Bargaining for the Future of Work

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Introduction: The Hershey’s Story

In August 2011, just a month before Occupy Wall Street captured the world’s attention, a window into the transformation of work in America opened in an unlikely place: the Hershey’s Chocolate packing plant in Central Pennsylvania.

As the New York Times reported, 400 of the plant’s workers occupied the factory floor and launched a strike that brought work to a halt. They were protesting sub-minimum-wage pay, brutal work conditions, and employer threats meant to silence complaints. But the biggest surprise was who these 400 workers were: international student guestworkers on J-1 visas from Turkey, China, Ukraine, and a dozen other countries. They’d paid $4,000 each to participate in what recruiters told them was a cultural exchange program. In reality, they were forced to live in overpriced company housing and work round-the-clock shifts, earning as little as $1 an hour after mandatory deductions.

Just a decade before, the jobs at the plant had been full-time, living-wage jobs that came with the benefits of a union contract and sustained hundreds of middle-class Pennsylvania families. Then Hershey’s changed its business model. It fired its direct employees and subcontracted operation of the plant to a logistics giant called Exel. Exel subcontracted plant staffing to a temporary staffing agency called SHS. SHS subcontracted worker procurement to an international recruiting agency called CETUSA. And CETUSA subcontracted out to local recruiters in a dozen countries, which hired the student guestworkers.

As a result, when the student guestworkers went on strike to win better conditions, they had no one to bargain with. The New York Times wrote: “Among the four companies with a role in the huge plant where the foreign students were employed, each one pointed to another as being the primary manager in charge of monitoring the students’ work.”

After months of public pressure and blanket national media coverage, the students succeeded in winning reforms to the J-1 student guestworker program from the U.S. State Department—but Hershey’s, the ultimate beneficiary of the student’s labor, was never forced to take responsibility for the labor abuse it profited from.
The Transformation of Work

Work in the U.S. is undergoing a fundamental transformation. The Hershey’s story exemplifies many aspects of the shift—and the challenges it poses for millions of workers in the U.S. Increasingly, corporations are using subcontracting as a way to cut costs and maximize profits, while distancing themselves for responsibility for the workers they once directly employed. As a result, wages and working conditions fall, and workers face enormous obstacles to organizing against labor abuse.

Previous generations of worker organizing depended on the ability of workers to build power by aggregating their numbers and making collective demands on their employers. But layers of subcontracting distance workers from their “real boss”—the corporation at the top of the chain. Millions of subcontracted workers face the same dilemma that the Hershey’s student guestworkers did, from seafood peelers facing forced labor conditions on the Walmart supply chain, to subcontracted Amazon workers in the online retailer’s massive fulfillment centers, to restaurant workers in fast-food franchises like McDonald’s.¹

Among the many questions facing those who are concerned with workers’ future in our rapidly changing economy—including the impact of increasing automation and the rules of the so-called “sharing economy”—is the question of what policies and strategies will allow subcontracted workers to bargain their way up the chain and win better wages and conditions for themselves and their industries.

Meeting the Challenge

The National Guestworker Alliance, which organized the Hershey’s student guestworker strike, has partnered with Jobs with Justice and National People’s Action to take up this challenge. The three groups have formed the Future of Work Initiative, meant in part to reinvent the way workers bargain with their employers. Our hypothesis is that by mobilizing workers regionally, and across industries, labor markets, and supply chains to win campaigns that redefine the nature of work and how workers bargain with employers, we can challenge the limitations of our country’s existing labor laws and create the conditions for a new social contract in America. Combined with a municipal legislative agenda consisting of innovative policy demands; scaled, “next generation” organizing strategies; culture change work; and civic engagement, we hope to inspire workers into action, win material changes in their lives, and facilitate building worker power and worker organizations.

For us, the immediate questions are clear: What policy tools and mechanisms can facilitate aggregating subcontracted workers and their demands? What approaches can move the sphere of bargaining into the community when employers reject it in the workplace? Are there frameworks and models that will help workers bargain the terms and conditions of their employment with their “real boss,” the corporations that distance themselves from the labor-intensive parts of their businesses and their responsibilities for those workers?

Together, we have identified two potential policy solutions that show real promise in helping subcontracted workers regain some of the ground they have lost in recent years: (1) expanding joint liability between labor contractors and the workers’ “real boss,” and (2) establishing a

¹ A preliminary decision by the National Labor Relationship Board in August 2014 provided some hope by saying that McDonald’s may be held responsible for franchisees’ labor abuses as a “joint employer.” McDonald’s plans to contest the decision. http://www.npr.org/2014/08/06/338354844/whos-the-boss-labor-board-says-its-mcdonalds-as-much-as-franchisee
community bargaining authority that would engage the state in the bargaining relationship between workers and their employers.

**Proposal One: Expanding Joint Liability**

Businesses increasingly use subcontracting to control their labor costs and reduce their liability. By subcontracting labor, businesses can pay a set amount for labor or a service. Unscrupulous subcontractors who are willing to short workers on wages have a dangerous advantage: they can win by underbidding responsible employers. Workers, meanwhile, struggle to negotiate for better wages or conditions because the firm that sets the context for their wages and conditions—the “real boss”—is no longer their direct employers.

When subcontracting chains were limited to a few key industries, such as construction, garment, and janitorial services, governments were able to develop industry-specific practices to try to prevent abuse. In the construction industry, for example, pre-hire agreements (which are unlawful in other industries) can be used to set standards and wages across a yard before construction begins. Similarly, jobbers’ agreements in the garment industry instituted triangular bargaining. But far too many of today’s subcontracted workers don’t have the tools they need to counteract the incentives for abuse among unscrupulous subcontractors.

As subcontracting has spread, many advocates have called for state-level legal reforms that expand liability up supply chains to the end user—the “real boss.” Joint liability provisions are attractive because when end users know that they will be held liable, they have a greater interest in ensuring that their labor contractors follow the law. These provisions can also promote bargaining by giving the state roles in ensuring transparent contracts, aggregating workers, and bringing labor contractors and companies that hire them to the table in a conciliation process.

There are numerous methods for expanding joint liability. California provides two examples. On September 28, 2014, Governor Jerry Brown signed AB 1897, an amendment to California’s labor code stating that businesses that use labor contractors will share civil legal liability for payment of wages and failure to obtain valid workers’ compensation coverage. By holding companies legally responsible if labor contractors they hire put workers in dangerous working conditions or fail to pay wages, the legislation removes the incentives employers have to use labor contractors to cheat on wages and health and safety while insulating them from liability.

This amendment augments an already innovative provision in California labor code, SB 179, which established vicarious liability for contractor’s employees. The provision makes it unlawful to enter into a contract for labor services with a construction, farm labor, garment, janitorial, or security guard contractor where the person or business knows or should that the contract does not include sufficient funds to allow the contractor to comply with all applicable local, state, or federal laws or regulations. The provision does not provide bargaining as a remedy, but levies fines of $250 for each worker for an initial violation and $1,000 for each worker for each subsequent violation.

The California law incentivizes transparency by offering a safe harbor for businesses whose contracts include certain key information. Employers can gain a “rebuttable presumption” in their favor if they have a written contract including detailed information on the contractor, the labor or services to be provided, insurance, worker housing, the total number of workers, and the size of

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2 Companies that enter into collective bargaining agreements are exempt from liability under the law. This may provide some incentive for companies to enter into collective bargaining agreements before problems arise, but it does not encourage bargaining after problems have arisen as a remedy or as a way to reduce penalties.
the payment, as well as other details. Employers are also exempted if they have entered into a collective bargaining agreement that covers the work.

Conversations with organizers, policymakers, and litigators in California have revealed both the advantages and disadvantages of this kind of law in combating labor abuse. According to one organizer in the janitorial sector, the statute had provided a useful opportunity to approach businesses that hadn’t been aware of it, and to persuade them to scrutinize subcontractors more closely. Organizers have also said that the law is valuable in industries with low union density because it can help raise the floor on conditions.

Litigators, on the other hand, said they faced real difficulties in proving that a business “knew or should have known” that there was insufficient money in the contract. The information needed to do so is very difficult to obtain without pre-litigation discovery. The California Division of Labor Standards Enforcement provides a partial solution because, as the state agency, it has the power to issue investigatory subpoenas. Still, few if any private litigators will take SB 179 cases because of the difficulty in proving them. Employers have been very effective in blocking access to business information, which means that at trial, plaintiffs would have to rely very heavily on expert evidence about the structure and costs of business in the industry.

As innovation continues at the state level, there are a number of strategic questions that require more investigation:

- How could campaigns to expand joint liability help build public awareness about the fragmentation of the economy and the impact on workers and communities?
- How could enforcement of joint liability laws help promote private bargaining and give worker advocates more power and resources to organize around wage theft?
- How could transparency measures—requiring labor contractors to file contracts with the state and disclose them to workers—shift contracting practices and provide information critical to worker power building?
- How could a state process for negotiation among workers, contractors, and contracting entities eventually facilitate bargaining?

Proposal Two: Building a Community Bargaining Authority

Few workers’ fights have gained more political momentum in recent months than the fight to raise the minimum wage. Some cities and counties have the authority to set a higher local minimum wage and to develop an independent enforcement system of the local wage law, providing clear organizing opportunities—already 10 county and city governments have raised the local minimum wage since 2013.

There is no question that a higher minimum wage improves the material conditions in workers’ lives. But the limitation of such campaigns is that they haven’t established an ongoing mechanism for negotiating with the state to establish higher wages or raise industry standards. Nor do they institutionalize mechanisms for aggregating workers and building the kind of self-sustaining organization that would let workers—especially those trapped at the bottom of supply chains—negotiate with employers and the state.

In cities that are empowered to set local wages, one solution would be to set up a community bargaining authority - a local body that would help organize and aggregate workers to negotiate higher wages, improve working conditions, and build worker organizations.
One impetus for examining a community bargaining model is the effort underway to legislate a “Fair Share Fee.” The idea, proposed by National People’s Action and Jobs With Justice, is to either assess a fee or discontinue a tax loophole for companies that fail to meet certain employment standards. Though the aim would be to incentivize good employment practices, some employers would end up paying the fee, creating a new pool of public funding. Ideally, this money could be used to create a fund that would serve low-wage workers and their communities. So how would workers and community members bargain over how these funds are spent? One potential model is the housing trust fund.

There are over 700 housing trust funds across the country. Trust funds exist at the state and local level, and collect revenue from a wide range of sources, including developers’ fees and mortgage refinance fees. A housing agency or similar government agency collects the fund, and an oversight board is given authority to decide on how the money is granted. Legislation outlines parameters for the funding, but there is still a good deal of flexibility for oversight boards to decide how to channel the money. In most instances these boards include community members and nonprofit representatives, in addition to developers and other housing stakeholders.

Whether it’s set up as a trust fund with community oversight or a structure given the power to set wages, a community bargaining authority could be governed by a combination of worker, employer, nonprofit, and government representatives. In jurisdictions with an existing local minimum wage enforcement agency, it could be housed within the enforcement agency, or it could be an independent body that reports to the mayor and the city council. Additionally, we could mandate that worker organizations nominate the worker representatives, or allow workers citywide to elect their own representatives.

The community bargaining authority could be structured to carry out a number of functions including:

- **Annual evaluation of minimum wage:** The authority could make annual recommendations to the mayor and the city council as to whether or how much to increase the minimum wage. The body could hold public hearings, town hall meetings, engage worker organizations, and employer associations, all of which would provide organizing opportunities.

- **Fact-finding on subcontracting and other forms of contingent work:** The authority could hold public hearings on issues related to contingent work, survey and examine working conditions in particular industries or occupations, as well as issues such as retaliation. This process would offer its own organizing opportunities and be a good basis for further policy reform.

- **Enforcement:** The authority could collaborate with and direct a local enforcement agency to target certain industries for strategic enforcement of the local minimum wage law. Fees collected from low-road employers could be used to fund worker-led enforcement by worker organizations, know-your-rights trainings, workplace monitoring for wage and hour violations, collecting evidence of wage theft for public enforcement, etc.

- **Overseeing grants:** The authority could distribute grants from a public revenue stream like the Fair Share Fee for programs and organizations that support low-income communities, such as legal aid groups, re-entry programs, job training for a particular sector, community health service providers, and other programs deemed to be a priority by the authority’s community board members.

3 Further resources on housing trust funds can be found here: http://housingtrustfundproject.org/

4 There are precedents in state wage boards, the New Jersey Minimum Wage Advisory Commission, and the Delaware Low-Wage Service Worker Task Force.
As we continue to explore the potential of community bargaining authorities, several questions remain: how can these bodies benefit low-income communities, while serving as a source of bargaining power for low-wage workers? Can these structures facilitate high-road employment practices and unionization for a given sector? Can they give worker centers and other worker advocacy groups more power and resources to organize around wage theft?
Acknowledgments

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