Introduction: Employment Law and the Evolving Organization of Work - A Commentary

Emily A. Spieler
Northeastern University, e.spieler@neu.edu

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EMPLOYMENT LAW AND THE EVOLVING ORGANIZATION OF WORK – A COMMENTARY


Emily A. Spieler
Northeastern University – School of Law
Employment Law and the Evolving Organization of Work –
A Commentary

Emily A. Spieler

A worker on the night shift in a fish processing plant in New Bedford, Massachusetts, is caught and killed in a shucking machine. He worked for a staffing agency that provided “manpower” to the plant. Who is responsible?\(^1\) Was he trained, and if so, by whom? Should the staffing agency or the processing plant be providing his family the required workers’ compensation benefits?

People who sew garments do not receive minimum wage and overtime. They work for a contractor to the primary garment manufacturer; the manufacturer routinely outsources the work to their employer. When they bring a lawsuit for unpaid wages, they find that their “employer” has vanished, cannot be served, and in any event is without assets. Can they collect their wages from the primary garment manufacturer?\(^2\)

An intern works for a film production company and is unpaid. After concluding that he was due wages under federal law, he wants to sue. The film production company has shut down, but the parent companies, all the way up to Fox Searchlight, are still in business. Should he have been receiving compensation for his work? If so, are the parent companies responsible for any wages due and owing?\(^3\)

A volunteer for her local fire and rescue squad is sexually harassed by the dispatcher, an employee of the town. Does-

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3 See Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed* No. 13-4478-CV (2d Cir.) (refusing to grant summary judgment to the tiered but integrated employers). Glatt awaits further decision as this journal issue goes to print.
the town or the dispatcher have any liability for the serious harassment?4

A new college graduate can’t find a job and signs up as a Turker for Amazon Mechanical Turk, earning $0.05 per human intelligence task and, in total, close to $10,000 per year.5 Is this relationship entirely outside any employment regulations?

Four hundred foreign students who had paid substantial sums to participate in the J-1 visa program are assigned to work in the manufacture of Hershey’s chocolate. They work long hours at heavy manual work. It turns out that they were hired by a staffing subcontractor to work for a contractor that had been hired by Hershey to produce the chocolate. Is Hershey responsible for their unpaid wages? And who is responsible when another temporary worker falls into the 120-degree vat of chocolate and is killed?6

Delivery truck drivers for FedEx are required to follow FedEx rules, wear FedEx logos, and follow FedEx routes, but must supply their own trucks and may use the trucks (if the FedEx logo is covered) for personal and other business. Are they misclassified as independent contractors by FedEx?7

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The authors in this issue of the Northeastern University Law Journal grapple with questions like these. In doing so, they expose


5 See Bernt, supra note 4, for a discussion of Amazon Mechanical Turk (AMT) and Turkers.

6 David Weil, The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It, 113–117 (2014). See also Dave Jamieson, Hershey Student Guest Workers Win $200,000 In Back Pay After Claims Of Abusive Conditions, HUFFINGTON POST, Nov. 14, 2012, http://www.huffingtonpost.com/2012/11/14/hershey-student-guest-workers_n_2131914.html ("Foreign students who claimed they toiled under abusive conditions at a Pennsylvania plant handling Hershey candies last year have won over $200,000 in back wages in a settlement struck with the U.S. Labor Department.").

the inadequacies of the current – and past – legal regime governing employment.

This discussion must be seen in historical context, looking back over the past 100 years. Continuous legal developments in work law in the 20th century chipped away at the 19th century presumption of the at-will doctrine. Workers’ rights were defined and redefined as courts and legislatures responded to complex social, political and economic forces. This history is, of course, well known. It is also worth remembering, however, that the application of 20th century legal developments to the realities of the marginal or nonstandard workforce has always been problematic.

In the post-Lochner depression era, in the face of economic crisis, a shared political sense emerged: that the engine of the economy, and therefore the labor market, needed legal intervention. Powerful political and economic forces created a sufficient consensus to allow Congress to enact federal legislation providing new protections for workers. During this period, the National Labor Relations Act8 (giving workers legal protection to engage in concerted activity and organize unions), the Fair Labor Standards Act9 (setting minimum wage and overtime requirements), and the Social Security Act10 (establishing old age pensions and unemployment insurance) were passed – and upheld.11

Later, the era of civil rights activism gave rise to developments in employment law that embraced basic notions of dignity, rejecting discrimination based on status, and resulting in the passage of the Civil Rights Act of 1964, including Title VII.12 This era persisted, so that disability rights under the Americans with Disability Act13 followed the ‘civil rights model’ of the earlier Title VII and Age Discrimination in Employment Act.14 Later amendments of these acts – including the Pregnancy Discrimination Act

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of 1976, the Civil Rights Act of 1991, the Lilly Ledbetter Fair Pay Act of 2009, and the American Disabilities Act Amendments of 2008 all were designed to correct excessively restrictive judicial interpretations of these statutes. Similar legislation was passed in most states, creating a web of protections against discriminatory treatment of workers.

At the turn of the 19th to 20th century, occupational health legislation was only upheld when groups viewed as particularly vulnerable were at risk. In fact, until the late 1960s, safety was largely shelved as a legislative issue – addressed primarily through state-based legislation that created workers’ compensation programs. It was not until the Farmington mine disaster in 1968 – and the activism of the period – that the Coal Mine Health and Safety Act of 1969 and the Occupational Safety and Health Act of 1970 were passed.

Starting in the 1970s, there was an interesting emergence of concern regarding the status of at-will employees when their claims collided with matters of public concern – resulting in various anti-retaliation provisions both under the common law and under a myriad of whistleblower statutes. This coincided with

19 See, e.g., Muller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon restriction on the number of hours per day a woman may work based on the state’s interest in protecting the health of women); Holden v. Hardy, 169 U.S. 366 (1898) (upholding a Utah restriction on the number of working hours per day for miners and smelters based on dangerous conditions of the professions). Cf. Lochner v. New York, 198 U.S. 45 (1905) (striking a New York law limiting the number of working hours for bakers and rejecting the argument that such a restriction was necessary to protect the health of bakers).
the expanding scholarly literature attacking rigid adherence to the employment-at-will doctrine.\textsuperscript{23} Although the California courts had carved out a common law public policy exception in 1959,\textsuperscript{24} it was not until the 1970s that other courts showed a willingness to follow California’s lead. In 1973, the Indiana Supreme Court held that it was a violation of public policy to discharge an employee for filing for workers’ compensation benefits.\textsuperscript{25} After this, these cases spread like wildfire – much as the adoption of the at-will doctrine had spread 100 years earlier – to state after state, resulting in near unanimity that there must be some exception to the unequivocal application of the at-will doctrine in these situations. During this same period, courts experimented with implied contract theories to expand protection of at-will employees who were deemed to legitimately count on promises made to them.\textsuperscript{26}

Underlying all of these 20th century legal developments was an assumption that the employee-employer relationship was amenable to simple analysis and definition: each employee worked for an identifiable employer, with some sense that the relationship had sufficient permanence to be identified – and regulated. Reflecting this – and as noted by both James Reif and Lisa Bernt in their articles in this symposium – none of the federal statutes ever attempted to include even a reasonably useful definition of the key terms of

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“employee” or “employer.” In fact, the statutory definitions are tautological: employees are individuals employed by employers; employers are entities that employ employees.

27 See, e.g., National Labor Relations Act, 29 U.S.C. 152(2)-(3) (2011) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly . . . . The term ‘employee’ shall include any employee . . . .”); Fair Labor Standards Act, 29 U.S.C. § 203(d)-(e) (2006) (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . . [T]he term ‘employee’ means any individual employed by an employer . . . .”); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)-(f) (2010) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term ‘employee’ means an individual employed by an employer . . . .”); Age Discrimination in Employment Act, 29 U.S.C. § 630(b)-(f) (2012) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term ‘employee’ means an individual employed by any employer . . . .”); Occupational Safety and Health Act, 29 U.S.C. § 652(5)-(6) (2010) (“The term ‘employer’ means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State . . . . The term ‘employee’ means an employee of an employer who is employed in a business of his employer which affects commerce.”); Employee Retirement Income Security Act, 29 U.S.C. § 1002(5)-(6) (2011) (“The term ‘employer’ means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such a capacity . . . . The term ‘employee’ means any individual employed by an employer.”); Americans with Disabilities Act, 42 U.S.C. § 12111(4)-(5) (2012) (“The term ‘employee’ means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States. . . . The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . .”); Even workers’ compensation statutes fail to provide clear definitions. In Massachusetts, an employer is defined as follows: “Employer’, an individual, partnership, association, corporation or other legal entity, or any two or more of the foregoing engaged in a joint enterprise . . . employing employees subject to this chapter.” Mass. Gen. Laws ch. 152, § 1(5). An employee under this section is “every person in the service of another under any contract of hire, express or implied, oral or written . . . .” Mass. Gen. Laws ch. 152 § 1(4). Only the Fair Labor Standards Act provides guidance regarding the targeted relationship, defining “employ” as “includes to suffer or permit to work.” 29 U.S.C. § 203(g).
These definitions suggest that Congress and others thought, “We’ll know one when we see one.”

Perhaps not surprisingly, this failure of definitional structure turned out to be problematic: even during the period when traditional employment relationships clearly dominated everyone’s thinking, alternative arrangements were common, and often—at least from the worker’s viewpoint—precarious. This problem has therefore been lurking, continuously, beneath our assumptions that workers were in traditional work with permanent, full-time relationships with identifiable employers. It is, as Bernt points out, a regulatory black hole.

This black hole in regulatory structures presents special challenges for the courts. Examples of definitional boundary-drawing dilemmas started to appear in cases and the legal literature soon after the first direct regulatory interventions in the employment relationship in the early 20th century—and have continued to this day. Before the sweeping federal legislative enactments, American Law Report annotations summarized case law that addressed questions regarding the proper scope of independent contractors and joint employer liability in the workers’ compensation systems—in part to determine the extent of the immunity from tort liability that was provided by these new laws.

After the constitutionality of the New Deal legislation was upheld, the U.S. Supreme Court had to confront the definitional problems inherent in the

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28 Weil, supra note 6, at 99–101. This notion of “traditional” employment relationships, reiterated in casebooks now for the education of our next generation of law students, was always a misnomer. In fact, there was a relatively brief period in the 20th century when the majority of workers in the U.S. had the benefit of stable work relationships in unionized settings with guaranteed wages, benefits and job security. This “traditional” arrangement began in the late 1940s and persisted until the late 1970s or 1980s, when it began to erode—a mere 30 to 40 years. There were, also, always large numbers of workers who never benefited from these arrangements. See id. at 39–41.


new employment and labor laws: under the Wagner Act in 1944; under the Social Security Act in 1948; under FLSA many times, including in 1961; under ERISA in 1992, and, later, under the anti-discrimination statutes. The court has itself noted the “problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance,” and that the definitional structure offered by the statutes is “completely circular and explains nothing.” Thus, the courts have been drawn to old common law rules, looking to pre-industrial master-servant relationships and the common law, to “economic realities” and issues of “control,” and to

31 NLRB v. Hearst Publ’ns. Inc., 322 U.S. 111 (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.” Id. at 121).
35 See Clackamas Gastroenterology Assoc., P. C. v. Wells, 538 U.S. 440 (2003) (interpreting the Americans with Disabilities Act and citing the discussion in Darden, supra, with approval: “[O]ur cases construing similar language give us guidance on how best to fill the gap in the statutory text.” Id. at 444–45).
36 Silk, 331 U.S. at 713.
37 Darden, 503 U.S. at 323.
38 “When Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” Id. at 322–23.
39 This test is most often used to see whether an employment relationship exists under the Fair Labor Standards Act. See, e.g., Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985); Goldberg, 366 U.S. 28 (noting “if the ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment, these homeworkers are employees.” (citation omitted) Id. at 33). The economic realities test is also used to determine whether there is joint employer liability in a claim, where the conclusion “must be based on a consideration of the total employment situation and the economic realities of the work relationship.” In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, 683 F.3d 462, 469 (3d Cir. 2012) (citing Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).
40 Where there are two or more employers, joint liability may rest on whether both employers exert significant control over the same employees, looking at whether they share or co-determine matters governing terms and conditions of employment. See e.g., Enterprise, 683 F.3d at 470; Bonnette, 704 F.2d at 1470.
developing multi-part tests in an attempt to try to draw bright lines through arguably ambiguous relationships.\textsuperscript{41} These definitional problems have never been solved, as the articles in this symposium illustrate clearly. Since the 1940s, workers have challenged their classification as non-employees under federal laws in many industries. Similarly, workers have sought responsible parties to pay wages or other benefits when their direct employer could not – or would not – live up to its obligation to pay compensation.\textsuperscript{42} The problem of identifying the responsible employers even continues to be the subject of very recent litigation under state workers’ compensation laws.\textsuperscript{43}

The legal arguments in the cases today remain remarkably similar to the arguments raised throughout the 20th century.\textsuperscript{44} But the underlying conditions may be undergoing a significant shift, suggesting that the issues have increasing salience for a growing segment of the workforce. Globalization, new technologies, union decline, changes in work organization and in financial institutions have fueled – or permitted – the expansion of alternative relationships. Franchising, independent contractor designations, subcontracting and staffing through employment

(considering “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” \textit{Id}.).

\textsuperscript{41} These definitional issues are discussed at length in the articles in this symposium. \textit{See} Bernt, \textit{supra} note 4; Reif, \textit{supra} note 2.

\textsuperscript{42} For example, in the 1970s, coal miners went looking for responsible parties when mines shut down with wages due and owing and the contractor for whom they worked was unable or unavailable to pay the wages. \textit{See} \textit{Weil}, \textit{supra} note 6, at 101–107. \textit{See also} Farley v. Zapata Coal Co., 281 S.E.2d 238 (W. Va. 1981); Zheng, 355 F.3d 61; \textit{Glatt}, 293 F.R.D. 516.


\textsuperscript{44} The articles included in this symposium tell this story well. \textit{See} Reif, \textit{supra} note 2; Christina Harris Schwinn, \textit{Half-Time or Time and One-Half? Recent Developments Deprive Employees of Their Rightful Overtime Compensation under the FLSA}, \textit{6 N E. U. L. J.} 409 (2014).
agencies have now expanded into sectors where they were previously uncommon.\textsuperscript{45} New ways of obtaining help – which some might legitimately call work – from sources that include volunteers or crowd-sourcing\textsuperscript{46} have opened up new questions about who deserves the protection of the 20th century labor and employment laws. Expanded use of staffing agencies creates additional barriers to collective action by workers.\textsuperscript{47} Scholars call attention to these trends, exposing the “fissuring” of work relationships that increases the level of vulnerability of many workers.\textsuperscript{48} Legislators are raising concerns about the impact of temporary work relationships on safety\textsuperscript{49} and the challenges of temporary and on-call work for marginal workers.\textsuperscript{50} Federal agencies are developing policies and regulations that address issues of staffing agencies and joint

\textsuperscript{45} See \textit{Weil}, supra note 6 (also noting, “[t]he more the workplace has fissured, the more the subtleties raised by definitions of employment matter.” \textit{Id.} at 185).

\textsuperscript{46} These arrangements are discussed by Lisa Bernt in her article in this symposium, supra note 4.

\textsuperscript{47} This issue is discussed in this symposium as well. See Kimberly Webster, Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights? 6 Ne. U. L. J. 433 (2014). The staffing industry sometimes goes under the misnomer of temporary agencies, though the workers may work at the same site, and be paid by the same agency, for years.


\textsuperscript{49} See, e.g., Letter from Senator Robert P. Casey, Jr., to Assistant Secretary of Labor David Michaels (July 10, 2014), available at http://www.casey.senate.gov/newsroom/releases/casey-presses-osha-on-safety-protections-for-temp-workers (discussing “possible regulatory or legislative impediments to OSHA’s ability to ensure safe and healthy workplaces for temporary workers.”).

employer liability. Reporting on the vulnerability of many of these workers.

Is there in fact a crisis of a changing workforce today? It is difficult to measure the magnitude of the recent changes. Part of the problem is that the definitions of precarious or contingent employment vary. A 1999 U.S. Department of Labor report on flexible staffing arrangements gives a flavor for the definitional problem: these arrangements include agency temporaries, leased employees, contract company workers, independent contractors, direct-hire temporaries, and on-call workers. The Government Account-

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51 See, e.g., Occ. Safety and Health Admin., Dep’t of Labor, CPL 02-00-124, OSHA Instruction: Multiemployer Citation Policy (Dec. 10, 1999) (holding responsible the employers that create a hazard, the employers whose employees are exposed to the hazard, the employers who are responsible for correcting the hazard and any employer with general supervisory authority over the worksite); Lawrence E. Dubé, Amicus Briefs Describe High-Stakes Debate As NLRB Revisits ‘Joint Employer’ Standards, BNA Daily Labor Report, July 02, 2014 (describing frenzy of amicus brief filing before the deadline in Browning-Ferris Indus. of Cal., Inc., NLRB, No. 32-RC-109684); U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act (2008).


53 Susan N. Houseman, Flexible Staffing Arrangements: A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States (Aug. 1999), available at http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/exec_s.htm (stating as follows: “Agency temporaries, leased employees, contract company workers, and independent contractors usually are not regarded as employees of the organization for whom they are performing work. For the first three categories, there are no official definitions and the distinction between them is sometimes blurred. However, it is commonly understood that agency temporaries are the employees of a staffing company which places them, usually on a short-term basis, with a client firm, which usually directs their work. Leased employees are similar to agency temporaries, except that they are typically assigned to the client on a long-term basis. Contract com-
ability Office considers all of these jobs, as well as day laborers, self-employed workers and “standard part-time workers” to be among the contingent workforce.54 Thus, the jobs labeled by some as “contingent” or “precarious” can be permanent or temporary, full-time or part-time, direct hires or indirect employment through agencies – but they may nevertheless be precarious from the vantage point of the workers. There are other new categories that may be confusing to anyone receiving a paycheck: Professional Employer Organizations (PEO) in which the workers are hired but then co-employed by the PEO, which assumes responsibility for human resources-related obligations; Human Resources Outsourcing, where the HR functions are contracted out, but the contractor does not assume the role of employer;55 crowd sourced piece workers, where the individuals may have little connection to the entity paying for their services.56 And this does not include people who have always been outside the boundaries of many legal protections, including domestic and agricultural workers. Nor does it include workers who are employed directly for employers who cannot be counted on to pay their wages; this may be due to the marginality of the firm, but it may also be due to contracting arrangements that themselves are problematic.57


55 Christiane Soto, Rise of the Contingent Workforce, Snelling Staffing Services (2012), http://www.snelling.com/WorkArea/DownloadAsset.aspx?id=20147 (also asserting that more than 25% of the private sector jobs added in 2010 were temp jobs, and that in 2012 contract employment grew by 24.2%).

56 See Bernt, supra note 4.

57 This is, in part, the problem explored by Reif in his article for this symposium, supra note 2. The immigrant workers who were the plaintiffs in Zheng, 355 F.3d 61, could not serve or collect wages from their direct employer, which was employing the workers to perform piece work for garment manufacturers which contracted with the direct employer for the goods that were produced.
Evidence is strong: we have plenty to worry about if we care about the ability of the modern workplace to provide safe, stable and secure employment.\textsuperscript{58} If not a majority, certainly large numbers of American workers are facing conditions that underscore legitimate concerns about precarious work and deep inequalities in our society, put to shame any commitment to “work-life” balance, and demonstrate the inadequacy of the current legal and regulatory structure to remedy problems.

But there is certainly no question that there is bubbling enthusiasm among firms and vendors about the possibilities for decreased costs combined with increased efficiencies and flexibility to be derived from these relationships. “Utilize the contingent workforce!” exhorts CBI Group, which characterizes itself as an “Outside-In recruitment solutions company.”\textsuperscript{59} CBI Group’s white paper on the subject continues:

Outside-In is a mindset and operating philosophy that drives us to be customer-centric in everything we do. Serving customers nationwide, we build recruitment, staffing and outplacement solutions across a variety of industries including Financial Services, Manufacturing, Healthcare, Pharma, Not-for-Profit and Hospitality... You may be thinking to yourself, how does this apply to my business? As employers, it’s time to start thinking differently. Take a fresh look at this workforce, and consider the possibility of employing contingent workers in the future (if you aren’t already!)... The structure of “work” is now increasingly being viewed as a project-based model where employers rely on highly technical skill sets and increased worker flexibility. This is far different from the days where workers would “punch the clock” and spend eight hours a day in a permanent position with a strict schedule. (In those days, lunch breaks measured down to the minute, and five o’clock-on-the-dot meant freedom!) These recent workforce realities developed this new structure and influenced how businesses operate, and how workers work!...Employing contingent workers not only alleviates the workload for

\textsuperscript{58} For an overview of the concerns, see Weil, supra note 6; Stone & Arthur, supra note 48, at 366–404 (providing a terrific summary of the available data).

permanent jobholders, but it can also serve as a cost saver for you as an employer. Contingent workers, who work for contracted lengths of time, are less expensive to employ than permanent workers. Benefits costs, 401K plans, and employment taxes are eliminated. Moreover, when a contingent worker is employed through a staffing or recruiting firm, the third party provider assumes the costs.\footnote{Id.}

Needless to say, CBI’s vision for the future of work collides with the interests of most workers. There is no question that fissured work organizations create greater pressure on those at the bottom. Anticipated payroll, tax and benefit savings through contracting results in downward pressure on wages and benefits. Business models may increase both efficiencies and consumer satisfaction, as parcels arrive promptly at doors and workers go unpaid if they are not needed that day\footnote{Greenhouse, supra note 50.} – but the stability of work days and pay decline dramatically as these practices spread. Meanwhile, workers attempt to fight back through 20th century laws, using old tests that are a poor fit for these realities.

As Bernt and Reif both point out, early Supreme Court cases interpreting statutes designed to protect working people repeatedly suggested that the statutes “must be read in the light of the mischief to be corrected and the end to be attained.”\footnote{NLRB v. Hearst Publ’ns. Inc., 322 U.S. 111 (1944) (citing S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)); cf. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 91 (1940). This language first appeared in the case of the master of a tugboat who “met his death on the waters of the Ohio river through the negligence of a pilot employed to navigate the tug.” Warner v. Goltra, 293 U.S. 155, 156 (1934). In a suit against the owner to recover damages, the court was called upon to interpret the meaning of the term “seaman” within the meaning of the Merchant Marine Act of 1920, §33 (41 Stat. 1007, 46 U.S.C. § 688 (46 U.S.C.A. § 688)). This decision by Justice Cardozo presaged the later cases under the New Deal legislation.} What is the precise “mischief” to be corrected today? How should the courts – and others – approach these persistent definitional problems in the current environment, assuming that it is true that increasing numbers of workers find themselves outside the existing regulatory boundary lines? The articles in this symposium address these
questions in the context of the laws governing compensation, dignity and collective voice.

Lisa Bernt investigates these broad issues in Suppressing the Mischief: New Work, Old Problems and suggests that we go back to first principles. What is the purpose of these laws? she inquires, as she explores the current scholarly literature that elucidates the challenges posed by both the current law and modern work arrangements. She advocates for a “boundaried purposive” approach, “one that sensibly focuses on regulatory purpose and the broader values that have been the foundation for the existing laws all along.” Reaching back to 1944, she echoes the Supreme Court in NLRB v. Hearst Publications: when conditions require protection, “protection ought to be given.” Acknowledging the “legislative neglect” that resulted in the remarkable lack of definition of key terms like “employer” and “employee,” she describes the tests that have been used by the courts to determine employee status, but she notes that these are “an ill fit for the remedial goals of the respective statutes.” These tests both fail to acknowledge the inequality of bargaining power between individual workers and their employers and fail to protect workers in evolving nonstandard employment.

Bernt builds her case using two modern examples: crowd workers who do piece work, often anonymously, through internet connections; and volunteers, who perform valuable work that is required in order to advance to jobs or into a profession. Building out from these illustrations, she posits that the employment relationship is “typically one between a bearer of power and one who is not a bearer of power, and labor law acts as a restraint on that power.” That is, quoting Harry Arthur, “labor law ‘is designed to protect ‘workers,’” and underlying labor law is a “protective reflex.” She concludes that current law leaves out work relationships that are exactly the kind of ‘mischief’ that “the law is meant to address,” and moves on to propose a taxonomy of definitions

63 Bernt, supra note 4.
64 Id. at 312.
65 Id. at 317.
66 Id. at 320.
67 Id. at 336.
69 Bernt, supra note 4, at 337.
that would extend work law to encompass these nonstandard work relationships. She would limit this protection to those who exert effort for another for “compensation or reward,” focusing on “whether, in reality, the putative worker was in a position of dependency.” Applying these definitions is nevertheless challenging. For example, she proposes that “traditional volunteers” should be outside the definition if their volunteer work “will not affect their job prospects or livelihoods in any meaningful way.” Bernt would, however, move most interns in training programs presumptively (though not conclusively) under the umbrella of employment legislation, particularly noting interns’ need for protection against discrimination and harassment.

In contrast to Bernt’s 21st century examples of evolving work, the twenty-five immigrants employed in a factory at 103 Broadway in New York’s Chinatown faced challenges that are more reminiscent of the 19th century workplace - or, perhaps, the garment industry in Bangladesh today. Working in sweat shop conditions under contracting arrangements, the question was: who was going to make good on their unpaid wages? Their immediate employer ceased doing business, and they pursued their claims against the garment manufacturer that had contracted for their work. The work that the plaintiffs performed was a critical component of the production of the garments and was done under precise requirements. Nevertheless, in remanding the case for further

70 Id. at 338.
71 Id. at 342.
72 Zheng, 355 F.3d 61. After remand, the workers prevailed at trial, and the jury verdict was upheld in a per curiam decision. See Zheng v. Liberty Apparel Co. Inc., 617 F.3d 182 (2d Cir 2010) (affirming jury verdict for plaintiffs, including decision by the trial judge to allow the jury to determine whether Liberty was a joint employer for purposes of the wage claims, noting that this determination is a mixed question of law and fact).
73 Zheng, 355 F.3d at 64 (“Liberty, a ‘jobber’ in the parlance of the garment industry, is a manufacturing company that contracts out the last phase of its production process. That process, in broad terms, worked as follows: First, Liberty employees developed a pattern for a garment, cut a sample from the pattern, and sent the sample to a customer for approval. Once the customer approved the pattern, Liberty purchased the necessary fabric from a vendor, and the vendor delivered the fabric to Liberty’s warehouse. There, the fabric was graded and marked, spread out on tables, and, finally, cut by Liberty employees. After the fabric was cut, Liberty did not complete the production process on its own premises. Instead, Liberty delivered the cut fabric, along with other essential materials, to various contractors for assembly. The assem-
consideration by the District Court, the Court of Appeals suggested that joint liability might be inappropriate if the purpose of the contracting was not to avoid application of the wage and hour laws.\(^74\)

With this case as his starting point,\(^75\) James Reif provides a detailed and thoughtful exploration of the outsourcing of business and joint employer liability under the wage and hour laws in ‘To Suffer or Permit to Work’: Did Congress and State Legislatures Say What They Meant and Mean What They Said?\(^76\) Noting that companies often engage contractors to perform parts of their processes of production, Reif argues that these companies should have joint liability with the direct employer. He is also quite rightly concerned about the notion that “run-of-the-mill” outsourcing arrangements are viewed by the court as outside the reach of joint employer liability: this approach suggests that the more outsourcing becomes commonplace in an industry, the lower the likelihood that workers performing the outsourced work will have a claim for wages against the primary company – irrespective of their ability to collect their wages from their direct employer.

The broad language of the Fair Labor Standards Act defines “employ” to include “to suffer or permit to work.”\(^77\) Reif notes that this language is broader than the definition of employment under the common law, but that the courts have nevertheless applied analyses and factors that result in a narrower interpretation than

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\(^74\) Id. at 73–75 (“Industry custom may be relevant because, insofar as the practice of using subcontractors to complete a particular task is widespread, it is unlikely to be a mere subterfuge to avoid complying with labor laws. At the same time, historical practice may also be relevant, because, if plaintiffs can prove that, as a historical matter, a contracting device has developed in response to and as a means to avoid applicable labor laws, the prevalence of that device may, in particular circumstances, be attributable to widespread evasion of labor laws.... supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement.”).

\(^75\) Reif served as plaintiff’s counsel in Zheng, 355 F.3d 61.

\(^76\) Reif, supra note 2.

the statutory language suggests. He makes a persuasive case that “courts proceed on the unarticulated presumption that Congress simply could not have meant what it said.”\(^7^8\) In situations involving outsourcing, this “leaves businesses in the same industry that comply with fair labor standards at a competitive disadvantage and ...effectively deprives the workers who perform outsourced work of FLSA rights or remedies.”\(^7^9\)

The solution, Reif suggests, is a return to the language of the statute itself, to the regulatory interpretations of the child labor laws, and to the earlier judicial interpretations that were not imbued with the “narrow, grudging manner”\(^8^0\) of more recent cases. He proposes the following test for joint liability when outsourcing is involved:

(i) the company outsourced to the contractor an integral part of its process of producing goods or providing services; (ii) the contractor employed the individuals in the performance of the outsourced work; (iii) the company knew or had reason to know that the individuals in question and/or other individuals similarly employed by the contractor were participating in the performance of its outsourced work, yet failed to prevent or hinder that work; and (iv) the outsourced work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company.\(^8^1\)

Further, Reif points out that the court in Zheng concluded that the purpose of the economic reality test is to “expose outsourcing relationships that lack a substantial economic purpose, but it is manifestly not intended to bring normal, strategically-oriented contracting schemes within the orbit of the FLSA.”\(^8^2\) He rightly raises an alarm about this “solicitude” that the federal appellate court demonstrated in favor of economically-motivated outsourcing arrangements – solicitude that flies in the face of the overwhelm-
ing concern that has been expressed by scholars and activists regarding wage and hour abuses that are tolerated in “normal” contracting schemes. Thus, he persuasively argues, the court had it all wrong: run-of-the-mill contracting should not be shielded from liability. Instead, “a company should not be entitled to a safe haven from wage and hour claims … if it engages in outsourcing primarily to reduce its labor costs.” Of course, if one is to believe the CBI exhortations, that is exactly what many companies are trying to do when they develop “flexible” work through contracting arrangements.

The issues of interpretation of the Fair Labor Standards Act – and concerns about recent interpretations in the federal judiciary – are also the focus of Christina Harris Schwinn’s article, *Half-Time or Time and One-Half? Recent Developments Deprive Employees of Their Rightful Overtime Compensation under the FLSA.* Schwinn critiques the Seventh Circuit’s methodology for the retroactive calculation of overtime in *Urnikis-Negro v. American Family Property Services,* a case in which the plaintiff had been misclassified as an administrative exempt employee, and therefore was not paid overtime when she worked more than 40 hours per week. The plaintiff had thought that she was hired to work a regular 40 hour week, but found that the bank intended her salary to compensate her for “whatever hours she happened to work.” Noting that the right to overtime under the Fair Labor Standards Act cannot be waived, Schwinn describes in detail the possible methodologies for calculation of overtime pay in these cases and argues that the court in *Urnikis-Negro* misinterpreted prior decisional law by applying the fluctuating-work-week (FWW) calculation. According to Schwinn, when FWW is applied retroactively, “the purposes of the FLSA are nullified because it abridges an employee’s right to time and one-half wages for overtime hours.” The essential problem is that the retroactive application of FWW in cases of misclassified exempt employees significantly cuts the overtime pay to an employee, reducing it to below the level that overtime would have

83 Reif, supra note 2, at 407.
84 See supra, notes 59–60 and accompanying text.
85 Schwinn, supra note 44.
87 Schwinn, supra note 44, at n.51, quoting Urnikis-Negro, 616 F.3d at 674.
88 Schwinn, supra note 44, at 431.
been paid absent the misclassification. It thus serves “to reward – and potentially encourage – an employer to misclassify a non-exempt employee as exempt at the inception of the employment relationship…”89 Notably, as Schwinn observes, the circuit courts are divided on this issue, and cases in other circuits have not followed the Urnikis-Negro reasoning. It is time, she suggests, that the Supreme Court or Congress rectify the ambiguity resulting from the split opinions of the circuits, and clarify that the FWW should not be applied to these situations.

Kimberly Webster turns our attention away from the minimum standards of compensation and the need for protection against discrimination and harassment, and toward the foundational issues of worker collective action. In her note, Fissured Employment Relationships and Employee Rights Disclosures: Is the Writing on the Wall for Workers’ Right to Know Their Rights?,90 she explores the fundamental importance of the right of workers to act together to advance their collective well-being. The first step, Webster argues, is that workers need to know their rights. First, she advocates for a “direct-to-worker” model of communication: “[R]egulations designed to inform workers of their rights should take a cue from different frameworks of legal rights disclosures that are better equipped for the present day,” and “an alternative framework for informing workers of their rights …encompassing electronic and/or active methods of disclosure – is a better fit for the current landscape of employment relationships…”91 This need might be met, for example, through electronic distribution of notices or through affirmative legal requirements for specific individual disclosures, as has been developed in new state legislation in Massachusetts and Illinois (targeting day and temporary laborers) and in New York (requiring disclosure of job information to all private sector employees). Second, Webster provides us with a deeply critical analysis of recent decisions that struck down an NLRB-promulgated regulation that would have required employers to post notices regarding workers’ rights under the NLRA. Without this regulation, workers receive no notice about these rights – in contrast to the statutorily mandated postings under other statutes.92

89  *Id.*
90  *Webster, supra* note 47.
91  *Id.* at 435-36.
92  *Id.* at 441-51.
Third, she suggests that workers’ access to each other is critical to the exercise of rights under the NLRA, and that this access is eroding due to the complex contracting and fissuring of the workforce.93 Given this, she advocates for an expanded interpretation of Section 794 that would give non-union workers access to co-workers’ contact information.

Conclusion

These four articles draw a troubling picture, reminding us that there are inadequate legal protections for misclassified workers and workers in nonstandard work arrangements. Authors in this symposium urge the courts to read the law expansively, rather than narrowly. “Suffer or permit to work” surely encompasses the business relationships that underlie the problem in Zheng v. Liberty Apparel, as Reif suggests. Workers who have been misclassified should be receiving a full retrospective accounting for overtime hours, as Schwinn recommends. The powers of the NLRB could have been read to include a requirement that workers be notified of their rights to engage in collective action, as Webster argues. If the courts were to read the statutes “purposely,” the 20th century laws discussed in these articles might protect many of those in murky or precarious legal situations, as Bernt proposes. Some of these authors argue, as well, for legislative solutions. All of these arguments have merit, though the extent to which they will be sufficiently powerful to persuade the courts – or the legislatures – remains to be seen.

There is, however, some movement that suggests change is possible, as these authors note. State legislatures are extending legal protections to domestic workers who have been historically excluded from all employment laws,95 creating “right to know”

93 Id. at 452-55.
95 Massachusetts, New York, California and Hawaii have all enacted laws providing protection for domestic workers. The Massachusetts law, “An Act Establishing a Domestic Worker’s Bill of Rights,” was signed by Governor Patrick on June 26, 2014, and extends the strongest protections; it goes into effect in 2015. According to the National Domestic Workers’ Alliance, the Massachusetts legislation amends “state labor law to guarantee basic work standards and protections: 24 hours off per 7-day calendar week; meal and rest breaks; limited vacation and sick days; parental leave; protection from discrimination,
laws to guarantee that temporary workers will receive basic protection and information about their work,96 and extending anti-discrimination protection to unpaid interns.97 Even Congress has recognized the problem of the exclusion of independent contractors from whistleblower statutes, and expanded at least one statute to protect long distance truckers from retaliation.98 State courts have acted to expand protection against discrimination and harassment to people not within state anti-discrimination statute definitions: sexual harassment and discrimination claims against small employers outside the specific statutory size requirements have been allowed under both the common law99 and under alternative statutory arguments;100 sexual harassment against unpaid

96 See Webster, supra note 47, at n.34, citing 820 ILL. COMP. STAT. 175/2 (2014); Id. at n.39, citing MASS. GEN. LAWS ch. 149 § 159C.
98 See Surface Transportation Assistance Act, 49 U.S.C. § 31105(j) (defining “employee” as follows: “In this section, ‘employee’ means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who - (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.”).
99 See, e.g., Williamson v. Greene, 490 S.E.2d 23 (W. Va. 1997) (holding that “even though a discharged at-will employee has no statutory claim for retaliatory discharge under . . . the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed . . . the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State.” Id. at 23.).
100 See, e.g., Thurdin v. SEI Boston, LLC, 895 N.E.2d 446 (Mass. 2008) (holding that, when an employer lacks the required six employees for coverage under MASS. GEN. LAWS ch. 151B, sex discrimination is nevertheless actionable under the Massachusetts Equal Rights Act, MASS. GEN. LAWS ch. 93 § 102).
interns – by definition “non-employees” – has been held actionable as well. Enforcement agencies have developed highly strategic approaches to setting priorities and are seeking to make the old laws applicable to changing workplaces. These developments may not represent the majority rule – but they do demonstrate that courts, legislatures and administrative agencies are capable of responding to concerns regarding holes in the regulatory structure. Not all change is initially rooted in the law. People are also developing new organizing strategies through workers’ centers and new networks that are enabled by social media. New ways of electronic communication provide just-in-time information to domestic workers. Thus, new technologies may help to overcome some of the isolation caused by nonstandard work arrangements. And, as always, legal change is integrally related to social and political movements.

These developments suggest that change is possible, though perhaps it is – at least as yet – too halting to meet the needs of many workers caught in unforgiving marginalized and nonstandard work. As the articles here suggest, there is much work left to be done.

103 See, e.g., NANNYVAN http://www.nannyvan.org/ (last visited July 28, 2014). NannyVan is part of an outreach program that provides domestic workers information about their rights and launched a text-based app for mobile devices in April 2014. (“The Domestic Worker App is a public art and know-your-rights app accessible by any kind of phone — even the most basic kinds. Call (347) 967-5500 at any hour to hear humorous episodes about topics such as overtime wage, paying your taxes, health and safety essentials, and the growing movement for domestic worker justice! AND, text the number to sign up to receive weekly text messages — type any key in the subject of the text message.” Id.)