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## All in a Day's Work? Statutory and Other Failures of the Workers' Compensation Scheme as Applied to Street Corner Day Laborers

### Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I wish to thank Professor Jennifer Gordon for her invaluable editing and critique and for her continuing guidance, as well as Amy Sugimori at the National Employment Law Project for providing the original idea for this Note.

# ALL IN A DAY'S WORK? STATUTORY AND OTHER FAILURES OF THE WORKERS' COMPENSATION SCHEME AS APPLIED TO STREET CORNER DAY LABORERS

*Juno Turner\**

## INTRODUCTION

On a recent trip to a wealthy area of Long Island, New York, a friend admired his hostess's exquisitely manicured gardens and patio.<sup>1</sup> Which contractor had she used, he wondered? "Oh, no contractor!" replied the hostess. "I just went down to the Mexican parking lot and hired a couple of guys to do the work!" This exchange illustrates the growing use of immigrant day laborers to perform tasks traditionally performed either by long-term employees (such as gardeners) or by outside contractors (such as landscaping firms).

On a typical morning on Roosevelt Avenue in Queens, New York, or on Cesar Chavez Street in San Francisco, or on numerous other urban and suburban street corners nationwide, a group of Latino men stand on a street corner, waiting for work. A van slows down and the driver gestures that he needs two men. Before the van has reached the curb, it is mobbed by laborers eager for a day's pay. Some quick negotiations as to pay and hours ensue, and, after a brief struggle, two men wriggle their way into the van. The job is theirs; the rest trudge back to their curbside shape-up site.<sup>2</sup> The two lucky enough to get hired will work, for one day or more, as roofers, painters, carpenters, or handymen, most likely employed by a local contractor or homeowner.

As part of the growing movement toward employing contingent workers, day laborers fill an important niche in today's American economy. Employers, who increasingly require low-cost labor to respond to pressing

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1. This is a hypothetical scenario based on actual events. It is provided here as a contextual reference to ground the concerns of this Note in their day-to-day realities and to facilitate the reader's understanding of the dynamics of the day labor relationship.

2. "Shape-up" is the term used to describe informal street corner labor markets. See John Leonardo et al., A Quantitative Analysis of "Shape-Ups" on Long Island (January 1997) (unpublished manuscript, on file with the Fordham Law Review).

market demands and increased competition, look to this flexible workforce as a substitute for more permanent workers. New immigrants facing multiple barriers to obtaining jobs in the traditional workforce often choose day labor as an alternative. Despite its economic importance, however, a multitude of concerns, including community opposition, employer abuse, and workplace safety, arise from the day labor phenomenon.

Specifically, as more people employ nonstandard workers for a variety of jobs, questions arise as to the nature and extent of the legal protections for these workers, and how the law can better respond to their needs. For instance, what if one of these workers had been injured during his day's work? Would he have been compensated for his injury? If so, by whom?

This Note explores these issues, focusing in particular on the health and safety concerns of street corner day laborers—those who obtain work informally by standing on busy streets—with regard to their access (or non-access) to workers' compensation benefits. Despite performing dangerous work with little safety training, street corner day laborers face substantial obstacles in obtaining workers' compensation benefits, especially if they are injured when working for a private homeowner. This Note emphasizes how a day laborer's workers' compensation coverage changes almost daily based on who hires him on a particular morning, even though he performs substantially the same work regardless of who employs him. Day laborers hired by contractors are often statutorily eligible for benefits, although they face substantial practical challenges to receiving them. But day laborers working directly for homeowners are often entirely barred from receiving workers' compensation benefits, forcing them to recover, if at all, in a negligence action. Because the workers' compensation statutes fail to account for the increasing number of day laborers working for private homeowners, many workers are excluded from the important legal protection of workers' compensation.

Part I of this Note introduces the phenomenon of day labor and provides an overview of the participants in the informal economy of the day labor market. It includes the historical background of workers' compensation in America, followed by an examination of the various statutory concerns that may prevent day laborers from being eligible for workers' compensation benefits. Although statutory constructions vary by state, day laborers working for homeowners are excluded from coverage in almost every state, either as a function of narrow definitions of what constitutes an employee or by restrictive definitions of eligible domestic workers. Part I provides an overview of this statutory backdrop and looks specifically at how it manifests itself in communities with large day laborer populations. Part II examines the arguments for and against increasing workers' compensation coverage for street corner day laborers. Part II also reviews current attempts to protect day laborers, including proposed federal legislation as well as other solutions that could ameliorate many day laborers' workers' compensation concerns. Part III rejects the proposition that day laborers should continue to be excluded from workers' compensation coverage and

argues that coverage should instead be expanded to match the growing importance of day laborers in the American economy. Part III also evaluates proposed and novel solutions to the problems experienced by day laborers trying to access workers' compensation benefits. Finally, Part III argues for a multipronged approach rooted in statutory reform, litigation, and community education.

## I. THE RECENT GROWTH OF DAY LABOR IN THE UNITED STATES

This part details the recent explosion of street corner day labor in the United States, particularly in large urban areas and their surrounding suburbs. It examines the factors contributing to this explosion, explores the motivating factors for both employers' and workers' participation in this informal economy, and highlights potential areas of concern for day laborers, particularly in the area of health and safety. Part I then reviews the available legal remedies for workers experiencing unsafe working conditions and the statutory definitions critical to qualifying for workers' compensation benefits.

### A. *Day Labor's Recent Expansion*

Day labor is an age-old phenomenon.<sup>3</sup> It has, however, recently enjoyed a resurgence in large urban centers and suburban areas throughout the United States.<sup>4</sup> Today, there are up to 750,000 day laborers nationwide.<sup>5</sup> The sight of groups of men awaiting potential employers on street corners has become the public face of this growing informal economy.<sup>6</sup>

The growth of day labor is a result of a combination of domestic and international circumstances. Global economic forces, including the increased flow of wealth to industrialized nations and the corresponding

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3. See Abel Valenzuela Jr., Ctr. for the Study of Urban Poverty, *Dispelling the Myths of Day Labor Work*, <http://www.ndlon.org/research.htm> (last visited Oct. 6, 2005). Valenzuela points out that day laborers were common in fifth-century Athens and nineteenth-century London. *Id.* As early as 1834, New York City set aside a place on the street where job seekers could meet with employers. *Id.*

4. See Abel Valenzuela Jr., Ctr. for the Study of Urban Poverty, *Working on the Margins: Immigrant Day Labor Characteristics and Prospects for Employment 2* (2000), available at <http://www.weingart.org/institute/research/colloquia/pdf/DayLaborerStudy.pdf> [hereinafter *Working on the Margins*].

5. Aixa M. Pascual, *Day Laborers' Danger: Risking it All for Work*, Atlanta J.-Const., Apr. 18, 2004, at C1.

6. See Corey Kilgannon, *Where Being the Hungriest Isn't Always Enough*, N.Y. Times, Nov. 14, 2004, § 14, at 6. This Note will focus primarily on informal, "street corner" day laborer hiring. A second, more formalized aspect of the day labor job market is characterized by labor pools, which contract with large employers to provide a steady supply of workers. See generally Arthur Rosenberg, *Manual Day Labor in the United States 1-6*, <http://www.nelp.org/docUploads/rosenberg%2Epdf> (last visited Oct. 9, 2005). Day laborers obtaining work via labor pools face many of the same worries as street corner day laborers, such as health and safety concerns and long waits for work. *Id.* at 4. Labor pools are widespread in the southern United States and employ predominantly African-American workers. *Id.* at 2-3. These workers' hours and compensation are regulated by the rules of the labor pool, not the supply and demand economy of the street corner. See *id.* at 4.

decrease in wealth to the developing world, have left workers around the world bereft of opportunity.<sup>7</sup> Fewer opportunities at lower wages, combined with the decline of agricultural societies,<sup>8</sup> have contributed to large-scale immigration to urban and suburban areas.<sup>9</sup> This, in turn, has created a swell in the immigrant work force.<sup>10</sup> The expansion of informal markets around the world and the domestic decline of state-regulated formal economic activity allow informal economies like day labor to flourish.<sup>11</sup>

Within the United States, the movement from manufacturing to service employment, particularly as it relates to part-time or contingent work,<sup>12</sup> has resulted in underemployment. Underemployment, in which workers do not work enough hours or earn sufficient income to suit their needs,<sup>13</sup> causes many workers to seek to supplement their income, some through day work.<sup>14</sup>

Other contributing factors to the rise in day labor include the growth of self-employment and entrepreneurship, the use of subcontracting in union contracts, and the expanding cash economy,<sup>15</sup> each of which creates additional opportunities for the use of temporary, informal workers like day laborers. The growth of a service economy, with its demands for low-wage childcare workers, housecleaners, janitors, restaurant workers, landscapers, and construction laborers, is another factor.<sup>16</sup> And the rising cost of employing permanent workers<sup>17</sup> creates an additional incentive for day labor hiring.<sup>18</sup>

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7. See Christopher W. Rudolph, *Globalization, Sovereignty and Migration: A Conceptual Framework*, 3 UCLA J. Int'l L. & Foreign Aff. 325, 332-33 (1998).

8. *Id.* Indeed, low wages and poverty in developing nations have only worsened in recent years, spurring even more migration. See Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. Mich. J.L. Reform 737, 741-42 (2003).

9. Working on the Margins, *supra* note 4, at 2.

10. *Id.* The passage of the North American Free Trade Agreement ("NAFTA"), which facilitated the movement of goods between the United States, Mexico, and Canada, is another factor. Alfredo Corchado & Laurence Iliff, *NAFTA is Both Boon, Bane to Mexico's Workers*, The Seattle Times, Jan. 24, 1999, at A15. In Mexico, the economy is unable to create the one million annual jobs promised under NAFTA. *Id.* These jobs are needed to keep underemployment from getting worse, and the lack of work prompts tens of thousands of men and women to leave their homes and come to the United States to work. *Id.*

11. Working on the Margins, *supra* note 4, at 2.

12. *Id.*

13. See The American Heritage Dictionary 1875 (4th ed. 2000).

14. See Robin Toma & Jill Esbenshade, L.A. County Bd. of Supervisors, *Day Laborer Hiring Sites: Constructive Approaches to Community Conflict 1* (2001).

15. Working on the Margins, *supra* note 4, at 2.

16. See Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights 21* (2005).

17. Health care costs, for example, are increasing dramatically. See Kaiser Family Foundation, *Employer Health Benefits: Summary of Findings (2004)*, available at <http://www.kff.org/insurance/7148/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=46287>.

18. Rosenberg, *supra* note 6, at 1.

The structural factors that facilitated day labor's recent expansion translate into an important economic role for day labor in today's economy. Day labor serves the interests of both employers and employees.<sup>19</sup> Part I.B will explore those interests in detail: Part I.B.1 will address the interests of employers, and Part I.B.2 will examine the interests of workers themselves.

## B. *Economic and Other Interests of Participants in the Day Labor Market*

### 1. The Employers

The growth in number and size of day labor sites, at least in metropolitan New York, can be directly attributed to employer demand.<sup>20</sup> The vast majority of people employing day laborers are either contractors or private individuals.<sup>21</sup> Both categories of employer benefit from the flexibility of this "relatively inexpensive, hard working, and trouble-free work force."<sup>22</sup> Day laborers can often be employed to perform tasks "not easily or willingly performed by workers in the general economy."<sup>23</sup> Moreover, they are "often hired for the labor-intensive aspects of a given job—something that most other men in the employment market would not take."<sup>24</sup>

In addition to the type of work performed by these workers, considerations of need play an important role in the demand for day laborers. Employers often hire based on work cycles: They employ only enough workers as full-time employees to staff their operation in off-peak times, and then fill in their work force with day laborers as demand increases.<sup>25</sup> They may also hire a day laborer to replace a regular employee who is sick or otherwise absent from work.<sup>26</sup>

Finally, those employing day laborers also consider cost. The relatively low cost of hiring day laborers makes the day labor market attractive for anyone looking to cut labor costs.<sup>27</sup> For contractors, day laborers are a convenient and inexpensive way to meet the demands of the rapid construction growth evident in major cities, especially southern cities, in

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19. See *infra* notes 22-33 and accompanying text (listing benefits to employers); *infra* notes 43-54 and accompanying text (citing benefits to workers).

20. Abel Valenzuela, Jr. & Edwin Meléndez, *Day Labor in New York: Findings from the NYDL Survey 10* (2003), available at <http://www.newschool.edu/milano/cdrc/pubs/daylabor.pdf> [hereinafter *Day Labor in New York*].

21. See *id.* This study found that 41 % of day laborer employers surveyed were private individuals and 56.3 % were contractors. *Id.* at 10 tbl.14.

22. *Id.* at 10.

23. Working on the Margins, *supra* note 4, at 3.

24. Bertina Lee, *San Francisco Day Laborers*, S.F. Dep't of Pub. Health Newsletter (S.F. Dep't of Pub. Health, S.F., Cal.), Nov. 2002, at 2, available at [http://www.dph.sf.ca.us/ehs/enviro\\_times/archives/Nov2002/DayLaborers.pdf](http://www.dph.sf.ca.us/ehs/enviro_times/archives/Nov2002/DayLaborers.pdf).

25. See Working on the Margins, *supra* note 4, at 13-14.

26. *Id.* at 3.

27. *Id.*

recent years,<sup>28</sup> while keeping the costs of medical coverage and benefits low.<sup>29</sup> Because day laborers are generally paid in cash,<sup>30</sup> and because employers do not pay health insurance or other benefits for them,<sup>31</sup> day laborers are cheaper to hire than longer-term workers.

Many homeowners are attracted by the ease of hiring someone to do small repairs or other manual labor on their property.<sup>32</sup> Such labor most likely consists of small jobs that are not worth hiring a contractor for, but which homeowners would prefer not to do themselves.<sup>33</sup> In Washington, D.C., for example, homeowners form an increasingly large segment of day labor employers; many homeowners find that they, or the teenagers who they once hired to do jobs around the house, are too busy to perform such tasks.<sup>34</sup> These homeowners now turn to day laborers to fill the gap.<sup>35</sup>

## 2. The Workers

Most day laborers are Latino men, many of whom are unauthorized to work in the United States.<sup>36</sup> Some day laborers are employed by agencies, or "labor pools," which contract the workers out to companies and construction firms.<sup>37</sup> These workers experience a particular set of problems relating to their relationship with the day labor agency, including discrimination, underpayment, and excessive deductions from their paychecks.<sup>38</sup>

Street corner day laborers—those not employed by agencies—are generally concentrated in large cities: In Atlanta, growing numbers of day laborers toil in the construction, landscaping, painting, and carpentry industries for between six and ten dollars an hour.<sup>39</sup> In southern California,

28. See Pascual, *supra* note 5, at C1 (noting the steady availability of construction-industry jobs); see also Brian Basinger, *Community Centers Help Hispanic Day Laborers*, Fla. Times-Union (Jacksonville), June 17, 2003, at F1 (noting the confluence of a booming housing industry in the South and the economics of hiring workers for whom benefits and medical coverage need not be provided).

29. Basinger, *supra* note 28, at F1.

30. See *infra* note 54 and accompanying text.

31. See Basinger, *supra* note 28, at F1.

32. Working on the Margins, *supra* note 4, at 3.

33. See Joel Millman & Dan Morse, *Can't Do it Yourself? There's Help for Hire in the Parking Lot*, Wall St. J., July 11, 2002, at A1.

34. S. Mitra Kalita, *For Day Laborers, Roles Change*, Wash. Post, May 21, 2005, at E1.

35. *Id.*

36. Working on the Margins, *supra* note 4, at 10. This study surveyed southern California only. A recent study in New York found larger numbers of women working as day laborers in New York City. Day Labor in New York, *supra* note 20, at 6 tbl.3. Polish housekeepers in the Williamsburg section of Brooklyn are one such group of women; many of them are divorced or widowed, and few have green cards. See Michael Kamber, *Desperate for Work*, Village Voice, July 31, 2001, at 36.

37. See *supra* note 6 and accompanying text.

38. Rosenberg, *supra* note 6, at 4.

39. Pascual, *supra* note 5, at C1. Historically, Atlanta's day laborers have been African-Americans working in a more formalized, agency-based market. See *supra* note 6. Recently, however, the numbers of Hispanic workers have increased in Atlanta, which has seen a 360

between 15,000 and 20,000 workers seek daily employment at nearly one hundred hiring sites.<sup>40</sup> In the New York metropolitan area, a 2003 survey estimates a total day labor work force between 5831 and 8283 workers at fifty-seven labor sites.<sup>41</sup> And a 2004 statewide study in Colorado found that twenty-one percent of immigrant workers in that state reported day labor as their primary type of work.<sup>42</sup>

Day labor is attractive to these workers for several reasons. Day labor provides work for those who, for various reasons, may not be able to find traditional work. It serves as a good “gap filler” between regular jobs,<sup>43</sup> and it may also be used as a stepping stone to permanent or semipermanent work.<sup>44</sup> For those lacking a degree or other formal education, obtaining work in the formal market may be difficult.<sup>45</sup> Moreover, many of the young Hispanic men who work as day laborers cite their lack of both immigration documents and English language skills as barriers to employment in the formal job market.<sup>46</sup> The “no-questions-asked” system of street corner day labor, in which workers are hired without reference to whether they are legally permitted to work in the United States, is preferable for undocumented workers.<sup>47</sup> Also, day labor gives workers diverse experience and flexibility and allows them to avoid a potentially unpleasant relationship with a regular boss.<sup>48</sup>

The financial aspects of day labor are also attractive to many workers. Often, workers are able “to undercut the market rate at a significant discount, yet . . . earn a rate significantly higher than similar work in Mexico or Central America and likewise higher than the U.S. minimum wage”:<sup>49</sup> A study of day laborers in Los Angeles determined that day laborers there earn an average hourly wage of \$6.91,<sup>50</sup> while in New York, the average wage was \$9.37 per hour during the high season of spring and summer, and \$7.61 in the winter.<sup>51</sup> A recent study in Virginia showed a

% rise in the Hispanic population since 1990. Pascual, *supra* note 5, at C1. With this increase in Hispanic workers came an increased informal day labor market. *See id.*

40. Working on the Margins, *supra* note 4, at 2, 9 (identifying ninety-seven day labor hiring sites of varying types in Los Angeles and Orange counties).

41. Day Labor in New York, *supra* note 20, at 3-4.

42. Suzette Tucker-Welch, Colo. Fiscal Policy Inst., The State of Working Immigrants in Colorado 11 fig.14 (2004), available at <http://www.cclponline.org/pubs/imworker3-04.pdf>.

43. *See* Working on the Margins, *supra* note 4, at 16.

44. *See id.* at 11.

45. *See id.* at 12; *see also* Tucker-Welch, *supra* note 42, at 9.

46. Working on the Margins, *supra* note 4, at 26 tbl.5. Other barriers cited by the workers in this study include low pay and lack of jobs in the formal job market, a lack of specific skills, transportation, or driver's license, age, racial discrimination, and employer abuses. *Id.*

47. *See id.* at 14.

48. *Id.* at 19-20.

49. *Id.* at 18.

50. *Id.* at 27 tbl.6.

51. Day Labor in New York, *supra* note 20, at 6. Federal minimum wage is \$5.15 per hour. 29 U.S.C. § 206 (2000). New York State's minimum wage was \$5.15 per hour until recently, when the legislature approved a \$2 increase over the next two years. *See* Al Baker,

majority of day laborers earning between \$7 and \$9.99 per hour.<sup>52</sup> These wages are negotiated on a job-by-job basis, meaning that workers can refuse to accept a job if it pays too little or is undesirable for any other reason.<sup>53</sup> Day laborers receive their tax-free earnings in cash at the end of the workday, a significant benefit for anyone living on a tight budget or unable to open a bank account.<sup>54</sup>

But day labor, despite its economic appeal, is plagued by numerous serious problems.<sup>55</sup> Central to the concerns of this Note are the difficult conditions under which many day laborers work. Day laborers often experience employer abuses on the job: Many report not being paid the

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*Over Pataki Veto, Minimum Wage to Rise to \$7.15*, N.Y. Times, Dec. 7, 2004, at A1. The minimum wage in New York State is currently \$6 per hour. N.Y. Lab. Law § 652 (McKinney 2005). According to the Department of Labor, the mean hourly wage for construction workers nationwide is \$13.86 an hour. U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 47-2061 Construction Laborers (2004), available at <http://www.bls.gov/oes/current/oes472061.htm>. Landscaping and groundskeeping workers earn an average of \$10.62 per hour. U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment & Wages, 37-3011 Landscaping and Groundskeeping Workers (2004), available at <http://www.bls.gov/oes/current/oes373011.htm>. The higher construction industry wages may reflect relatively high unionization—nineteen percent according to most recent data, compared to nineteen percent of workers in private industry. U.S. Dep't of Labor, Bureau of Labor Statistics, Career Guide to Industries 2004-05: Construction, available at <http://www.bls.gov/oco/cg/cgs003.htm> (last visited Oct. 6, 2005). In 2001 in Queens, New York, union construction workers made more than \$250 a day, while skilled undocumented Sikh laborers could earn between \$100 and \$125 a day. Kamber, *supra* note 36. Unskilled laborers earned between \$65 and \$70 a day. *Id.* Further, Sikh workers complained that employers threatened to hire “Spanish” workers at \$45 a day. *Id.*

52. Dep't of Sys. Mgmt. for Human Servs., *An Account of Day Laborers in Fairfax County* 13 (2004) available at <http://www.fairfaxcounty.gov/service/dsm/daylabor/daylaborreport04.pdf>.

53. Working on the Margins, *supra* note 4, at 18.

54. *Id.*

55. One issue, which this Note will not address in depth, is the often intense opposition of local communities to day laborers in their midst. Police harassment has been a problem for day laborers in many cities, often a result of community concerns about large numbers of men blocking sidewalks and obstructing traffic, as well as intimidating women with catcalls and other behavior that community members may find offensive. Toma & Esbenshade, *supra* note 14, at 3-5. Some communities have responded to increased day laborer presence with vociferous complaints and sometimes have passed “anti-solicitation” ordinances. *Id.* at 7, 23-24; see also Patrick Healy, *L.I. Clash on Immigrants is Gaining Political Force*, N.Y. Times, Nov. 29, 2004, at A1. There have even been instances of violence against day laborers. See, e.g., Charlie LeDuff, *Immigrant Workers Tell of Being Lured and Beaten*, N.Y. Times, Sept. 20, 2000, at B1 (relating the story of two day laborers assaulted in a suburban New York town). Day laborers and their supporters have responded to these concerns by organizing formalized day labor centers, which in turn sponsor community outreach and dialogue and provide safety training, English lessons, and sometimes legal representation. See generally Toma & Esbenshade, *supra* note 14. These centers also help workers obtain jobs in a more orderly fashion and assist day laborers in combating wage complaints or other abuses. *Id.* at 15, 19. On the topic of community opposition to day laborers' presence, see generally Mauricio A. España, Comment, *Day Laborers, Friend or Foe: A Survey of Community Responses*, 30 Fordham Urb. L.J. 1979 (2003).

amount agreed upon, and some report not being paid at all.<sup>56</sup> No breaks, no food or water,<sup>57</sup> and improper or nonexistent safety training<sup>58</sup> are all in a day's work for these men.

### C. Safety Concerns of Street Corner Day Laborers

In addition to the concerns noted above,<sup>59</sup> day laborers frequently work under hazardous conditions.<sup>60</sup> Fearful of retaliation if they report the abuses, and sometimes desperate for work, many day laborers toil under high-risk conditions without ever reporting them.<sup>61</sup> In their study of day labor in New York, professors Abel Valenzuela, Jr., and Edwin Meléndez note that "day laborers perform a wide variety of jobs including dirty and/or dangerous tasks that might expose them to chemical wastes and other occupational hazards."<sup>62</sup> When working in private homes, day laborers may be expected to provide their own safety equipment or be familiar with safety procedures. Homeowners may rather not face the consequences of workers being injured on their property; one day laborer reported that when he cut himself and asked the homeowner for a bandage, he had the door slammed in his face.<sup>63</sup> Of greater concern, contractors looking to keep budgets low violate building codes and compromise workers' safety, leading to injury, and, in some cases, death.<sup>64</sup> Perhaps reflecting these dangerous conditions, the injury rate among Hispanics on the job is on the rise.<sup>65</sup> The dangers are especially pronounced for immigrant workers in

56. Day Labor in New York, *supra* note 20, at 10. Eighty-five percent of the day laborers surveyed for this study reported some form of employer abuse. *Id.*

57. *Id.* at 10 tbl.15.

58. See *infra* notes 119-66 and accompanying text (describing inadequate safety training and procedures for day laborers).

59. See *supra* notes 56-58 and accompanying text.

60. Hearing on Day Laborers Before the New York City Council 2 (Jan. 15, 2003), available at <http://www.nelp.org/docUploads/Statement%20of%20the%20National%20Employment%20Law%20Project%20on%20the%20Su%2Epdf> [hereinafter Hearing] (testimony of the National Employment Law Project).

61. *Id.*

62. Day Labor in New York, *supra* note 20, at ii.

63. Valeria Godines, *Day Laborers' Risks Include Lack of Medical Care, Not Getting Paid*, San Diego Union-Trib. (Bulldog Ed.), Sept. 22, 2002, at A4. Not all homeowners are so uncaring. Another laborer reported that when he cut his hand trimming bushes, his employer took him to the hospital and paid for \$750 worth of medical care and \$60 worth of medicine. *Id.*

64. See David W. Chen, *Chinese Builder's Death Reveals Anonymous Web of Risky Labor*, N.Y. Times, June 9, 2004, at B1.

65. Kim Krisberg, *Work Place Health Disparities Increasing Among Hispanics*, Nation's Health, Mar. 1, 2004, at 11. According to the Centers for Disease Control and Prevention, occupational deaths among Hispanic workers in the United States have increased by more than fifty percent since 1992. *Id.* In 2000 and 2001, on-the-job deaths of Hispanic workers rose by eleven and nine percent, respectively. Ernie Garcia, *Local Hispanics' Job Safety Targeted*, J. News (White Plains, N.Y.), June 2, 2003, at 1B. According to the Bureau of Labor Statistics, Hispanic workers have higher rates of fatal on-the-job injuries than any other ethnic group. Bureau of Labor Statistics, National Census in Fatal Occupational Injuries in 2004, at 13 (2005), available at <http://www.bls.gov/news.release/pdf/foi.pdf>. Between 1992 and 2002, the number of fatal work-related injuries among foreign-born

low-wage, high-risk occupations: From 1996-2001, “[n]early one in four fatally-injured foreign-born workers was employed in the construction industry.”<sup>66</sup> These various factors combined suggest that day laborers face a heightened risk of injury on the job.

#### D. Available Legal Remedies to Protect the Health and Safety of Street Corner Day Laborers

There are a variety of strategies available to improve the health and safety conditions of street corner day laborers. Enforcement of current occupational health and safety regulations<sup>67</sup> and workers’ compensation law,<sup>68</sup> as well as proposed congressional legislation,<sup>69</sup> increased state law protections,<sup>70</sup> and state-sponsored investigation of workers’ rights abuses<sup>71</sup> may address some of these concerns.

This section examines the two legal remedies for unsafe working conditions: a complaint to the Occupational Safety and Health Administration (“OSHA”) and workers’ compensation insurance.

##### 1. OSHA

OSHA is a federal agency dedicated to “assur[ing] the safety and health of America’s workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health.”<sup>72</sup> OSHA operates primarily on the basis of individual complaints that are evaluated and handled either via an off-site investigation or an on-site inspection.<sup>73</sup> The agency may issue a citation or impose fines on the

workers increased by forty-six percent, despite a drop in overall workplace fatalities. AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs 3* (2005).

66. Bureau of Labor Statistics, *Foreign-Born Workers: Trends in Fatal Occupational Injuries, 1996-2001* (2004), available at <http://www.bls.gov/opub/mlr/2004/06/art3full.pdf>.

67. See *infra* Part I.D.1.

68. See *infra* Part I.D.2.b (applying current workers’ compensation statutes to street corner day laborers).

69. See *infra* notes 168-79 and accompanying text (explaining the proposed Day Laborer Fairness and Protection Act).

70. See *infra* notes 180-82 and accompanying text (explaining proposed affirmative state law measures to protect immigrant workers).

71. See *infra* notes 166-67 and accompanying text (describing an Illinois commission charged with investigating Hispanic workplace injuries).

72. OSHA Mission Statement, <http://www.osha.gov/oshinfo/mission.html> (last visited Oct. 5, 2005).

73. See OSHA Complaint Handling Process, <http://www.osha.gov/as/opa/worker/handling.html> (last visited Oct. 5, 2005). In an off-site investigation, the Occupational Safety and Health Administration (“OSHA”) telephones the employer, describes the alleged hazards, and then follows up with a fax or letter. See *How to File a Complaint with OSHA*, <http://www.osha.gov/as/opa/worker/complain.html> (last visited Oct. 5, 2005). If the employer does not respond within five days identifying problems found and corrective actions taken, or if the response is inadequate, OSHA may conduct an on-site investigation. *Id.* Every worker may request an on-site investigation, but

employer.<sup>74</sup> Although many day laborers fall within OSHA's jurisdiction, the National Employment Law Project has observed that

[l]imited investigative resources, the fleeting nature of day labor employment and the complaint driven nature of OSHA enforcement result in a virtual absence of health and safety enforcement for day laborers . . . . In practice, fear of retaliation, the short term nature of day labor . . . and limited enforcement resources have severely restricted OSHA monitoring of day labor worksites.<sup>75</sup>

Furthermore, OSHA enforcement can only result in employer citation or monetary penalty.<sup>76</sup> It provides no compensation to injured workers. An injured day laborer must turn to the state workers' compensation system in order to be made whole.

## 2. The Law of Workers' Compensation

### a. *A Brief History of Workers' Compensation Law in America*

Workers' compensation was first introduced in the United States in the early twentieth century to provide individual financial assistance to injured workers.<sup>77</sup> Before that time, employment injuries were litigated under the common-law system, which required the worker to prove negligence attributable to the employer in order to obtain relief.<sup>78</sup> As the Industrial Revolution swung into high gear and employment surged in dangerous industries such as heavy manufacturing, public awareness of workplace accidents increased.<sup>79</sup> These changes in turn prompted employer concern over an increasingly unfavorable liability climate.<sup>80</sup> Eventually, a coalition of employers, employees, and organized labor succeeded in obtaining the

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such an investigation will be conducted only if certain conditions are met. *Id.* Those conditions include "claims of serious physical harm that have already resulted in disabling injuries or illnesses or claims of imminent danger situations; written, signed complaints requesting inspections; and situations where the employer provided an inadequate response to a phone/fax investigation." *Id.*

74. See 29 C.F.R. §§ 1903.14, 1903.15 (2004).

75. Hearing, *supra* note 60, at 4. This testimony goes on to cite a New York Newsday analysis concluding that at least 202 immigrant workplace fatalities went completely unreviewed by safety inspectors. *Id.*

76. See Occupational Safety and Health Admin., All About OSHA 25-27 (2003), available at <http://www.osha.gov/Publications/osha2056.pdf>.

77. See Mark A. Rothstein et al., Employment Law 405 (1994).

78. *Id.* at 403. At common law, employers could assert either contributory negligence, the fellow servant rule, or assumption of the risk to preclude employee recovery. *Id.* at 404.

79. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 315-16 (1998). Although the actual numbers of fatal accidents varied by industry, the reported level of accident risk was rising, prompting decreased employer protections in the courts. See *id.* at 316.

80. *Id.*

passage of workers' compensation laws in many states.<sup>81</sup> Under these laws, workers engaged in a tradeoff: They forfeited their right to a common-law negligence suit in exchange for a relatively more certain and more generous average post-accident benefit.<sup>82</sup> In order to obtain legal redress, employees needed only to demonstrate that their injuries "arose out of and during the course of their employment."<sup>83</sup> Employers, too, benefited from this new system by agreeing to pay predictable and relatively small insurance premiums up front in exchange for a guarantee that they would not face liability judgments in court down the road.<sup>84</sup>

Despite the advantages inherent in the workers' compensation system, day laborers do not always receive the benefit of coverage. The next section examines whether and how workers' compensation statutes cover day laborers.

#### b. *Workers' Compensation Statutes Applied to Street Corner Day Laborers*

Recall the scenario presented in the introduction of this Note. Who was driving the van that precipitated the chaotic scramble of workers at the street corner day labor "shape-up"? Was it a professional contractor needing a few extra hands on the jobsite that morning? Or was it a private homeowner looking for some help around the house and grounds? Although the answers to these questions have little relevance during the rapid curbside negotiations over a day's pay and hours worked, they become critical when a day laborer is injured on the job. While homeowners and contractors enjoy many of the same benefits that come with hiring day laborers, in most states, only contractors are statutorily responsible for contributing to the workers' compensation scheme.<sup>85</sup> Workers' compensation statutes generally apply to all employers that have one or more full-time employees and to many that have one or more regular

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81. *Id.* at 305; *see also* Rothstein et al., *supra* note 77, at 405. Initially, two early state workers' compensation statutes were declared unconstitutional, New York's due to the compulsory nature of its insurance system. Fishback & Kantor, *supra* note 79, at 313. Subsequent statutes made workers' compensation elective, but stripped employers opting for a negligence scheme of all common law defenses. *Id.* at 314. These statutes survived constitutional challenge. *See* Rothstein et al., *supra* note 77, at 405.

82. Fishback & Kantor, *supra* note 79, at 306. Although a negligence action could procure higher individual damages, it was less certain and therefore paid less on average. *See id.* at 305.

83. Rothstein et al., *supra* note 77, at 406; *see, e.g.*, N.Y. Workers' Comp. Law § 2(7) (McKinney 2005) (defining "injury" to mean "only accidental injuries arising out of and in the course of employment"). Establishing liability under this standard is no simple matter. Every year, numerous cases are litigated to determine whether an injury is compensable based on this standard. *See, e.g.*, Boone v. Orange Steel Erectors Inc., 711 N.Y.S.2d 355 (App. Div. 2000).

84. *See* Fishback & Kantor, *supra* note 79, at 306. Scholars have noted that employer support for the legislation resulted from a desire for industrial peace as well as increasing certainty as to liability. *See id.* at 309-10. Many employers were able to pass the costs of workers' compensation on to the workers. *Id.* at 310.

85. *See infra* Part I.D.3.

part-time workers.<sup>86</sup> Homeowners, however, are generally excluded from workers' compensation requirements.<sup>87</sup> Therefore, whether an employer is a homeowner or a contractor becomes crucial for workers' compensation coverage.

Imagine that the man in the van is a construction contractor, working as one of many subcontractors at a large job site building a tract of new homes. The two day laborers arrive at the site and their new boss directs them up onto the roof of one of the new buildings to help lay the roof tile. No safety harnesses are provided, but the workers do not want to make trouble, so they do as they are told. A few hours into the job, one laborer slips on a loose tile and falls to the ground, seriously injuring his back. Under most state statutes, this worker is eligible for workers' compensation.<sup>88</sup> Whether the worker would actually apply for coverage, and whether he would ultimately obtain benefits, are separate questions;<sup>89</sup> according to a survey of immigrant workers in Colorado, fewer than one half of survey respondents injured on the job reported receiving workers' compensation coverage, while thirty-four percent received no medical treatment at all.<sup>90</sup>

Now imagine that instead of a professional contractor, the man in the van is a homeowner from a nearby suburb. He, too, has some roofing work that needs to be done. When the workers arrive at his home, the man asks the workers whether they know how to patch roof tile. The laborers nod, and the homeowner leaves them to do the job. Within a couple of hours, one of the workers has slipped on the roof and fallen, again, severely injuring his back. In this scenario, under almost all state statutes, the worker has no recourse under the workers' compensation law, despite the fact that he was performing exactly the same work as in the prior example. The happenstance of who hired him that morning determines whether he can claim a predetermined amount of money through an administrative procedure, or whether he must sue the homeowner for negligence in a civil court proceeding. Although the day laborer in the first example is, at least theoretically, able to collect workers' compensation benefits, a variety of

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86. Rothstein et al., *supra* note 77, at 406. Some states exclude private employers who do not regularly employ the minimum number of individuals (perhaps by generally working alone but hiring a helper during the "busy season"), but if the employer regularly employs the minimum number of employees for a significant portion of the year, he will be deemed within the statute. *Id.*

87. *See infra* Part I.D.3 (explaining that homeowners are required to carry workers' compensation insurance only under limited circumstances).

88. *See infra* Part I.D.3 (describing state statutory workers' compensation schemes).

89. *See infra* notes 138-39 and accompanying text (exploring practical barriers to day laborers' access to workers' compensation).

90. *See* Tucker-Welch, *supra* note 42, at 14. Of the survey respondents, twenty-one percent identified their primary work as day work, ten percent identified intermittent work as their primary type of work, and seventeen percent reported working primarily in temporary or seasonal positions. *Id.* at 11. Fifty-two percent of respondents had permanent positions. *Id.*

legal concerns arise to prevent the second worker from receiving compensation for his injuries.

### 3. Legal Obstacles to Obtaining Workers' Compensation Benefits

#### a. *The Statutory Definition of "Employee"*

The different outcomes in the two examples described above are statutorily determined in most states. Workers' compensation statutes were originally designed to address the increasing numbers of industrial accidents in heavy manufacturing,<sup>91</sup> and have evolved, to some extent, to adjust to the changing health and safety concerns of the formal labor market.<sup>92</sup> The statutes have yet to evolve, however, to meet the needs of the rising numbers of street corner day laborers performing construction and landscaping work. An examination of the common statutory requirements illuminates some of the places where the system excludes day laborers from coverage.

The first concern for a day laborer seeking workers' compensation benefits is establishing that, when he was injured, he qualified as an "employee" under his state's workers' compensation statute. Since day laborers often work for different employers every day, day laborers' legal protections are determined by chance, depending on who picks them up for work on a given morning.

State legislatures have approached the definition of "employee" in several ways. Many state workers' compensation statutes exclude workers whose employment is both casual and not in the usual course of the trade, business, or occupation of the employer.<sup>93</sup> "Casual" was defined by one court as "irregular, unpredictable, sporadic and brief in nature."<sup>94</sup> When they are employed by contractors, this dual requirement can work in day

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91. See *supra* notes 77-84 (detailing background to passage of workers' compensation statutes).

92. See, for example, N.J. Stat. Ann. §§ 34:15-36 (West 2005), which includes occupational disease under the definition of disability. The notion of occupational disease is a relatively recent phenomenon, and its inclusion reflects the legislature's attention to the changing needs of the workforce, often in response to widespread public pressure. See, e.g., Peter S. Barth, *Review: Black Lung: Anatomy of a Public Health Disaster*, 570 *Annals Am. Acad. Pol. & Soc. Sci.* 198 (2000) (noting that receipt of workers' compensation benefits for occupational diseases has never been easy).

93. See, e.g., Ariz. Rev. Stat. Ann. § 23-901(5)(b) (2004).

94. *Smith v. Coastal Tire & Auto Serv.*, 207 S.E.2d 810, 811 (S.C. 1974). This definition of casual is an apt description of the employment of many day laborers. In Delaware, the workers' compensation statute defines "casual employment" as "employment for not over 2 weeks or a total salary during the employment not to exceed \$100." Del. Code Ann. tit. 19, § 2301(9) (2004). The statute, however, does require that repairs and maintenance to the employer's home or business not be considered casual employment. *Id.* The West Virginia statute excludes casual employers, defined as those for whom "the number of his or her employees does not exceed three and the period of employment is temporary, intermittent and sporadic in nature and does not exceed ten calendar days in any calendar quarter." W. Va. Code Ann. § 23-2-1(b)(4) (LexisNexis 2005).

laborers' favor by ensuring that even workers hired for a single day's work are included, so long as the work is typical of the contractor's business.<sup>95</sup> On the other hand, this definition functionally excludes most homeowners, who are generally hiring workers to perform tasks they do not regularly perform.<sup>96</sup>

Some state statutes exempt all casual employment from coverage, whether or not the work performed is in the employer's course of trade.<sup>97</sup> The Maryland workers' compensation statute, for example, declares simply that "[a] casual employee is not a covered employee."<sup>98</sup> Courts, however, have frequently read into such statutes a second requirement that the worker in question also be performing work outside the usual trade of the employer, thereby making these statutes functionally equivalent to those in which a "usual trade" requirement is specified in the statute.<sup>99</sup> In Maryland, for example, a

principal and compelling factor [in determining whether an employee is casual] is the nature and scope of the employer's business and whether the services being rendered by the employee-claimant at the time of his injury were in furtherance of, central to and being performed within the ambit of the employer's regular business.<sup>100</sup>

#### b. *Domestic Worker Provisions*

Excluded from traditional workers' compensation coverage when they work for homeowners,<sup>101</sup> day laborers may look to statutory "domestic" worker provisions for coverage, but here, too, most day laborers will be excluded because of the intermittent nature of their work.<sup>102</sup> Many state statutes contain specific provisions regarding domestic workers, including those performing maintenance or repair work around a private home. The content and breadth of these statutes vary considerably. Some statutes distinguish between domestic servants and workers hired to do "gardening,

95. See, e.g., *Gooden v. Mitchell*, 21 A.2d 197, 203 (Del. Super. Ct. 1941).

The words 'regular course of . . . business' have reference to the habitual or regular occupation that the party is engaged in, with the view of winning a livelihood or some gain, and the most natural meaning is that they refer to the normal operation which regularly constitutes the business of the employer. What constitutes the regular course of business of an employer must be determined by the facts and circumstances of each particular case.

*Id.*

96. See *supra* notes 32-33 and accompanying text (describing the role of homeowners in day labor hiring).

97. See, e.g., Idaho Code Ann. § 72-212(2) (2004); Md. Code Ann., Lab. & Empl. § 9-205 (LexisNexis 2003).

98. Md. Code Ann., Lab. & Empl. § 9-205.

99. See, e.g., *Larson v. Bonneville Pac. Servs. Co.*, 793 P.2d 220 (Idaho 1990) (stating that casual employment arises only occasionally and is not part of the usual trade or business of the employer).

100. *Winters v. Payne*, 283 A.2d 807, 810 (Md. Ct. Spec. App. 1971).

101. See *supra* note 96 and accompanying text.

102. See *infra* notes 103-05 and accompanying text.

maintenance, repair, remodeling, or similar work in or about the private home or residence of the person employing the employee.”<sup>103</sup> Others include certain employees earning more than a statutorily determined minimum.<sup>104</sup> Still others include those household employees working more than a minimum number of hours.<sup>105</sup> Such provisions provide legal protections for longer-term employees, but the occasional day laborer remains excluded by virtue of his brief employment for relatively low wages.<sup>106</sup>

*c. Homeowner Exemptions Prevail Even in States with Large Day Laborer Populations*

Even in those states with large day laborer populations, workers in private homes lack protection under state workers’ compensation statutes. The New York statute, for example, excludes from its definition of “employee” all “persons engaged by the owner in casual employment consisting of yard work, household chores and making repairs to or painting in and about a one-family owner-occupied residence.”<sup>107</sup> In New Jersey, the workers’ compensation statute excludes “casual employments, which shall be defined, if in connection with the employer’s business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.”<sup>108</sup> This test could exclude laborers working for contractors if a street corner pickup is deemed “by chance,” and will exclude workers employed by homeowners for brief, noncontinuous jobs.<sup>109</sup> And in California, despite a broad definition of

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103. Ark. Code Ann. § 11-9-102(11)(A)(ii) (2005).

104. *See, e.g.*, Haw. Rev. Stat. § 386-1 (2004) (excluding from the definition of employment “[s]ervice performed by an individual for another person solely for personal, family, or household purposes if the cash remuneration received is less than \$225 during the current calendar quarter and during each completed calendar quarter of the preceding twelve-month period”); Md. Code Ann., Lab. & Empl. § 9-209 (LexisNexis 2003) (“An individual who is employed as a domestic servant in a private home is a covered employee with respect to a household if the individual earns at least \$750 in cash in a calendar quarter from that household.”).

105. *See, e.g.*, Conn. Gen. Stat. Ann. § 31-275(9)(B)(iv) (West 2005). The statute excludes “any person engaged in any type of service in or about a private dwelling provided he is not regularly employed by the owner or occupier over twenty-six hours per week.” *Id.*; *see also* D.C. Code Ann. § 32-1501(9)(E) (LexisNexis 2005) (stating that domestic servants in or around a private home are covered by the statute where the homeowner employs one or more household domestic workers for 240 hours or more during any calendar quarter in the same or previous year).

106. *See supra* notes 32-33, 50-52 and accompanying text.

107. N.Y. Workers’ Comp. Law § 2(4) (McKinney 2005).

108. N.J. Stat. Ann. § 34:15-36 (West 2004).

109. Because the work that day laborers are hired to perform in private homes is generally not “in connection with any business of the employer,” *id.*, and is rarely continuous, *see supra* notes 32-33, 50-52, those day laborers will be considered casual employees.

“employee,”<sup>110</sup> which includes “any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling,”<sup>111</sup> workers who are employed for less than a minimum number of calendar days or who earn less than the requisite earnings are excluded from coverage.<sup>112</sup> Aside from statutory exclusions, judicial decisions in many states make clear that homeowners are exempt from the requirements of the workers’ compensation statutes.<sup>113</sup>

Alternatively, some statutes do permit a small employer or homeowner to “opt in” to the workers’ compensation plan,<sup>114</sup> or require homeowners’ insurance to cover domestic workers, as defined by the statute.<sup>115</sup> Such provisions are useful when applied to continuous domestic help such as nannies or full-time gardeners, but it is unclear whether homeowners would elect to opt in to such provisions to insure against liability arising out of hiring the occasional day laborer.<sup>116</sup>

## II. SHOULD THE WORKERS’ COMPENSATION SYSTEM BE CHANGED?

Part I of this Note traced the emergence of the current day labor market, explained its benefits to both employers and workers, and illustrated how current workers’ compensation statutes apply to street corner day laborers. This Part presents arguments for and against changing those statutes and examines proposals for change.

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110. “‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . . .” Cal. Lab. Code § 3351 (West 2004).

111. *Id.* § 3351(d).

112. *See id.* § 3352(h).

113. *See, e.g.*, Gaede v. Saunders, 53 P.3d 1126 (Alaska 2002) (holding that a worker injured while building an addition on an employer’s home was not an employee eligible for workers’ compensation); *see also* Blevins v. Mitchell, 906 P.2d 293 (Or. Ct. App. 1995) (finding that the householder was not required to purchase workers’ compensation insurance).

114. *See, e.g.*, Utah Code Ann. § 34A-2-103 (2004); W. Va. Code Ann. § 23-2-1 (LexisNexis 2004).

115. *See, e.g.*, N.H. Rev. Stat. Ann. § 281-A:6 (LexisNexis 2004) (requiring that all insurance companies authorized to provide “comprehensive personal liability, tenant’s or homeowner’s insurance . . . shall . . . provide workers’ compensation insurance covering domestics unless the employer has a separate policy of workers’ compensation insurance covering domestics”). “Domestics” include “a person performing domestic services in a private residence of the employer,” *id.* § 282-A:2V-a, and “domestic services” include the performance of gardening and handy person work, *id.* § 282-A:2V-b(a). *But see supra* notes 103-12 and accompanying text (describing how most state statutory definitions of domestic workers would not include day laborers).

116. *See infra* Part III.A (discussing the feasibility of this kind of solution).

### A. Arguments for Change

#### 1. Day Laborers Are Being Injured on the Job at an Alarming Rate

Despite the workers' compensation system, the important role that day laborers currently play in the American economy<sup>117</sup> is not always matched by genuine and effective legal protections for their health and safety. Working for a contractor or homeowner on commercial or household repairs can be dangerous work; as unskilled laborers, day laborers' risk for occupational injury is high.<sup>118</sup> Despite OSHA guidelines requiring that contractors keep the workplace free from hazards, inform employees of safety procedures, and have someone trained in first aid on site if there is no emergency response unit nearby, many day laborers report that such procedures are widely ignored.<sup>119</sup> The heavy turnover and constantly changing work in the day labor industry may compound working conditions that are already hazardous.<sup>120</sup> Moreover, depending on for whom they are working, the statutory workers' compensation scheme leaves many day laborers without traditional protections when injured on the job.

The recent explosion of these workers in urban areas<sup>121</sup> suggests that greater protections for day laborers should be a legislative priority. The rising influx of day laborers into the labor market highlights pressing safety concerns,<sup>122</sup> and the rising injury rate among Hispanic workers<sup>123</sup> suggests that additional action must be taken.

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117. See *supra* Part I.B.1.

118. Lee, *supra* note 24, at 2; see also *infra* notes 119-32 and accompanying text (detailing occupational hazards experienced by day laborers).

119. Amaya Larrañeta, *Workplace Safety: High Risk for Laborers*, Newsday (Melville, N.Y.), July 16, 2004, at A8. A community organizer of day laborers reported that construction sites where day laborers are employed constantly violate safety standards, but because of concerns over immigration status and job security, many workers are reluctant to report their employers' violations to authorities. *Id.* Other workers report working without hard hats, gloves, or safety training. Krisberg, *supra* note 65, at 5; see also Darragh Johnson, *Region's Day Laborers Push for Better Training*, Wash. Post, June 6, 2004, at T5 (noting a lack of training for day laborers on the use of power tools following the death of a Hispanic teenager who fell into a mulching machine). Despite extensive violations of OSHA procedures, the agency is often unable to adequately address or track on-site safety concerns. See Krisberg, *supra* note 65, at 11; see also U.S. Gen. Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance* (2002), available at <http://www.gao.gov/new.items/d02925.pdf> [hereinafter *Labor's Efforts*]. For a more detailed examination of OSHA complaint procedures, see *infra* notes 72-76.

120. AFL-CIO, *supra* note 65, at 8.

121. See *supra* notes 7-18 and accompanying text (detailing this expansion and the factors contributing to it).

122. See *infra* Part II.A.2.a.

123. See *supra* note 65 and accompanying text.

## 2. Practical Obstacles Impede Even Eligible Day Laborers' Access to Workers' Compensation Benefits

Although an injured immigrant day laborer's eligibility for workers' compensation depends on whether he was working for a contractor or private homeowner when he was injured,<sup>124</sup> a host of secondary factors also influence the day laborer's ability to seek and receive benefits. The workers' compensation system should be improved because the combination of poor safety procedures and misinformation about the nature of benefits leaves many injured workers uncompensated.

### a. *Day Laborers Face High Risks but Have Little Recourse*

Practical problems relating to day laborers' day-to-day work increase the likelihood that day laborers will experience on-the-job injury. A language barrier may make safety instruction difficult or impossible.<sup>125</sup> Aside from the dangerous nature of construction or landscaping work,<sup>126</sup> day laborers are often hired to do work that even regular employees in these industries do not want to undertake because of safety concerns.<sup>127</sup> Day laborers may be so eager for work that they are willing to sacrifice safety, for example by pretending to know how to operate dangerous tools, in order to get work.<sup>128</sup> Many are insufficiently trained in safety procedures,<sup>129</sup> and either do not know that employers are mandated to provide training, or are afraid that

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124. See *supra* notes 93-100 and accompanying text.

125. See, e.g., *Profile: On the Job Death Rates for Hispanic Workers* (Minnesota Public Radio: Marketplace radio broadcast July 24, 2003) (noting that, on a job site where a Hispanic worker was killed in a building collapse, Chinese-speaking bosses communicated with Mexican workers through a combination of English, Spanish, and body language); see also AFL-CIO, *supra* note 65, at 10.

[L]anguage is a substantial barrier to safety and health for Hispanic construction workers in the United States. One Spanish-speaking worker said, "When safety procedures are explained, I don't understand." Others said people appear less willing to explain things to those with limited English. They said it is hard to ask questions and communicate with foremen.

*Id.*

126. According to the Bureau of Labor Statistics, in 2004, the construction industry recorded more fatal injuries than any other industry sector. Bureau of Labor Statistics, U.S. Dep't of Labor, National Census of Fatal Occupational Injuries in 2004, at 4 (2005), available at <ftp://ftp.bls.gov/pub/news.release/cfoi.txt>. Of a total of 5703 fatalities, 168 involved grounds maintenance workers. *Id.*

127. Lee, *supra* note 24, at 2.

128. See, e.g., Larrañeta, *supra* note 119, at A8 (reporting that a day laborer stated, "If I demand security, someone else will get the job"). Workers confess that they willingly work for employers who do not provide scaffolds, harnesses, or other anchors. *Id.*

129. A recent study of day laborers in Washington, D.C., found that 79% of those surveyed considered some of the work they do dangerous, yet 81% had received no job safety training, and 51% reported not having received safety equipment that can prevent a workplace injury. Abel Valenzuela Jr. & Ana Luz Gonzalez, Ctr. for the Study of Urban Poverty, In Pursuit of the American Dream: Day Labor in the Greater Washington D.C. Region 10 (2005).

employers would brand them troublemakers if they asked.<sup>130</sup> Furthermore, laborers report hostile responses from employers when they hesitate to perform hazardous tasks.<sup>131</sup> And it is unlikely that day laborers will have health insurance or private funds to pay for accidental injuries that occur on the job.<sup>132</sup> All of these concerns may be increased for undocumented immigrants who fear retaliation for speaking up about on-the-job hazards.<sup>133</sup> Because of the dangerous circumstances of their work, day laborers are in particular need of the financial protection traditionally offered to injured workers by state workers' compensation statutes. But the workers' compensation statutes, as they are currently drafted,<sup>134</sup> are not protecting this vulnerable population.

b. *Temporary Work Makes Information Gathering Difficult*

Several additional factors highlight the need for a legal safety net to protect day laborers' safety. One set of concerns arises from the temporary nature of day laborers' work. If a contractor generally works alone and only occasionally hires day laborers for larger jobs, he may be less likely to carry workers' compensation insurance.<sup>135</sup> Moreover, the lack of a long-term relationship between the employer and the employee means that employers may consider employees more fungible.<sup>136</sup> Because of their casual relationship with employees, employers may avoid the reach of the law by claiming that the worker is not their employee, or by simply disappearing after a worker suffers an injury.<sup>137</sup> Workers may have difficulty proving employment because they are paid in cash.<sup>138</sup> Or they

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130. See Garcia, *supra* note 65, at 1B. Construction training programs, such as those run by OSHA, have begun to address some of the deficiencies in the safety training offered to Hispanic day laborers. *Id.*

131. *Id.* (citing one day laborer's complaint that, when he pointed out an incorrect scaffolding arrangement to his employer, he was told, "You're acting like a woman"); see also Larrañeta, *supra* note 119, at A8 (reporting one worker recounting that "the first thing the contractor said to me was that he didn't have insurance and that I was to take full responsibility for any accident").

132. Labor's Efforts, *supra* note 119, at 24; see also AFL-CIO, *supra* note 65, at 12 (noting that of total costs resulting from workplace injuries, workers' compensation covers only 27%, while workers and their families pay 44%, private health insurance pays 10%, and taxpayer-funded state and federal Medicaid and Medicare programs pay 18%).

133. See *infra* Part II.A.2.c (explaining immigration concerns).

134. See *supra* Part I.D.2.b.

135. For an example of an uninsured employer for whom workers' compensation insurance was not generally of concern, see *Putz v. Industrial Commission*, 51 P.3d 979 (Ariz. Ct. App. 2002) (finding an employer who did not regularly employ other workers and did not carry workers' compensation insurance to be outside of the workers' compensation law).

136. See Ernie Garcia, *Ex-day Laborer Fights for Compensation*, J. News (White Plains, N.Y.), Apr. 11, 2004, at 1A.

137. See *id.* (reporting that "contractors who do use day laborers do not pay liability insurance, Social Security, unemployment insurance, or workers' compensation insurance for these workers").

138. See *id.*

may be unable to locate or even identify their employer due to the fly-by-night nature of the work. Also, many day laborers may be unaware of the protections offered by workers' compensation laws because, unlike employees in more formal job settings, they do not receive information about workers' compensation from their employers.<sup>139</sup>

### c. Immigration Concerns

For many day laborers, a major factor in the decision to pursue a legal remedy is the specter of immigration enforcement. The advantages of the day labor market for those without legal immigration status<sup>140</sup> come with their own dangers: Immigrants may fear that employers will report them to Immigration and Customs Enforcement ("ICE")<sup>141</sup> if they speak out about workplace health and safety concerns.<sup>142</sup> Moreover, not all state statutes are clear on whether undocumented workers are eligible for workers' compensation coverage.<sup>143</sup> Even if an undocumented day laborer would like to proceed with a claim, he faces uncertainty over whether his immigration status will be a legal obstacle to obtaining benefits.<sup>144</sup> Although many state workers' compensation statutes specifically extend benefits to aliens regardless of immigration status,<sup>145</sup> other statutes include "aliens" as eligible employees without explaining whether this definition includes undocumented aliens.<sup>146</sup> One state defines employee to include only those aliens lawfully authorized to work in the United States.<sup>147</sup>

Additionally, undocumented immigrants' eligibility for workers' compensation benefits took on new resonance after the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>148</sup> which

139. See Krisberg, *supra* note 65, at 11.

140. See *supra* notes 46-47 and accompanying text.

141. Immigration and Customs Enforcement ("ICE") is the division of the Department of Homeland Security that enforces immigration laws. Homeland Security Act, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135 (2002) (to be codified at 6 U.S.C. § 101).

142. See *infra* notes 143-47, 152 and accompanying text.

143. See *supra* Part I.D.3 (detailing state workers' compensation statutes).

144. See *infra* notes 148-52 (explaining how many courts have interpreted the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) as not precluding workers' compensation benefits for undocumented immigrants). Despite many courts' favorable post-*Hoffman* holdings on undocumented immigrants' eligibility for workers' compensation, the law is not settled in many states. See *infra* notes 148-52. Undocumented workers have much to lose as "test cases" in this kind of litigation.

145. Virginia's workers' compensation law, for example, includes "aliens . . . whether lawfully or unlawfully employed" under its definition of "employee." Va. Code Ann. § 65.2-101(1)(a) (2004 & Supp. 2005).

146. See, e.g., Ala. Code § 25-5-1(5) (2004); Minn. Stat. Ann. § 176.011 (West 1993 & Supp. 2005). Other state statutes, like Hawaii's, do not expressly include aliens. See Haw. Rev. Stat. § 386-1 (1993 & Supp. 2004).

147. Wyo. Stat. Ann. § 27-14-102(a)(vii) (2005). Bills have been introduced in South Carolina and Virginia to limit or prohibit undocumented workers from receiving workers' compensation benefits. AFL-CIO, *supra* note 65, at 13.

148. 535 U.S. at 137. In May 1988, Hoffman Plastic Compounds, Inc., hired a worker named Jose Castro to work in its chemical factory. *Id.* at 140. At the time of his hiring,

held that undocumented immigrants fired in the course of a union organizing campaign are not eligible for back pay under the National Labor Relations Act ("NLRA").<sup>149</sup> Although most courts have resolved the question in favor of the immigrant worker,<sup>150</sup> some states have limited certain elements of state workers' compensation laws.<sup>151</sup> This uncertainty over immigration status requirements, and courts' increased scrutiny of undocumented immigrant workers' claims for compensation, may further increase fear among day laborers, and chill their efforts to fight for workplace rights.<sup>152</sup>

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Castro presented documents suggesting that he was authorized to work in the United States. *Id.* When the United Rubber, Cork, Linoleum, and Plastic Workers of America began a union-organizing campaign at the factory in December 1988, Castro supported the campaign and distributed union authorization cards to factory employees. *Id.* He and several others were subsequently dismissed, and the National Labor Relations Board ("NLRB"), after determining that their dismissal was in violation of the National Labor Relations Act ("NLRA"), ordered Castro and the other employees reinstated with back pay. *Id.* at 140-41. When Castro testified that he was not authorized to work in the United States and had used fraudulent documents to obtain a work authorization, the question arose whether the award of back pay to an undocumented immigrant was permissible under United States immigration law. *Id.* at 141. The Immigration Reform and Control Act ("IRCA") makes it unlawful for an alien to tender false documents in an attempt to gain employment. *Id.* at 148. IRCA also makes employers civilly and criminally liable for knowingly employing undocumented aliens. *Id.* The Supreme Court held that an award of back pay to an undocumented alien would significantly undermine United States immigration policy, as expressed in IRCA, and limited the NLRB's authority to authorize such awards. *Id.* at 151.

149. *Id.* at 140. The reach of this decision to other areas of law outside of the labor organizing context remains unclear.

150. *See, e.g.,* *Corea v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) (holding that illegal aliens may receive workers' compensation benefits conditioned on a diligent job search). The *Corea* court rejected the reasoning of the *Hoffman* majority, noting that nothing in IRCA or the Minnesota workers' compensation statute reflected a policy of denying workers' compensation to undocumented immigrants. *Id.* at 329; *see also* *Celi v. 42nd St. Dev. Project, Inc.*, No. 37491-01, 2004 WL 2812902 (N.Y. Sup. Ct. Nov. 9, 2004) (holding that the claimant's immigration status was merely one factor relevant to whether he was eligible to receive future wages).

151. *See, e.g.,* *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510, 514-16 (Mich. Ct. App. 2003) (holding, based on a Michigan law denying benefits to those unable to work due to commission of a crime, that an undocumented immigrant who used false documents to obtain employment was ineligible to receive wages lost due to an on-the job injury); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 108 (Pa. 2002) (holding that, while an undocumented worker is eligible for workers' compensation benefits, the employer may refer to the employee's undocumented status in seeking to suspend payment of benefits and may avoid having to demonstrate that other employment is available). On the issue of how the Supreme Court's decision in *Hoffman* affects other areas of workplace law, see generally Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. Pa. J. Lab. & Emp. L. 497, 509-16 (2004).

152. *See, e.g.,* Wishnie, *supra* note 151, at 497 (noting that a weak economy "has left many employees, especially vulnerable low-wage immigrant workers, unable to resist employer demands for lower pay, longer hours, and other reductions in the terms and conditions of employment" and relating those concerns to the Supreme Court's decision in *Hoffman*).

### B. Arguments Against Change

Despite the strong arguments for altering workers' compensation statutes to include day laborers,<sup>153</sup> several concerns support the notion that individual workers whose employers change almost daily are beyond the scope and purpose of the workers' compensation laws.

#### 1. Homeowners Are Not or Should Not Be Required to Buy Workers' Compensation Insurance

Perhaps the strongest argument against mandating workers' compensation coverage for all day laborers, regardless of who employs them, is that homeowners—a major employer of day laborers—are ill-equipped to bear the risks associated with employing these workers.<sup>154</sup> One reason why homeowners are generally exempt from workers' compensation requirements is evident in state court decisions rejecting homeowner responsibility for carrying insurance.<sup>155</sup> One rationale articulated in such decisions is a policy concern based on cost bearing: Homeowners are consumers, not producers, and therefore they should not have to bear the costs of workers' compensation insurance.<sup>156</sup> Because, as one court put it, individual homeowners cannot pass the costs of workers' compensation insurance on to their consumers,<sup>157</sup> homeowners should not bear the same responsibility for worker safety as contractors operating a business for profit.

#### 2. Legislative History Suggests that the Drafters of Workers' Compensation Laws Did Not Envision Protecting These Workers

Arguably, day laborers should be excluded from workers' compensation coverage because such coverage was simply not contemplated by lawmakers when these statutes were initially drafted. Legislatures enacted workers' compensation statutes in response to increased threats to worker safety during the industrial revolution. These laws sought to protect manufacturing workers from injuries typical on large machine floors,<sup>158</sup> not temporary workers in private homes.

#### 3. Day Laborers Are Independent Contractors

The analysis of workers' compensation statutes in Part I presumes that day laborers are treated as employees.<sup>159</sup> But another argument against coverage for day laborers is that they are independent contractors. Almost

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153. See *supra* Part II.A.

154. See *infra* note 156 and accompanying text.

155. See, e.g., *Gaede v. Saunders*, 53 P.3d 1126 (Alaska 2002).

156. *Id.* at 1127.

157. See *Blevins v. Mitchell*, 906 P.2d 293, 294-95 (Or. Ct. App. 1995).

158. See *supra* Part I.D.2.a (detailing the passage of workers' compensation acts).

159. See *id.*

all states exclude independent contractors from workers' compensation coverage,<sup>160</sup> and either a contractor or a homeowner could use the independent contractor provisions to escape liability if a day laborer applies for benefits.<sup>161</sup>

An independent contractor is "a business person hired for a specific result. Generally, the person is in business for himself . . . and is working to achieve a profit, not a wage . . . [and is] usually not eligible for unemployment, workers' compensation or employer sponsored benefits."<sup>162</sup> Typically, a host of factors must be established if a worker is to be excluded as an independent contractor,<sup>163</sup> but the general question is whether and to what degree the employer controls the worker.<sup>164</sup>

It is often easier to establish that a worker is an employee than to prove that he is an independent contractor. One New York court, for example, noted that, in workers' compensation cases, the employment relation may be grounded upon proof of any one factor, such as right to control, method of payment, furnishing of equipment, right to discharge, and the so-called

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160. See, e.g., Cal. Lab. Code § 5705 (West 2003) (stating that establishing that an employee is an independent contractor is an affirmative defense to a workers' compensation claim); N.Y. Workers' Comp. Law § 2(4) (McKinney 2005) (excluding from coverage certain employees deemed independent contractors).

161. See, e.g., *Celeste Painting and Decoration*, 2003 NY Wrk. Comp. LEXIS 85255 (Aug. 11, 2003) (holding that day laborer was an employee entitled to workers' compensation based on the employer's control of his work, payment of a daily wage, provision of equipment, and at-will employment). Although unlikely, if day laborers were found to be independent contractors, additional problems would arise. Independent contractors are not considered "employees" within the terms of the NLRA. 29 U.S.C. § 152(3) (2000). In turn, if day laborers are not employees under the NLRA, then they cannot be considered part of a labor organization entitled to exception from the antitrust laws. Laura Storto, *Antitrust Concerns for Organizing Day Laborers* 3-4 (Oct. 29, 1999) (unpublished manuscript, on file with the Fordham Law Review). Such a determination could seriously hamper day labor organizing efforts, especially those aimed at fixing a "reservation wage." *Id.* at 4.

162. Patricia Ball, Comment, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 Santa Clara L. Rev. 901, 902 n.5 (citing Stephen S. Mead, *A Guide for Employers Contemplating the Use of the Contingent Worker*, All Regions (2001)); see also Cal. Lab. Code § 3353 (West 2003) ("Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.").

163. See, e.g., *infra* note 165 and accompanying text.

164. See *Comm'rs of the State Ins. Fund v. Kaplan*, 392 N.Y.S.2d 971 (N.Y. Civ. Ct. 1977); see also *Nev. Indus. Comm'n v. Bibb*, 374 P.2d 531 (Nev. 1962). In *Bibb*, the court held that

[i]n determining whether an individual is an employee entitled to compensation under workmen's compensation acts, one test is that of control. If he is subject to the control, supervision, or authority of the person for whom the work is done, his status is that of an employee within the meaning of such statutes. Indeed lack of control is not always conclusive.

*Id.* at 543 (citations omitted).

relative nature of the work test, but the status of independent contractor is established only by convincing evidence that many indicia exist.<sup>165</sup>

### C. Possible Solutions

The health and safety concerns of street corner day laborers, and the arguments over whether and how to ameliorate them, have not gone unnoticed. What follows is a survey of proposed solutions suggested by legislators and policy analysts to help mitigate some of the problems facing this population.

#### 1. Investigating Worker Injuries: The Illinois Commission

Illinois recently formed a commission to investigate work-related deaths in Illinois, focusing specifically on Hispanics and day labor agencies.<sup>166</sup> The commission will, among other things, “identify and develop best practices for reaching Hispanic workers, and will also recommend training and legislative changes to strengthen worker protections.”<sup>167</sup>

#### 2. The Day Laborer Fairness and Protection Act

In July 2003, Representative Luis Gutierrez proposed legislation aimed at remedying many of the legal concerns affecting day laborers. The stated purpose of the proposed Day Laborer Fairness and Protection Act (“DLFPA”) is “to ensure that individuals working as day laborers, or temporary workers, are afforded full protection of and access to employment and labor laws that ensure workplace dignity and to reduce unfair competitive advantage for firms that abuse day laborers.”<sup>168</sup> The legislation broadly defines day labor to include all work that is “occasional or irregular,” and includes those situations where a day laborer is employed only for the amount of time necessary to complete the discrete assignment for which he was hired.<sup>169</sup> Employers are also broadly defined as anyone who directly hires or indirectly permits a day laborer to work, or who can otherwise exercise control over the wages, hours, or working conditions of a day laborer.<sup>170</sup> This language is broad enough to include homeowners,

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165. *Kaplan*, 392 N.Y.S.2d at 975. The *Kaplan* court noted that control was, historically, the principal factor in determining tort liability in the master-servant context, and referred to agency law to determine whether such control existed. *Id.* at 974 & n.6. The court added that the remedial purposes of workers’ compensation law are important in making the employee determination. *Id.* at 974.

166. Press Release, State of Illinois, Governor Blagojevich Calls for a State Panel to Investigate Work Related Death Rates in Illinois (Sept. 30, 2004), available at <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=1&RecNum=3433>.

167. *Id.*

168. Day Laborer Fairness and Protection Act, H.R. 2870, 108th Cong. § 3 (2003).

169. *Id.* § 4(2).

170. *Id.* § 4(3).

thus eliminating the principal statutory barrier for recovery by day laborers in their employ.<sup>171</sup>

The DLFPA includes several provisions on workers' compensation, including one that requires employers to pay health-care costs for their employees who are injured while working if workers' compensation benefits are not available.<sup>172</sup> Such a provision functions as a gap filler to ensure coverage of those workers who, despite the law's broad definition of employer,<sup>173</sup> remain unprotected. The DLFPA also would require all day labor service agencies and day labor employers to provide workers' compensation coverage for their day laborers, regardless of immigration status.<sup>174</sup> This provision could ameliorate the deportation fears that prevent day laborers from pursuing workers' compensation claims.<sup>175</sup> Moreover, the DLFPA would establish health and safety requirements, including the provision of safety equipment and tools at no cost to the worker, and general safety measures for worksites.<sup>176</sup> Such provisions might help avoid day labor injuries in the first place.<sup>177</sup> Finally, the DLFPA would require that day laborers be informed, in their native language, of their right to workers' compensation benefits and of possible exposure to hazardous work.<sup>178</sup> This, too, will mitigate the unsafe nature of day laborers' workplaces.<sup>179</sup>

### 3. Amending Workers' Compensation Statutes to Explicitly Include Day Laborers

Another more immediately attainable solution is to amend state workers' compensation statutes to explicitly include day laborers, regardless of who employs them.<sup>180</sup> Aside from amending their workers' compensation statutes to explicitly include undocumented immigrants, state legislatures could act to fill coverage holes that prevent day laborers from receiving benefits for an injury that occurred while working for a private homeowner.<sup>181</sup> States could enact provisions specifically tailored to ensure

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171. *See supra* Part I.D.3.a (explaining how state workers' compensation statutes generally exclude homeowners).

172. H.R. 2870, 108th Cong. § 7(d)(1).

173. *See supra* note 170 and accompanying text.

174. H.R. 2870, 108th Cong. § 7(d)(3).

175. *See supra* Part II.A.2.c (explaining the unique concerns of undocumented workers).

176. H.R. 2870, 108th Cong. § 7(d)(2).

177. *See supra* notes 119-67 and accompanying text (detailing the safety concerns specific to day labor work).

178. H.R. 2870, 108th Cong. § 7(d)(4).

179. *See supra* notes 119-25.

180. *See infra* note 182 and accompanying text (describing recommendations of the National Employment Law Project); *see also* Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. Rev. L. & Soc. Change 597, 607-11 (2004) (endorsing state legislative and administrative protections of immigrant workers' rights).

181. *See supra* Part I.D.3 (detailing these concerns as evident in statutory drafting and case law).

that those day laborers qualify for workers' compensation benefits. States could also enact broad provisions mandating that all day labor employers provide their employees with coverage.<sup>182</sup>

Although it is unlikely that homeowners would have the foresight to purchase workers' compensation insurance for the occasional day laborer, were such a provision in effect, injured workers could, when necessary, receive their benefits via the state's uninsured workers' fund. This would, of course, increase the financial burden on such funds, but the burden of paying for uninsured injuries is now borne disproportionately by day laborers.

#### 4. Mandating that Umbrella Homeowners' Insurance Cover Worker Injuries

Outside of changing the workers' compensation statutes, it is possible that protections for day laborers working in private homes could also be achieved by mandating that insurance companies that provide umbrella homeowners' insurance must insure homeowners for day laborers' injuries that occur on the insured homeowner's property.<sup>183</sup> A legislative requirement that homeowners' insurance policies cover injured day laborers<sup>184</sup> would avoid the logistical difficulties of requiring homeowners to purchase workers' compensation coverage, because many homeowners already carry such policies.<sup>185</sup> Some companies currently provide insurance against injuries that occur on homeowners' property, but only where negligence can be established. If companies, especially those providing insurance in areas where day laborer hiring by homeowners is on the rise, were required to adopt a narrowly tailored workers' compensation-like provision guaranteeing injured day laborers limited compensation, it would be a safety net for workers unable to otherwise receive compensation. Additionally, if homeowners' insurance extended workers' compensation to day laborers, homeowners and their insurance companies would not have to defend costly negligence suits.

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182. The National Employment Law Project recommends that the following provision be included in legislation directed at day laborers: "All day labor employers must provide full workers' compensation coverage for their day laborers, regardless of immigration status for work related injuries." Luna Yasui et al., *Drafting Day Labor Legislation: A Guide for Organizers and Advocates* 21 (2004), available at <http://www.nelp.org/docUploads/DayLaborGuide%283%2D04%29%2Epdf>.

183. Indeed, New Hampshire's workers' compensation statute has just such a requirement. See *supra* note 115 (citing the New Hampshire statute). Allstate Insurance Company's homeowners' policies cover day laborer injuries, but it is not clear whether this coverage applies only in negligence actions. See Garcia, *supra* note 136, at 1A.

184. See *supra* note 115 and accompanying text (describing how homeowners' insurance might be employed to protect day laborers).

185. In 2001, eighty-eight percent of respondents to an Insurance Research Council poll said they had a homeowner's insurance policy. See Insurance Research Council, *Public Attitude Monitor 2002: Child Passenger Safety, Ownership of a Home and Homeowners Insurance* (2002).

### 5. Community Organizing and Education

As a low-income population<sup>186</sup> with little political power,<sup>187</sup> day laborers may not fully benefit from a legal solution without added components of community outreach, education, and organizing, as well as direct community involvement in strategizing and decision making.<sup>188</sup> Both practical and legal obstacles to collecting workers' compensation may not be overcome without a multipronged solution aimed at reaching out to the day laborer community and involving its members in the assertion of their rights.<sup>189</sup> Such solutions have been widely employed in other worker organizing contexts, with positive results.<sup>190</sup> Litigation and workplace organizing have been combined "to pressure employers to enforce wage and hour requirements, workers' compensation laws, occupational health and safety regulations, child labor protections, and antidiscrimination laws."<sup>191</sup>

This part explained the arguments for and against taking steps to ensure that street corner day laborers receive workers' compensation when they are injured, regardless of whom they are working for, and detailed several

186. See *supra* notes 49-52 (demonstrating that most day laborers earn, on average, less than \$10 per hour).

187. As undocumented immigrants, see *supra* note 36, most day laborers are unable to vote in U.S. elections.

188. See generally Gerald Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992) (critiquing the "regnant" model of progressive law practice and advocating for a model that emphasizes client and community involvement in developing and implementing legal and organizing strategies).

189. See generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443 (2001) (tracing the evolution of the law and organizing movement and arguing for fuller theoretical analysis and practice-based examination of the movement's implications and challenges). Beginning in the late 1970s, a progressive critique of law emerged which challenged the effectiveness of legal advocacy as a vehicle for social change. *Id.* at 451-53. Mass mobilization was encouraged and litigation disfavored. *Id.* at 453-55. In the late 1980s and early 1990s, poverty lawyers themselves were criticized for dominating their poor clients and contributing to their subordination. *Id.* at 456-59. The alternative model advocated by many scholars was client empowerment, *id.* at 459-60, which included community organizing focusing on "fostering grassroots participation in local decision making, coordinating the strategic deployment of community resources to achieve community-defined goals, and building community-based democratic organizations led by local leaders who advocate for social and economic change," *id.* at 460-61 (citation omitted). With time, progressive lawyers sought to integrate organizing into their legal strategies as a means of community empowerment, in a poverty law paradigm known as "law and organizing." *Id.* at 465-66. This model has been utilized as a strategy for improving the conditions of low-wage workers, and is therefore particularly relevant to the concerns addressed by this Note. See *id.* at 470.

190. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407 (1995) (describing a worker center in which workers must become active members of the organization in order to receive legal services); see also Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. Gender Race & Just. 405, 411 (1998) (describing organizing meetings of exploited Thai and Latina workers in conjunction with civil and criminal lawsuits).

191. Cummings & Eagly, *supra* note 189, at 470 (citation omitted).

proposed solutions. Part III evaluates these and other ways to increase legal protections for these workers.

### III. A MULTIFACETED SOLUTION

This part first considers the merits of the proposed solutions to provide workers' compensation coverage for street corner day laborers. It also posits some additional solutions and argues that a multifaceted approach is the only way to fully protect day laborers' health and safety.

Excluded under the definition of "employee" from traditional workers' compensation statutes,<sup>192</sup> domestic worker provisions,<sup>193</sup> and case law,<sup>194</sup> and faced with the possibility of being deemed independent contractors,<sup>195</sup> day laborers hired by homeowners risk incurring an uncompensated injury. As day laborers become more widely used by contractors and homeowners alike, these uncompensated injuries cannot continue to be tolerated. A multifaceted solution encompassing legislative change, litigation, and community organizing is necessary if day laborers are to be effectively protected.

The economic benefits day labor brings to both employers<sup>196</sup> and employees<sup>197</sup> must be considered when evaluating ways to legally protect day laborers from the uneven application of workers' compensation laws. Successfully providing legal protections to day laborers requires striking a delicate balance by protecting workers' health and safety without eliminating the market for day labor.<sup>198</sup> As Part I discussed, day laborers play an important role in the economy,<sup>199</sup> and the ideal solution must not destroy the practical and economic motivations underlying this informal job market.<sup>200</sup> Solutions that substantially decrease day laborers' hourly wages will undermine their incentives to perform this work, but solutions that substantially increase day laborers' wages will drive potential employers back to traditional workers. Further, day laborers' wages will dramatically decrease, discouraging them from working, if employers try to pass on the costs of workers' compensation to day laborers.<sup>201</sup> An overly formalized working relationship may similarly remove many of the incentives for both parties.<sup>202</sup>

192. *See supra* Part I.D.3.a

193. *See supra* Part I.D.3.b.

194. *See supra* Part I.D.3.c.

195. *See supra* Part II.B.3.

196. *See supra* notes 22-33 and accompanying text (describing employer benefits).

197. *See supra* notes 43-54 and accompanying text (describing employee benefits).

198. *See supra* notes 22-33, 43-54 and accompanying text (detailing benefits to both parties to the transaction).

199. *See supra* Part I.B.

200. *See supra* Part I.B.

201. Although day laborers may be willing to work for lower wages, at some point the transaction will no longer carry a premium over minimum wage, and they may decide to seek other work. *See supra* notes 49-52 (discussing day laborers' average earnings).

202. *See supra* notes 22-33, 43-54 and accompanying text (detailing these incentives).

Regardless of which solution is implemented, day laborers who are eligible to receive workers' compensation benefits must be able to access those benefits irrespective of immigration status. Most courts that have addressed this issue after *Hoffman* have concluded that *Hoffman* does not affect immigrant eligibility for workers' compensation benefits,<sup>203</sup> and state legislatures should amend their workers' compensation laws to reflect this growing consensus. This policy change will remove a major obstacle keeping undocumented day laborers from even considering application for workers' compensation.<sup>204</sup>

State legislatures and executive branches should also follow the lead of Illinois in taking an active role in investigating day laborers' injuries.<sup>205</sup> This study should inspire similar studies in other states, which in turn could promote legislative reform and raise public awareness of these workers' dangerous plight. Just as public awareness helped create the movement for workers' compensation in the early twentieth century,<sup>206</sup> so too can it boost a campaign to increase day laborers' access to compensation today. In addition, state-sponsored investigation and documentation of day laborers' injuries, and injuries in the Hispanic workforce in general, may create pressure for increased OSHA enforcement, which in turn will create safer workplaces and fewer injuries.

#### A. *Legislative Solutions, Including the DLFPFA, Should Be Adopted*

When day laborers are injured, it is critical that legal protections exist to make them whole. Despite the myriad of practical<sup>207</sup> and statutory<sup>208</sup> barriers that prevent day laborers from accessing workers' compensation, few comprehensive solutions besides the DLFPFA<sup>209</sup> have been proposed.

A legislative solution like the DLFPFA<sup>210</sup> would create a necessary and comprehensive legal regime that recognizes day laborers' unique position in our economy. Several provisions of this proposed act address deficiencies in coverage for day laborers employed by contractors.<sup>211</sup> Most importantly, the DLFPFA would require that employers pay workers' medical bills for on-the-job injuries where workers' compensation is not available.<sup>212</sup> A close

203. See *supra* notes 150-52 and accompanying text (noting recent court decisions on workers' compensation cases involving undocumented immigrants).

204. See *supra* note 152 and accompanying text (explaining workers' fears arising out of their undocumented status and their resulting reluctance to address workplace dangers).

205. See *supra* note 166 and accompanying text.

206. See *supra* Part I.D.2.a (reviewing the history of workers' compensation passage).

207. See *supra* notes 138-39 and accompanying text (detailing practical barriers to day laborers accessing workers' compensation).

208. See *supra* Part I.D.2.b (detailing statutory barriers to day laborers accessing workers' compensation).

209. H.R. 2870, 108th Cong. § 3 (2003); see *supra* notes 168-79 and accompanying text.

210. See *supra* notes 170-78 (describing the relevant provisions of the Day Laborers Fairness and Protection Act).

211. See *supra* Part I.D.2.b (describing the statutory constructions in different states that function to exclude day laborers from workers' compensation coverage).

212. See *supra* note 172 and accompanying text.

reading of this provision suggests that it might even apply if day laborers are considered independent contractors.<sup>213</sup> The DLFPA also addresses some of the practical concerns, namely educating workers about their rights and providing coverage regardless of immigration status, that impede workers from filing claims.<sup>214</sup>

By requiring employers to pay for full medical coverage if workers are injured on the job, however, as opposed to the lesser payments required in a workers' compensation scheme, the DLFPA could undermine the economic rationale for hiring day laborers. It is possible that contractors would prefer to hire full-time employees rather than carry the risk of having to pay medical bills that could amount to thousands of dollars. On the other hand, this provision could create an incentive for employers to purchase workers' compensation insurance if their insurance costs were, on balance, less than the medical expenses of injured employees.

For day laborers working for private homeowners, it is unclear whether the DLFPA would award day laborers greater workers' compensation protections than under current law. Although the statutory language is broad, the legislative history suggests that the DLFPA was designed with professional contractors in mind.<sup>215</sup> Moreover, forcing homeowners to cover full medical bills where workers' compensation does not apply may drive homeowners back to using professional contractors. Especially because most state statutes do not apply to homeowners,<sup>216</sup> homeowners' potentially enormous liability—paying full medical expenses instead of a risk-sharing workers' compensation insurance premium—could significantly detract from the advantages of hiring day laborers.

As a practical matter, this legislation is unlikely to pass in the foreseeable future. It has been in a House committee since August 2003.<sup>217</sup> With a Democratic sponsor in a Republican-controlled Congress and only one cosponsor,<sup>218</sup> it is unlikely that day laborers will benefit from federal statutory protections any time soon.

In the absence of comprehensive federal legislation, state governments should take the lead in reforming workers' compensation statutes to include day laborers.<sup>219</sup> Those states with the largest populations of day laborers should lead the charge by passing effective legislation and ensuring that employers and workers are aware of its provisions.

213. See *supra* Part II.B.3 (detailing this argument).

214. See *supra* notes 174, 178 and accompanying text; see also *supra* notes 138-39 and accompanying text (detailing practical barriers to day laborers accessing workers' compensation).

215. See generally Labor's Efforts, *supra* note 119.

216. See *supra* Part I.D.3.a.

217. See Bill Summary and Status for the 108<sup>th</sup> Congress, <http://thomas.loc.gov> (follow "Search Bills and Resolutions" hyperlink, then search for "H.R. 2870" under "Summary and Status Information" for the 108<sup>th</sup> Congress).

218. *Id.*

219. See *supra* Part II.C.3 (enumerating actions states can take to protect day laborers).

Any state legislation should include an explicit statement that day laborers are not independent contractors for the purposes of workers' compensation law. The requirements for establishing independent contractor status are strict: Under New York law, to exclude a day laborer from coverage, a contractor would have to establish that he did not control the laborer's work, that he did not furnish equipment, and that he had no right to discharge the worker.<sup>220</sup> Because of the realities of the day laborer hiring process,<sup>221</sup> this standard would be difficult to prove. The workers hold themselves out as capable of assisting in a wide range of construction and maintenance-related types of work, and employers often control the nature and length of work as well as the method of payment.<sup>222</sup> Nevertheless, employers have attempted to use independent contractor provisions to escape liability,<sup>223</sup> and states should move to clarify the workers' compensation statutes to prevent these kinds of evasions.

A state requirement that homeowners purchase workers' compensation insurance<sup>224</sup> could result in decreased employment opportunities for day laborers. Instead, states should work with insurance brokers to include coverage for injured workers in homeowners' insurance policies.<sup>225</sup> This protection should be drafted to mirror state workers' compensation statutes, so that day laborers would not be required to prove negligence; workers and employers would engage in a tradeoff similar to that envisioned in the policy behind workers' compensation laws themselves.<sup>226</sup>

### B. *Litigation*

Aside from legislative solutions, day laborers who currently qualify for workers' compensation benefits need legal help to bring and defend workers' compensation claims.<sup>227</sup> For those who are not currently covered, a large-scale, carefully coordinated campaign to bring negligence actions could put employers on notice and perhaps make them realize—as they did when workers' compensation was originally introduced—the overall gains

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220. See *Comm'rs of the State Ins. Fund v. Kaplan*, 392 N.Y.S.2d 971 (N.Y. Civ. Ct. 1971).

221. See *supra* Introduction, Part I.A.

222. See *supra* Part I.B.

223. See *supra* note 161 and accompanying text.

224. See *supra* notes 182-86 and accompanying text. It should be noted that the recommendation of the National Employment Law Project is directed at ensuring that workers are eligible for workers' compensation, regardless of immigration status. A corollary effect of such legislation, however, could be that homeowners are discouraged from employing day laborers because of the additional insurance requirements imposed upon them. This is not to say that homeowners should not be required to contribute to the health care of workers injured on their property; rather, perhaps such contributions should be made within the parameters of an insurance scheme, such as homeowners' insurance, in which these employers are already participants.

225. See *id.*

226. See *supra* notes 82-84 and accompanying text.

227. See *supra* note 90 and accompanying text (noting that less than half of surveyed workers who were injured on the job received workers' compensation benefits).

implicit in the workers' compensation tradeoff.<sup>228</sup> A public education campaign aimed at informing employers of potential liability could also encourage employers to consider insurance coverage prior to hiring day laborers.

Day laborers need legal representation to help them identify potential claims and guide them through the compensation process. Day labor organizations and worker centers should be funded to assist workers in bringing and defending claims so that day laborers can successfully assert their rights against employers. Small, contingency-based law firms who handle workers' compensation cases should also be enlisted to bring meritorious cases on behalf of day laborers.<sup>229</sup> Where day laborers are not eligible for workers' compensation coverage, strategic negligence suits should be brought to highlight the unfairness of the current workers' compensation regime as it applies to these workers. And employers should also be informed about the legal requirements for purchasing workers' compensation insurance, and their potential liability if they do not do so.

### C. Private Solutions

One possible private solution might involve recruiting "big box stores," such as Home Depot, to partner with organized groups of day laborers in financing workers' compensation insurance by extending the insurance purchased for their employees to day laborers working out of their parking lots. Campaigns are already taking place between day laborer organizers and Home Depot to formalize parking lot day labor centers; perhaps the campaigns could be expanded to include discussions of workers' compensation funding.<sup>230</sup> This type of campaign could be difficult. It is unlikely that Home Depot would agree to pay into the workers' compensation fund for nonemployee workers. Moreover, it would likely require some additional formalization of the day labor transaction, thereby undermining one of the benefits of day labor for both workers and employers.

It is also possible that organized day labor centers could establish a system of purchasing workers' compensation coverage for the workers who operate out of their sites, although it is unclear whether a non-employer can purchase workers' compensation insurance.

One additional problem is that any private solution would affect only a limited population of day laborers: those working for homeowners with the

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228. See *supra* notes 77-81 (detailing the introduction of workers' compensation laws in the early twentieth century).

229. Furthermore, amending workers' compensation statutes to include provisions providing attorneys' fees to victorious plaintiffs would provide lawyers with a greater incentive to bring these cases. Alternatively, such an attorneys' fees provision could serve as a source of income for worker centers and other nonprofit organizations providing day laborers with legal assistance.

230. See Janice Fine, Worker Centers: Organizing Community on the Edge of the Dream (forthcoming Jan. 2006).

right insurance coverage, or those working out of a store parking lot where the store has agreed to provide workers' compensation coverage. As emergency or temporary measures these are acceptable solutions, but they are no substitute for the sort of comprehensive statutory schemes necessary to ensure that all day laborers receive workers' compensation.

#### D. Organizing Solutions

Regardless of which solutions are adopted to address day laborers' health and safety concerns, additional action is required to inform and educate workers and employers about their rights and responsibilities in the area of worker safety. The principal methods for surmounting the practical obstacles to accessing benefits presented in Part II of this Note are community organization and outreach, a strategy that has already proven successful for other low-wage worker populations.<sup>231</sup> The traditional model for worker organization, the union, has its own obstacles for day laborers, including antitrust concerns<sup>232</sup> and the practical difficulties of organizing a workforce whose employer changes daily. Day labor centers are another option widely used for educating workers about their rights and providing access to legal resources and referrals to counsel.<sup>233</sup> There are currently more than 100 day laborer centers, some of them taxpayer funded, throughout the country.<sup>234</sup> These centers help workers to agree on a baseline pay rate and provide protection against exploitation and abuse.<sup>235</sup> In addition to purchasing insurance, as mentioned above, day labor centers can take an active role in educating workers about workers' compensation coverage, and they can keep records so that workers know who they were working for in case of an accident. Such measures will ameliorate the fear, intimidation, and lack of information that impede day laborers in their access to workers' compensation.

Many advocates working with day laborers already incorporate health and safety oriented "know your rights" education into their programs to inform workers of their eligibility for workers' compensation, and these advocates should be funded to continue these projects.<sup>236</sup> If they do not do so already, organized day labor sites should also be encouraged to track employers to ensure that workers can identify their employers to facilitate claim prosecution.<sup>237</sup> Such sites should also continue public education

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231. See *supra* notes 190-91 and accompanying text (listing examples of successful worker organizing campaigns in other contexts).

232. See Storto, *supra* note 161 (summarizing these concerns).

233. *An Answer or a Problem? Putting Illegal Immigrants to Work*, *The Economist*, July 26, 2003, at 29.

234. *Id.*

235. *Id.*; see also Basinger, *supra* note 28, at F1; Arlene Martinez, *Risks are Part of a Day's Work*, *L.A. Times*, May 18, 2005, at B5; *supra* note 55 (discussing the efforts of day labor centers).

236. See *supra* note 55 (describing organized day labor sites).

237. Many sites already keep track of employers for the purposes of following up on unpaid wages. See *supra* note 55. Such tracking raises concerns about overly formalizing

campaigns that highlight the dangers of day labor work and the public health consequences of failing to insure day laborers.

Employers, in addition, could be provided with information about their responsibilities when they hire a worker. Many states have landscapers' and contractors' boards that regulate the licensing and bonding of contractors within their jurisdictions.<sup>238</sup> Such boards could be effectively used to disseminate materials about employers' responsibilities for their workers' health and safety.

### CONCLUSION

Day laborers face not only legislative barriers, but also substantial practical hurdles rooted in fear, intimidation, and lack of information to accessing the workers' compensation coverage that should be their due. These practical challenges prevent eligible workers from applying for and receiving benefits, while concerns over immigration status further chill workers from asserting their rights. Workers' compensation statutes arbitrarily discriminate between day laborers working for contractors and those working for homeowners, although both groups perform almost identical work.

An effective solution will incorporate both legislative reforms, whether on the state or federal level, and litigation. The ideal solution must also include substantial funding and encouragement for community organizing, education, and outreach to effectively institute any legal reforms. Only through a multipronged solution can American society protect the street corner day laborers who constitute such a key part of our economy.

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the process of day laborer hiring, but many sites have incorporated such measures without substantially impeding the transaction.

238. See, e.g., Or. Rev. Stat. §§ 701.205-295 (2005).

*Notes & Observations*