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Law Twisted to Squeeze Workers: Menial Jobs Lifted to Scaffold of Independent Contracts

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Law twisted to squeeze workers

Menial jobs lifted to scaffold of independent contracts

Aspecter is haunting the United States — the specter of independent contracting.

All over the country employers are seeking to rid themselves of their legal responsibilities by treating their employees as if they were self-employed.

What's the employers' motive?

Since the advent of the New Deal, social change in the United States has been closely bound up with the employer-employee relationship. By virtue of being employed, workers have been entitled to benefits from a range of federal and state laws designed to enhance their market power and reduce the instability and insecurity inherent in an unplanned society.

Now, in an attempt to increase profits and undermine the progress working people have managed to achieve, employers and their industrial associations have been increasingly successful in creating the illusion that their distinctly dependent employees have realized the "American dream" of being "their own bosses." In reality, employers are seeking to avoid:

- employer's Social Security tax;
- employer's federal unemployment insurance tax;
- employer's state unemployment insurance tax;
- workers' compensation premiums;
- statutory minimum wage or overtime payments;
- withholding of employees' Social Security or income tax;
- collective bargaining;
- ERISA pension benefits;
- safety and health inspections;
- race, sex and age discrimination complaints;
- sanctions for employment of "unauthorized aliens."

WHO are the affected employees? Farm workers, construction workers, nurses and allied health workers, janitors, food service workers, carpet-layers, casual and temporary retail employees, industrial homeworkers, forestry workers, truck and taxi drivers, and salespeople.

— In Weld County, some farmers attempt to pay their field laborers only \$2.50 an hour by calling them independent contractors. These are poor persons who perform menial and backbreaking work, "stoop labor."

— A bakery in Adams County employs 10-15 cake decorators. Some have worked there daily for years, decorating cakes that they do not bake, ice or sell. They punch a time clock, use the baker's equipment, are supervised and all do the same routine work. Yet none of the 60 hours they often work in a week are paid at overtime rates because the

bakery deems them to be "independent contractors."

In neither instance is a professional, a craftsman or a business providing complete and specialized services, as does a true independent contractor.

This reclassification is not based on any reorganization of production or introduction of new technology. The same worker can undergo this extraordinary transformation from one day to the next. This sleight of hand is made possible by the magic of Form 1099-MISC. Merely by filing this form with the IRS and furnishing a copy to the worker, an employer can try to eliminate the application of worker-protection laws to his employees.

What is this magical Form 1099-MISC? According to the Internal Revenue Code, businesses must file it if they pay \$600 or more for services performed to a person not treated as an employee. This Statement for Recipients of Miscellaneous Income, once largely reserved for reporting



payments of fees to attorneys, accountants and the like, now does standard service for the humblest hewers of wood and drawers of water.

A major impetus was given to this transaction by the Revenue Act of 1978. As a result of lobbying by the insurance, real estate, direct sales and other industries, which were seeking to thwart intensified efforts by the IRS to ensure that such employers did not evade their statutory obligations to pay Social Security and unemployment insurance taxes, Congress inserted a provision known as Section 530.

This provision was originally supposed to self-destruct after one year but has now been extended indefinitely. It creates so-called safe havens for employers who have consistently treated employees as independent contractors for employment-tax purposes in reasonable reliance, among other things, on a "longstanding recognized practice of a significant segment of the industry."

Congress fortified the safe haven by prohibiting the IRS from publishing any regulations or revenue rulings regarding employment status.

With the enforcement and compliance arm of the IRS shackled, wave after wave of 1099s have come cascading down upon former employees. Lawyers and CPAs have been doing yeoman service in alerting their clients to the money-saving possibilities. Satisfied customers have then spread the gospel to new disciples.

Many employees, unpleasantly surprised by the fact that the 1099-MISC brings with it the obligation to pay the self-employment Social Security tax — which is twice as high as the employee's share of the FICA tax — have been unable to pay it. By and large the lowest paid employees, who can least afford it, are being deprived of coverage under, and hence benefits from, the Social Security disability and retirement, unemployment insurance, workers' compensation and minimum-wage laws.

Even if a worker successfully contests his wrongful classification as an independent contractor, his employer would still have no FICA tax obligation. The result: The integrity of the Social Security Trust Fund is undermined.

IN Colorado, Gov. Roy Romer recently ordered the attorney general to investigate and prosecute employers who "knowingly mischaracterize" their employees as independent contractors, and the U.S. Department of Labor is in federal court where the label of "independent contractor" was used to avoid overtime pay. Except for these limited efforts, little attention is being given this issue.

What can be done about it?

1. Congress should establish for all federal protective social legislation a uniform definition of "employee," subject to the broadly remedial and humanitarian "economic reality of dependence" test developed by the courts in interpreting the Fair Labor Standards Act.

2. Such a definition should include additional categories of so-called statutory employees whose status would not be subject to manipulation by employers. Chief among the vulnerable workers who are especially in need of such protection are migrant farm workers.

3. A presumption should be created that all workers — but certainly all workers whose hourly earnings are in the vicinity of the minimum wage — are employees (as is already done, for example, by most state unemployment compensation statutes).

4. Congress should repeal Section 530.

5. No employer should be permitted to issue a Form 1099-MISC without prior approval of the IRS. Such approval would be sought by filing the already existing Form SS-8 ("Information for Use in Determining Whether a Worker Is an Employee for Federal Employment Taxes and Income Tax Withholding").

For more than a decade Congress has been unable to resolve definitively the issue of employee status. Its paralysis has stemmed from conflicting claims pressed by various industry associations — a debate that has, by and large, not penetrated popular consciousness.

It is time, now, for the affected workers to speak up.

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