

February 2016

Occupy Our Occupations: Why “We Are the 99%” Resonates With Working People and What We Can Do to Fix the American Workplace

Sarah Leberstein

National Employment Law Project

Anastasia Christman

National Employment Law Project

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Labor and Employment Law Commons](#), [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Sarah Leberstein and Anastasia Christman, *Occupy Our Occupations: Why “We Are the 99%” Resonates With Working People and What We Can Do to Fix the American Workplace*, 39 Fordham Urb. L.J. 1073 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol39/iss4/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

OCCUPY OUR OCCUPATIONS: WHY “WE ARE THE 99%” RESONATES WITH WORKING PEOPLE AND WHAT WE CAN DO TO FIX THE AMERICAN WORKPLACE

Sarah Leberstein & Anastasia Christman***

Introduction	1073
I. Workers Are Falling Behind	1077
A. Running Faster to Stay in Place	1077
B. Where Have All the Good Jobs Gone?	1080
C. Wage Theft and the Decline of the Organizations that Fight It	1083
II. The Decline of Standard Work	1086
A. You Don’t Work Here Anymore, Now Get to Work.....	1086
B. Losing Your Job is “Just a New Way of Doing International Business.”	1090
III. A Disintegrating Safety Net	1092
IV. Rebuilding Work as a Pathway to Opportunity.....	1093
A. Raise the Minimum Wage and End Outdated Exclusions	1094
B. End Tax Incentives for Outsourcing American Jobs and Create Incentives for U.S. Job Creation	1097
C. Support Strong Enforcement of Labor Standards and Hold Employers Accountable	1098
D. Stop Independent Contractor Misclassification and Hold Subcontracting Employers Responsible	1100
E. Get America back to Work.....	1103
Conclusion.....	1104

INTRODUCTION

The experts have named “Occupy” 2011’s word of the year,¹ even as the path for the Occupy Wall Street (OWS) movement itself is un-

* Staff Attorney, National Employment Law Project.

** Senior Policy Analyst, National Employment Law Project.

clear. Protest sites throughout the country are threatened with closure, and recent polling shows that a slim majority of respondents see their physical presence as a public nuisance.² The same polls however, show that between forty and forty-eight percent of respondents continue to see OWS as representing the frustrations of most Americans.³ By coining the phrase “We Are the 99%,” OWS has distilled a general sense of lost equilibrium such that even four months after its start, OWS remains able to “occupy” the popular imagination of a significant portion of the public. As *The New York Times* observed,

1. Stephanie Gallman, *Linguists Name ‘Occupy’ as 2011’s Word of the Year*, CNN (Jan. 7, 2012), http://articles.cnn.com/2012-01-07/us/us_2011-word-of-year_1_linguists-american-dialect-society-new-words-committee?_s=PM:US.

2. Rasmussen Reports, 51% See Occupy Wall Street Protesters as Public Nuisance (Jan. 5, 2012). Similarly, a December 2011 Pew Research Poll showed that 49% of respondents disagreed with how OWS protests were being conducted. Joel Connelly, *Public: Yes to Occupy ‘Concerns,’ No to Its Tactics*, SEATTLE PI (Dec. 15, 2011, 6:10 PM), <http://blog.seattlepi.com/seattlepolitics/2011/12/15/public-yes-to-occupy-concerns-no-to-its-tactics/>. Camps throughout the country are being shut down. Perhaps best known are closures in New York City, Colin Moynihan, *Occupy Wall Street Drops Suit on Zuccotti Park*, N.Y. TIMES (Feb. 15, 2012, 4:13 PM), <http://cityroom.blogs.nytimes.com/2012/01/24/occupy-wall-street-drops-suit-on-zuccotti-park/>; Oakland, Matthew Artz, *Oakland Tries New Tactics Against Occupy*, SAN JOSE MERCURY NEWS (Jan. 30, 2012, 10:18 PM), http://www.mercurynews.com/breaking-news/ci_19855702, and Washington, D.C., *Cops Converge on Occupy D.C. Site*, CBS NEWS (Feb. 4, 2012, 8:09 PM), http://www.cbsnews.com/8301-201_162-57371574/cops-converge-on-occupy-d.c-site/, but these actions are taking place across the country. See, e.g., *City: Occupy Asheville Must Move by Friday*, CITIZEN-TIMES (Feb. 14, 2012, 1:43 PM), <http://www.citizen-times.com/article/20120215/NEWS/302150057/City-Occupy-Asheville-must-move-by-Friday>; *Police Clear Austin City Hall of Occupy Campers*, ASSOCIATED PRESS (Feb. 3, 2012, 11:10 PM), <http://www.chron.com/news/houston-texas/article/Police-clear-Austin-City-Hall-of-Occupy-campers-3008719.php>; Tina Susman, *Occupy Pittsburgh Goes Quietly as D.C., Oakland Resist*, L.A. TIMES (Feb. 6, 2012, 7:36 AM), <http://latimesblogs.latimes.com/nationnow/2012/02/occupy-pittsburgh-dismantles-dc-oakland-resist.html>; Mike Tolson & John Rigg, *Occupy Protestors Told to Leave Tranquility Park*, HOUSTON CHRON. (Feb. 14, 2012, 12:58 AM), <http://www.chron.com/news/houston-texas/article/Occupy-protesters-told-to-leave-Tranquillity-Park-3312680.php>; *TN Lawmakers Vote Thursday on Future of Occupy Nashville Camp*, TENNESSEAN (Feb. 15, 2012, 3:36 AM), <http://www.tennessean.com/article/20120215/NEWS02/302150088/TN-lawmakers-vote-Thursday-future-Occupy-Nashville-camp>; Samantha Wright, *Occupy Boise One Step Closer to Eviction*, BOISE STATE PUB. RADIO (Feb. 14, 2012), <http://www.boise-statepublicradio.org/2012/02/14/occupy-boise-one-step-closer-to-eviction/>. Similar evictions are taking place outside of the United States as well. See, e.g., Shiv Malik, *Occupy London Eviction Postponed*, GUARDIAN (Feb. 13, 2012, 11:43 AM), <http://www.guardian.co.uk/uk/2012/feb/13/occupy-london-eviction-postponed>. For broader legal questions on the evictions from two National Lawyers Guild lawyers, see Arun Gupta & Michelle Fawcett, *Occupy Fights the Law: Will the Law Win?*, SALON (Feb. 14, 2012, 1:00 PM), http://www.salon.com/2012/02/14/occupy_fights_the_law_will_the_law_win/.

3. Rasmussen Reports, *supra* note 2; Connelly, *supra* note 2.

2012]

OCCUPY OUR OCCUPATIONS

1075

OWS took a sentiment “in the air” and converted it into “simple math.”⁴

Although most onlookers are not pitching tents at an Occupy camp, they are nevertheless experiencing the division between the 1% and the 99% every day in their occupations.⁵ Workers at all levels are feeling precarious and exposed, and their ability to defend their labor rights and bargain collectively to set workplace standards is under attack.⁶ OWS’s early assertion that the movement represents “all people who feel wronged by the corporate forces of the world”⁷ resonated with the suspicion among millions of U.S. workers that employment no longer provides certainty today or promise for tomorrow.⁸ Indeed, workers in the United States have less relative economic mobility—the ability to move outside the economic class of one’s

4. David Carr, *For a Movement, a Question: What Now?*, N.Y. TIMES, Nov. 21, 2011, at B1.

5. In the context of the workplace, we embrace the metaphorical power of the “99%” label—even if statistically many of those who do not earn enough to be at the very top of the income ladder nevertheless enjoy more financial stability—in part, because it reflects the self-reported flattening of class distinctions among a population that overwhelmingly defines itself as “middle-class,” and in part, because it reflects the commonly shared disconnect between the professions that place people in the top tiers and those that keep others in the lower tiers. As Paul Krugman has pointed out, “43 percent of the super-elite are executives at nonfinancial companies, 18 percent are in finance and another 12 percent are lawyers or in real estate. And these are not, to put it mildly, professions in which there is a clear relationship between someone’s income and his economic contribution.” Paul Krugman, *We are the 99%*, N.Y. TIMES, Nov. 24, 2011, at A35.

6. We go into greater detail on the increase in intimidation against workers in the private sector who seek to unionize and the efforts of state legislatures to limit public sector collective bargaining below. For an overview of the historical uniqueness of these efforts, see William Cronon, *Wisconsin’s Radical Break*, N.Y. TIMES, Mar. 21, 2011, at A27; Robert Reich, *The Shameful Attack on Public Employees*, HUFFINGTON POST (Jan. 5, 2011, 9:14 PM), http://www.huffingtonpost.com/robert-reich/the-shameful-attack-on-pu_b_805050.html; Zoe Bridges-Curry, *GOP Prioritizing Attacks on NLRB at the Expense of Jobs*, AM. RTS. WORK (Nov. 3, 2011, 3:42 PM), <http://americanrightsatwork.org/blog/2011/11/03/nlr-attacks-graphic-jobs/>.

7. Michael Greenberg, *In Zucotti Park*, N.Y. REV. BOOKS (Nov. 10, 2011), <http://www.nybooks.com/articles/archives/2011/nov/10/zucotti-park/?pagination=false>.

8. In 2011, the Pew Economic Mobility Project polled respondents on their sense of their own economic future and that of the country. Less than one-third felt confident in its own financial situation, and more than half rated the national economy as poor. Fifty-nine percent believe it will be harder for their children to move up the income ladder, and eighty percent believe that the government does an ineffective job of helping poor and middle-class Americans. See *Poll 2011: Economic Mobility and the American Dream—Where Do We Stand in the Wake of the Great Recession?*, ECON. MOBILITY PROJECT <http://www.economicmobility.org/economicmobility.org/poll2011> (last visited Mar. 5, 2012).

parents—than in most other industrial nations.⁹ At the same time, legislative changes to safety net programs and increasingly hostile rhetoric against those who depend upon them have signaled to workers that they are on their own.

Even before the Great Recession, workers struggling with stagnant wages and stalled mobility were confronted by an idealized “meritocracy” that suggested their failure to rise was due to flaws in their character rather than a system where the rules were stacked against them.¹⁰ Even now, several years into the recovery, an unprecedented number of workers are feeling the stigma. The Great Recession came on the heels of another slow “jobless” recovery; from 2000 to 2007, average annual job growth was only 0.6%,¹¹ leaving millions un- or under-employed and providing no pressure to increase the wages of those still at work.¹² The jobs that are being added to the economy are concentrated in higher-wage skilled professions or lower-wage jobs, while mid-wage jobs like machinists, kindergarten teachers, and sales representatives accounted for only 6.2% of net employment growth between 2001 and 2008.¹³ This new hourglass economic model squeezes out any promise of economic mobility for most workers.¹⁴

Even with the start of this most recent “recovery,” wage growth and job growth stagnated. Between the second quarter of 2009, when

9. See Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES, Jan. 4, 2012, at A1; Scott Winship, *Mobility Impaired*, NAT'L REV. ONLINE (Nov. 7, 2011, 4:00 AM), <http://www.nationalreview.com/articles/282292/mobility-impaired-scott-winship>.

10. See, e.g., MICHAEL ELLSBERG, *THE EDUCATION OF MILLIONAIRES: IT'S NOT WHAT YOU THINK AND IT'S NOT TOO LATE* (2011).

11. LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2008–2009* 9 (2009).

12. The Bureau of Labor Statistics calculates the unemployment rate using a household survey asking respondents if they are currently in the labor force, meaning if they are working or actively looking for work. This number does not include those who continue to want work, but have become “discouraged” and are no longer actively seeking work. This also does not include those who are involuntarily working only part-time, or those who have been compelled to accept work below their skills level rendering them “under-employed.” For more details, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *HOW THE GOVERNMENT MEASURES UNEMPLOYMENT*, http://www.bls.gov/cps/cps_htgm.htm (last visited Mar. 5, 2012).

13. NAT'L EMP. LAW PROJECT, *THE GOOD JOBS DEFICIT: A CLOSER LOOK AT RECENT JOB LOSS AND JOB GROWTH TRENDS USING OCCUPATIONAL DATA* 5 (July 2011).

14. Douglas S. Massey & Deborah S. Hirst, *From Escalator to Hourglass: Changes in the U.S. Occupational Wage Structure, 1949–1989*, 27 SOC. SCI. RESEARCH 51, 51–71 (1998); Erik Olin Wright & Rachel E. Dwyer, *The Patterns of Job Expansions in the U.S.A.: A Comparison of the 1960s and 1990s*, 1 SOCIO-ECON. REV. 322, 322–25 (2003).

the recovery began, and the fourth quarter of 2010, national income rose by \$528 billion, with the vast majority of that increase — \$464 billion — going to pretax corporate profits and just \$7 billion going to aggregate wages and salaries (after accounting for inflation).¹⁵ In contrast, in the recovery that began in 1991, 50% of the growth in national income went to wages and salaries during the first six quarters after the recession ended, while corporate profits actually fell by 1% during that period.¹⁶ That this “recovery” has disproportionately favored corporations over workers may help to explain why such a large swath of the workforce feels left behind. The social compact whereby Americans believed that both the opportunity for prosperity and the burdens of economic change would be widely shared is in shreds, making working people especially responsive to OWS’s rallying cry of “the 99%.”

In this Article, we review some of the methods by which corporations and their allies have diminished workers’ leverage in the workplace, providing decades worth of lived experiences that ratify the OWS critique. We also suggest concrete policy solutions to rebuild the workplace as a point of opportunity, to “re-occupy” our occupations. Worker and community organizations have taken the lead in challenging workplace insecurity and injustice, though the path to broad coalition work remains unmapped. As we move into the third year of the purported economic recovery and the election season opens the dialogue on what kind of economy we want as a nation, these case studies in policy design suggest ideas to take “occupy” from the word of the year to a solid economic plan.

I. WORKERS ARE FALLING BEHIND

A. Running Faster to Stay in Place

Long before the first tents were set up, even before the Great Recession, working people were working harder just to keep their heads above water. Between 1973 and 2007, productivity (the output per hour) went up by 83%, while pay for the median worker increased by

15. ANDREW SUM ET AL., CTR. FOR LABOR MARKET STUDIES, NORTHEASTERN UNIVERSITY, THE ‘JOBLESS AND WAGELESS RECOVERY’ FROM THE GREAT RECESSION OF 2007–2009: THE MAGNITUDE AND SOURCES OF ECONOMIC GROWTH THROUGH 2011 AND THEIR IMPACTS ON WORKERS, PROFITS, AND STOCK VALUES (May 2011), *available at* <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/field-content-file/pdf/Mike%20Lillich/Revised%20Corporate%20Report%20May%2027th.pdf>.

16. *Id.*

only 10%.¹⁷ Had typical wages been in line with productivity increases, by 2005, workers would have seen a 6 to 70% rise in their paychecks.¹⁸ These lost dollars have added up; researchers estimate that in the first decade of the twenty-first century alone, the failure of wages to keep up with productivity increases has cost workers more than \$200 billion in lost labor compensation.¹⁹

Wages have stagnated as a result. For two decades, high-school educated workers in particular saw miniscule wage increases; in the private sector their paychecks rose just 4.8%, and those in state government struggled with a barely perceptible 2.6% growth.²⁰ The federal minimum wage, theoretically the floor that upholds workers' wages and provides them some level of leverage in negotiating their pay, has increased only five times since the late 1960s.²¹ Because federal legislation fails to index minimum wage to rising costs of living, the minimum wage now stands at roughly two-thirds the value it had in 1968 and is less than 40% of the average wage.²² To compensate for stagnant wages, families depend ever more heavily on multiple wage earners, entering into the "two-income trap" in which adults—

17. Horst Brand, *Whose Recession? U.S. Workers Confront Growing Insecurity*, 54 DISSENT MAG. 4, 49 n.19 (2009). As Ian Dew-Becker and Robert J. Gordon point out, through most of the second half of the twentieth century, growth in median wages barely grew at all, while average wages kept pace with productivity growth, primarily because half of the income gains went to the top ten percent of the income distribution leaving the bottom ninety percent to share what was left. See Ian Dew-Becker & Robert J. Gordon, *Where Did the Productivity Growth Go? Inflation Dynamics and the Distribution of Income* (Nat'l Bureau of Econ. Research, Working Paper No. 11842, 2005).

18. RICHARD FREEMAN, *AMERICA WORKS: THE EXCEPTIONAL U.S. LABOR MARKET* (2008).

19. Brand, *supra* note 17, at 48–53.

20. LAWRENCE MISHEL & HEIDI SHIERHOLZ, ECON. POL'Y INST., *THE SAD BUT TRUE STORY OF WAGES IN AMERICA* 297 (Mar. 14, 2011), available at http://www.epi.org/publication/the_sad_but_true_story_of_wages_in_america/.

21. The minimum wage under the Fair Labor Standards Act has been changed and expanded many times since it was originally passed in 1938. In 1961, Congress passed amendments that increased the minimum for previously covered workers from \$1.00 to \$1.25 by 1963. A 1966 amendment took the minimum wage from \$1.00 to \$1.60 over the course of 5 years. In 1974, Congress amended the law again to increase the rate to \$3.35 by 1981. Amendments in 1996 brought the pay level to \$5.15 by 1997, after which Congress failed to increase the minimum wage for a full decade. It was most recently raised through the Fair Minimum Wage Act of 2007, which increased the minimum wage from \$5.15 to \$7.25 in three phases. See *History of Changes to the Minimum Wage Law*, U.S. DEP'T LABOR, <http://www.dol.gov/whd/minwage/coverage.htm> (last visited Mar. 5, 2012).

22. HEIDI SHIERHOLZ, ECON. POL'Y INST., *FIX IT AND FORGET IT: INDEX THE MINIMUM WAGE TO GROWTH IN AVERAGE WAGES* 251 (Dec. 17, 2009), available at <http://www.epi.org/publication/bp251/>.

especially women — cannot afford to quit their jobs, but find that increased costs for child care and transportation mean they cannot really afford to keep them either.²³

Some pin the blame for stagnant wages on American workers' lack of skills and education, arguing that these alleged deficiencies make them unable to compete in the modern economy.²⁴ And indeed, the income gap between skilled and unskilled labor has grown exponentially as earnings for those with college degrees dramatically outpace those of workers without post-secondary education, adding pressure for working-class families to send children to university. By 2009, this college wage premium had risen to 84%.²⁵ These premiums in earnings come with a steep price; since the 1990s, tuition and fees at public universities have grown by almost 130%,²⁶ with the result that graduates can see repayments that consume more than 15% of their income. In an international context, the United States is “clearly the worst place to be” for low-income high-education debt graduates.²⁷ Many OWS activists have called for student debt forgiveness, noting that because it is non-dischargeable, loan debt can follow a borrower for years.²⁸

23. ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003).

24. Ironically, during the 1970s, sociologists, economists, and policy makers fretted that American workers were overeducated for the job market, a position they dramatically reversed in the 1980s and 1990s. For a review of this literature, see Michael J. Handel, *Skills Mismatch in the Labor Market*, 29 ANN. REV. SOCIOL. 135 (2003). As researchers at the Political Economy Research Institute have pointed out, however, of the thirty occupations with the largest growth, twenty-one do not require more than a high school degree, and Department of Labor projections estimate that sixty-eight percent of jobs in 2016 will be accessible to workers with a high school degree or less. See John Miller & Jeannette Wicks-Lim, *Unemployment: A Jobs Deficit or a Skills Deficit?*, DOLLARS & SENSE 9, 10 (Jan.–Feb. 2011), http://www.peri.umass.edu/fileadmin/pdf/other_publication_types/magazine___journal_articles/ds-janfeb2011--miller-wicks-lim.pdf.

25. ANTHONY P. CARNEVALE ET AL., *THE GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 1* (2009) [hereinafter CARNEVALE ET AL., *THE COLLEGE PAYOFF*].

26. Annalyn Censky, *Surging College Costs Price Out Middle Class*, CNNMONEY (June 13, 2011, 5:44 AM), http://money.cnn.com/2011/06/13/news/economy/college_tuition_middle_class/index.htm.

27. ALEX USHER, EDUC. POL'Y INST., *GLOBAL DEBT PATTERNS: AN INTERNATIONAL COMPARISON OF STUDENT LOAN BURDENS AND REPAYMENT CONDITIONS 17–18* (Sept. 2005), available at http://educationalpolicy.org/pdf/global_debt_patterns.pdf.

28. See, e.g., Petra Cahill, *Another Idea for Student Loan Debt: Make it Go Away*, MSNBC.COM (Oct. 26, 2011, 6:35 AM), <http://www.msnbc.msn.com/id/450>

Sadly, taking on these debt burdens doesn't guarantee a job. Unemployment for recent graduates with a bachelor's degree is just under 9%, with holders of degrees in architecture, information systems, and the fine arts averaging over 10% unemployment.²⁹ Furthermore, the benefits of higher educations are not spread equally across occupations, with the greatest rewards concentrated amongst managerial and health professionals. Nor do the benefits accrue equally across race and gender lines. In fact, women need to have a doctoral degree to earn as much as men with a bachelor's degree.³⁰ On average African Americans' lifetime earnings are 13 to 16% less than their Caucasian counterparts, a discrepancy that increases to 23% less for those with professional degrees.³¹

B. Where Have All the Good Jobs Gone?

Even now, in the third year of the "recovery," job growth remains sluggish. According to the Department of Labor (U.S. DOL), in December 2011, the total unemployed, including those out of work, discouraged workers who have stopped looking for jobs, and those employed only part-time for economic reasons, remained at 15.2%.³² Early data indicates that while many mid-wage jobs were lost during the recent recession, lower-wage industries are returning more quickly.³³ The federal government predicts that some mid-wage professions that suffered significantly in the recession, for example architecture and engineering, may only barely recover their 2006 employment levels by 2020, while occupations generally classified as lower-wage, such as personal care aides and home health aides, are predicted to

40659/ns/us_news-life/t/another-idea-student-loan-debt-make-it-go-away/ (detailing a petition signed by 600,000 holders of student loan debt calling for forgiveness).

29. ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, *HARD TIMES: COLLEGE MAJORS, UNEMPLOYMENT AND EARNINGS, NOT ALL COLLEGE DEGREES ARE CREATED EQUAL* 3–21 (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Unemployment.Final.update1.pdf>.

30. CARNEVALE ET AL., *THE COLLEGE PAYOFF*, *supra* note 25, at 10.

31. *Id.* at 11.

32. ECONOMIC NEWS RELEASE, BUREAU OF LABOR STATISTICS, TABLE A-15 ALTERNATIVE MEASURES OF LABOR UNDERUTILIZATION (last modified Mar. 9, 2012), available at <http://www.bls.gov/news.release/empst.t15.htm>.

33. See ANNETTE BERNHARDT & CHRISTINE RIORDAN, NAT'L EMP. LAW PROJECT, *A YEAR OF UNBALANCED GROWTH: INDUSTRIES, WAGES, AND THE FIRST 12 MONTHS OF JOB GROWTH AFTER THE GREAT RECESSION* 1 (Feb. 2011).

have the largest percentage growth over the next decade.³⁴ By 2018, the U.S. DOL expects the fastest growing occupational groups to include home health aides (with a projected growth of 50%), home care aides (46%), food preparation workers (15%), and medical orderlies and attendants (19%).³⁵ This pattern is not new. Between 1980 and 2005, the number of U.S. labor hours in service occupations—jobs that typically entail caring for or assisting others like home health care aides, child care workers, janitors, or food service workers—grew by 35%.³⁶ As an economist pointed out at the time, “[T]he jobs we are creating pack less of a punch for the economy. . . . With less income, there is less spending and less growth.”³⁷

Low-wage jobs carry additional financial burdens for the worker beyond low wages. If employers in these occupations offer health care plans, they typically demand high deductibles, cover only a small proportion of their workforce, or impose long waiting periods to qualify for coverage.³⁸ In 2010, nearly one-third of working-age adults spent 10% or more of their income on premiums or out-of-pocket medical care costs, an increase of 10% over 2001.³⁹ Forty-four million people are currently trying to pay off medical debt, with one-quarter carrying more than \$4000 in debt.⁴⁰ As a result, researchers estimate that in 2007, more than six out of every ten bankruptcies came as a

34. C. Brett Lockard & Michael Wolf, *Occupational Employment Projections to 2020*, 135 MONTHLY LABOR REV. ONLINE 84, 84 (2012), available at <http://www.bls.gov/pub/mlr/2012/01/art5full.pdf>.

35. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION, tbl.2, <http://www.bls.gov/oco/oco2003.htm> (last visited Mar. 5, 2012).

36. David H. Autor & David Dorn, *Inequality and Specialization: The Growth of Low-Skill Service Jobs in the United States 2* (Institute for the Study of Labor (IZA), Discussion Paper No. 4290, 2009).

37. Barbara Hagenbaugh & Barbara Hansen, *Low-Wage Jobs Rise at Faster Pace*, USA TODAY (June 30, 2004, 10:32 PM), http://www.usatoday.com/money/economy/employment/2004-06-29-jobs_x.htm (quoting Mark Zandi).

38. Perhaps the most criticized company in this regard is Wal-Mart. See, e.g., Michael Barbaro, *Health Plan Overhauled at Wal-Mart*, N.Y. TIMES, Sept. 19, 2007, at C1; Steven Greenhouse & Reed Abelson, *Wal-Mart Cuts Some Health Care Benefits*, N.Y. TIMES, Oct. 20, 2011, at B1; *Wal-Mart: High Risk, High Reward*, ECONOMIST, Oct. 12, 2006, at 80.

39. SARA R. COLLINS ET AL., THE COMMONWEALTH FUND, HELP ON THE HORIZON: HOW THE RECESSION HAS LEFT MILLIONS OF WORKERS WITHOUT HEALTH INSURANCE, AND HOW HEALTH REFORM WILL BRING RELIEF 7 (Mar. 2011), available at http://www.commonwealthfund.org/~media/Files/Surveys/2011/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_31611.pdf.

40. *Id.* at 9.

result of lost income due to illness or mortgaging a home to pay medical bills, an increase of almost 50% since 2001.⁴¹

Similarly, most low-wage workers will be on their own once they are too old for the workplace. As of 2008, only 53.2% of private-sector workers had an employer-sponsored retirement plan,⁴² with only 20% in a defined benefit pension plan.⁴³ This pattern is especially true for low-income, part-time, young workers at small firms. According to one recent study, “fewer than 40 percent of private sector workers in the bottom income quartile work for a firm that sponsors a retirement plan.”⁴⁴ Even the fortunate few with defined benefit plans have seen dramatic drops in their funds’ status, an average of 30% in 2008.⁴⁵ Between October 2007 and 2008, the value of equity assets in defined benefit and 401(k) accounts dropped by about \$4 trillion.⁴⁶ These shortfalls combined with the lost value of most older Americans’ largest asset, their homes, has placed 51% of all households—and a dismaying 60% of low income households—“at risk” of being unable to maintain their pre-retirement standard of living.⁴⁷ This issue does not affect only older workers; the Center for Retirement Research notes that barring dramatic changes in the economy, the greatest number of “at risk” households are, in fact, those of Generation X-ers who currently have lower wealth-to-income ratios than their elders.⁴⁸

41. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 743–44 (2009); see also Michelle M. Doty et al., *Seeing Red: Americans Driven in Debt by Medical Bills*, 10 COMMONWEALTH FUND: ISSUE BRIEF 1 (2005), available at http://www.commonwealthfund.org/usr_doc/837_Doty_seeing_red_medical_debt.pdf.

42. MICHAEL CALABRESE, NEW AM. FOUND., FACING UP TO THE RETIREMENT SAVINGS DEFICIT: FROM 401(K)S TO UNIVERSAL AND AUTOMATIC ACCOUNTS 4 (Oct. 13, 2011), http://newamerica.net/events/2011/retirement_savings_deficit.

43. Barbara Butrica et al., *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SECURITY BULLETIN 1 (2009).

44. CALABRESE, *supra* note 42, at 4.

45. *Defined Benefit Pensions Threatened*, FORBES (June 23, 2009, 6:00 AM), <http://www.forbes.com/2009/06/22/pension-plans-economy-business-oxford-analytica.html>.

46. ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH AT BOSTON COLLEGE, THE FINANCIAL CRISIS AND STATE/LOCAL DEFINED BENEFIT PLANS, No. 8-19, at 1 (Nov. 2008).

47. ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH AT BOSTON COLLEGE, THE NATIONAL RETIREMENT RISK INDEX: AFTER THE CRASH, No. 9-22, at 6 tbl.2 (Oct. 2009).

48. *See id.* at 2.

C. Wage Theft and the Decline of the Organizations that Fight It

It comes as little surprise that low-wage workers are often cheated out of the pay they earn. But the extent of the problem is surprising. A survey of low-wage workers in three large U.S. cities showed that 26% of workers were paid less than the legally required minimum wage, and more than three quarters were not paid required overtime.⁴⁹ Government agencies charged with protecting workers from this wage theft have been starved of resources; the budgets for the four key U.S. DOL regulatory agencies ensuring occupational safety, fair pay, and federal contract compliance have been essentially flat since the late 1970s.⁵⁰ One study estimates that the resulting diminished regulatory staff coupled with the growth of establishments has resulted in a decline in the rate of investigations per establishment of more than 50%.⁵¹ For the many workers who are not covered by federal protections, or who would find making claims at the state level more efficient than at the federal, the situation is equally grim. Since 2007, most states have reduced the number of full time employees dedicated to wage and hour enforcement or have instituted furloughs among this staff,⁵² and researchers have found that many states are less than rigorous in enforcing state-level laws that protect low-wage workers.⁵³

Lost wages is not a problem affecting only low-wage workers. Many mid- and upper-wage workers are similarly affected by their employers' efforts to keep wages down. Entire industries have made concerted efforts to lower labor costs by bilking workers of their pay.

49. ANNETTE BERNHARDT ET AL., NAT'L EMP. LAW PROJECT, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2* (2009), available at <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1>.

50. DAVID WEIL, BOSTON UNIVERSITY, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, A REPORT TO THE WAGE AND HOUR DIVISION 6* (May 2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

51. *Id.* at 6.

52. JACOB MEYER & ROBERT GREENLEAF, COLUMBIA LAW SCH., NAT'L STATE ATT'Y GEN. PROGRAM, *ENFORCEMENT OF STATE WAGE AND HOUR LAWS: A SURVEY OF STATE REGULATORS 22* (Apr. 2011), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=551819&rtcontentdisposition=filename%3DWage%20and%20Hour%20Report%20FINAL.pdf.

53. See generally Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411 (2011).

In 2010, the Department of Justice filed complaints against several high-tech brand-name corporate giants, including Google, Apple, Adobe, and Intel, stating that agreements between the companies reduced competition for highly-skilled employees and made it impossible for them to leverage their knowledge and training for better wages.⁵⁴ Despite the complaint and the proposed settlement, workers in Silicon Valley remain wary and fearful, unwilling to talk about their own work conditions lest it prove to be “career suicide.”⁵⁵

Overworked and underfunded public agencies struggle to keep up with the problem of lost wages at the same time that labor unions, which also help workers fight unfair conditions, are under virulent attack. A recent analysis of union elections found that in 57% of cases employers threatened to close the plant, in just over 30% of cases they discharged workers, and in 47% of cases they threatened to cut wages and benefits.⁵⁶ Here, too, elected leaders are threatening the funding and authority of regulators who would protect workers’ right to organize. In 2011 alone, union opponents in Congress introduced or passed bills or amendments designed to defund the National Labor Relations Board; five would limit workers’ rights to free and fair elections, and eleven would limit the body’s ability to enforce rules and regulations.⁵⁷

Even workers whose ability to collectively bargain seemed secure now find themselves under attack. Right-wing economists and politicians decry public sector unions as a threat to the sovereignty of the state.⁵⁸ In numerous states, public sector workers are being told they must take pay and benefit cuts, and furloughs in order to protect public services, even as states give an estimated \$70 billion a year in subsidies to private industries with few accountability measures to guar-

54. Press Release, Dep’t of Justice, Office of Public Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010).

55. Barry C. Lynn, *Killing the Competition: How the New Monopolies are Destroying Open Markets*, HARPER’S MAG., Feb. 2012, at 27.

56. KATE BRONFENBRENNER, ECON. POL’Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 235 (May 20, 2009).

57. Bridges-Curry, *supra* note 6.

58. LEO TROY, *THE NEW UNIONISM IN THE NEW SOCIETY: PUBLIC SECTOR UNIONS IN THE REDISTRIBUTIVE STATE* (1994) (often cited as among the first modern critiques of public sector unions as “the new Socialism”). For a recent overview of their concerns, see Eileen Norcross, *Public-Sector Unionism: A Review* (Mercatus Ctr. at George Mason Univ., Working Paper No. 11-26, 2011).

antee promises of jobs.⁵⁹ As New Jersey Governor Chris Christie opined, “there can no longer be two classes of citizens: one that receives rich health and pension benefits, and all the rest who are left to pay for them.”⁶⁰ In Wisconsin, Ohio, and Indiana, workers are engaged in battle against legislators seeking to end their right to bargain collectively. Governors in New York, California, and Massachusetts have all used language that posits public employees and taxpayers as two separate entities with conflicting interests.⁶¹

The recent attacks on public sector unions reveal an underlying race and gender bias. As a recent study points out, the public sector “is the single most important source of employment for African Americans.”⁶² Indeed, African Americans are 30% more likely to be employed in the public sector.⁶³ Further, the exemptions from politicians’ attacks are telling. In Wisconsin, 70% of law enforcement personnel and 96% of firefighters are male.⁶⁴ Conversely, 80% of teachers and 95% of nurses, who were not exempted from the law, are women.⁶⁵

Many observers have struggled to understand the cause of declining union density,⁶⁶ but comparisons across countries reveal that the

59. See *Money-Back Guarantees for Taxpayers: Clawbacks and Other Enforcement Safeguards in State Economic Development Subsidy Programs*, GOOD JOBS FIRST (Jan. 2012), <http://www.goodjobsfirst.org/moneyback>.

60. David Halbfinger, *Christie Declares ‘New Normal’ in Budget Proposal*, N.Y. TIMES, Feb. 22, 2011, at A16.

61. For an overview of the bipartisan state-level attacks on public sector workers, see Melissa Maynard, *Anti-Union Republicans Seize Their Moment*, STATELINE (June 17, 2011), <http://stateline.org/live/details/story?contentId=581971>. See also Shamus Cooke, *The Democrats Attack Unions Nationwide*, TRUTHOUT (May 18, 2011), <http://www.truthout.org/democrats-attack-unions-nationwide/1305653855>; Walter Russell Mead, *Blue State Dems Turn on State, Local Workers*, THE AM. INTEREST (Feb. 27, 2011), <http://blogs.the-american-interest.com/wrm/2011/02/27/blue-state-dems-turn-on-state-local-workers/>.

62. STEVEN PITTS, UNIV. OF CAL., BERKELEY, CTR. FOR LABOR RES. AND EDUC., *BLACK WORKERS AND THE PUBLIC SECTOR* (Apr. 4, 2011).

63. *Id.*

64. Alyssa Battistoni, *The Dirty Secret of Public-Sector Union Busting*, SALON (Feb. 24, 2011, 8:01 AM), http://www.salon.com/2011/02/24/battistoni_public_employees/.

65. *Id.*

66. See, e.g., ROBERT BALDWIN, *THE DECLINE OF US LABOR UNIONS AND THE ROLE OF TRADE* (2003). See generally LAWRENCE RICHARDS, *UNION-FREE AMERICA: WORKERS AND ANTIUNION CULTURE* (2008); John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LABOR REL. REV. 82, 82–108 (2009); Jake Rosenfeld, *Little Labor: How Union Decline Is Changing the American Landscape*, PATHWAYS 3–6 (Summer 2010); Chris Tilly, *An Opportunity*

single greatest predictor for low union density may be political opposition to them.⁶⁷ These efforts not only contribute to the declining number of American workers represented by unions, now at 14.8 million members or 11.8% of the workforce,⁶⁸ but also call into question the basic premises of due process,⁶⁹ free speech, and self-governance.⁷⁰

II. THE DECLINE OF STANDARD WORK

Although U.S. workers might shake their heads at the term “non-standard work,” the term the rest of the English-speaking world uses would trigger nods of recognition: “precarious work.” Increasingly, we have come to accept work that is insecure, uncertain, poorly paid, and which lacks even basic wage or safety protections. Employers embrace new employment models in the name of “flexibility,” which all too often leave workers in an ambiguous status and make claiming lost or stolen wages difficult at best.

A. You Don’t Work Here Anymore, Now Get to Work

Businesses’ increased emphasis on “flexibility” in all industries — from manufacturing to retail, high-tech, back office customer service, and higher education — means that millions of workers do not have a long-term relationship with their employer.⁷¹ Instead, numerous for-profit “labor market intermediaries” control workers’ day-by-day workplace, effectively “leasing” them back to the firms for which they perform labor, and leaving them unsure who carries responsibility for workers compensation, tax withholding, and unemployment insurance. By the early 1970s, “temp agencies” won new state laws that made them statutory employers rather than “employment agencies,”

Not Taken . . . Yet: U.S. Labor and the Current Economic Crisis, 14 WORKINGUSA 73 (2011).

67. JOHN SCHMITT & ALEXANDRA MITUKIEWICZ, CTR. FOR ECON. AND POL’Y RES., POLITICS MATTER: CHANGES IN UNIONIZATION RATES IN RICH COUNTRIES, 1960–2010 (Nov. 2011), available at <http://www.cepr.net/documents/publications/unions-oecd-2011-11.pdf>.

68. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNION MEMBERS SURVEY (Jan. 27, 2012), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

69. Fred Feinstein, *Attacks on NLRB Imperil Due Process*, POLITICO (July 14, 2011, 9:50 PM), <http://www.politico.com/news/stories/0711/58998.html>.

70. See generally Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223 (2005).

71. For an overview of temporary work as a management strategy, see ERIN HATTON, *THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPs IN POSTWAR AMERICA* (2011).

exempting them from many state regulations and making it almost impossible for temporary employees to organize. By 2008, as temporary work grew in ever more highly skilled positions, this employment model affected more than 2.3 million workers.⁷² Companies have come to see “temporary” workers as a permanent part of their workforce, entering into long-term contracts with agencies and allowing the agencies in practice to become an extension of the company human resources department by performing the hiring, firing, and even payroll functions.⁷³ As legal scholars have pointed out, these practices limit the security of all workers by reducing pressure to raise wages and benefits and by relieving employers of legal obligations to their own workforce.⁷⁴

In related practices, employers are increasingly shifting their workforces off their books by misclassifying workers as “independent contractors” to evade responsibility for workplace laws and to create confusion among workers. Numerous state and federal studies have shown that approximately 10 to 19% of employers may be misclassifying workers as independent contractors, with the levels in construction work as high as 30%.⁷⁵ Despite federal and state government crackdowns on this tactic, large employers in many sectors continue to use this scheme, including FedEx Ground,⁷⁶ landscaping companies⁷⁷ and construction,⁷⁸ building services,⁷⁹ port trucking,⁸⁰ and home health care,⁸¹ to name a few.

72. Tian Luo, Amar Mann & Richard Holden, *The Expanding Role of Temporary Help Services from 1990 to 2008*, 133 MONTHLY LABOR REV. ONLINE 3 (2010), available at <http://www.bls.gov/opub/mlr/2010/08/art1full.pdf>.

73. Arne Kalleberg, *Employment Relations: Part-Time, Temporary and Contract Work*, 26 ANN. REV. OF SOCIOLOGY 341, 341–65 (2000).

74. Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y J. 285 (2009).

75. FRANCOISE CARRE & RANDALL WILSON, UNIV. OF MASSACHUSETTS, BOSTON, CTR. FOR SOC. POL'Y, *THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION* (2004); see also MICHAEL P. KELSAY & JAMES I. STURGEON, DEP'T OF ECON., UNIV. OF MISSOURI-KANSAS CITY, *THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF INDIANA* (2010). For information on other state reports, see http://www.carpenters.org/misclassification/key_studies.html.

76. See, e.g., *Mass, FedEx Ground in \$3 Million Accord*, ASSOCIATED PRESS (July 16, 2010), http://articles.boston.com/2010-07-16/business/29286353_1_fedex-ground-drivers-accord.

77. Press Release, U.S. Dep't of Labor, US Labor Department Investigation Results in Court Order Against Landscaping Companies for Wrongfully Misclassifying Employees, \$173,000 in Back Wages (Oct. 4, 2010), available at <http://www.dol.gov/whd/media/press/whdpressVB2print.asp?pressdoc=Midwest/20101004.xml>.

By issuing workers an IRS 1099 independent contractor form instead of a W-2, or by paying the employee off the books, and providing no tax forms or tax reporting and withholding, employers can argue they are off the hook for any rule protecting an “employee.” This includes even the most basic rights to minimum wage and overtime premium pay, health and safety protections, job-protected family and medical leave, antidiscrimination laws, and the right to bargain collectively and join a union.⁸² Misclassifying employers stand to save upwards of 30% of their payroll costs, including employer-side FICA and FUTA tax obligations, workers compensation, and state taxes paid for “employees.”⁸³

The test to determine if a worker is truly an independent contractor is complicated, and procedures vary from state to state.⁸⁴ Nevertheless, workers might find themselves confronted with legal documents that affirm their independent status with little explanation of what that term means for them.⁸⁵ The practice dissuades many work-

78. Studies have found that upwards of 30% of construction firms misclassify their employees as independent contractors. FRANCOIS CARRE & J.W. MCCORMACK, CONSTRUCTION POL’Y RES. CTR., LABOR AND WORKLIFE PROGRAM, HARVARD LAW SCHOOL AND HARVARD SCHOOL OF PUBLIC HEALTH, THE SOCIAL AND ECONOMIC COST OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION 8 (Apr. 25, 2005), *available at* <http://www.law.harvard.edu/programs/lwp/Maine%20Misclassification%20Maine.pdf>.

79. *See, e.g.*, *Coverall N. Am., Inc. v. Comm’r of the Div. of Unemployment Assistance*, 857 N.E.2d 1083 (Mass. 2006).

80. *See, e.g.*, REBECCA SMITH ET AL., NAT’L EMP. LAW PROJECT, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA’S PORTS (2010), *available at* http://nelp.3cdn.net/000beaf922628dfea1_cum6b0fab.pdf.

81. *See, e.g.*, *Lee’s Industries, Inc.*, Case No. 4-CA-36904, *Decisions and Orders of the National Labor Relations Board* (N.L.R.B. Feb. 25, 2010).

82. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

83. *Hearing on the Effects of Misclassifying Workers as Independent Contractors Before the House Comm. on Ways and Means, Subcomms. on Income Security and Family Support and on Select Revenue Measures*, 110th Cong. 2d Sess. (2007) (statement of Rebecca Smith, Staff Atty., Nat’l Emp. Law Project), *available at* <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5874>.

84. NAT’L ASSOC. OF INS. COMM’R, AN OVERVIEW OF WORKERS’ COMPENSATION INDEPENDENT CONTRACTOR REGULATORY APPROACHES (Oct. 24, 2008), *available at* http://www.naic.org/documents/committees_c_wctf_naic_iaibc_ind_contractor_overview.pdf.

85. *See for instance*, the form that workers must sign in Rhode Island for the Department of Labor and Training. STATE OF RHODE ISLAND, DEP’T OF LABOR AND TRAINING, DIV. OF WORKERS’ COMPENSATION, NOTICE OF DESIGNATION AS INDEPENDENT CONTRACTOR PURSUANT TO R.I.G.L § 28-29-17.1 (2006), *available at*

ers from ever attempting to exercise their rights. In fact, they may assume they have none simply because of the label their employer has given them. Whether the affected workers are garment workers,⁸⁶ farm laborers,⁸⁷ warehouse workers, or janitors⁸⁸ bilked by a fly-by-night contractor, construction workers,⁸⁹ home health aides or nurses⁹⁰ denied unemployment insurance benefits when they are laid-off, or computer software technicians,⁹¹ or television writers attempting to recoup overtime pay, the employer's mechanisms and the effect on the workers are often surprisingly similar across sectors. Workers at opposite ends of the socio-economic spectrum may be forced into the same take-it-or-leave-it deals when looking for a job—and face the same practical and legal burdens when they later attempt to stake a claim to the social-safety net benefits or wage-and-hour protections that they have been cheated of by their employers.

Not only is the scope of these problems broad, the practices have become so rampant in certain industries that they have fueled wholesale shifts from middle-class, family-supporting jobs to work that pays poverty-level wages with no benefits. For example, over the past three decades, the port trucking industry has undergone a dramatic transformation; large unionized companies that once provided workers with decent wages and benefits now “contract” with truckers clas-

http://www.dlt.ri.gov/wc/pdfs/forms/employer/DWC_11_IC_Mar06.pdf. The worker declares that he is an independent contractor and signs away his right to workers' compensation benefits, but the form does not include an explanation of how one determines true independent contractor status meaning that the worker must rely on the employer to do so.

86. *See, e.g.*, *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 63 (2d Cir. 2003); *Lopez v. Silverman*, 14 F. Supp. 2d 405, 406 (S.D.N.Y. 1998).

87. *See, e.g.*, *Torres-Lopez v. May*, 111 F.3d 633, 636 (9th Cir. 1997); *Antenor v. D&S Farms*, 88 F.3d 925, 927 (11th Cir. 1996).

88. *See e.g.*, *Itzep v. Target Corp.*, 543 F. Supp. 2d 646, 648 (W.D. Tex. 2006); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 299 (D.N.J. 2005); *Vega v. Contract Cleaning Maint.*, No. 03-C9130, 2004 U.S. Dist. LEXIS 20949, at *2 (N.D. Ill. Oct. 18, 2004).

89. *See, e.g.*, *Lemus v. Timberland Apartments LLC*, No. 3:10-cv-01071-PK, 2011 WL 7069078, at *4 (D. Ore. Dec. 21, 2011), *aff'd*, 2012 WL 174787 (D. Ore. Jan 20, 2012); *Deras v. Verizon Md., Inc.*, No. DKC 09-0791, 2010 U.S. Dist. LEXIS 77249, at *20 (D. Md. July 30, 2010); *Mendoza v. Essential Quality Constr., Inc.*, 691 F. Supp. 2d 680, 685 (E.D. La. 2010); *Quintanilla v. A & R Demolition, Inc.*, NO. H-04-1965, 2005 U.S. Dist. LEXIS 34033, at *46 (S.D. Tex. Aug. 3, 2005).

90. *See, e.g.*, *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 130 (2d Cir. 2004), *rev'd on other grounds*, 551 U.S. 158 (2007) (holding that home care attendant working for agency employer who placed workers in individual homes can sue for unpaid wages).

91. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1189 (9th Cir. 1996), *cert. denied*, 522 U.S. 1098 (1998).

sified as independent contractors who bear the burden of buying or leasing and maintaining their trucks, have little bargaining power, and seldom receive benefits like health insurance.⁹² Earnings for port truckers have plummeted during this time to just 65% of the national average for truck drivers, and below or close to the poverty level in many regions.⁹³

Corporations that employ these practices cheat not only their own workers, but taxpayers at large, draining local, state and federal coffers at the expense of corporate profits, and undermining vital safety net programs. Moreover, these practices cost taxpayers in lost social security, unemployment, and other taxes.⁹⁴ A 2009 Government Accountability Office report estimated that independent contractor misclassification kept \$2.72 billion out of federal coffers in 2006,⁹⁵ and states report that they are losing tens-of-millions to hundreds-of-millions of dollars annually in income tax revenues and workers' compensation and unemployment insurance contributions.⁹⁶

B. Losing Your Job is “Just a New Way of Doing International Business.”

Ironically, one instance when low-wage service workers may feel more secure than their higher-skilled counterparts is in debates about sending jobs out of the country. The 2004 presidential campaign put the growing practice of sending jobs overseas, or “offshoring,” into the spotlight. That year, a survey of businesses showed that 86% of employers planned to outsource more technology work in the next twelve months.⁹⁷ With political leaders telling Americans that off-

92. SMITH ET AL., *supra* note 80, at 1.

93. *Id.* at 17.

94. U.S. DEP'T OF LABOR, COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS (1995), *available at* http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.

95. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 10 (2009) (noting that the \$2.72 figure is an inflation-adjusted number).

96. *See generally* SARAH LEBERSTEIN, NAT'L EMP. LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2011), *available at* <http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1>.

97. Carrie Kirby, *Firms Plan to Send More Jobs Abroad; Expectations are Lower, but Will is There, Survey Finds*, SAN FRANCISCO CHRON., Mar. 27, 2004, at C1, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/03/27/BUG8F5S2A71.DTL>.

shoring jobs was just a new way of doing international trade, and business leaders telling them to stop “whining” about the practice,⁹⁸ workers had little reason for optimism. In fact, by 2009, outsourcing had become a \$500 billion global industry.⁹⁹ An industry study concluded that companies will soon offshore as many as 800,000 back office administrative, human resources, procurement, finance, and information technology jobs, shifting almost \$30 million from wages into company coffers.¹⁰⁰ Others predict that by 2015, as many as 3.3 million jobs could be sent overseas with a loss of \$136 billion in wages for US workers.¹⁰¹

Even workers at the highest end of the pay scale have reason to be fearful. Through the recession, legal services have increasingly been outsourced to overseas companies charging well under \$100 per hour,¹⁰² and law firms are hiring lawyers on short-term contracts paying as little as \$15 an hour.¹⁰³ Similarly, an engineer may find his employer expects him to compete in wages against one who earns 80 to 88% less in Shanghai or India.¹⁰⁴ Even college professors, the very emblem of a safe, liberal, and elite profession, may find some aspects of their jobs outsourced overseas or to low-priced online operations including grading, lecturing, and even curriculum design.¹⁰⁵ Tax laws

98. Rachel Konrad, *U.S. Chamber of Commerce Chief Endorses Offshoring*, ASSOCIATED PRESS (July 1, 2004, 10:00 AM), <http://www.informationweek.com/news/22103240>; see also Jonathan Weisman, *Bush, Advisor Assailed for Stance in ‘Offshoring’ Jobs*, WASH. POST, Feb. 11, 2004, at A06.

99. Press Release, Plunkett Research, Ltd., *Plunkett Research Reports 10 Prominent Trends Affecting the Outsourcing and Offshoring Industry* (June 25, 2009).

100. Press Release, Hackett Group, *Hackett: Offshoring of Back Office Jobs Is Accelerating; Global 1000 to Move More than 350,000 Jobs over Next Two Years* (Jan. 6, 2009).

101. David P. Boyd, *The Rush to Outsource: The Interplay of Location and Dislocation*, 3 INT’L BUS. & ECON. RES. J. 11, 11 (2004).

102. Cynthia Cotts & Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, N.Y. TIMES (Aug. 21, 2007), <http://www.nytimes.com/2007/08/21/business/worldbusiness/21iht-law.4.7199252.html>.

103. Vanessa O’Connell, *Lawyers Settle . . . for Temp Jobs*, WALL ST. J., June 15, 2011, at B1.

104. Bruce Einhorn & Manjeet Kripalani, *Outsourcing: Make Way for China*, BLOOMBERG BUSINESSWEEK (Aug. 4, 2003), http://www.businessweek.com/magazine/content/03_31/b3844132_mz033.htm.

105. See, e.g., Audrey Williams June, *Some Papers are Uploaded to Bangalore to Be Graded*, CHRON. HIGHER EDUCATION (Apr. 4, 2010), <http://chronicle.com/article/Outsourced-Grading-With/64954/>; Marc Perry, *Outsourced Ed: Colleges Hire Companies to Build Their Online Courses*, CHRON. HIGHER EDUCATION (July 18, 2010), <http://chronicle.com/article/Outsourced-Ed-Colleges-Hire/66309/>; Didi Tang, *Universities Turn to Outsourced Instructors*, USA TODAY (June 29, 2011, 4:38 PM),

that give corporations tax breaks for moving jobs overseas and allow deductions for capital costs for new equipment for offshore facilities send the message to employers and workers that long-term commitments to American workers are not in a company's best interest.

III. A DISINTEGRATING SAFETY NET

As workers are buffeted by the rise of low-wage jobs, the decline of workplace stability, and widespread wage theft, they are also confronted by unemployment numbers that are nearly unprecedented in their size and longevity. The specter of hordes of eager replacement workers, coupled with threats to funding for unemployment insurance (UI) benefits, make it difficult for workers to protest unfair working conditions confidently. While the economy is slowly creating new jobs, as of January 2012, more than 7.3 million people were claiming unemployment benefits,¹⁰⁶ with millions more involuntarily working only part-time, working at jobs well below their skill level, or so discouraged that they have dropped out of the system entirely. This recovery has been marked by long-term unemployment, a circumstance that hit older workers and workers of color especially hard.¹⁰⁷

UI benefits have been critical in supporting the slow recovery; since 2009, more than seventeen million unemployed workers applied for and received these benefits, allowing them to put nearly \$180 billion into their local economies.¹⁰⁸ Although these benefits are hardly generous (state benefits averaged only \$300 per week¹⁰⁹), they kept 3.4 million families out of poverty in 2010,¹¹⁰ allowed workers to care for their families, and assessed the best options for finding remunerative work. With only 3.5 million job openings at the end of 2011 (the

http://www.usatoday.com/money/perfi/college/2011-06-28-instruction-outsourcing_n.htm.

106. U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE WEEKLY CLAIMS REPORT (Feb. 2, 2012), *available at* <http://www.ows.doleta.gov/unemploy/wkclaims/report.asp>.

107. GERALD MAYER, CONGRESSIONAL RESEARCH SERV., THE TREND IN LONG-TERM UNEMPLOYMENT AND CHARACTERISTICS OF WORKERS UNEMPLOYED FOR MORE THAN 99 WEEKS 13 (Dec. 20, 2010).

108. NAT'L EMP. LAW PROJECT, HANGING ON BY A THREAD 3 (2011), *available at* http://nelp.3cdn.net/68172c0cee6bd3e294_czm6iiviu.pdf.

109. NAT'L EMP. LAW PROJECT, HOLIDAY MESSAGE FROM HOUSE OF REPRESENTATIVES TO LONG-TERM UNEMPLOYED: 'TIS BETTER TO ABANDON YOU THAN TO COMPROMISE 1 (2011), *available at* <http://www.nelp.org/page/-/UI/2011/nelp-uilapse-brief-dec21.pdf?nocdn=1>.

110. ARLOC SHERMAN, CTR. ON BUDGET AND POL'Y PRIORITIES, POVERTY AND FINANCIAL DISTRESS WOULD HAVE BEEN SUBSTANTIALLY WORSE IN 2010 WITHOUT GOVERNMENT ACTION, NEW CENSUS DATA SHOW 1 (Nov. 7, 2011), *available at* <http://www.cbpp.org/cms/?fa=view&id=3610>.

latest data available at this time),¹¹¹ it becomes clear that without this lifeline many families would suffer terribly.

Nevertheless, recipients of UI benefits have been subjected to harsh criticism. One lawmaker recently cited the need to “get those people out of the slacker rolls,”¹¹² while others have called for mandatory drug testing claiming that many unemployed were “more or less sitting at home getting stoned.”¹¹³ In a situation all too familiar to recipients of other safety net benefits like the Supplemental Nutrition Assistance Program or Temporary Assistance to Needy Families,¹¹⁴ the long-term unemployed find themselves hectored by business leaders, elected officials, and the media to take “personal responsibility” for their own wellbeing while the public safety net is stigmatized as a “moral hazard.”¹¹⁵ Again, the effect of this language is to pit one group of workers against another, to appeal to one group as “taxpayers” and the other as “swindlers,” and suppress dialogues like that inspired by OWS that question the efficacy of the system.

IV. REBUILDING WORK AS A PATHWAY TO OPPORTUNITY

The long history of union organizing and gradual implementation of regulatory workplace protections teaches us that no job is inherently “good.” Although lawmakers call for a return to quality manufac-

111. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, JOB OPENINGS AND LABOR TURNOVER—NOVEMBER 2011 (Jan. 10, 2012), available at <http://www.bls.gov/news.release/pdf/jolts.pdf>.

112. Arthur Delaney, *Extended Unemployment Benefits Not Turning Jobless into Slackers: Study*, HUFFINGTON POST (Sept. 16, 2011, 4:46 PM), http://www.huffingtonpost.com/2011/09/16/extended-unemployment-ben_n_966111.html.

113. Jeremy White, *Drug Testing for Unemployment Benefits Allowed in Payroll Tax Cut Bill*, INT’L BUS. TIMES (Dec. 15, 2011, 10:38 AM), <http://www.ibtimes.com/articles/267874/20111215/drug-testing-unemployment-benefits-allowed-payroll-tax.htm>. Section 2127 of the newly signed H.R. 3630, opens the door for states to mandate drug testing applicants for unemployment insurance as a condition of receiving benefits. H.R. 3630, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3630eh/pdf/BILLS-112hr3630eh.pdf>.

114. Title IV of the Food, Conservation and Energy Act of 2008 changed the name of the Federal Food Stamp Program to the Supplemental Nutrition Assistance Program. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4001, 122 Stat. 1651 (2008). Similarly, The Personal Responsibility and Work Opportunity Act of 1996 replaced the older Aid to Families with Dependent Children program with the Temporary Assistance for Needy Families program. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 103, 110 Stat. 2105 (1996).

115. JACOB S. HACKER, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE AND RETIREMENT AND HOW YOU CAN FIGHT BACK 51–53 (2006) (calling this attitude “The Great Risk Shift”).

turing jobs,¹¹⁶ the family wages, safety rules, health care benefits, and pensions that accompanied these jobs were all hard-fought victories. The narrative of the “99%” can be empowering in allowing widely disparate groups of workers to understand the systemic nature of the injustices they experience in their own workplace. It will, however, be for naught if they do not also embrace the activism of the “Occupy” frame and seek to redress those injustices. Members of the OWS movement are moving to confront harmful policies by challenging unfair foreclosures¹¹⁷ and submitting comments on proposals for Wall Street reforms.¹¹⁸ Already we are seeing the candidacy of the first “Occupier” in a Pennsylvania race for Congress.¹¹⁹ Here we lay out policy suggestions that may redress some of the unjust employment practices that have whittled away the perception of work as a pathway to opportunity and would level the playing field for workers to retake some security in their workplaces.

A. Raise the Minimum Wage and End Outdated Exclusions

Eight states have already taken action by legislating annual increases to their minimum wage rates indexed to inflation, with several other states and cities considering similar bills. In 2012, more than one million workers in Arizona, Colorado, Florida, Montana, Ohio, Oregon, Vermont, and Washington saw increases in their wages to

116. See, e.g., Michael Fletcher & David Nakamura, *For Factories, 2012 Brings on Happier Tune*, WASH. POST, Feb. 15, 2012, at A01.

117. Kara Bloomgarden-Smoke, *What's Next for Occupy Wall Street? Activists Target Foreclosure Crisis*, CHRISTIAN SCI. MONITOR (Jan. 29, 2012), <http://www.csmonitor.com/USA/2012/0129/What-s-next-for-Occupy-Wall-Street-Activists-target-foreclosure-crisis>.

118. Occupy the SEC, a group affiliated with Occupy Wall Street, has submitted a 325-page comment to the Federal Reserve Board, the Security Exchange Commission, the Federal Deposit Insurance Corporation, and the Comptroller of the Currency regarding the “Volcker Rule,” available at <http://www.occupythesecc.org/letter/OSEC%20-%20OCC-2011-14%20-%20Comment%20Letter.pdf>. See also Mike Konczal, *An Interview with Occupy the SEC About Their Volcker Rule Comment Letter*, TRUTHOUT (Feb. 16, 2012), <http://www.truth-out.org/interview-occupy-sec-about-their-volcker-rule-comment-letter/1329408315>.

119. Nate Kleinman, an active participant in the Occupy Philadelphia movement, has clearly stated that Occupy itself does not make political endorsements, but that the experiences he has had in the Occupy movement may shape his platform and candidacy. Dylan Byers, *The First Occupy Candidate: Nate Kleinman*, POLITICO (Jan. 24, 2012, 12:37 PM), <http://www.politico.com/blogs/media/2012/01/the-first-occupy-candidate-nate-kleinman-112057.html>.

between \$7.64 and \$9.04 per hour.¹²⁰ The Economic Policy Institute has estimated that these increases will increase wages for directly and indirectly affected workers by more than \$578 million and will add the equivalent of over 3000 jobs.¹²¹ But according to the Bureau of Labor Statistics, nearly 3.8 million workers still work at or below the minimum wage, often in fast growing industries like retail. A full-time worker earning \$7.25 an hour brings home about \$15,000 a year, barely above the federal poverty line for a family of two people.¹²² Unfortunately, the federal minimum wage has fallen far below its historic value; currently it is \$7.25 per hour and would have to be set at over \$10 per hour to achieve the value it held in 1968. Furthermore, fast-growing low-wage jobs like home care continue to be excluded from the Fair Labor Standards Act by overbroad U.S. DOL regulations, rendering 2.5 million workers ineligible for basic protections like the minimum wage and overtime pay.¹²³

Furthermore, in recognition of changes in our economy and the increasing prevalence of low-wage jobs, lawmakers need to repeal or narrow exclusions in minimum wage and overtime standards that have driven down standards in key sectors such as agriculture, domestic and home care work, and food service. Several states have ended or narrowed exemptions in conjunction with campaigns to raise the state minimum wage, as Missouri did in the course of a 2006 state ballot initiative. The initiative raised the minimum wage while closing

120. David Cooper, *More than a Million Workers Helped by Inflation-Linked State Minimum Wage Increases*, ECON. POL'Y INST. (Dec. 20, 2011), <http://www.epi.org/publication/inflation-linked-minimum-wage-increases-8-states/>.

121. The Economic Policy Institute stresses that simply counting new payroll jobs missed added hours for people already at work, and therefore calculates the "Jobs Impact—Full-time employment" by taking the number of total hours added and dividing by forty to reach the full-time-equivalent jobs added. See NAT'L EMP. LAW PROJECT, DATA SHEET: GDP AND JOBS GROWTH GENERATED BY JAN. 2012 MINIMUM WAGE INCREASES (Dec. 20, 2011), available at <http://www.nelp.org/page/-/rtmw/GDP%26JobsGrowthJan2012MinWageIncreases.pdf?nocdn=1>.

122. The U.S. Department of Health and Human Services set the 2011 poverty guideline for a family of two at \$14,710. See U.S. DEP'T OF HEALTH & HUMAN SERVS., THE 2011 HHS POVERTY GUIDELINES (Feb. 2, 2012), available at <http://aspe.hhs.gov/poverty/11poverty.shtml>.

123. PHI, SENATE BRIEFING ON HOME CARE WORKERS, U.S. HOME CARE WORKFORCE: BASIC FACTS (Oct. 6, 2011). The U.S. DOL issued a Notice of Proposed Rulemaking on December 27, 2011, that would revise the companionship and live-in worker regulations under the Fair Labor Standards Act to clarify job descriptions for these workers, describe activities and duties that go beyond the companionship function, change record-keeping requirements and make clear that employees of third party staffing agencies are not exempt from minimum wage and overtime protections.

exclusions for home care and domestic workers.¹²⁴ Ohio and Arizona also saw similar campaigns in 2006.¹²⁵ In 2010, New York passed the nation's first Domestic Worker Bill of Rights, marking the culmination of a six year organizing campaign led by Domestic Workers United and the New York Domestic Workers Justice Coalition.¹²⁶ The new law closes gaps in the Minimum Wage Act that had resulted in substandard protections for domestic workers, and extends new protections to this group, including annual paid time off.¹²⁷ A similar effort is now underway in California.¹²⁸ And in late 2011, the U.S. DOL published proposed rules that would significantly narrow the companionship exemption, thereby extending minimum wage and overtime protections to the vast majority of our nation's 2.5 million home care workers.¹²⁹ Initiated by the National Domestic Workers Alliance, and now involving dozens of organizing and advocacy groups and unions, the Caring Across Generations campaign has backed the U.S. DOL's proposed companionship rules as part of a bold and comprehensive set of policy reforms to improve standards in the home care industry for both recipients of home care services and for the workers.¹³⁰ The campaign has had remarkable success at bringing together a wide range of workers and activists who have suffered the effects of inadequate funding for these vital services, and has taken a lead on generating comments in support of the proposed rule. Unsurprisingly, however, the campaign faces continual challenges in balancing the sometimes competing interests of groups anx-

124. MO. ANN. STAT. § 290.500.3(h) (West 2006); John Atlas, *Waging Victory*, AMERICAN PROSPECT (Nov. 10, 2006), <http://prospect.org/article/waging-victory>.

125. See John M. Broder, *States Take Lead in Push to Raise Minimum Wage*, N.Y. TIMES, Jan. 2, 2006, at A1; Paul Nussbaum, *Voters Lean Left on Some Ballot Issues Arizona Rejected a Same-Sex Marriage Ban. Voters in Six States Approved Raising the Minimum Wage.*, PHILA. INQUIRER (Nov. 9, 2006), http://articles.philly.com/2006-11-09/news/25406771_1_south-dakota-voters-michigan-voters-nevada-and-ohio.

126. See, e.g., Ai-jen Poo, *Organizing with Love: Lessons from the New York Domestic Workers Bill of Rights Campaign*, LEFT TURN (Dec. 1, 2010), <http://www.leftturn.org/Organizing-with-Love>; DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/2012-01-07-00-45-55> (last visited June 12, 2012).

127. N.Y. LAB. LAW §§ 170, 2 (McKinney 2011).

128. Domestic Workers Bill of Rights, A.B. 889, 2011–2012 Reg. Sess. (Ca. 2011); see also NATIONAL DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkers.org/ca-bill-of-rights>.

129. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81189, 81190 (Dec. 27, 2011).

130. CARING ACROSS GENERATIONS, <http://www.caringacrossgenerations.org/> (last visited June 12, 2012).

ious about how limited Medicaid, Medicare, and other public funding will be spent.

B. End Tax Incentives for Outsourcing American Jobs and Create Incentives for U.S. Job Creation

We agree with recent calls to end the tax privileges that accrue to companies that outsource jobs.¹³¹ “Deferral” rules that allow corporations to delay paying taxes on overseas income until they bring it to the United States encourages corporations to keep it in overseas tax havens. Corporations use the funds they bring back not for hiring, but to benefit shareholders and owners.¹³² Companies should not be able to deduct the costs of moving their operations abroad; instead the deduction for investment in plants and equipment in businesses located in the United States and deductions for research and development should be reauthorized. Surveys of business owners have found that 95% wanted to implement growth plans, but only 53% were able to obtain funding.¹³³ Researchers estimate that commercial banks are carrying \$1.4 trillion in excess capital that, if deployed strategically, could enable private businesses and the public sector to create as many as nineteen million new jobs over three years.¹³⁴

We must, however, also support programs that create the demand for new business innovation and subsequent new jobs. Addressing the shortcomings in the Property Assessed Clean Energy Program,¹³⁵

131. Senators Carl Levin and Kent Conrad have introduced the Cut Unjustified Tax Loopholes Act which would crack down on offshore tax abuses, close loopholes that encourage companies to move jobs overseas and change the tax deduction for some stock option plans. S. 2075, 112th Cong. (2012); *see also* Kate Anderson Brower & Hans Nichols, *Obama Says Tax Code Should Encourage U.S. Manufacturing Jobs*, BLOOMBERG (Feb. 15, 2012, 2:20 PM), <http://www.bloomberg.com/news/2012-02-15/obama-says-tax-code-should-encourage-u-s-manufacturing-jobs.html>; Jonathan Weisman, *A Tax Proposal is Brought out Again*, N.Y. TIMES, Jan. 25, 2012, at A18; Press Release, Main Street Alliance, Poll: Small Business Owners Say Big Business, Millionaires Not Paying Fair Share of Taxes (Feb. 7, 2012).

132. CHUCK MARR ET AL., CTR. ON BUDGET AND POL’Y PRIORITIES, REPATRIATION TAX HOLIDAY WOULD INCREASE DEFICITS AND PUSH INVESTMENT OVERSEAS 4, 9 (Oct. 12, 2011), *available at* <http://www.cbpp.org/files/10-12-11tax.pdf>.

133. JOHN K. PAGLIA, PEPPERDINE PRIVATE CAPITAL MARKETS PROJECT, STATE OF SMALL BUSINESS REPORT 7 (Fall 2011), *available at* www.bs.school.pepperdine.edu/privatecapital.

134. ROBERT POLLIN ET AL., POLITICAL ECON. RES. INST., 19 MILLION JOBS FOR U.S. WORKERS: THE IMPACT OF CHANNELING \$1.4 TRILLION IN EXCESS LIQUID ASSET HOLDINGS INTO PRODUCTIVE INVESTMENTS (Dec. 2011), http://www.peri.umass.edu/fileadmin/pdf/published_study/PERI_19Million.pdf.

135. The Property Assessed Clean Energy Programs (PACE) have been authorized in dozens of states and would allow property owners to repay the costs for ener-

the Home Star and Build Star¹³⁶ programs would create demand for energy efficiency retrofits and the wide range of equipment they entail. Reauthorizing the Surface Transportation Act, adequately funding the Federal Highway Administration, and supporting investments in new forms of public transit would similarly create demand for construction jobs that cannot be outsourced, but would also support research, architecture and engineering jobs that come with advances in research and design. The BlueGreen Alliance, a coalition of labor unions and environmental groups, is not only drafting and supporting strong policy proposals to advance these goals, but has also launched state-based grassroots organizations to advocate for quality jobs that will stay in the U.S.¹³⁷ In Portland, Oregon, Clean Energy Works Portland advocated for and won a Community Workforce Agreement covering residential retrofit projects that mandated contractors pay fair wages and ensure access to jobs for hard-hit local residents. The pilot project was so successful that a state-wide initiative is being planned with the goal of upgrading 6000 homes and creating or retaining 1300 jobs.¹³⁸

C. Support Strong Enforcement of Labor Standards and Hold Employers Accountable

Workers need stronger tools to fight wage theft, and employers need stronger disincentives to steal from their workers. First, in order to encourage employers' compliance with core wage and hour laws,

gy efficiency retrofits through increased property tax assessments over time. In July of 2010 the Federal Finance Housing Agency instructed federal loan guarantors Freddie Mac and Fannie Mae to restrict these loans, cautioning that they could pose risk management challenges. Currently new legislation in Washington, D.C., the PACE Assessment Protection Act, would redress these issues. *See generally* Devashree Saha & Mark Muro, *Bring Residential PACE Back to Life*, NEW REPUBLIC (Aug. 30, 2011, 12:10 PM), <http://www.tnr.com/blog/the-avenue/94351/bring-residential-pace-program-back-life>.

136. The Home Star program, popularly known as "Cash for Caulkers" provides rebates to homeowners for making their homes more energy efficient. Build Star is the equivalent program for commercial properties. While the Home Star Energy Retrofit Act passed in the House in 2010, it did not become law. The sponsor has indicated an intention to reintroduce the bill in 2012. *See* Renee Schoof, *Climate and Energy Bill Delayed as Political Support Withers*, MCCLATCHY NEWSPAPERS (July 22, 2010), <http://www.mcclatchydc.com/2010/07/22/98007/climate-and-energy-bill-delayed.html>.

137. *Jobs21!*, BLUEGREEN ALLIANCE, <http://www.bluegreenalliance.org/jobs21> (last visited June 12, 2012).

138. GREEN FOR ALL, HIGH ROAD OUTCOMES IN PORTLAND'S ENERGY EFFICIENCY UPGRADE PILOT (Mar. 2011); CLEAN ENERGY WORKS OREGON, <http://www.cleanenergyworksoregon.org/> (last visited Mar. 22, 2012).

states, and cities (where permitted), should raise the stakes for employers by enhancing monetary and other penalties for violations of wage and hour laws. Strategies to better compensate workers, deter violators, and facilitate legal action include: establishing triple damages provisions for minimum wage, overtime, and other related violations; increasing civil fines against employers and making them non-discretionary; allowing workers to recover attorneys' fee and costs in litigation to encourage lawyers to assist workers in filing lawsuits; and lengthening the deadlines for wage claims.

Second, to allow workers to enforce their rights, workers need better protection from retaliation to ensure they have the protection they need to make complaints. State Departments of Labor should: allow anonymous complaints or third parties, such as unions or workers centers, to file complaints; be required to keep the identities of complaining workers confidential for as long as possible during investigations; and permit one worker to file a complaint on behalf of a group of affected workers. Further protection from retaliation can be provided by amending state anti-retaliation laws to create legal protection that any adverse or discriminatory action taken by an employer within a certain period of time after the worker makes a complaint is presumed to be retaliatory.

Third, workers' rights advocates have made significant progress in targeting abuses by collaborating with state departments of labor, state attorneys general, and the U.S. DOL. Advocates can, and should, encourage public enforcement agencies to affirmatively target and investigate high-violation industries through unannounced audits and industry specific approaches, regardless of whether individual workers bring complaints. Following passage of the Domestic Worker Bill of Rights in New York, Domestic Workers United, other domestic workers rights organizations, and allies began meeting with the New York Department of Labor to educate investigators and other key staff on common patterns of abuse and barriers to compliance; to discuss the most effective ways to inform workers and employers about the new law; and to urge the agency to prioritize claims brought by domestic workers to enforce the new provisions. At the national level, a coalition of advocates and attorneys has made significant headway in promoting a series of federal reforms to the U.S. DOL, informed by years of experience advocating for workers. The National Employment Law Project's 2010 *Just Pay* report outlines these

key policies,¹³⁹ many of which the U.S. DOL has already begun to act upon. Finally, enhancing agency resources or, as is too often the case, fending off attempts to trim staff and budgets, is also key to safeguarding workers' ability to pursue claims.

D. Stop Independent Contractor Misclassification and Hold Subcontracting Employers Responsible

States have taken the lead in initiating reform efforts to combat independent contractor misclassification and subcontracting abuses by making better use of agency resources to document the problem and coordinate on enforcement and tightening up the rules to ensure employers are held accountable for their employees. Almost half of the states now have a task force or commission to document the problem and better direct enforcement efforts, while many others have strengthened their labor laws to make it harder for employers to avoid compliance.¹⁴⁰ In the last legislative session, Virginia,¹⁴¹ New Hampshire,¹⁴² and Utah¹⁴³ set up commissions to study and coordinate state agency efforts to identify and investigate independent contractor abuses. Several states have proposed laws that would create a presumption of "employee" or "employer" status for those performing or receiving labor or services for a fee, as Massachusetts and other states do.¹⁴⁴ Partially in response to steady campaigning by the United Brotherhood of Carpenters and Joiners and the International Brotherhood of Teamsters, Pennsylvania,¹⁴⁵ Delaware,¹⁴⁶ and Maine¹⁴⁷ passed sector-specific laws targeting industries with rampant independent contractor misclassification, such as construction and de-

139. NAT'L EMP. LAW PROJECT, JUST PAY: IMPROVING WAGE AND HOUR ENFORCEMENT AT THE UNITED STATES DEPARTMENT OF LABOR (2010), available at <http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1>.

140. For a compilation of state and city policies enacted to fight wage theft, see NAT'L EMP. LAW PROJECT, WINNING WAGE JUSTICE (Jan. 2011), available at http://nelp.3cdn.net/4fd24202008c596117_oxm6bglbn.pdf.

141. Va. S.J. Res. No. 345 (2011), available at <http://e-lobbyist.com/gaits/text/224191>.

142. N.H. Exec. Order No. 2010-3 (2010), available at <http://www.governor.nh.gov/media/orders/documents/2010-03.pdf>.

143. UTAH CODE ANN. § 34-47-101 (West 2006).

144. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 148B (West 2006).

145. 43 PA. CODE § 933.17 (2011), available at <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=953319&mode=2>.

146. DEL. CODE ANN. TIT. 19, §§ 3501-3513 (West 2006), available at [http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/HS+1+for+HB+230/$file/legis.html?open).

147. ME. REV. STAT. ANN. TIT. 39, § 114 (2011), available at http://www.mainelegislature.org/legis/bills/bills_125th/chappdfs/PUBLIC176.pdf.

livery. A growing number of states are raising the stakes for violators by enabling members of the public to bring suits against lawbreakers and by increasing penalties for misclassification violations. A new Massachusetts law, for example, provides for a private attorney general action against employers that break the workers' compensation law,¹⁴⁸ while Massachusetts,¹⁴⁹ Kansas,¹⁵⁰ and California¹⁵¹ have all passed laws or proposed laws increasing civil penalties or allowing for the issuance of stop-work orders against lawbreakers.

The federal government is joining the states in tackling independent contractor misclassification, although prospects of federal legislation look less promising than in the states. Two bills have been introduced in Congress: the Payroll Fraud Prevention Act,¹⁵² which would amend the recordkeeping requirements of the Fair Labor Standards Act to require employers to keep records relating to non-employees who perform services for remuneration; and the Taxpayer Responsibility, Accountability and Consistency Act,¹⁵³ which would amend the Internal Revenue Code to tighten up the rules that give employers a "safe harbor" when they misclassify employees as independent contractors. Offering more potential for the near-term, the U.S. DOL has initiated a multi-agency initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification.¹⁵⁴ The IRS recently announced the launch of the Voluntary Worker Classification Settlement Program,¹⁵⁵ which will enable employers to resolve past worker misclassification problems by voluntarily reclassifying their workers prospectively and making a minimal payment covering past payroll tax obligations rather than waiting for an IRS audit.

In addition to these agency and legislative reform efforts, several union campaigns have employed a mix of legislative action, litigation,

148. MASS. GEN. LAWS ANN. ch. 152, § 25C (West 2006).

149. S. Res. 968, Petition (Mass. 2011), available at <http://www.malegislature.gov/Bills/187/Senate/S00968>.

150. S. Res. 157 (Kan. 2011), available at http://www.kslegislature.org/li/b2011_12/year1/measures/documents/sb157_00_0000.pdf.

151. CAL. LABOR CODE § 226.8 (West 2006).

152. S. 770, 112th Cong. (2011).

153. H.R. 2882, 111th Cong. (2011).

154. See U.S. DEP'T OF LABOR, *Testimony of Secretary of Labor Hilda L. Solis Before the Subcomm. On Labor, Health and Human Services, Education and Related Agencies, Comm. On Appropriations*, Mar. 10, 2010, available at http://www.dol.gov/_sec/media/congress/20100310_appropriations.htm.

155. See I.R.S. News Release IR-2011-95 (Sept. 21, 2011), available at <http://www.irs.gov/newsroom/article/0,,id=246203,00.html>.

worker organizing, and media outreach to challenge the business models of corporations that misclassify workers as independent contractors or use abusive subcontracting schemes to deny workers' rights and drive down pay. Of particular note are the Teamsters' campaign challenging FedEx's move to classify drivers in its Ground Division as independent contractors (in contrast to the unionized United Parcel Service) and so shift many of the costs of business onto its workforce,¹⁵⁶ and Change to Win's Port Trucking campaign calling attention to the port trucking industry's move to an independent contractor model.¹⁵⁷ Similarly, Warehouse Workers United fights to improve conditions for logistics workers employed in warehouses and distribution centers serving the nation's largest retailers including, but not limited to, Walmart.¹⁵⁸

Yet, even as these advocates make impressive headway in fighting independent contractor misclassification and abusive subcontracting schemes, they face new attacks to roll back protections in this field, including a Maine Executive Order repealing the state's independent contractor misclassification taskforce,¹⁵⁹ and efforts by industry groups to carve out exemptions for their workers from the broad definitions of employee in states labor and employment laws. For example, a 2011 Maryland law¹⁶⁰ creates an exemption from the state's unemployment insurance system for messenger service drivers who have signed an independent contractor agreement with their employer.

156. See, e.g., Erin Johansson, *Fed Up with FedEx: How FedEx Ground Tramples Workers' Rights and Civil Rights*, AM. RTS. WORK (Oct. 2007), <http://www.americanrightsatwork.org/dmdocuments/ARAWReports/fedupwithfedex.pdf>.

157. See SMITH ET AL., *supra* note 80; Joy Ride, *Breaking: America's Truck Drivers Shut Down Port of Seattle to Expose Dangers of the Job*, COALITION FOR CLEAN & SAFE PORTS (Feb. 1, 2012), <http://cleanandsafeports.org/blog/2012/02/01/breaking-america%E2%80%99s-truck-drivers-shut-down-port-of-seattle-to-expose-dangers-of-the-job/>.

158. See, e.g., Dave Jamieson, *Walmart-Contracted Warehouse Jobs Saved by Judge*, HUFFINGTON POST (Feb. 3, 2012, 4:52 PM), http://www.huffingtonpost.com/2012/02/03/walmart-warehouse-workers-california_n_1253267.html.

159. Me. Exec. Order No. 10 FY 11/12, *An Order Abolishing the Joint Enforcement Task Force on Independent Contractor Misclassification* (2011), http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=186554&v=article2011.

160. Md. S. 685, § 17(c) (2011), available at http://mlis.state.md.us/2011rs/chapters_noln/Ch_625_sb0685T.pdf ("concerning Unemployment Insurance — Messenger Service Drivers — Delivery").

E. Get America back to Work

Although recent job reports have revealed slow and steady progress in the economy, far too many remain in “jobless” recovery. Many people have been out of work for more than six months and risk being perceived by potential employers as having stagnant skills or being insufficiently motivated. Other, often younger, workers risk delayed attachment to the workforce, a condition that can adversely affect their earning power for decades.¹⁶¹

We have examples of specific programs that have effectively put people back to work after the Great Recession, but must make the commitment to fund and expand them. The Temporary Aid to Needy Families Emergency Fund, created by the American Reinvestment and Recovery Act, reimbursed states for 80% of the costs of subsidizing jobs for low-income workers and placed 260,000 adults and youth in jobs before expiring in September 2010.¹⁶² In twenty-three states, laws creating work-sharing programs, avoiding layoffs by cutting the hours for all employees but providing them with a partial weekly unemployment benefit, have been credited with saving 265,000 jobs between 2009 and 2010.¹⁶³ Similarly, in twenty-eight states, workers can draw on partial UI benefits if their hours are reduced or if they find part-time work;¹⁶⁴ in the other states, claimants must be looking for full-time work to qualify for UI.¹⁶⁵ Allowing for partial benefits not only makes sense in an economy that still has more than four applicants for every job opening, but also provides at least a small income to affected workers that in turn is spent in their communities. Unfortunately, numerous states were forced to borrow

161. Lisa Kahn, *The Long Term Labor Market Consequences of Graduating from College in a Bad Economy* (Aug. 13, 2009) (unpublished student work, Yale University), *available at* http://mba.yale.edu/faculty/pdf/kahn_longterm labor.pdf.

162. LADONNA PAVETTI ET AL., *CTR. ON BUDGET AND POL'Y PRIORITIES AND CLASP, CREATING SUBSIDIZED EMPLOYMENT OPPORTUNITIES FOR LOW-INCOME PARENTS: THE LEGACY OF THE TANF EMERGENCY FUND* (Feb. 16, 2011), *available at* <http://www.cbpp.org/files/2-16-11tanf.pdf>.

163. The twenty-three states with work-sharing UI programs are: Arizona, Arkansas, California, Colorado, Connecticut, the District of Columbia, Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, and Washington. *See also* Press Release, United States Senator for Rhode Island, Reed Calls for New National Plan to Help Save American Jobs (July 6, 2011).

164. NAT'L EMP. LAW PROJECT, *RESPONDING TO RECESSION: STRENGTHEN STATE UNEMPLOYMENT INSURANCE PROGRAMS 3* (Jan. 2009), *available at* <http://www.nelp.org/page/-/UI/UIStateRecession.pdf>.

165. *Id.*

money from the federal government to finance their UI programs during the Great Recession; years of poorly financed rainy day funds and numerous employer tax breaks left state governments ill-equipped to address high levels of unemployment. Now states are cutting benefits and duration of benefits for out-of-work families in their time of need.¹⁶⁶ We must support tax reforms that will allow states to fund UI programs sufficiently to weather future economic downturns without asking workers to shoulder the entire burden.¹⁶⁷

CONCLUSION

For decades workers have seen conditions deteriorate in the workplace and their right to challenge these declines through regulatory action or union organizing have been undercut. Millions experience circumstances in their daily occupations that have primed them to respond to calls to confront corporate power by “occupying” public space. Workers face concerted efforts by employers to cheat them out of wages, to redefine their employment status, and to game the tax code at the expense of U.S. jobs and public revenues. Politicians defund critical regulatory agencies, pit the interests of workers against the public, rail against public safety net programs, and vilify those who depend upon them during economic downturns. Workers are ready for a framework that emphasizes their common interests and encourages them to band together to take action, making OWS rhetoric appealing and empowering.

But to succeed we must move beyond slogans. Many states and cities have already begun to tackle these problems, often as a result of campaigns by coalitions between workers and community advocates, there is still a long way to go. If we are to reaffirm the power of work to define our sense of well-being and our faith in the promise of opportunity, we must implement more practices that challenge the privileging of corporations and the 1% over the 99% of workers. The task is daunting and difficult, and the political power of those who would protect the status quo is strong. Nevertheless, OWS has opened a dialogue about justice — economic and political — in the midst of what

166. NAT'L EMP. LAW PROJECT, DEADLINE NEARS FOR EMPLOYERS TO BEGIN PAYING BACK BORROWED UNEMPLOYMENT INSURANCE FUNDS (Jan. 27, 2012), available at http://nelp.3cdn.net/a385fca66373785800_hsm6idn2d.pdf.

167. For the threats to unemployment insurance solvency and moves in the states to reduce benefits, see CLAIRE MCKENNA & GEORGE WENTWORTH, NAT'L EMP. LAW PROJECT, UNRAVELING THE UNEMPLOYMENT INSURANCE LIFELINE (Aug. 2011), available at http://nelp.3cdn.net/833c7eeb782f18bdb3_a5m6b0wvp.pdf.

2012]

OCCUPY OUR OCCUPATIONS

1105

promises to be a hard-fought electoral season. This confluence of a compelling framework, a critique that resonates with common experience, and an electorate concerned about perpetuating longstanding inequities presents an opportunity to unite the 99% behind efforts to improve our workplaces.