

Nonstandard Work Arrangements & Worker Health

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Washington, D.C.**

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San Diego, California**

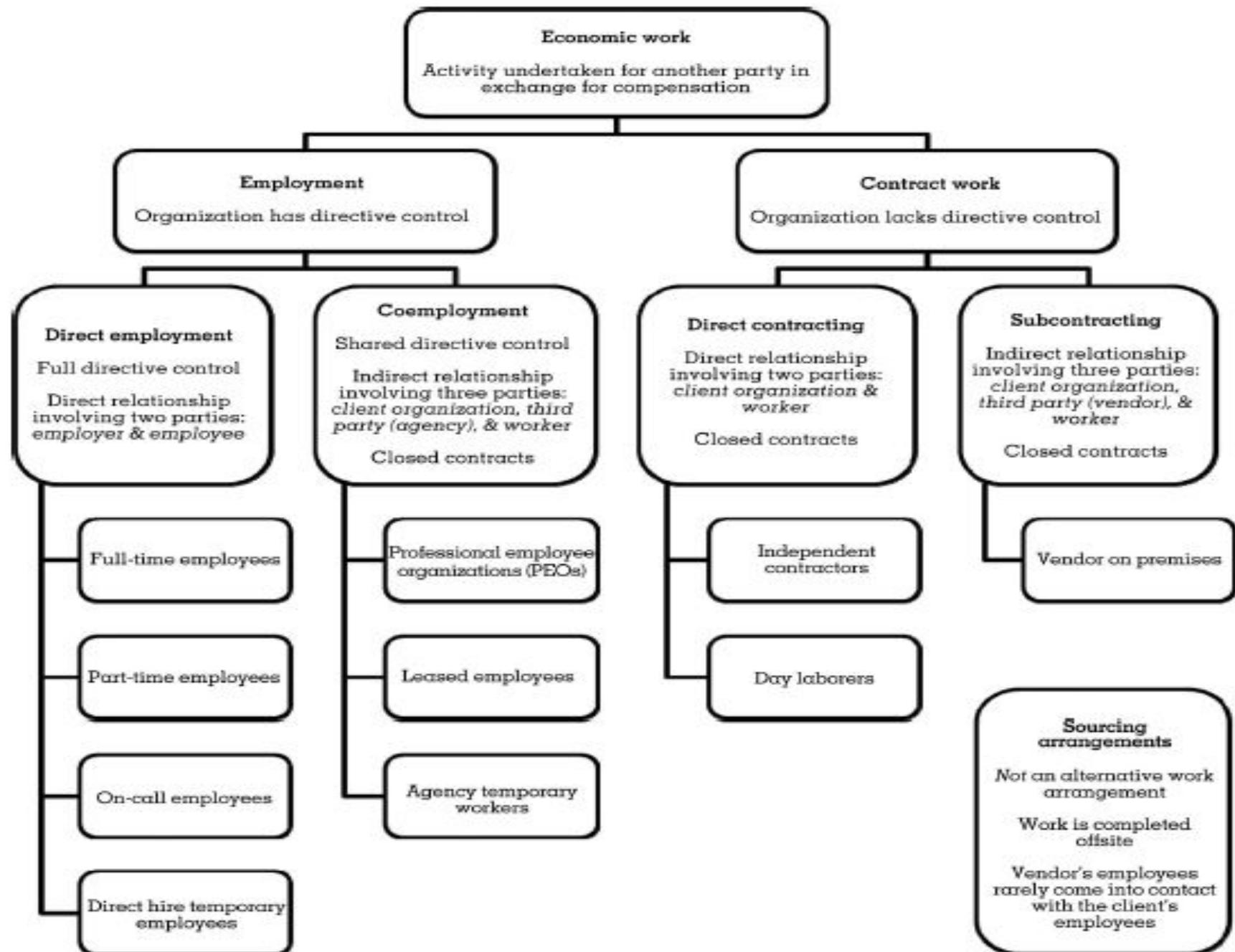
From *Stability* to *Precariousness*: 1880-1980

- Growth of companies created by industrial revolution
 - Vertical structure differentiated jobs from one another more clearly than ever before
- “Good” job was being an employee of a particular company for your entire working life (age 65)
- Government built social welfare laws along same lines
 - Workers got security, benefits, protections, and steady wage increases
 - Social Security (1935), FLSA (1938), Medicare (1965)
 - Companies got stable workforce in which they could invest with fair expectation of positive returns

Model in Trouble

- Erosion of traditional employer-employee relationship
 - Decline of *Standard* Employment Relationship
- Declining unionization
 - Private Sector losses >> Public sector
- Increasing life expectancies
 - Threats to social benefits solvency
- Rise of the virtual workplace
 - A series of locations technologically connected via a private network or the Internet without regard to geographic boundaries or time zones

Classification of Economic Work Arrangements



Types of Work Arrangements

- Employment Work
 - Organization has directive control
 - Standard arrangement
 - Co-employment (temporary) arrangement
 - Employees exist
- Contract Work
 - Organization lacks directive control
 - Independent contractor
 - Employees do not exist
- Gig Work
 - Organization lacks directive control
 - Employer does not exist
 - Employees do not exist

Federal & State Labor Rights

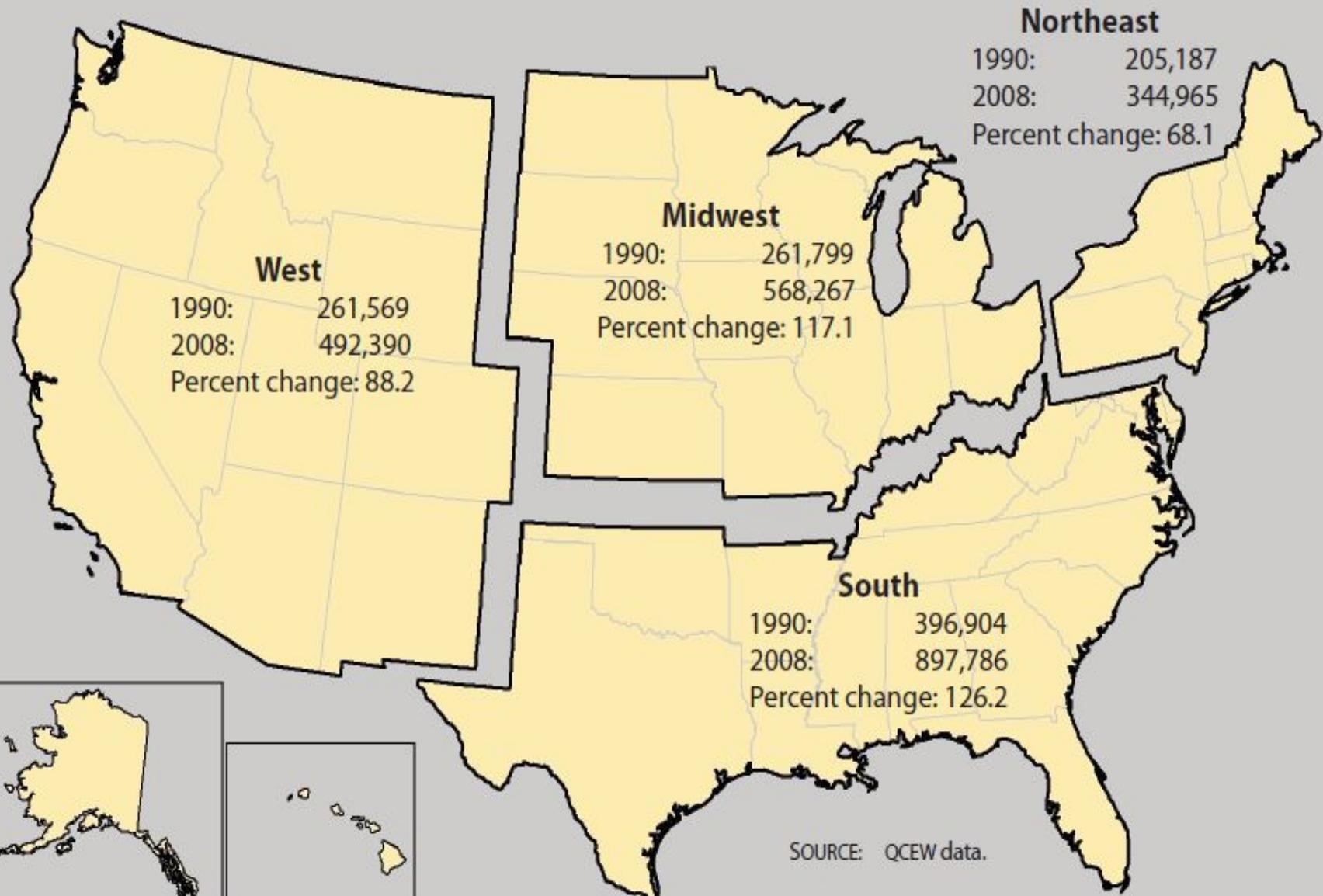
Applies Only to Employer—Employee Relationship

- **Old-age assistance and disability benefits**
 - Social Security Act of 1935
- **Collective bargaining rights**
 - National Labor Relations Act, 1935
- **Minimum wage, overtime and child labor protections**
 - Fair Labor Standards Act, 1938
- **Employment discrimination protections**
 - Title VII of the Civil Rights Act, 1964
 - Age Discrimination in Employment Act, 1967
 - Americans with Disabilities Act, 1990
- **Workplace safety and health protections**
 - Occupational Safety and Health Act, 1970
- **Pension, health and other employee benefits**
 - Employee Retirement Income Security Act, 1974
 - Family Medical Leave Act of 1993
- **Unemployment insurance and workers compensation benefits**
 - Various Federal and state laws.

Prevalence of New Arrangements

- **1995—2005 (BLS)**
 - 9.3 to 10.1% of total employment
- **2005—2015**
 - 10.1 to 15.8% of total employment
 - Represents an increase of 9.4 million over ten year period
 - Greater than the rise in total employment for same period
 - Meaning there was a small net decline in number of workers in standard arrangements
 - Katz, L.F. & Krueger, A.B. (2016). NBER.
- **GAO, 2015**
 - Size of the contingent workforce can range from less than 5% to more than 33% of total employed labor force, depending on widely-varying definitions of “contingent” work
 - Gig workforce less than 0.5% (and mostly in transportation)

Temporary Employment by Region



Firms Using Temporary Workers by Size

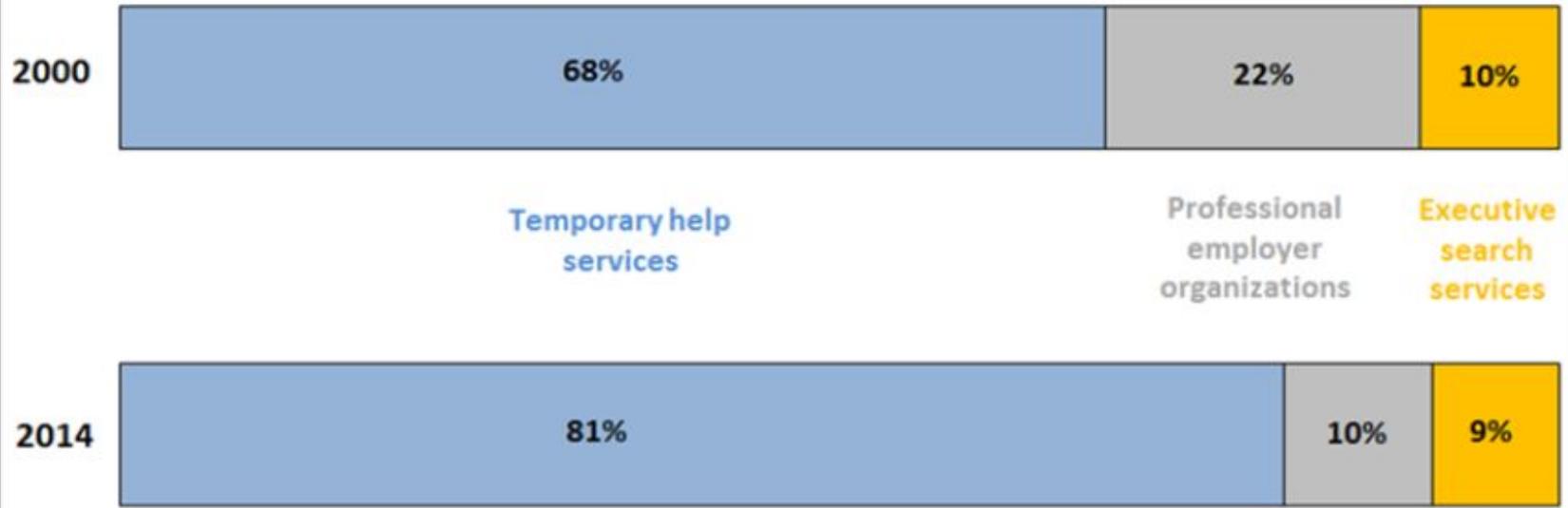
	25-99 Employees	Average 25+ Employees	100+ Employees
Percent of Firms Using Temporary or Leased Workers	12%	15%	24%

Source: American Staffing Association, Client Survey (ASA, 2011)

Temporary Services Industry

- As a share of the employment services industry, the temporary help industry has grown. In 2000, the temporary help industry accounted for 68% of all employment services industry jobs. By 2014, the share grew to 81%

Figure 1. Employment in Employment Services Industry, by Sub-Industry



Source: Bureau of Labor Statistics, Current Employment Statistics

Issues in Alternative Employment

- **Management**

- How do organizations decide which arrangement to use?
- How do workers in different arrangements working side by side alter the social context of work and managers' ability to get work done?

- **Legal**

- Is there a difference direct employment and co-employment?
- How do you tell if you have employees or not?

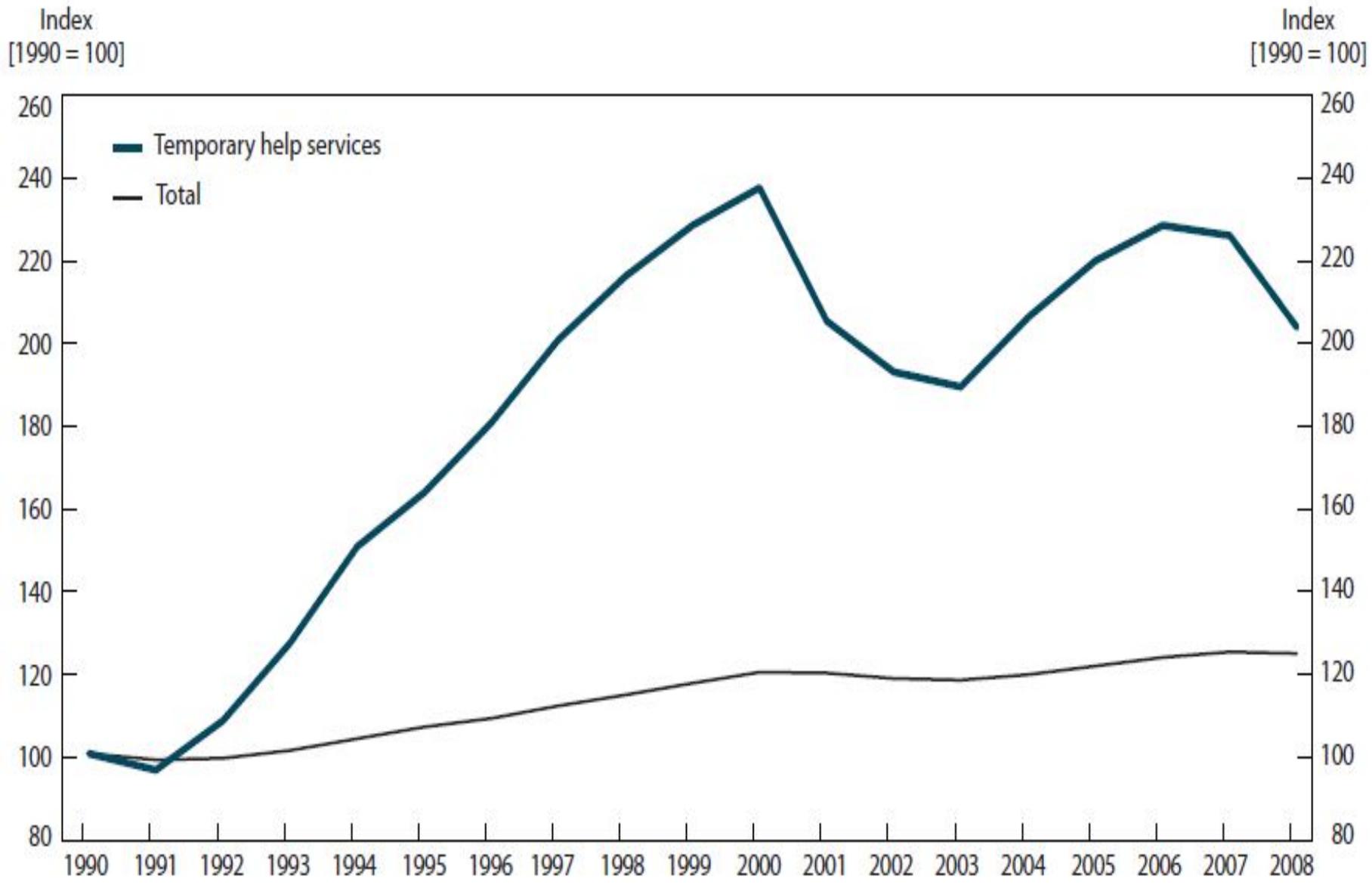
- **Health**

- How does OSHA protect workers who are not employees?
- If alternative arrangements impact worker health and safety, how and what can be done?

Why Alternative Employment Attractive

- **Expertise**
 - Domestic outsourcing allows firm to tap into expertise
- **Flexible Staffing**
 - Helps adjust to fluctuations in demand—temporary help services and professional employer organization workers easier to replace
- **Cost Savings**
 - Cost of specialized services less if obtained in the market vs internally
 - Reduces health insurance, pension, workers' compensation, unemployment insurance costs
- **Capital Market Pressures**
 - Pressures arise from financial markets that incentivize corporations to shed all but their core business.
 - Gave rise to contractors, temporary or contingent workers working under a brand name, but actually working for a set of serial subcontractors
 - Pressures to structure work in the most efficient or leanest way possible—a contractor can do peripheral tasks cheaper than can primary employer--specialization
 - Insulates from legal liability, or does it?

Chart 1. Indexed employment of temporary help services and of all industries, 1990-2008

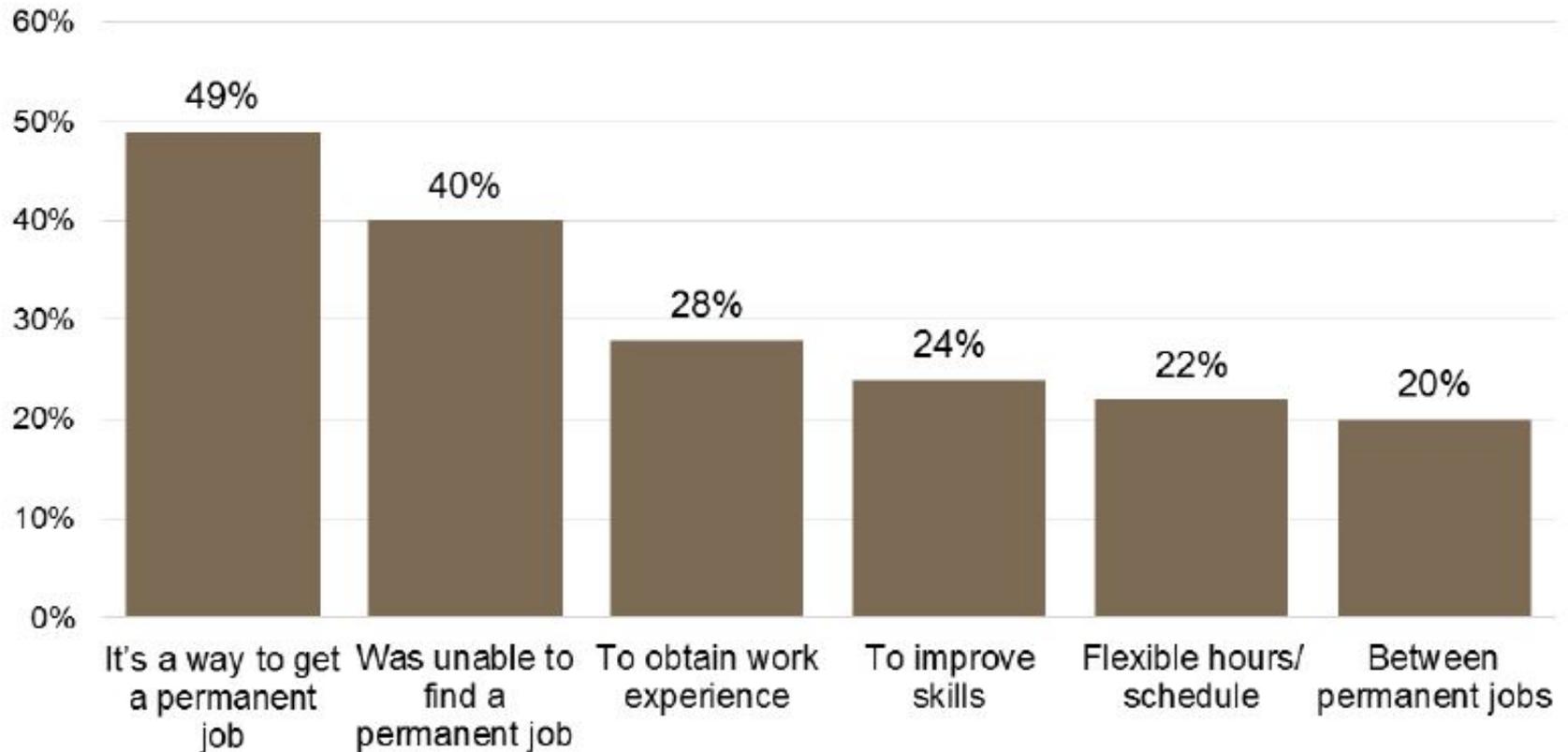


SOURCE: QCEW data.

Why People Do Temporary Staffing Work

Source: ASA (2014) https://americanstaffing.net/wp-content/uploads/2014/08/Fact_Sheet_Aug_20141.pdf

Reasons for Choosing Temporary or Contract Work



Legal Issues

- **Employee or Independent Contractor?**
 - Defining an employee is a complex issue
 - If large number of workers become contractors, then a company can get an exemption from specific employment laws that society has spent over a century constructing.
- **Employer Tax Obligations**
 - Employers pay taxes on employees but not on independent contractors, so misclassification of workers may result in tax evasion
- **Labor Laws**
 - Independent contractors are not protected by most state and federal employment laws, including wage and hour, workers' compensation

Employee versus Contractor

- **How to decide if a worker is an employee or not?**
 - **OSHA**—Common Law Agency Test—Direct and Control (10 factors)
 - **DOL**—Economic Realities Test (FLSA)—Consider whether workers are economically dependent on the business for which they labor.
 - **IRS** uses a 20 factor test in three areas: (1) behavioral control; (2) financial control; and (3) the relationship of the parties
- No one test or grouping of factors has achieved national legal consensus because the definition of employee is adapted to meet the purpose of the individual act which makes for very fact-dependent analysis
 - Except Congress confined definition of employee under NLRA to the common law definition of employee (“right to control”), excluding independent contractors
- The law of the employment relationship remains unsettled
 - *FedEx Home Delivery v. NLRB*, DC Circuit, No. 07-1391, 07-1436 (2009).
 - *FedEx Home Delivery*, 361 NLRB No. 55 (2014).

States: Oregon

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

ADVISORY OPINION OF THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

Regarding:

October 14, 2015

**THE EMPLOYMENT STATUS OF
UBER DRIVERS**

ADVISORY OPINION

States: Alaska

Heidi Drygas
Commissioner

www.labor.alaska.gov



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Press Release

COMMISSIONER'S OFFICE

FOR IMMEDIATE RELEASE

September 3, 2015

No. 15-38

For more information: Rhonda Gerharz, Workers' Compensation Division
907-269-2012, Rhonda.Gerharz@alaska.gov

Uber Agrees to Stop Worker Misclassification in Alaska

Uber signs agreement to cease operations and pay settlement to state

- *Uber* has agreed not to operate in Alaska unless it classifies drivers as employees or otherwise complies with state law.

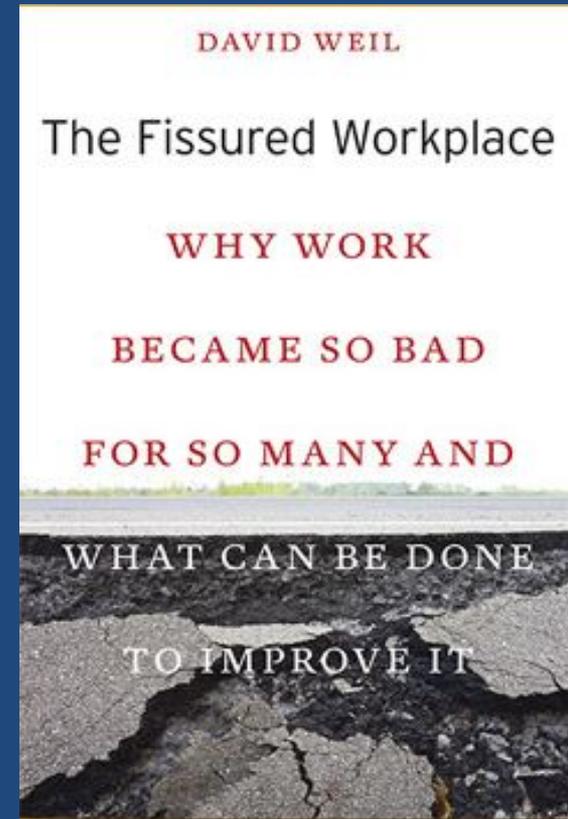
CA Uber Litigation

<http://uberlawsuit.com/>

- California Labor Commissioner ruled that an Uber driver was indeed an employee, not an independent contractor, and ordered Uber to reimburse the driver for her expenses. Uber has appealed.
- California Unemployment Insurance Appeals Board ruled that an Uber driver is an employees eligible to obtain unemployment benefits.
- *O'Connor v. Uber Techs., Inc.*
 - Alleged that Uber misclassified its drivers as independent contractors rather than employees and three years of contentious litigation followed.
 - Settlement reached with Uber under which it would pay up to \$100 million and make some significant changes in its policies
 - In August 2016, U.S. District court declined to approve the settlement.
- *Mohamed v. Uber*
 - Ninth Circuit Court of Appeals recently reversed the District Court judge on his ruling that Uber's arbitration clause is not enforceable.

“The Fissured Workplace”

- “For many businesses, sustaining the employer-employee relationship ranks below customer relationship management and investor value.”
- “Large corporations have shed their role as direct employers of the people responsible for their products, in favor of outsourcing work to small companies that compete fiercely with one another.”
 - Serial subcontracting
- Results Asserted:
 - “Declining wages, eroding benefits, inadequate health and safety protections, and ever-widening income inequality.”



Who is an Employee These Days?

- **Employer-employee relationship is a legal construct**
 - OSH Act
 - Employee means an employee of an employer who is employed in a business of his employer which affects commerce. *Huh?*
 - Employer means a person engaged in a business affecting commerce who has employees. *A bit circular?*
 - *Deliberately so to provide flexibility in interpretation*
- **How to decide if there is an employment relationship?**
 - OSHA: OSHRC uses the control and direction test (traditional common law test). *Secretary of Labor v. Froedtert Memorial Hospital* (2004)
 - DOL: Economic realities test (FLSA)
 - IRS: 20 Factor Test (<http://www.irs.gov/pub/irs-pdf/p1779.pdf>)
 - Behavioral control
 - Financial control
 - Relationship of the parties

New Guidance from WHD/DOL

- Growing variety of alternatives has made concept of “joint employment” more important.
- DOL Wage and Hour Division Administrator’s Interpretations
 - Application of FLSA “suffer or permit” standard in identification of employees who are misclassified as independent contractors—July 5, 2015
 - Joint employment under FLSA & Migrant and Seasonal Agricultural Workers Protection Act—January 20, 2016
 - Both promote use of *economic realities test* to determine who is an employee of which employer.



Wage and Hour Division

Was this page helpful?

DOL Home > WHD > Employee Misclassification as Independent Contractors

For Workers

For Employers

For States

How to File a Complaint

News Room

About WHD

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Wage and Hour Division (WHD)

Misclassification of Employees as Independent Contractors

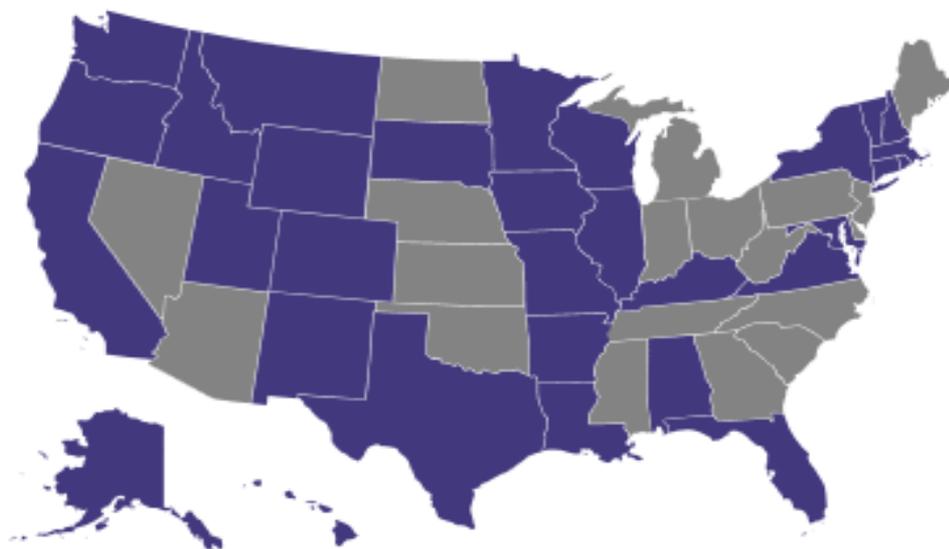
The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy.

Misclassified employees often are denied access to critical benefits and protections to which they are entitled, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces. Employee misclassification generates substantial losses to the federal government and state governments in the form of lower tax revenues, as well as to state unemployment insurance and workers' compensation funds. It hurts taxpayers and undermines the economy.

Quick Links

- [IRS MOU](#)
- [Misclassification News Room](#)
- [Resources](#)

The DOL Misclassification Initiative



Select a State

United States Court of Appeals for the Seventh Circuit

- **ILLINOIS TRANSPORTATION TRADE ASSOCIATION, et al., Plaintiffs-Appellants,**
- **Versus**
- **CITY OF CHICAGO, Defendant-Appellee, DAN BURGESS, et al., Intervening Defendants-Appellees.**

- **Decided: October 7, 2016**

Arguments: Taxi vs Uber

- Taxi medallions authorize the owners to own and operate taxis, not to exclude competing transportation services.
- The plaintiffs in this case cannot exclude competition from buses or trains or bicycles or liveries or chartered sightseeing vehicles or jitney buses or walking; indeed they cannot exclude competition from taxicab newcomers, for the City has reserved the right (which the plaintiffs don't challenge) to issue additional tax medallions.
- Why then should the plaintiffs be allowed to exclude competition from Uber?
- To this question they offer no answer.

Taxi versus Uber

- The plaintiffs argue that the City has discriminated against them by failing to subject Uber to the same rules about licensing and that the taxi ordinance subjects the plaintiffs to.
- That is an anticompetitive argument.
- Its premise is that every new entrant into a market should be forced to comply with every regulation applicable to incumbents in the market with whom the new entrant will be competing.

Cats versus Dogs

- Most cities and towns require dogs but not cats to be licensed. There are differences between the animals.
 - Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors.
- Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the “competing” animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination.
- Plaintiffs in the present case have no stronger argument for requiring that Uber be subjected to the same licensure scheme as the taxi owners.
- Just as some people prefer cats to dogs, some people prefer Uber to Yellow Cab. They prefer one business model to another. The City wants to encourage this competition, rather than stifle it as urged by the plaintiffs, who are taxi owners.

Is Alternative Employment Harmful?

- Contingent employment increases negative consequences for an injured worker and society:
 - Workers
 - More hazardous work assigned to temporary workers.
 - Worker might quickly find herself out of a job and, depending on the severity of an injury, the prospects of new employment might be slim.
 - Society
 - Employer-based health insurance is a rarity for leased/temporary workers, so the costs of treating injuries are typically shifted to the worker or the public at large (SSA disability)
 - Employers
 - Do not directly pay for workers' compensation and health insurance—they are insulated from premium adjustments based on the cost of workers' injuries.
 - Employers of contingent labor escape the financial incentives that drive decisions to eliminate hazards for other workers.

Why the Differential Risks?

- New economy jobs are more hazardous than standard jobs
 - Less experience & familiarity with operations due to short tenure at a worksite
 - Fewer hours of safety training relevant for the specific job assignment
 - More distant relationships with longer-term workers who could help navigate worksite hazards
- Limited availability & use of personal protective equipment
- Less likely to report unsafe conditions because of risks associated with precarious employment
- Confusion (real or perceived) about who is responsible for worker safety:
 - Who is the responsible employer? How do you tell?
 - Common law test, economic realities test, IRS test, various court cases

What Are the Exposures Affecting Health?

- **Temporariness**
 - Duration of current employment
 - Months working in previous year
- **Disempowerment**
 - How did you settle your wages or working hours?
- **Vulnerability**
 - Afraid to demand better working conditions or fair treatment?
- **Wages**
 - Cover basic needs?
 - Allow for unexpected expenses?
- **Rights**
 - Sick, medical & family leave
 - Paid holiday; Wage and hour protection
- **Exercise of rights**
 - Can you exercise any of the rights permanent workers have?

Research 1

- **Agreed on definitions** of economic work arrangements
 - Standard indicators for survey research needed
 - Precarious, contingent, temporary, alternative, new economy, gig
 - Definitions of new economy relationships lack standardization across intra- and inter-national databases
 - » Benach et al. (2012)
- **Improved surveillance** about extent of new economy arrangements and number of workers involved in each type is needed
 - Data challenges in measuring extent of new economy arrangements
 - Dynamic arrangements
 - » Bernhardt (2014)

Research 2

- **Are existing models for employment quality that relate to health outcomes useful?**
 - Pressures-Disorganization-Regulatory (PDR) Failure Model
 - Quinlan, M. et al. (2004).
 - Employment strain model (demand/control model)
 - Lewchuk, W. et al. (2008).
 - Rodger's multidimensional definition of precarious work
 - Rogers, G. (1989).
 - Employment Precariousness Scale (EPRES)(2012).
- **If so, use a model to:**
 - Organize data and understand links between employment & health
 - Encourage observation/testing of causal pathways & mechanisms
 - Identify potential entry points to implement interventions
 - Benach et al. (2016). What should we know about precarious employment and health in 2025? Framing the agenda for the next decade of research. *Int J. Epidemiol*, 45(1), 232-238.

Research 3

- **Possible Studies?**

- Prospective study of health consequences of new economy employment
 - Chronic stressor vs shorter isolated exposures
 - Choice vs. forced
- Intervention effectiveness study of a range of policy approaches
 - Boden et al. (2016)

- Emphasize study of the “new” organization of work as distinct research area
 - NIOSH
 - Healthy work design and worker well-being (NORA 3)

Some Final Thoughts

- **Risk from New Arrangements Are Real**
 - Evidence is unequivocal that employers are shifting burden of protecting workers from the things that go wrong in life to the worker.
 - Evidence suggests that workers employed in a triangular arrangements (co-employment) are at higher risk for occupational safety and health risks than workers in direct employment arrangements or direct contracting.
- **Better Taxonomy, Better Surveillance and New Research Methods and Research Needed!**

The logo for the Occupational Safety and Health Administration (OSHA) is centered on the page. It features a stylized 'O' with a blue and white circular design inside, followed by the letters 'S', 'H', and 'A' in a white, serif font. A registered trademark symbol (®) is located to the upper right of the 'A'. The background is a close-up of the American flag, showing the stars and stripes in a slightly blurred, high-contrast manner.

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**Occupational Safety
and Health Administration**

OSHA/NIOSH Recommended Practices

- 8 recommendations for staffing agencies and host employers.
- <https://www.osha.gov/Publications/OSHA3735.pdf>
- <http://www.cdc.gov/niosh/docs/2014-139/pdfs/2014-139.pdf>

OSHA • NIOSH

Recommended Practices

Protecting Temporary Workers



Protecting Temporary Agency Employees

Temporary agency employees work for a “host employer” but are on the payroll of a “primary employer.” A primary employer can be either:

1. A temporary (temp) agency that hires workers and sends them to work for a host employer, or
2. A professional employer organization (PEO) that puts a host employer’s employees on the PEO’s payroll as its own employees.

In these dual-employer situations, both the primary employer and the host employer must protect employees from safety and health hazards and comply with Cal/OSHA regulations.

The primary employer issues the employee’s paycheck, administers workers’ compensation

A Real Case of Fatality

A temporary worker died from being entangled with the exposed rotating shaft of a mixer while mixing industrial adhesive. Had the host employer identified and safeguarded the worker against the hazards of working near the mixer, he would be alive today.

Primary employers must do the following:

- Take reasonable steps to evaluate conditions at the host employer’s worksite by doing periodic inspections.
- Ensure their employees are covered by an effective Injury and Illness Prevention Program (IIPP) and other safety programs required by the assigned work, and ensure they are properly trained and provided necessary personal protective equipment.
- Inform the employees that if they are assigned work they reasonably believe to be dangerous, they may refuse to do that work and may return to the primary employer for reassignment to other work without penalty.

[Cal/OSHA](#) recommends that the primary employer and host employer specify in their contract their respective responsibilities for complying with applicable Cal/OSHA regulations. However, such a contract does not eliminate each employer’s legal obligation to protect the employees.

Thank You!



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