficient to the task of properly tracking and understanding misclassification.<sup>62</sup> Recording and tracking subcontracting agencies and data on low-wage subcontracted workers is vital. The lack of aggregate information on workers employed by contractors and subcontractors makes it difficult to create a comprehensive overview of contracted and subcontracted worker demographics, leaving subcontracted workers at risk and allowing unscrupulous employers to remain unaccountable. The 2014 study involved the unprecedented creation of a “data warehouse” of eleven years of data on contracting by sector in Massachusetts that could be used as a foundation for continued and expanded tracking of contracting and subcontracting. Such data would need to be

protected for confidentiality reasons, but there are existing methods by which non-government investigators can be permitted access to sensitive information that could be adopted in order to access to this data warehouse.<sup>63</sup>

## Conclusion

With the expanding use of subcontracting and outsourcing, the straightforward employer-employee relationship disappears and an underground economy emerges where workers are exploited daily and employers and contractors can simply pass the blame. Existing laws and enforcement mechanisms are difficult or impossible to apply to multi-layered employment relationships and violators can and do escape without penalty.

Weakly regulated subcontracting and outsourcing models are increasingly being used to circumvent 80 years of labor protections designed for a direct employment relationship model between employer and employee. Dishonest companies seeking to skirt government regulations to increase their profit margins will find an easy strategy in hiring through intermediaries or misclassifying workers.

The increasing use and misuse of subcontracting and outsourcing practices is a major contributor to the low wages and unsafe working conditions in our economy today. The race to the bottom in business standards and practices has serious repercussions. Subcontracting and outsourcing, especially when coupled with illegal practices, drives down standards for all workers whether they are outsourced or permanent employees. This happens in practically every industry.

The damage caused by these unethical and illegal employment practices is felt by workers, their families and communities; by responsible businesses; and by the state and its taxpayers. Meanwhile, the benefits, profits and competitive advantage accrue solely to the employers that continue gaming the system. The well-being of our Commonwealth as a whole depends on our ability to hold those who employ workers and enjoy the fruits of their labor fully accountable for the pay, benefits, and working conditions they control.

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# **GOOD JOBS, STRONG COMMUNITIES**

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