

Preparing for the Future of Work Through Understanding the Present of Work: A Fissured Workplace Perspective

Testimony before the U.S. House of Representatives Committee on Education and Labor
Subcommittee on Workforce Protections and Subcommittee on Health, Employment, Labor, and
Pensions

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Joint Subcommittee hearing on “The Future of Work: Preserving Worker Protections in
the Modern Economy”

Washington, DC
October 23, 2019

Chair Wilson, Chair Adams, Ranking Member Walberg, Ranking Member Byrne, and members of the subcommittees. My name is David Weil and I am the Dean and a professor at the Heller School for Social Policy and Management at Brandeis University. I also had the honor of serving as President Obama’s Administrator of the Wage and Hour Division at the US Department of Labor between 2014 and 2017. I offer these comments regarding the topic of today’s hearing, “The Future of Work: Preserving Worker Protections in the Modern Economy” informed by my ongoing academic research as well as my experience as the head of the federal agency in charge of enforcing our most basic labor standards.

Understanding the future of work by understanding the present of work

In the past few years, there have been innumerable conferences, workshops, and convenings on the “future of work.” These meetings typically focus on issues like robotics, artificial intelligence, and platform business models like Uber and Lyft. But these topics regarding the future of work are generally regarded as affecting a relatively small part of the workforce and speculations on the impacts of technology have often proven to be off the mark.¹

A focus on changes that have impacted the present workplace and will continue to do so in my view is far more useful. Millions of workers in the US have jobs that don’t pay enough, provide few—if any—benefits, and lack opportunities for advancement or career growth. A median worker in 2017 did not earn much more than one in 1979.² The pronounced decline in union membership, particularly for private-sector employees, growing international competition in trade-exposed

¹ Current estimates of the size of the digital platform economy are generally around 1 percent of the workforce (see Larry Katz and Alan Krueger. “The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015.” *ILR Review*, 72, no.2 (June 2017): 382-416.

² Jay Shambaugh, Ryan Nunn and Becca Portman, “Introduction: Thirteen Facts about Wage Growth..” in *REVITALIZING WAGE GROWTH: POLICIES TO GET AMERICAN WORKERS A RAISE*, in Jay Shambaugh & Ryan Nunn (eds.), (Washington, DC: Brookings, 2018).

industries, deregulation of sectors of the economy, and growing market concentration at the product and labor market level have all contributed to the decline in wages and working conditions.

Additionally, and most relevant here, employers are moving away from a traditional employment model and outsourcing and subcontracting much of their work. This change in both the present and future structure of work, is what I have termed the “fissured workplace.” The phrase encompasses increased outsourcing, contracting and subcontracting, franchising in its many forms, and most recently platform business models.³ The fissured workplace model has allowed employers to shift risks and responsibilities onto workers and incentivized the misclassification of employees as independent contractors. Its impacts on workers span a range of outcomes including lower wages, fewer benefits, unreliable hours, and limited or no labor and employment protections. The growth in earnings inequality that has been documented over the last few decades can also be traced in part to the fissuring of work.⁴

We arrived at this place through an evolution that occurred over the past three decades. Major companies throughout the economy have faced intense pressure to improve financial performance for private and public investors. They responded by focusing their businesses on core competencies—that is, activities that provide the greatest value to their consumers and investors—and by shedding less essential activities. Firms typically started outsourcing activities like payroll, publications, accounting, and human resources. But over time, this spread to activities like janitorial work, facilities maintenance, and security. In many cases it went even deeper, spreading into areas once regarded as core to the company: housekeeping in hotels; cooking in restaurants; loading and unloading in retail distribution centers; even basic legal research in law firms.

Like a fissure in a once-solid rock that deepens and spreads, once an activity like janitorial services, housekeeping, or package delivery is shed, the secondary businesses doing that work are affected, often shifting those activities to still other businesses. A common practice in janitorial work, for instance, is for companies in the hotel or grocery industries to outsource that work to cleaning companies. Those companies, in turn, often hire smaller businesses to provide workers for specific facilities or shifts. These work arrangements alter who is the employer of record or make the worker-employer tie tenuous and far less transparent.⁵

The fissuring of the workplace impacts present and future workers’ earnings, benefits, safety net protections, health and safety, and other labor protections. As I will discuss below, conservatively 23 million workers work in highly fissured industries, several of which are among the projected fastest growing industries over the next decade. The rise of on-demand employment relationships adds further to the prevalence and impacts of the fissured workplace. The future of work demands that we address the way that the present state of work has been transformed so that we can assure workers a more promising future.

³ DAVID WEIL, *THE FISSURED WORKPLACE: HOW WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard University Press, 2014); *see also* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 640 (2012).

⁴ David Weil. “Income Inequality, Wage Determination, and the Fissured Workplace.” in Bradford DeLong, Heather Boushey, and Marshall Steinbaum, (eds) *ON THOMAS PIKETTY’S CAPITAL*. (Cambridge, MA: Harvard University Press, 2017), pp. 209-231

⁵ David Weil, “Enforcing Labour Standards in Fissured Workplaces: The US Experience,” *The Economic and Labor Relations Review*, 22, no. 2 (July 2011): 33-54.

Worker and social consequences of the fissured workplace

Because each level of business in a fissured workplace structure requires a financial return for their work, the further down one goes, the slimmer are the remaining profit margins. At the same time, as you move downward, labor typically represents a larger share of overall costs—and one of the only costs in direct control for those entities. That means the incentives to cut corners rise—leading to violations of our fundamental labor and employment standards such as the minimum wage, overtime, or even the basic concept that people should be paid for the work they do. The extent of these violations was something that was most disturbing to me when I served as the Wage and Hour Administrator.⁶

The growth of fissured work arrangements and increasing misclassification of workers as independent contractors⁷ means that now and in the future, more people will work without the protections of our fundamental labor and employment laws and without the ability to access important social safety net benefits.⁸ These workers are not covered by the minimum wage or overtime protections, lack access to unemployment insurance or workers' compensation, or the right to collectively bargain for improved wages, benefits, and working conditions. Workers classified as employees but embedded in fissured workplace arrangements are more likely to face violations of the Fair Labor Standards Act. Illustrations of this include the failure to pay janitors and cleaners,⁹ cable and satellite installers,¹⁰ carpenters, home care workers, and other workers the

⁶ Indicative workplace investigations of violations of these standards can be found in the following US Department of Labor Wage and Hour Division press releases: construction workers (US Department of Labor Wage and Hour Division, News Release, 14-0827-SAN, “Paul Johnson Drywall Inc Agrees to Pay \$600,000 in Back Wages, Damages and Penalties Following US Labor Department Investigation” (19 May 2014), online: <www.dol.gov/newsroom/releases/whd/whd20140827>; cleaners (US Department of Labor Wage and Hour Division, News Release, 16-1818-DAL, “US Labor Department Sues Oklahoma Cleaning Company, Alleging Its Cleaning ‘Franchises’ Are Employees” (29 September 2016), online: <www.dol.gov/newsroom/releases/whd/whd20160929-3>; hotels (US Department of Labor Wage and Hour Division, News Release, 16-1045-SAN, “Staffing Agency to Pay More than \$151K in Overtime Back Wages, Damages, After Misclassifying 275 Hotel Employees as Independent Contractors” (2 June 2016), online: <www.dol.gov/newsroom/releases/whd/whd20160602>; fracking (US Department of Labor Wage and Hour Division, News Release, 14-1883-PHI, “US Labor Department Helps More Than 3,500 Pennsylvania And West Virginia Oil and Gas Workers Recover \$4.5M In Back Wages For Unpaid Overtime” (9 December 2014), online: <www.dol.gov/newsroom/releases/20141209>; food service (Eric Schroeder, “J&J Snack Foods to pay \$2.1 million to settle wage dispute,” *Food Business News* (29 October 2015), online: <www.foodbusinessnews.net/articles/5155-j-j-snack-foods-to-pay-2-1-million-to-settle-wage-dispute>

⁷ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009); Françoise Carré, *(In)dependent Contractor Misclassification*, Economic Policy Institute (Jun. 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification>; National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, 2-6 (Jul. 2015), <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf>; U.S. Department of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standard Act's “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015) available at http://www.blr.com/html_email/AI2015-1.pdf (withdrawn by the Secretary of Labor on June 7, 2017).

⁸ Weil, *supra* note 3; Maltby and Yamada, 38 B.C. L. REV. at 247 (“All of these effects—“companies” or “employers” treating individuals as independent contractors rather than employees, large firms contracting out work to small firms, and the growth of temporary help agencies—increase the net number of independent contractors.”).

⁹ See, e.g., *Vazquez v. Jan-Pro Franchising International, Inc.*, 923 F.3d 575 (9th Cir. 2019); *Awuah v. Coverall North America, Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010).

¹⁰ See, for example, *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (11th Cir.2013); *Keller v. Miri Microsystems LLC*, 781 F.3d 799 (6th Cir. 2015); *Solis v. Cascom, Inc.*, 3:09CV257, 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011);

wages and overtime they had rightly earned—losses typically equivalent to losing three to four weeks of earnings.¹¹ For a family struggling to get by, the loss arising from these violations translate to more than five weeks of groceries, a month of rent, or five weeks of childcare. This also results in an estimated \$4.7 billion in lost income tax revenues at the federal level.¹²

Different forms of workplace fissuring can also undermine providing workers safe and healthful work places. Having multiple parties with unclear responsibilities for health and safety can create a work environment where the likelihood of injuries or fatalities increases. This was the case in the mid-2000s as the explosion of cell phone use spurred by the iPhone led to the rapid expansion of cell tower networks. Major companies like AT&T and Verizon drew on a highly subcontracted system to undertake that work. In that period, the fatality rate among cell tower workers—often those at the bottom of multi-leveled subcontracting—was three times that facing underground coal miners.¹³

Workers who are hired on a temporary or conditional basis often do not know who is the responsible party to report safety problems or, more often, are reluctant to exercise their right to complain about unsafe conditions due to fear of reprisal.¹⁴ And the prevalence of misclassification of workers as independent contractors in many dangerous work settings like construction, logistics, and transportation can increase fatality risks. Analysis of the Census of Fatal Occupational Injuries (CFOI) found that in 2017, about 12% of fatal workplace injuries were experienced by independent workers (defined as workers with short-term jobs that involve a discrete task and have no guarantee of future work). Compared to their employee counterparts, independent workers have a disproportionately higher propensity of injury or death due to a workplace incident.¹⁵ The lack of health and safety protections extends beyond temporary workers to include many self-employed workers whose employer of record, training requirements and reporting procedures are often ambiguous. Self-employed workers make up one-fifth of workplace fatalities and are more than twice as likely to suffer a workplace fatality than workers in traditional employment arrangements.¹⁶ Health and safety risks arising from fissured relationships can also spillover to

Thornton v. Mainline Communications, LLC, 157 F. Supp. 3d 844, 849 (E.D. Mo. 2016); Lang v. DirecTV, Inc., 801 F. Supp. 2d 532 (E.D. La. 2011); *but see* Chao v. Mid-Atlantic Installation Services, Inc., 16 Fed. App'x 104 (4th Cir. 2001).

¹¹ U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, <https://www.dol.gov/whd/data/index.htm> (last visited Aug. 30, 2019).

¹² GAO-09-717, *supra* note 7.

¹³ WEIL, *supra* note 3 (Chapter 5); Jason M Breslow, “Labor Department Warns of ‘Alarming’ Rise in Cell Tower Deaths,” *Frontline* (13 February 2014), online: <www.pbs.org/wgbh/frontline/article/labor-dept-warns-of-alarming-rise-in-cell-tower-deaths/>. A workplace fatality on the first day of work for a staffing agency worker is discussed in Michael Grabbell, Jeff Larson and Olga Pierce, “Temporary Work, Lasting Harm,” *Pro Publica* (18 December 2013), online: <www.propublica.org/article/temporary-work-lasting-harm?utm_campaign=get-involved&utm_source=youtube&utm_medium=video&utm_term=temp-land>.

¹⁴ Sean Tucker and Nick Turner. “Waiting for Safety: Response by Young Canadian Workers to Unsafe Work.” *Journal of Safety Research*, 45, no.1 (June 2013): 103-110.

¹⁵ Stephen Pegula and Matt Gunter. “Fatal Occupational Injuries to Independent Workers.” US Bureau of Labor Statistics, *Beyond the Numbers: Workplace Injuries*, 8, no. 10 (August 2019) <https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm?view_full>

¹⁶ 2017 fatalities based on Bureau of Labor Statistics, *Census of Fatal Occupational Injuries*, 2018. <https://stats.bls.gov/iif/oshwc/cfoi/cfch0016.pdf>; Number of workers in self-employed and traditional categories based on Bureau of Labor Statistics (2018b), *Current Population Survey Labor Force Statistics*, 2018 <<https://www.bls.gov/webapps/legacy/cpsatab9.htm>>

others, such as the finding that outsourcing hospital cleaners increases the spread of health care-associated infections.¹⁷

Being split off from the main firm affects more than labor standards compliance; it can also lower wages and worker access to benefits. When you work as an employee for a major business, decades of research shows that wages and benefits tend to increase over time.¹⁸ But earnings fall significantly when a job is contracted out¹⁹—even for identical kinds of work and workers. Opportunities for “climbing the ladder” fade because the person in the mailroom (or, more likely, at the IT service desk) is now a subcontractor without a pathway upward in the organization. That not only means lower wage growth and reduced access to benefits, but also diminished opportunities for on-the-job training, protections from social safety nets like unemployment insurance and workers’ compensation, access to valuable social networks, and other pathways to upward advancement. As a result, increasing evidence suggests that the fissured workplace contributes to growing earnings inequality.²⁰

The fissured workplace and misclassification of workers significantly impact low-wage workers, people of color, immigrants, and undocumented workers. Women, people of color, and immigrants, often work in low-wage and fissured sectors. Hispanic workers, for example, are overrepresented in service occupations.²¹ Women make up the majority of the low-wage workforce. And in specific low wage industries affected by fissuring, like temporary help services, security guards and patrol services, home health care, hospitality, and logistics, women of color make up more than one-quarter of the workplace.²² These changing workplace dynamics will therefore compound the historic and systemic inequities that prevented many women and people of color from being protected by standard labor protections under the Fair Labor Standards Act and the National Labor Relations Act. Historically, these laws excluded classes of workers, including domestic workers, independent contractors, and agricultural workers, disproportionately impacting women and people of color.

Digital platforms and the fissured workplace

On-demand work platforms and apps such as Uber, Lyft, and Handy create new capacities to execute their core business strategies drawing on workers classified as independent

¹⁷ Adam Seth Litwin, Ariel Avgar and Edmund Becker. “Superbugs Versus Outsourced Cleaners: Employment Arrangements and the Spread of Health Care-Associated Infections, *ILR Review*, 70 no. 3 (2017): 610-641.

¹⁸ See generally Charles Brown and James Medoff. 1989. “The Employer Size-Wage Effect.” *Journal of Political Economy*, 97, No. 5 (October 1989):1027-1059; John Gibson and Steven Stillman, “Why Do Big Firms Pay Higher Wages?” *The Review of Economics and Statistics*, 91, No. 1 (February 2009):213-218.

¹⁹ Deborah Goldschmidt & Johannes F. Schmieder, “The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure,” *The Quarterly Journal of Economics*, 132, no.3 (2017): 1165-1217.

²⁰ See generally Erling Barth, Alex Bryson, James C. Davis, and Richard Freeman, “It’s Where You Work: Increases in the Dispersion of Earnings across Establishments and Individuals in the United States,” *Journal of Labor Economics* 34, no. S2 (Part 2, April 2016): S67-S97; David Weil, “Inequality and the Fissured Workplace.” *Canadian Labour and Employment Law Journal* 21, no.2 (Spring 2019): 207-238; David Weil, “Understanding the Present and Future of Work in the Fissured Workplace Context.” *RSF Journal of the Social Sciences*, 6, no.1 (2020, forthcoming):147-165.

²¹ Non-white includes black, Asian, and Hispanic or Latino. Bureau of Labor Statistics, “Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity.” *Current Population Survey Labor Force Statistics*, 2019, <<https://www.bls.gov/cps/aa2017/cpsaat11.htm>>.

²² Author’s calculation based on *Current Population Survey Labor Force Statistics*, 2019, <<https://www.bls.gov/cps/aa2017/cpsaat11.htm>>.

contractors.²³ Rather than representing an entirely new form of business as is often asserted by those companies and other commentators, many platform business models can be understood as digital fissured workplaces where adherence to core competencies is assured through software algorithms that create strong incentives, disincentives, and monitoring mechanisms that operate in many respects as a management system.

Digitally-enabled branded platform businesses like Uber, Deliveroo and Handy connect users with a service that has been carefully crafted to have certain qualities, characteristics and benefits. The app provides users with the service that has a specific quality standard - characteristics that are assured by the company, and in most cases a pre-specified price for services set by the platform and not by the individual service providers (e.g. Uber or Lyft drivers). In general, branded platforms specify to their providers the type of service, the prices that will be allowed, the timing and in some cases place that services will be delivered as well as other central attributes of the service.

Because of their independent contract status and the fact that the price for services are set by the platform and not the provider, the net earnings of platform workers may be significantly lower than if they worked as employees—sometimes pushing them below the federal minimum wage. The impact of Amazon Flex on the pay and conditions of delivery workers is indicative. Started in 2015, Amazon Flex offers “flexible opportunity for Delivery Partners to turn free time into supplemental or part-time income.” It does so via a system where individuals, vetted via a multi-step on-line course, bid for small deliveries via an Amazon Flex app, and deliver those packages within very tight time restrictions set by Amazon using the driver’s own vehicle. After accounting for vehicle fuel, amortization, insurance, maintenance, tolls, and other costs, drivers received net earnings of \$5.30 per hour (significantly below the Federal minimum wage of \$7.25). This compares to average earnings of \$23.10 for UPS and \$14.40 for FedEx drivers (Vernon 2018).²⁴

The hyper-incentives created by platform business models potentially lead to long hours and inadequate systems to reduce health and safety risks. The recent death of Amazon Flex drivers suggests that the model may increase the likelihood of injuries and fatalities relative to other delivery providers while also shifting responsibility for accidents from employers to workers.²⁵

²³ David Weil and Tanya Goldman, “Labor Standards, the Fissured Workplace, and the On-Demand Economy,” *Perspectives on Work*, 20, (2016): 26-29.

²⁴ Not surprisingly, the estimated cost per delivery for Amazon Flex are significantly below that of UPS: \$1.50-2.00 per package versus \$4.00-6.00 for UPS or FedEx. However, the services are not direct substitutes because some of the costs that the latter providers charge customers are born by Amazon prior to the Flex drivers receiving parcels. See David Vernon, “UPS, FDX: A Deep-Dive on Amazon Flex and the Threat from Crowdsourced Delivery.” A/B Bernstein Analysts, May 24, 2018, Exhibit 5, pp. 6-7. See also Olivia Zaleski, “Amazon Raises Minimum Pay for Everyone—Except These Workers.” *Bloomberg*, November 1, 2018, <<https://www.bloomberg.com/news/features/2018-11-01/amazon-flex-workers-are-left-out-of-minimum-pay-raises>>. On June 7, 2019, FedEx announced that it would no longer be providing express shipping service for Amazon. See Michael Corkery, “FedEx Says it will Stop Express Mail for Amazon.” *New York Times*, June 8, 2019, p. B4.

²⁵ Fatalities related to platform business models are discussed in Patricia Callahan, “Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost,” *New York Times* (5 September 2019), online: <<https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html>>.

Prevalence of the fissured workplace

The different formats that fissured workplaces take create challenges to measuring its size in the workforce. To do so, one can start with the kinds of alternative work practice tracked by the Bureau of Labor Statistics' Contingent Worker Survey (CWS). The four practices that BLS classifies as "alternative work arrangements" —independent contracting, on-call employment, temporary help and contract work— are measured in the CWS through the household survey, and certainly are all linked to the concept of fissuring. Based on the CWS, the BLS estimated that there were 15.5 million workers in alternative work arrangements in the US.²⁶ The recent CWS estimates represent a slight decrease in the incidence of alternative work arrangements from 10.7 percent in 2005 to 10.1 percent in 2017, primarily because of a decline in the share of workers classified as independent contractors.²⁷

There are a number of reasons that the CWS does not fully capture the incidence of alternative work practices. To begin, the CWS definition of alternative work includes independent contractors—that is, those workers who are not considered employees under the definitions of workplace laws. Though the criteria for classifying independent contractors vary under state and federal statutes, a growing body of evidence indicates that workers often incorrectly classify themselves as employees when they are not being treated that way by the organization for whom they work.²⁸ Even if they correctly identify themselves as employees rather than independent contractors, workers may not be aware of the presence of workplace intermediaries like staffing agencies, third party management companies, or franchise arrangements. This further reduces the reported number of worker in alternative work arrangements in the CWS.²⁹

Even accounting for these measurement problems, the boundaries of the fissured workplace are not synonymous with those of the CWS' narrow definition of alternative work arrangements. The fissured workplace describes a business strategy rather than the adoption of individual work practices or arrangements and as captured more narrowly by household surveys like the CWS. Fissured workplace arrangements can exist when employment itself is "traditional" (i.e. ongoing and full time) but the worker is employed by a subcontractor, franchisee, or other business organization that undertakes the work of a lead business. Such employment would never

²⁶ Bureau of Labor Statistics (2018c), Contingent and Alternative Employment Arrangements, May 2017 <<https://www.bls.gov/news.release/pdf/conemp.pdf>>

²⁷ Bureau of Labor Statistics, 2018. Katz and Krueger (*supra* note 1) originally estimated significant growth in alternative work practices in their own survey in 2015 (constructed to estimate the prevalence of these practices at a time when it was unclear if the CWS would be repeated). Their revised estimates indicate "there likely has been a modest upward trend in the share of the U.S. workforce in alternative work arrangements during the 2000s" (Lawrence Katz and Alan B. Krueger. "Understanding Trends in Alternative Work Arrangements." *RSF Journal of the Social Sciences*, 6, no.1 (2020, forthcoming)).

²⁸ A number of recent studies show that self-employment has been growing when using Internal Revenue data sources (based on actual tax filings) even though household sources like CWS suggest little change in incidence. See Katharine Abraham, John Haltiwanger, Kristin Sandusky, and James Spletzer. "Measuring the Gig Economy: Current Knowledge and Open Issues." National Bureau of Economic Research, Working Paper No. 24950 (2018); Katz and Krueger (*supra* note 1); and Katharine Abraham and Ashley Amaya. "Probing for Informal Work Activity," NBER Working Paper No. 24880, (August 2018). Ongoing work by Abraham, Hershbein and Houseman indicate that part of the discrepancy may arise from misunderstanding by household survey respondents of their actual employment status (*see* Katharine Abraham, Brad Hershbein, and Susan Houseman. 2018. "Independent Contract and Informal Work: Preliminary Evidence on Developing Better Measures in Household Surveys." Working Paper).

²⁹ As a result, workers appear to have a difficult time accurately reporting on their work status in standard surveys, further compounded when household surveys are based on proxy respondents (Abraham and Amaya *id*).

be picked up in the CWS and would require information about contracting relationships between companies rather than household surveys to detect.

One can get a conservative and admittedly rough estimate of the size of the fissured workplace by tallying a subset of industries where fissured relationships have been well documented and appear to be widespread on the basis of industry-based studies and enforcement data.³⁰ Table 1 provides a list of these industries and the number of workers (overall and non-supervisory and production employees) in each as reported in the BLS Current Employment Statistics for 2017. I compare the total number of workers in these highly fissured industries to total employment in the private workforce to provide a rough estimate of scale.

The list in Table 1 is far from comprehensive. It does not include many industries where there is fissured activity alongside with continuing traditional forms of employment.³¹ I also do not include industries where fissuring has become common in particular occupational areas, such as: the use of adjunct professors in higher education; outsourced lower level contract work in legal services, real estate, and financial services; mechanical and ground transportation work in air transport; a variety of copy editing, illustration, and marketing functions in publishing industries; extensive subcontracted work in fracking in oil and gas extraction; or contract mining in the coal mining industry.

Table 1 therefore represents a very conservative estimate of the extent of fissuring in the economy. Based on that, close to 19 percent of the private sector workforce (23 million workers) are in industries where fissured arrangements predominate. If we consider the additional workers in occupations and in industries with mixed partial presence of fissured practices, the prevalence could easily double, making fissuring as pervasive as were unions in the US at their pinnacle in 1956 (34 percent).³² And, like unionization, the presence of fissuring in one workplace spills over to the wage setting decisions of other businesses and to the labor markets in which they compete for workers. That means that the impact of fissuring on the wage and salary structure of the economy is sizeable.

Realigning responsibility and protections in the workplace

There remains a critical paradox for the companies that shed so many activities to other organizations. If the lead entities provide the satellite businesses upon which they depend exquisite detail in the timing, specifications, quality, and of course price for their contracted services—and research and experience say they do—shouldn't the companies have some responsibility for compliance with laws? Answering the question of “who is responsible here?” given the ambiguity introduced by the fissured workplace is therefore of critical importance.

³⁰ To be included on the list, the industry needed to have had significantly affected by fissured practices as documented by detailed cases studies (including those conducted by the author), evidence from enforcement sources that indicate significant use of these practices, and / or detailed appraisals in investigative reporting. The selection errs on the side of conservatism as described further in the text. See Weil (2020) *supra* note 20 for details of this analysis.

³¹ For example, to be conservative in the estimate, I do not include any manufacturing (NAICS 31-33) or public administration (NAICS 92) industries, even though subcontracting and outsourcing is extensive in the former and staffing agencies and other forms of contracting out in the latter.

³² Four of the top ten industries projected to have the highest employment growth are highly fissured: construction, warehousing and storage, services to buildings, and home health care services. These four industries alone are projected to add nearly 2 million workers over the next ten years.

There were industries that were highly sub-contracted in the 1930s, when Congress enacted the Fair Labor Standards Act and even earlier than that.³³ But subcontracting was limited to a subset of business models and limited to a handful of industries, including mining, garments, construction, and industries where child labor was also prevalent. Congress was aware of the problematic business models in those industries and the importance of addressing them through protective legislation.³⁴ In drafting the FLSA, Congress like the Supreme Court presumed that in most industries, work and employment were synonymous and drew upon traditional employer / employee relationships.³⁵

Many of our fundamental workplace protections—spanning from being assured pay for work done, provision of a safe workplace, and protections against retaliation from exercise of many workplace rights—emanate from employment. Benefits provision and the basic workplace safety net of policies like unemployment insurance, workers compensation, and paid leave are linked to employment. Fissuring also raises important questions about how to fund the range of family-friendly policies given the complexity of employment relationships in many of the industries where women represent a high percentage of the workforce.

For reasons described above, the disparity between the degree of control exercised by lead business organizations and their responsibility under law is large and problematic. Current state and federal laws provide a patchwork structure for assigning responsibility, some relying on master-servant concepts arising from the common law to broader definitions of the “economic reality” of employment arising from statutes like the Fair Labor Standards Act. Reevaluating existing policies and assessing what is needed to provide the rights established by workplace and labor statutes is therefore warranted.

Revising our basic workplace standards and protections should be grounded in some basic principles. Workplace laws are based in a recognition of the uneven nature of bargaining power in the labor market. As the California Supreme Court recently noted in its *Dynamex* decision, “Wage and hour statutes... were adopted in recognition of the fact that individual workers generally

³³ See Kati L. Griffith, “The Fair Labor Standards Act at 80: Everything Old is New Again,” *Cornell Law Review* 104, no. 3 (March 2019): 101-150.

³⁴ Keith Cunningham-Parmeter, “From Amazon to Uber: Defining Employment in the Modern Economy,” *Boston University Law Review* 96 (2016): 1673-1728. (“For example, New Deal reformers passed the FLSA in part to disrupt the nation’s “sweating” system, wherein garment manufacturers contracted with sweatshops to produce their wares. Under this scheme, the sweatshops exposed workers to oppressive working conditions, while the clothing manufacturers that hired the sweatshops distanced themselves from these violations and protected their brands from reputational harm. By extending liability to parties that “permitted” wage violations, Congress placed these clothing manufacturers squarely within FLSA’s crosshairs. In addition to holding end-user garment companies accountable for wage violations, Congress also passed the FLSA to solve the persistent problem of middlemen who employed children in certain American industries. By making these firms answer for their use of underage labor, Congress targeted businesses that hid behind middlemen who formally employed children. Thus, in both the context of the sweating system and child labor, Congress attempted to bypass intermediaries and hold end-user companies responsible for workplace violations, even when intermediaries had the most direct interaction with workers.”) (internal citations omitted); Griffith, *supra* note 31 at 579 (“the FLSA’s framers foresaw that some businesses might change certain formalities such as where work is located, or how pay arrangements are structured, in ways that evaded coverage.”).

³⁵ In a recent majority decision by the Supreme Court, Justice Gorsuch notes in 1925, “a ‘contract of employment’ usually meant nothing more than an agreement to perform work.” See *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019). Justice Gorsuch further notes that the Railroad Labor Board in 1922 interpreted “employee” to include anyone “engaged in the customary work directly contributory to the operation of the railroads.” *Id.* at 543. Dictionaries of the day similarly considered “employment” as synonymous with “work.” (*Id.* at 539).

possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions."³⁶ Workplace laws seek to address that imbalance by providing minimum wages, overtime, and the requirement that they be provided a safe workplace. They also recognize that workers may have a limited ability to face risks in the labor market. Unemployment insurance and workers compensation were established to provide a safety net for spells of job loss and injury at work. Those basic imbalances persist and should remain the underpinnings of employment policies.

Restructuring of work and labor markets may also mean that workers will have more jobs, less stability in employment, and increased demands –and preferences –for flexibility in their schedules. Whether that need for flexibility arises from the nature of work or changing preferences of workers (or a combination of both), it implies a greater need for public policies to accommodate greater volatility of work and the risks that come with it. But rather than treat that flexibility as a tradeoff for the principle of rights and protections described above, they should seek to solve for both.³⁷

In work with Tanya Goldman, we seek to operationalize these principles while still building from two existing categories of work central to our system of workplace and labor rights and protections: employment and independent contracting. We do so by defining three concentric circles of workplace rights and protections, an inner core assured regardless of employment status; a middle circle providing rights linked to employment, and an outer ring providing social safety net and benefit protections to both categories of workers via multi-party financing mechanisms.³⁸

Core rights regardless of employment status: At the center of this concentric circle model are central rights and protections so fundamental that they should be tethered to work itself, whether as an employee or independent contractor. In the basic labor standards area, this starts with the principle that people should be compensated for the work they do at a minimum wage rate reflecting basic social needs. Workers receiving the minimum rate of pay typically have the least leverage in labor markets and therefore face the greatest need for protection, particularly with the erosion of the minimum wage.

³⁶ *Dynamex*, 416 P.3d at 32; *Rosenwasser*, 323 U.S. at 361 (wage and hour laws are intended to protect workers against “the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health”).

³⁷ Some analysts have argued that emerging work relationships do not fit into the existing legal definitions of employee and independent contractor, necessitating new laws. They suggest a third designation other than “employee” and “independent contractor” could benefit some workers by providing additional protections for workers who might otherwise be considered independent contractors. A third designation, the argument goes, might also benefit workers by explicitly allowing businesses to provide some benefits, such as group insurance plans, they would not otherwise provide for fear of creating additional indicia of an employment relationship. (See, e.g. Seth Harris and Alan B. Krueger. “A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker” Discussion Paper 2015-10, The Hamilton Project. Washington, DC: The Brookings Institution). While changes in the structure of work necessitate a re-balancing of employment protections, technological changes do not necessitate a new worker designation that could codify eroded labor standards. While there may be some instances where app-based companies have characteristics that do not match neatly with one or the other of the models we discuss, this ambiguity is not distinctive to the on-demand sector but can be found in the wider economy.

³⁸ See Tanya Goldman and David Weil. “Who’s Responsible Here?” Working paper, Heller School for Social Policy and Management, Brandeis University (August 2019).

Equally, workers should not be discriminated against for exercising or attempting to exercise rights, even when they lack a formal employment relationship. Prevention of or prompt response to retaliation for the exercise of rights is critical to protecting the rule of law and workers' rights. Employers strategically retaliate to undermine law enforcement and obstruct justice by silencing victims and witnesses.³⁹ When there is a culture and expectation of retaliation, workers are silenced, and workplace violations go unreported and unaddressed. Even when retaliation is addressed, it is hard to undo the chilling effect that the retaliatory action has already had on other workers in discouraging them from speaking up and reporting violations.⁴⁰ Combatting retaliation is therefore fundamental to protecting labor and employment standards, the rule of law, and worker power. Recent Supreme Court decisions that limit worker voice in regards to individual and collective action further raise the importance of this protection.⁴¹

Finally, the right to work in a safe environment should be a fundamental right, regardless of employment. Congress recognized in passing the Occupational Safety and Health Act the importance of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions."⁴² Congress further acknowledged the importance of incentivizing employers and employees to reduce occupational safety and health hazards to promote safe working conditions.⁴³ A core right that protects workers from retaliation is again essential to ensure that workers can freely report hazards and injuries for the safety of workers and civilians.

Rights assured through employment: The next level of rights, protections, and responsibilities are linked to employment status, providing additional protections and rights specific to that status. These include the right to be paid the minimum wage and overtime and receive meal and rest breaks under the Fair Labor Standards Act, the right to organize and be represented through collective bargaining based on the National Labor Relations Act, and safety net protections, including workers' compensation and unemployment insurance.⁴⁴

The second ring of the concentric circle rests on two elements. First, there should be a presumption of an employment relationship that the putative employer must rebut. A rebuttable presumption will help re-balance the power dynamics between workers and employers and

³⁹ See, e.g., Tanya Goldman, *Addressing and Preventing Retaliation and Immigration-Based Threats to Workers*, Center for Law and Social Policy and Rutgers (Apr. 2019), available at <https://www.clasp.org/publications/report/brief/labor-standards-enforcement-toolbox-addressing-and-preventing-retaliation>.

⁴⁰ Charlotte S. Alexander, *Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce*, 50 AM. BUS. L.J. 779, 781 (2013) (noting that in a 2013 report on Alabama's poultry processing industry, almost 100 percent of the workers who had previously witnessed employer retaliation were uncomfortable asking their employers about problems with workplace safety, discrimination, and wages) (citing Tom Fritzsche, *Unsafe at These Speeds*, Southern Poverty Law Center and Alabama Appleseed Center for Law & Justice, 2013, <https://www.splcenter.org/20130228/unsafe-these-speeds>).

⁴¹ See, e.g., *Epic Systems Corporation v. Lewis*, 138 S.Ct. 1612, 1616 (U.S. 2018) (upholding mandatory arbitration provisions prohibiting class actions in employment contracts); *Janus v. American Federation of State, County, and Mun. Employees*, Council 31, 138 S.Ct. 2448 (U.S. 2018) (prohibiting state and local government workers from negotiating collective bargaining agreements with fair share fee arrangements); *Lamps Plus, Inc., v. Varela*, 139 S.Ct. 1407 (U.S. 2019).

⁴² 29 USCA § 651(b).

⁴³ *Id.*

⁴⁴ Under state and local law there is growing momentum around additional rights and protections related to work, including access to paid sick and safe time, paid family and medical leave, fair and predictable schedules; and fair chance employment.

rightfully place the burden of proof on the only entity in the fissured workplace who might have access to the necessary evidence to establish the existence or lack of an employment relationship. This is particularly relevant once again with the principle that workplace protections seek to redress imbalances in labor market bargaining position.

Second, that default rule should be coupled with a stronger, more predictive test for defining who is an employee for purposes of rebutting the presumption. In order to ensure that a revised system moves forward, such a test must address deficiencies of the status quo: lack of clarity of the boundaries of employment that reflects underlying economic realities. We believe there are several reasonable standards from which to draw. The first is the economic realities test arising from the Fair Labor Standards Act, but in this case would be applied more broadly. The second is the ABC Test developed in several states, most recently by the California Supreme Court in its *Dynamex* decision. A third option is a hybrid from these two tests, focusing on factors most indicative of workers in need of protection from these laws.⁴⁵

Access to safety net and non-mandatory benefits for all workers: The “outer ring” of the concentric circle model of workplace policy would recognize that workers are likely to face greater volatility in the course of their working years in terms of having a larger number of employers and shorter spans of work, regardless of employment status. It would provide access to social safety net benefits (workers compensation and unemployment insurance) and to non-mandatory benefits for both employees and independent contractors.⁴⁶ Broadening access to workers compensation and unemployment insurance would provide a hedge against the risks that have been shifted onto a growing percentage of workers in both employee and independent contractor status.

Non-mandatory benefits systems could be created to provide a mechanism for workers to accumulate resources for training, skill development, paid time off, and retirement savings for employees and independent contractors. For example, it could include methods to provide workers with a means to accumulate retirement savings beyond those arising from Social Security or those that would continue to be provided through traditional employer-based systems. Rather, retirement benefit systems would provide mechanisms for workers to accumulate savings from the joint worker and employer contributions arising from a larger number of employers or contracting partners in the course of their work lives. Like retirement savings, other outer ring benefits could be structured in the fashion of multi-employer funds with contributions related to hours worked.

The ongoing need for strategic enforcement

An enforcement agency with broad responsibilities like the Wage and Hour Division or the Occupational Safety and Health Administration inevitably faces challenges of limited resources. When I led the Wage and Hour Division, the statutes for which it had responsibility covered 7.3 million establishments and 135 million workers.⁴⁷ Under the Obama administration, the agency

⁴⁵ See Goldman and Weil, *supra* note 38.

⁴⁶ Third ring social insurance could also recognize that legitimate independent contractors may seek ways to reduce risk exposure arising from health and safety injuries (workers compensation) or intermittent periods where they lack work (unemployment insurance). Those workers could also be provided mechanisms to pay into such risk pools either through their own direct contributions or those of their customers. Benefit levels and coverage under either social insurance program would reflect the levels of worker contributions either through employer contributions (from all sources) or their own contributions in the case of independent contractors.

⁴⁷ *Wage and Hour Division: Resources for Workers*, U.S. Department of Labor,

increased the number of investigators to almost 1000 from a low of 700 at the end of the Bush administration. Yet that represents a tiny number relative to the scale of workplaces the agency oversees. The challenge is further compounded by the complexity of enforcement introduced by the fissured workplace. Thinking about how to prioritize and make sure that the agency's investigators and efforts focused on where we could have greatest impact on compliance therefore became central. Our shorthand for the approach was "strategic enforcement."

The foundation of strategic enforcement required shifting a far larger portion of investigations to a proactive approach, chosen on the basis of agency priorities and undertaken as part of a plan to improve compliance.⁴⁸ It also required WHD offices to sometimes decide not to pursue complaints, thereby freeing investigator time to pursue proactive, directed investigations. Doing so was possible in part because the law allows workers to undertake back wage claims via private rights of action. At the same time, the agency refined methods of triaging complaints so that it pursued incoming complaints where significant problems seemed to be present, in situations related to broader investigation priorities, and where it was unlikely that workers would be able to pursue their claims for back wages.

Through these efforts, pro-active investigations grew as a percent of all investigations from 24% in 2008 to over 50% by 2017. Increasing our capacity to undertake proactive ("directed") investigations was the bedrock of the strategic enforcement approach. The agency prioritized directed investigations to focus on industries and occupations where statistical evidence indicated a higher prevalence of violations and systemic problems. It built upon mapping the structure of industries so that enforcement tools and outreach could have an impact not just on compliance at the bottom of fissured structures but on the organizational relationships that led to those violations. This approach was designed to insure that limited resources for enforcement, deterrence, and education would lead to broader and lasting changes in compliance.

We fundamentally changed the way we did enforcement and outreach so that the parties who had impact on the fissured workplace were engaged in the resolution of problems from which they arose. For example, we pursued an active policy of invoking joint employment where appropriate and by the law in our enforcement actions. But we also did so in issuing guidance—Administrator Interpretations—that clearly laid out the legal and judicial basis pertaining to the application of joint employment. We addressed the issue of joint employment in our educational and public outreach to industries where it had become commonplace. And we engaged with state and local government partners on this issue by coordinating enforcement and outreach efforts in industries with highly fissured workplace structures. That work, in concert with the work of advocacy organizations and progressive employers, led to broader awareness by the public.

Providing resources to enforcement agencies to have a sufficient number of investigators in the field and the tools they need to do their work is fundamental and essential to assure compliance with workplace and labor laws. At the same time, there will always be a need for enforcement agencies to use their resources carefully to achieve greatest impact through the strategic approaches described above and that are being carried out now in many states. There is much more that can be learned about new methods to improve compliance. The challenges faced

<http://www.dol.gov/whd/workers.htm>.

⁴⁸ For a detailed discussion of this work, see David Weil, "Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change." *Journal of Industrial Relations* 60, no. 3 (June 2018): 437-460.

by working men and women subject to violations of our most basic labor standards are reminders of the continuing importance to do so.

Conclusion

The changes in business organization that underlie the fissured workplace have been transformative. But workplace policies have not adequately factored these profound changes into the rights and protections for workers and the responsibilities placed upon business and other organizational entities. Public policies therefore hew to familiar paths that miss important characteristics of the problems they seek to address.

Although current political realities in the U.S. may preclude addressing the impacts of the fissured workplace in the short term, policymakers will be required to deal with them because of their broad impacts in the long term. But in considering that task, it is important to remember that the problematic consequences of the fissured workplace are not the result of inexorable forces that cannot be stopped. They arise from deliberate choices made by businesses and organizations. That means the present and the future of workers can likewise be affected by the conscious choices of policy makers in the public, private, and non-profit sectors.

New technologies, the changing expectations of employees and the dynamic nature of business will always affect the nature of work. This has been true throughout economic history. But this does not mean we should neglect our need to balance financial outcomes with the protections, rights, and considerations of fairness that underlie our workplace policies.

Table 1
Highly Fissured Industries, 2017

NAICS code	Industry	All Employees (in thousands)	Nonsupervisory & production employees (in thousands)
23611	Residential Building Construction	752.5	483.7
23813	Framing Contractors	83.6	73.7
23831	Drywall and Insulation Contractors	242.5	204.7
4451	Grocery Stores	2705.3	2380.3
44711	Gasoline Stations with Convenience Stores	824.7	695.8
4841	General Freight Trucking	1002.0	886.0
4853	Taxi and Limousine Services	78.5	N/A
4931	Warehousing and Storage	1026.9	904.3
5152	Cable and Other Subscription Programming	52.69	N/A
51731	Wired & Wireless Telecommunications Carriers	692.0	583.9
56132	Temporary Help Services	2940.1	2821.3
56142	Telephone Call Centers	530.5	469.6
56143	Business Service Centers	78.2	64.2
561612	Security Guards and Patrol Services	742.0	N/A
56171	Exterminating and Pest Control Services	119.8	95.8
56172	Janitorial Services	1078.0	963.5
56173	Landscaping Services	780.5	651.0
56179	Other Services to Buildings and Dwellings	91.1	73.7
56292	Materials Recovery Facilities	60.0	N/A
6216	Home Health Care Services	1419.7	1318.1
72111	Hotels (except Casino Hotels) and Motels	1615.1	1383.1
72231	Food Service Contractors	499.3	437.9
72233	Mobile Food Services	199.6	169.9
722513	Limited-Service Restaurants	4380.6	3858.3
811192	Car Washes	168.8	143.7
8121	Personal Care Services	710.4	605.6
81293	Parking Lots and Garages	140.7	124.2
81299	All Other Personal Services	75.6	N/A
	Total Private	124,259.4	102,415.3
	Total Highly Fissured Industry Employment	23,091	19,392
	Percentage of private workforce	18.6%	18.9%

Source: Current Employment Statistics, 2017, Seasonally Adjusted (Annual Estimates, 000s). See David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context." *RSF Journal of the Social Sciences*, 6, no.1 (2020, forthcoming):147-165.