

# Fee-Splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship

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*Based on a historical study of fee regulation in the employment agency business, the claim that temporary help agencies charge “no fees” to workers is challenged. It is found that the claim rests on technical changes in the statutory definitions of fee and employment agency won through industry lobbying efforts, changes that simply mask traditional fee-charging methods. The article traces the evolution of fee-charging practices in the post–World War II period and points to a new version of “fee splitting” as a prevalent wage setting practice in the staffing industry. The implications of these developments for wage depression and income redistribution are explored.*

You always have to expect emotional reactions on the part of trade unions against temporary work, unless you can provide us with security that profits obtained at the expense of two employers are not greater than the profits made by a single employer.

—German trade unionist (1979)<sup>1</sup>

Despite the view of many analysts that the “temporary help” arrangement is an exploitative one<sup>2</sup> and increasing statistical evidence of the substantial losses of earnings and benefits incurred by temps,<sup>3</sup> the subject of agency fees has scarcely been mentioned in the growing literature on temporary work and remains a much overlooked aspect of the “flexible” labor market in the United States. One reason for this is the general acceptance of the staffing industry’s position that “tempo-

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rary employees are never charged a fee of any kind,"<sup>4</sup> that fees are borne entirely by employers, the business clients of staffing firms. This article excavates the political and historical foundations of this virtually taken-for-granted claim and suggests that with the rapid growth in recent years of the temporary help and staffing industry (hereafter, "the staffing industry"), fees for jobs, shouldered largely by workers, have surged. It explores current fee-charging practices and their implications for income redistribution and wage depression.

Through the early 1990s, a job seeker going through the classified ads placed by temp and staffing firms would have been assuaged by the following kinds of inducements: "No fees," "Not an agency—Never a fee," "Never a fee to the job seeker," "ALL FEES COMPANY PAID," "A fee-paid service."

From its birth in the late 1940s, the staffing industry used these claims to build what became by the 1970s the fastest growing industry in the country. Nowadays, industry representatives say, the idea that staffing agencies charge no fees to workers has become so widely accepted and understood that these printed claims have become unnecessary. Still, the "no fees" claim is continually reinforced in TV and radio ads and reiterated in industry literature and in briefings with job applicants in agency offices. Moreover, state laws across the country now uphold the industry's position. If the existence of fees is acknowledged at all, they are said to be "client-paid," that is, covered in their entirety by the industry's business clients, the users of temporary help.

Furthermore, changes in state laws brought about by industry lobbying have allowed staffing agencies to conceal their "mark-ups," thereby hiding the amount they garner from a worker's labor. The staffing firm's mark-up is the biggest secret in the industry, "the great untouchable topic."<sup>5</sup> In an openly self-serving and transparent practice of dubious legality, agencies forbid temps from ever inquiring about the wages of other workers or about the firm's billing rate. The agreement that temps sign typically contains a provision such as the following: "I understand that all matters relating to wages and rates are necessarily confidential and will never discuss same with clients or others."<sup>6</sup>

Such warnings are to a surprising extent effective in keeping temps (and organizers) in the dark about what regular employees or other temps make on the same job and about what their agency is receiving for their work, and hence inhibit bargaining and the operation of a free labor market. Due to effective concealment, it is safe to say that workers paying fees out of their own pockets early in the 20th century knew more about the actual cost to them of working through an agency than their counterparts do today. Recently, however, anger over fees among temps and contract workers has grown, and workers' groups in some states have backed "right-to-know" legislation that would require labor market intermediaries to reveal to workers the hidden fees in their employment contracts. A movement for "full disclosure" agencies has been spawned.<sup>7</sup>

Based on a sociolegal study of fee regulation over the past century, this article shows that the claim currently made by the staffing industry that no fees are charged to workers rests solely on technical changes in the statutory definitions of *fee* and *employment agency* quietly won by the industry through its aggressive lobbying efforts over the past four decades, changes that simply mask traditional fee-charging methods that have been prevalent since the emergence of private employment agencies in the 1890s. After providing some historical background, the article traces the evolution of fee-charging practices in the post–World War II United States through three important mutations: (1) the elimination of early definitions of *fee* that included an agent’s “mark-up”; (2) the rapid spread and acceptance of the doctrine of “client paid” fees; and (3) the use of this doctrine to legalize referrals from public employment offices to commercial agencies and to promote staffing agencies as legitimate providers of employment for former welfare recipients. At the center of these developments was the staffing industry’s effort to reshape the legal environment to legitimate its social “takings.”<sup>8</sup> As will be shown, these alterations of law meant a change in wage setting practices for the growing “temporary” workforce—in effect, a revival of the formerly illegal practice of “fee splitting”—helping to effect the redistribution of bargaining power and income between workers and employers in recent decades.

#### STATE REGULATION OF EMPLOYMENT AGENCY FEES

Early in the twentieth century, concern over excessive employment agency fees was intense. The problem commonly appeared on the lists of industry abuses compiled by state labor bureaus and federal commissions, and a broad movement grew up in opposition to “the vampire system.”<sup>9</sup> In the words of Justice Louis Brandeis in 1917:

There gradually developed a conviction that the evils of private agencies were inherent and ineradicable, so long as they were permitted to charge fees to the workers seeking employment. And many believed that such charges were the root of the evil.<sup>10</sup>

As early as 1890, states began to pass regulatory legislation addressing all aspects of employment agency operations, including their fee-charging practices.<sup>11</sup> Prior to the passage of national labor legislation in the 1930s, which sanctioned collective bargaining as the primary means of protecting workers’ rights, this state level regulation of labor market intermediaries comprised a significant part of labor law and provided the only protection for the majority of workers engaged in “individual bargaining.”<sup>12</sup> State legislative efforts to guard workers from excessive fees were further intensified after the U.S. Supreme Court declared in 1917 that a state’s attempt to *abolish* commercial fee-charging agencies was unconstitutional.<sup>13</sup> By 1928, 29 states had placed statutory ceilings on

employment agency fees. When, in that year, the Supreme Court outlawed fee ceilings as an illegal form of price fixing,<sup>14</sup> many states forced disclosure by requiring agencies to post their fee schedules in a “conspicuous place” in their offices and to file them with the state.

The free public employment office, or labor exchange, many of which had been established by states and municipalities in the pre-World War I period, was seen as a natural alternative to the commercial fee-charging firm. In 1933, the charter for the United States Employment Service forbade the referral of workers to agencies that charged either workers or employers a fee. But the growing number of private labor scouts kept the issue on the national agenda into the New Deal period, when Congressional hearings in 1940 focused attention again on the “excessive fees, paid by workers for employment, out of all proportion to the wages earned.”<sup>15</sup> And in 1941 the Supreme Court reversed its earlier ruling, once again allowing states to set ceilings on employment agency fees, a practice that continued into the post-World War II period.<sup>16</sup> Through the mid-1960s, state departments of labor strongly pursued the regulation of private employment agencies, and fee regulation in specific, over vehement industry opposition.<sup>17</sup> “One of the most important reasons for regulating private employment agencies is to protect applicants against excessive fees,” the U.S. Department of Labor stated in 1960,<sup>18</sup> and recommended that states set maximum fees “for both temporary and permanent jobs.”<sup>19</sup>

Along with the strengthening of the public employment service during and after World War II, and the broad support for continued government manpower policies, these renewed efforts at fee regulation were compelling reasons why the future of the employment agency business looked problematic to its practitioners in the immediate postwar period. But now, collective bargaining had become the main agenda for labor, as opposed to the protection of individual rights vis-a-vis private labor agents. State employment agency laws were relegated to minor importance, receiving little attention from either the public, the media, or organized labor, thus making it possible for a quiet industry-run campaign to reverse the trend toward strict state regulation. Beginning in the 1960s, when the temporary help industry turned to aggressive lobbying in the state legislatures,<sup>20</sup> the regulation of employment agencies “deteriorated.”<sup>21</sup> The trend now turned to the oversight of employment agencies by generally friendly industry boards and, in many states, toward the deregulation of placement fees.<sup>22</sup>

#### FEE SPLITTING AND JOBS OF SHORTENED DURATION

To appreciate the temp industry’s solution to the post-WWII predicament of the employment agency business, we must examine another aspect of that business early in the 20th century, namely, the practice of *fee-splitting*, widely reviled by workers and reformers, and cited prominently on all the lists of employment

agency abuses generated by government investigations. Fee-splitting referred to a form of collusion in which an employer (or foreman) agreed to hire workers from a certain agent in return for a share of the fees collected from these workers. Such collusive arrangements resulted in increased fee rates, since employment agents were caused to charge enough to cover both their own costs and the gratuity paid the employer.<sup>23</sup> In addition to inflated charges, fee splitting almost inevitably resulted in another problem for workers, that of accelerated turnover (or jobs of shortened duration), as workers were discharged solely to make way for others, thereby multiplying the fees to be collected and divided.<sup>24</sup>

Artificially shortening work assignments, that is, making jobs more temporary, increased the immediate profits of both employers and employment agents.<sup>25</sup> Thus the practice of fee-splitting was widely seen as exacerbating the irregularity of employment. Workers often testified before government commissions that they had been sent to positions which employment agents had represented as permanent or long-term but which turned out to be of short duration.<sup>26</sup> As early as 1913, legislation in eight states and the District of Columbia prohibited fee-splitting. By 1940 the number had grown to twenty-one states.<sup>27</sup>

The arrangements between labor agents and employers engaged in fee splitting could take several forms.<sup>28</sup> Most simply, discharged workers could be sent back to the employment agent for reassignment and, after paying another fee, were frequently sent back to the same work site.<sup>29</sup> In a somewhat more sophisticated version of the practice, workers would be forced to pay the agent a certain percent of their wages each week or month, that is, a regular fee, for the promise of holding their jobs against other workers.<sup>30</sup> Taking it one step further, some agents took on the role of paymaster, collecting payments from the employer and deducting their fees before compensating the workers (as the staffing industry does today), often making additional charges for transportation, supervision of workers, housing, commissary, or other “services.”

With these improvisations, many employment agents had devised means of collecting a *continuous stream* of fees— whether workers stayed on a single job or worked at a series of different work sites, and whether for the same or different employers. In effect, a segment of the employment agency business had moved beyond the idea that agency fees were one-time payments made for job *placement*, that is, matching a worker with an employer, the traditional role of what became known as the “permanent” employment agency. This segment of the business was based on forming an ongoing triangular relationship with the worker on one side and the employer on the other. This triangular arrangement not only served to increase the financial gain for the agent, but was also beneficial to the user of labor in that it served to weaken his ties or obligations to these “agency workers” relative to what would be expected toward his direct employees, and therefore also decreased long-term pressures toward higher wages (a point which became even more salient after New Deal legislation endorsed collectivization

and increased the obligations of employers). This possibility of distancing or shielding the actual users of labor from obligation to workers was another reason (along with screening for union preferences) that the “services” of private employment agents appealed to employers, that is, why they might even pay premium hourly rates for this arrangement, and conversely why free public agencies, which could not serve the same functions, were not as useful.<sup>31</sup>

The triangular arrangement was optimal, then, for both employers seeking labor “flexibility” and employment agents seeking steady income. But, as the post–World War II period began, this system, along with the employment agency business as a whole, had for half a century faced broad public enmity and been vexed by the extensive efforts of state regulators and reformers. The amount of fees that could be charged workers was limited by ceilings set in most states, and fee-splitting, as a mechanism for multiplying fees, was outlawed in 32 states.<sup>32</sup> At the same time, the strengthening of the public employment service posed the question of whether that competitor would become the primary way that the nation marketed its labor. These conditions constituted a problem to be solved not just for the employment agency business itself, but for many corporate employers concerned with the rigidity of labor markets in a period of apparent union strength.

This challenge was taken up by the emerging temporary help industry, which followed the past practice of that segment of the employment agency business that used an ongoing triangular relationship, collecting payment from employers and serving as paymaster to workers. To avoid state regulation, however, the industry put itself forward as a “new type of service.”<sup>33</sup> not connected with the old employment agency business, basing this claim on the premise that temp firms were themselves employers, not employment agencies.<sup>34</sup> In taking this position, the “new” business faced obstacles in the prevailing legal definitions of *employment agency* and *fee*. The industry thus turned its attention to reshaping this legal environment.

#### THE EVOLUTION OF FEE-CHARGING PRACTICES

##### *Eliminating the Definition of Fee as Mark-Up*

For the type of triangular practice represented by the temporary help industry, the *fee* was commonly defined in state law as the difference between what an employment agency charged its business client for supplying workers and what it paid those workers. For instance, New Jersey’s 1918 employment agency law specified that the term *fee*, in addition to direct payment for employment, “shall also mean and include the difference between the amount of money received by any person who furnishes employees . . . and the amount paid by him to said employees.”<sup>35</sup> This definition of *fee* (what I call the “fee as mark-up”) would remain part of employment agency law for much of the nation into the post–World

War II period. In the early years of temp industry growth this prevailing definition supported the intuitive understanding of state regulators that temp firms were in fact fee-charging employment agencies. Thus, during the 1960s temp firms found they were “viewed as simply another version of employment agencies, that is, it is contended that the spread between the wage rate and the billing rate is a ‘fee.’”<sup>36</sup> And, like the early law that defined *fee* as mark-up, temp workers were from the beginning prone to see the billing rate as their “gross wage” from which the agency took a “cut,”<sup>37</sup> a view that found support in some state courts.<sup>38</sup>

The young “temporary help industry” fought hard against this understanding of *fee*.<sup>39</sup> Defining the mark-up as a fee, it was said, “could mean the demise” of the industry,<sup>40</sup> since it would force temp agencies to reveal their most important secret, the spread between billing rates and wages. Avoiding this, the industry organized nationally for a fight to exempt temp firms from state regulation. In a state-by-state blitz between 1963-1971, the industry pushed through quick, often crude, amendments to state employment agency laws across the country, amendments that defined temp firms as legal employers, categorically exempted them from state regulation, and specifically eliminated the definition of fee as mark-up.<sup>41</sup> This could be accomplished in many states with the addition or subtraction of just a few lines in the state statute, and without any public debate.

Insuring its ability to hide the mark-up provided the industry with considerable relief. In 1960, prior to deregulation, no less than twenty states required that maximum “fee schedules” be posted in agency offices for workers to see.<sup>42</sup> For temp agencies the required fee schedule would display the hourly amount to be billed the business client (the billing rate) on one side and the hourly wage paid the worker on the other, thus clearly revealing the mark-up. In 1957, the N.J. Superior Court found the statutory requirement to post fee schedules entirely appropriate. “It is important,” the Court stated,

for the worker to know what Manpower [the agency] is charging the customer for his work, or, to put it another way, it is important for the worker to know how the money paid by the customer will be divided as between [the agency] and himself.<sup>43</sup>

The industry despised the requirement to post fee schedules, perhaps more than any other provision of law. Community organizers found they simply flaunted the law, refusing to post them. Winning exemption from this requirement, along with fee ceilings, produced the situation faced by temporary workers today, in which there is no regulation of the amount of the mark-up, and no requirement for agencies to make it known. Thus, in hearings on a bill that would reregulate agencies under the U.S. Department of Labor (DOL), Senator Walter Mondale spoke in 1971 of the “unconscionable fees” charged to temp workers, and bemoaned the fact that “there are no controls or limits on what private temporary help supply firms may . . . charge for what are in substance placement fees.”<sup>44</sup> (In negotiations with staffing firms over an industry “code of conduct” in recent

years, grass-roots groups have found that disclosure of mark-ups is practically the only provision to which agencies adamantly refuse to agree. In contrast, labor law prohibits unions from charging excessive dues or initiation fees.<sup>45)</sup>

In practice, the passage of legislation defining temp agencies as employers rendered the notion of fee-as-markup meaningless. If temp workers are their direct employees, it follows that the paychecks issued by temp firms — at an hourly rate apparently agreed to by workers — represent their pay in full (less only the standard deductions required by law). Hence the notion that temp agencies charge no fees to workers was neatly inscribed in law and became part of the accepted logic of employment relations in the United States. In effect, “no fees” came to mean that there is no need for workers to take money out of their pockets to make a payment to the agency, as they normally did in the earlier history of the industry. Soon, this logic would become institutionalized for other types of staffing and “payrolling” firms as well, as the industry moved to ratify the notion of “client paid” fees for a wide range of personnel firms.

#### *The Spreading Acceptance of “Client-Paid” Fees*

The next stage in the evolution of fee charging practices, occurring from the mid-1970s through the early 1990s, consisted of the rapidly spreading acceptance of the veracity of “client-paid” fees as a basis for exemption from state regulation. This included other “new” types of personnel placement firms, for example, staffing, executive search, personnel consulting, and payrolling firms, and PEOs (“professional employer organizations”), even many engaged in traditional permanent placement activities. Like “temporary help” firms, many of these firms were now beginning to collect fees from business clients rather than workers, whether these workers were treated as W-2 employees of the personnel firm or not. Their argument (to state legislators and regulatory agencies) was that since they charged no fees directly to workers, then the original reason for their regulation, that is, the protection of workers from abuses such as exorbitant fees, had been eliminated.

To put the emergence of “client-paid” fees in bold relief, note that as recently as 1962 the U.S. DOL had reported that fees were paid by employers only in “rare circumstances.”<sup>46)</sup> But thereafter the legal environment changed rapidly. In the mid-1970s, the Book of States noted the legislative trend toward “shifting fee charges from job applicants to employers for all or certain types of placements.”<sup>47)</sup> Throughout the later 1970s and 1980s legislative measures in many states, presented by their backers as pro-worker initiatives, excluded from regulation as employment agencies firms whose fees were “employer paid.”<sup>48)</sup> Based on the assumption that the amount of any “client-paid” fees did not matter to, or affect, workers, the fee as mark-up as well as the traditional one-time fee for placement were deregulated as long as they were viewed as paid for by employers.<sup>49)</sup> The

“about face” in economics from institutionalism to a free market perspective in the 1970s supported these developments.<sup>50</sup>

Such was the extent of fee deregulation under this logic that in 1990 the industry trade association could say that, “[e]mployment agencies are still licensed in many states although the number requiring a license has dropped and is often limited to the relatively few agencies that charge applicants a fee.”<sup>51</sup> Thus the notion of client paid fees became pervasive in the culture of the personnel industry, and trade groups made the most of it in advertising and public relations.

*Who really pays?* Many pro-worker observers, however, had long realized that “employer paid” fees (fees collected “on the back end” rather than up front) could not be viewed as a solution to the problem of agency fees. As early as 1914 it had been pointed out that agencies advertising “positions furnished free” ultimately found ways to charge workers,<sup>52</sup> that is, that fees ostensibly “charged to employers” could easily be passed on to workers by reducing wages or through other means.<sup>53</sup> This lesson was internalized into new employment agency laws passed by states in the wake of the 1918 Supreme Court decision nullifying Washington state’s initiative to outlaw the practice of charging agency fees to workers.<sup>54</sup> These new laws specified that both worker-paid and employer-paid fees would be recognized as fees. For instance, beginning in 1918 New Jersey defined an employment agency as

the business of procuring . . . help or employment . . . where a fee or privilege is exacted, charged or received *directly or indirectly* . . . *whether such fee is collected from the applicant for employment or the applicant for help.*<sup>55</sup>

In this way lawmakers early in the twentieth century explicitly recognized that whether charges were collected “directly or indirectly” — that is, from the worker or the user of labor — they were nonetheless fees in need of regulation, since such charges had the potential effect of diminishing real wages by diverting a certain amount of the total income flow away from workers.

Similarly, delegates to the International Labour Organization, deliberating in 1932 over that organization’s position on employment agencies, reached the conclusion that charges collected indirectly, rather than out of the worker’s pocket, nonetheless constituted a fee requiring state regulation. Thus ILO convention No. 34 defined a “fee charging employment agency” as inclusive of any business that supplies workers to employers “with a view to deriving *either directly or indirectly* any pecuniary or other material advantage *from either employer or worker.*”<sup>56</sup> As interpreted by the ILO Director-General in 1966 (when the issue of temporary help firms was raised) this language clearly signified that a triangular arrangement in which an intermediary paid workers out of revenues collected from the user of labor represented a segment of the fee-charging employment agency business.<sup>57</sup>

Since early in the twentieth century, then, employment agency law in the United States and internationally reflected the realization of pro-worker advocates that so-called “employer-paid” fees were nothing but an illusion. Experience taught that it was a relatively simple matter for labor market intermediaries to pass along to workers the fees ostensibly charged to their business clients by adjusting pay rates in accordance with desired margins, a process that was facilitated by the natural alliance long established between employment agents and the users of labor.<sup>58</sup> But that history was “forgotten” and the myth of employer-paid fees reborn when, through political lobbying in the 1970s and 1980s, the idea was legitimized again and put to work by the staffing industry on a widespread basis. Through public relations work and changes in law, the idea that “no fees” are extracted from workers through staffing and other personnel firms was raised to truth value and official policy across the country. As a result of this change in policy, temporary help and other personnel placement firms that use the device of client paid fees no longer have those fees subject to state regulation, and hence may legally conceal them. The official account now holds that if fees are unseen, that is, if workers do not take money out of their own pockets to pay them, then they do not exist.

#### *State Subsidized Fees*

The latest stage in the evolution of fee-charging practices involves the entrance of the state into the employment triangle, as exemplified in the expanding partnership between the commercial staffing industry and the public employment service. The newly elevated doctrine that staffing firms do not charge workers a fee was instrumental in this development, as it provided the justification for allowing free public agencies to refer job applicants to staffing agencies and other private personnel offices. This constituted a change in long-standing policy. Based on the record of employment agency abuse and on the principle that job placement services should be free, federal regulations since 1933 had provided that the state employment service (ES) could “make no referral as a result of which a charge would be made *to either the worker or the employer* for filling the job.”<sup>59</sup> For many years, the private employment agency business had “objected strenuously” to this prohibition,<sup>60</sup> but in the 1980s, the widespread acceptance of the notion of client-paid fees provided a new opening. In Congressional hearings on the 1982 Job Partnership Training Act, the private personnel business, and the staffing industry in particular, pressed for inclusion of a specific provision that would encourage the public ES to make referrals to staffing firms and other private agencies.<sup>61</sup> JPTA thus included language — in effect an amendment to the 1933 Wagner-Peyser Act—that allowed public employment offices to make such referrals “as long as the *applicant* is not charged a *fee*.” The provision allowed public offices to fill job orders from any placement firm that claimed its fees were client paid, and with

passage of JPTA, the private personnel industry was eager for a surge of business from this new market.

Yet it was only under continuing political pressure, bolstered by the 1986 General Accounting Office study entitled “More Jobseekers Should be Referred to Private Employment Agencies,” that the Department of Labor, initially reticent, finally agreed to issue new guidelines to regional offices directing implementation.<sup>62</sup> State implementation took different forms. In New Jersey, private agencies seeking referrals from public offices are required to sign an agreement stating that no jobseeker referred will be charged a fee. (Of course, the state accepts the premise that any fees charged by private staffing agencies are “client-paid.”) According to regional ES staff in several states, the program of referrals to temp firms and other private agencies has grown substantially in recent years.<sup>63</sup> However, since these referrals are not separately categorized by the ES, no data on their number are currently available.<sup>64</sup>

It is also on the basis of the “client paid” fees doctrine that public social service agencies other than the Employment Service have been transformed into labor brokers.<sup>65</sup> The prime example comes from the states’ burgeoning welfare-to-work programs, in which public funds are used to pay subsidies—a portion of the fees—to private agencies that either “place” welfare recipients or, posing as “employers,” hire them directly. In this connection, a staffing industry representative states quite candidly,

The training and job placement activities in the staffing industry have a lot of appeal for those who are looking at welfare reform strategies. . . . The ability to create a successful alliance between these governmental organizations and the staffing services industry can go a long way in helping to alleviate the recruiting shortages in our industry.<sup>66</sup>

Since passage of federal welfare reform in 1996, staffing firms have offered proposals to many states eager to implement expanded “workfare” programs, and now profit from the large number of former recipients entering the workforce.<sup>67</sup> In the first year of Wisconsin’s program, staffing firms handled 42 percent of the state’s placement efforts, and 30 percent of the total jobs held by former recipients were through staffing firms.<sup>68</sup> Though extensive, the precise extent of the staffing industry’s national role in welfare reform is currently unknown, again because pertinent statistics are not made public.

Returning to our discussion of the evolution of fee charging practices, we see that another mutation of policy has occurred. With the developments discussed above, the notion of client paid fees has been stretched again, to include not only employer-paid fees but publicly paid fees as well. But government subsidies paid to staffing firms represent just the first installment of the fee program. As long as these workers remain “employed” by staffing agencies, a significant part of what they earn each hour goes for the agency mark-up, undermining workers’ ability to

gain self-sufficiency. The typical agency mark-ups of 30 to 50 percent are literally the difference between poverty and a living wage.<sup>69</sup>

#### FEE-SPLITTING REVISITED

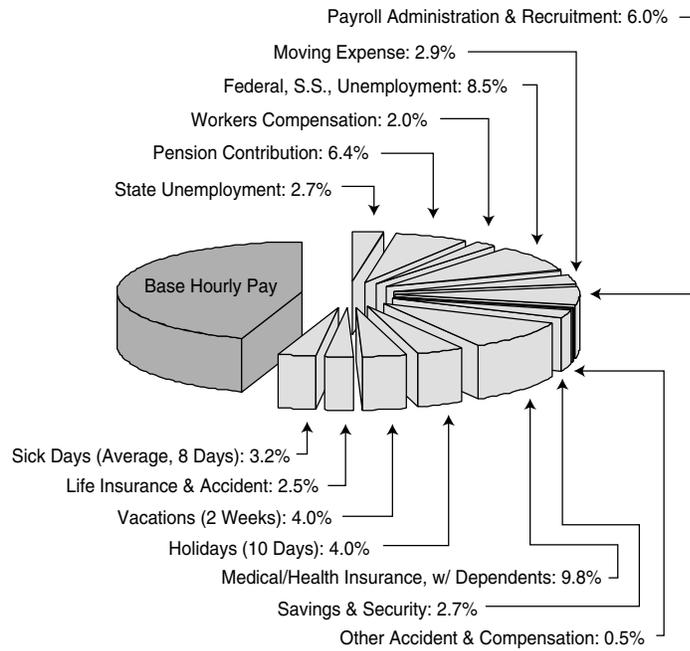
As noted earlier, *fee splitting* was among the most reviled abuses of the early employment agency era. State laws prohibited this collusion whereby workers were “given a few days’ work and then discharged to make way for new workmen, the agent and employer dividing the fee.”<sup>70</sup> During the staffing industry’s recent boom period, however, the issue has disappeared from public discussion. The spread of “client paid” fees has seemed to make regulations or concerns pertaining to fee-splitting obsolete.<sup>71</sup>

But a close look at how billing rates and pay rates are set in the staffing industry casts serious doubt on this optimistic view. Current industry practices, though more sophisticated, are in many respects indistinguishable from those which state law defined as illegal fee splitting early in the century. A strong case can be made that the practice exists today on a much greater scale than it did in its earlier manifestation and has only been hidden in the dynamics of the staffing business. In private negotiations, staffing firms and their clients share information on current labor costs and other operating expenses and decide where to set billing rates and wages so as to allow for “cost savings” to the client and a reasonable operating margin for the agency. These “savings” and the agency’s take, including its fee, are paid for by the benefits that “temp” employees will forego and the difference between the old (“premium”) and the new (“market”) wage, as positions are converted from “regular” to “temporary.” The two parties literally decide, in the words of one agency manager, to “split the difference” between them (though not necessarily in equal proportions).

This picture is supported by the industry’s own advertising claims, in which “cost savings” are guaranteed for business clients. (“Comforce has helped some clients cut labor costs by as much as 50%.”) For instance, the ad targeted to potential business clients by Comforce Corporation (the “fastest growing” staffing firm from 1996-98, according to Staffing Industry Report) graphically represents the current cost of the workers’ benefits package (including health insurance, holidays, sick days, et al.) as “your [the client’s] savings” (see Figure 1). As shown, other employment-related costs (unemployment insurance, worker’s compensation, payroll administration) become part of the revenue stream of the staffing firm. What was formerly part of the employees’ share of total income has been redistributed or split between client firm and agency.<sup>72</sup> Along with the client’s savings on labor costs, the agency’s fee has come out of workers’ pockets.

From a business standpoint, fee-splitting in its current form is clearly superior to the cumbersome early twentieth century practice in which employment agents had to collect fees directly, over and over again, from workers, and then rebate a portion of these fees to allied employers. First, although it allows the turnover of

Your Costs without COMFORCE



Your Costs with COMFORCE

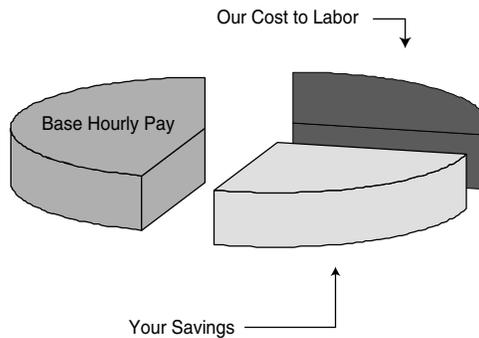


Figure 1. COMFORCE ad.

Source: COMFORCE Corporation (1999). Retrieved from <http://comforce.com/comforce/ci.htm>

workers as frequently as may be desired by the user-firm, rapid turnover is unnecessary to achieve the desired results, since long-term assignments generate continuous fees from every hour worked. Second, since fees are paid indirectly, they are invisible, making collection more efficient and the potential for exploitation

even greater. There is no need to collect fees from workers, and no need to make a “kickback” to the client firm. In effect, the “fee-split,” or redistribution of income, in proportions agreed upon ahead of time through negotiation between the agency and client-firm, is consummated when the worker accepts a paycheck and the client firm pays its bill to the agency. As “employer,” the agency issues a paycheck from which all the necessary deductions have already been made—both those required by law, which the worker finds marked, and those unmarked deductions covering the agency’s fee and the “savings” of the corporate client. Depending on the duration of a “temporary” assignment, the worker often ends up paying much more for leasing a job than what would have been the maximum allowable placement fee under state law before deregulation. Tied to the agency, what the long-term temp actually pays in fees (or, if one prefers, in reduced compensation) is not only for placement, but for the privilege of continuing her employment, a situation in no way different from the extortion practiced early in the twentieth century when agents charged periodic fees to “keep” or hold a job for one worker against another.

By winning the legal endorsement of the temp agency as “employer,” and the acceptance of the notion of client-paid fees, the staffing industry had not only solved the problem posed by government fee ceilings. It had also avoided the old prohibition against fee-splitting by submerging the practice within the private relationship between the employment agency and its client.

*The public-private split.* One reason that employers have always preferred to utilize private agencies rather than the public service has usually remained unspoken. As Grace Abbott was told in 1908 by the superintendent of Chicago’s free public agencies, it is that public agencies have “no fees to divide with contractors.”<sup>73</sup> But, now, with the policy changes (reviewed above) that allow public agencies to hand off job applicants and former welfare recipients to commercial labor market intermediaries, these “problems” with the public service may have been rectified. Thus, in addressing the issue of how public referrals to private agencies would work, the GAO considered the following suggestion:

Private agencies should split employer-paid fees with the Employment Service if it supplied jobseekers for private agency job openings, some state Employment Service officials believe. (This is what private agencies currently do among themselves when they pool resources to match jobseekers with openings.) Such fee-splitting would be an acceptable concept, private agency industry representatives told us.<sup>74</sup>

Since the term *fee-splitting* had never before been used in connection with the employment agency business except to refer to an illegal and abusive practice, the suggestion to lend it legitimacy and involve the state as partner would seem particularly striking. For the state, the payoff or “kickback” associated with using commercial labor brokers is the presumed reduction in expenditures for its employment or “welfare” programs. (The expanding practice of leasing prison labor is a particularly salient example of this, as a portion of inmates’ wages goes to offset

the costs of prison administration, a public expense.) The alliance of social service agencies with commercial labor market intermediaries favors employers' interests and has "mainly guided the poor into a low-road in the labor market."<sup>75</sup> Since, thus far, neither private or government agencies have effectively monitored job placements to determine either their quality or duration, the program of referrals to private agencies contributes to the problem of accelerated turnover ("temporary jobs") that, as we have seen, has always been associated with the practice of fee-splitting.

Interestingly, rather than wage a fight to *displace* the public service to extend its market (as earlier generations of the employment agency business had done), the staffing industry has "partnered" with it, helping to improve state agencies' "placement" statistics while continuing to serve employers' interests. From this view, it is no coincidence that the boom in "temporary work" has occurred concomitantly with the restructuring of the welfare state since the 1970s, since the expansion of the contingent labor market (otherwise called "job creation") was a "solution" for both the private personnel industry and the state itself. Though the industry does not provide figures on the proportion of its business that is represented by the public sector, government (at the federal, state and local levels) is a significant, and may actually be its largest, client. Thus the state's heavy reliance on the staffing industry to implement the latest "welfare reform" initiative was a natural choice. In a profound way, the state's answer to welfare reform literally *is* temporary work.

*Fee-splitting and wage depression.* Some observers have recently been critical of such broad concepts as globalization, new technology, and skill differences as causes for the growth of inequality and have pointed to wage structure as the largest contributing factor.<sup>76</sup> The mechanics of the wage setting process in the staffing industry (outlined above) is one overlooked locus within which wage depression and income redistribution has taken place. The private negotiation of billing rates and pay rates in the "external" labor market, mediated by the commercial staffing industry, has provided an institutional mechanism by which labor markets have been made to function more like commodity markets in recent years. "Floating" pay rates, the daily adjustment of wages to the supply and demand conditions of the external market, serve the cause of wage flexibility, one of the central functions of the staffing industry for its business clients.

The introduction and spread of this wage setting practice in industries and occupations throughout the economy may be seen as one important means by which the older norms of equity and stability characteristic of the post-World War II institutional model of wage setting have been undermined.<sup>77</sup> "Splitting the difference" in every transaction, the staffing industry has in the last quarter century played an important role in the "relentless shaving of labor costs,"<sup>78</sup> and functioned on a macro level to redivide a portion of the total national income paid out to labor and capital. Simply put, the new wave of "fee splitting," like its historical

predecessor, acts not only to exacerbate the irregularity of work but to depress wage scales toward what classical economists call the “correct” market rate.<sup>79</sup> Wage setting by the staffing industry not only reduces income for temps, but erodes traditional wage scales for all workers in the occupations and economic sectors where the industry functions to create a secondary labor market. Thus, the involvement of the staffing industry is another reason (in addition to flooding the low-wage labor market) why workfare policies exert downward pressure in the low-wage sector.<sup>80</sup> It now appears clear that the rapid expansion of the staffing industry helps account for the relative decline in the growth of compensation in the United States beginning in the early 1970s and the continuation of this trend even in the tight labor markets of recent years. Thus, researchers find consistently lower wage growth in states with a greater share of temporary help employment.<sup>81</sup>

#### CONCLUSION

With union decline and the growing externalization of labor markets since the 1970s, “individual bargaining” has been reinstated as the norm for American workers. Part and parcel of this change has been the resurgence of unregulated labor agents. Historically, periods of high labor mobility or “churning” in America have provided the opportunity for private labor agents to place what Veblen called an “overhead charge” on the price of labor. This cost has always come out of the pockets of workers.<sup>82</sup> With the widespread return of agency fees and the spread of a new brand of fee-splitting, today’s labor market is eerily reminiscent of the “secret rates and rebates” of a past era of employment relations.<sup>83</sup> Filling the “structural hole” left by the loosening of the employer-employee relationship,<sup>84</sup> the staffing industry has served as a catalyst for the secondary labor markets burgeoning within companies, occupations, and industries<sup>85</sup> and as a medium for the upward redistribution of revenues from workers to firms. What appears to many as a small percent of workers in “temporary” employment has given employers tremendous leverage in the bargaining relationship.

In his study of a union machine shop, Burawoy pointed to the crucial role of concealment in the process by which surplus value is appropriated.<sup>86</sup> Temporary work and other emergent forms of employment relations depend on new means of obscuring power and exploitation.<sup>87</sup> An aura of secrecy has long surrounded the employment agency business.<sup>88</sup> The extensive, often blatant, measures taken by staffing agencies to keep their billing rates and the wages of others a secret from workers testifies to the importance of concealment in the temporary employment relationship. By fashioning changes in law and public perception, the staffing industry gained legitimacy for its claim on a share of the revenues flowing from economic enterprise, that is, for its social “takings.”<sup>89</sup> The staffing industry’s overall “take” has been growing steadily. If an old fashioned fee schedule for the entire industry were presented to workers for 1998, it would indicate fees of \$15.2 billion, a figure that is no doubt conservative, since the trade association reporting

the data from which the figure is derived does not represent or count the personnel business as a whole. What would have been “big money crime” in an earlier era of employment agency regulation is now merely the legalized looting of workers throughout the economy.<sup>90</sup> Recalling the early history of state regulation lends support to the current fight of temporary workers for disclosure of agencies’ mark-up rates.

Due to staunch industry opposition, efforts to pass state “right-to-know” legislation that would require the disclosure of agency mark-up rates have not succeeded. In the meantime, grass roots groups (recently joined together in the National Alliance for Fair Employment) seek voluntary compliance through an industry code of conduct. The old adage to “follow the dollar” holds weighted importance for workers today. As one organization’s Website proclaims,

We believe we have a fundamental right to know how much is being charged for our work. . . . We are the ones—not the staffing agencies—who add value to the products on which we work. Knowing bill rates empowers contractors to make informed decisions about contracts, benefit options, job classifications and career paths.<sup>91</sup>

Some “discount brokers” at the high end of the staffing industry now say they provide access to billing information and allow workers to negotiate their own rates.

At the low end of the labor market, hidden agency fees undermine the ability of workers to escape poverty. Labor markets mediated by for-profit agencies is not an effective antipoverty strategy. Compensation from work must be increased if employment-based welfare reform is to succeed.<sup>92</sup> The significant slice of compensation costs siphoned off by staffing firms belies the assumption that employers cannot afford to pay a living wage. Thus, the analysis presented above suggests certain policy options, all of which have historical precedents in the United States: (1) minimally, requiring the disclosure of agency billing rates would allow workers to bid down agency fees, and would be relatively easy to implement; (2) reinstating ceilings on the amount of fees that can be extracted from workers is a more difficult measure to implement, but would help address the problem of “permatemping,” that is, keeping workers on staffing agency payrolls for extended periods; (3) once again banning the use of fee-charging agencies by public employment programs and public sector employers might spur the growth of nonprofit agencies and union hiring halls providing alternatives. These measures may be implemented without immediately raising labor costs to employers that now use private agencies. They would, however, result almost immediately in better wages, and ultimately help workers gain greater leverage in bargaining over the terms and conditions of their employment.

#### NOTES

1. Quoted in Randy Albeda and G.M.J. Veldcamp, *Temporary Work and Modern Society: Part III—Proceedings of the International Conference* (Boston: Kluwer, 1979), 123.

2. See, for example, Jackie Krasas Rogers, *Temps: The Many Faces of the Changing Workplace* (Ithaca, NY: ILR Press, 2000); Jamie Peck and Nik Theodore, "Contingent Chicago: Restructuring the Spaces of Temporary Labor," *International Journal of Urban and Regional Research* (forthcoming); Heidi Gottfried, "In the Margins: Flexibility as a Mode of Regulation in the Temporary Help Service Industry," *Work, Employment and Society*, 6, no. 3 (1992).

3. Susan N. Houseman, "Temporary, Part-time, and Contract Employment in the United States: A Report on the W. E. Upjohn Institute's Employer Survey on Flexible Staffing Policies" (Kalamazoo, MI: W. E. Upjohn Institute for Employment Research); Arne L. Kalleberg, Edith Rasell, Ken Hudson, David Webster, Barbara F. Reskin, Naomi Cassirer, and Eileen Appelbaum, *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (Washington, DC: Economic Policy Institute 1997).

4. Edward A. Lenz, "Apples and Oranges: Some Key Operational and Legal Differences Between Temporary Help and Other Services," *Contemporary Times* (Fall 1990): 15.

5. Joseph B. Darby, "The Untouchable Topic: Agencies Explain Why They Charge Fees and What is Reasonable," *Contract Professional* (July-August 1998): 37.

6. From the "employees' agreement" signed by workers sent out by Career Blazers, quoted in William Lewis and Nancy Schuman, *The Temp Worker's Handbook: How to Make Temporary Employment Work for You* (New York: American Management Association, 1988), 62.

7. Washington state House Bill 2756 (2000); Mike Blain, "We Need Full Disclosure of Agency Fee Rates," *Contract Professional* (November-December 1998): 72; Brian O'Connell, "The Untouchable Topic Part II: Agency Fees and Lack of Disclosure Feed Contractors' Anger," *Contract Professional* (November-December 1998): 33-7.

8. Elizabeth Mertz, "The Uses of History: Language, Ideology, and Law in the United States and South Africa," *Law & Society Review*, 22, no. 4 (1988): 682.

9. A Massachusetts critic referred to fee-charging agencies as "leeches engaged in sucking the life blood from the poor." Quoted by Alexander Keyssar, *Out of Work: The First Century of Unemployment in Massachusetts* (Cambridge: Cambridge University Press, 1986), 259. "The necessity of paying for the privilege of going to work," the U.S. Commission on Industrial Relations stated in 1912, "seems foreign to the spirit of American freedom and opportunity." Quoted in *Adams v. Tanner*, 244 U.S. 590, 604 (1917).

10. *Adams v. Tanner* 244 U.S. 590, 606 (1917).

11. E. L. Bogart, "Public Employment Offices in the United States and Germany," *Quarterly Journal of Economics*, 14 (1900): 341-377.

12. John R. Commons and John B. Andrews, *Principles of Labor Legislation* (New York: Augustus M. Kelley, 1967 [1916, 1936]).

13. *Adams v. Tanner*, 244 U.S. 590; John B. Andrews, "Fee-charging Employment Agencies Must Be Effectively Regulated," *American Labor Legislation Review*, 19 (1929): 367-70.

14. *Ribnick v. McBride*, 277 U.S. 350 (1928).

15. Chairman Tolan of the Select Committee of the House of Representatives, quoted by W. S. Woytinsky and Associates, *Employment and Wages in the United States* (New York: Twentieth Century Fund, 1953), 180. Seeking to close the gap in the Wagner Act which left workers using private employment agents unprotected, the Committee introduced legislation (backed by the Roosevelt administration) to impose federal regulation on employment agents under the supervision of the U.S. Department of Labor. The legislation failed to materialize.

16. *Olsen v. Nebraska*, 313 U.S. 236 (1941). In once again setting ceilings on employment agency fees, the states were guided by a uniform bill prepared by the U.S. DOL. See

U. S. Department of Labor, *Private Employment Agencies: Laws Relating to Their Regulation as of Sept. 1, 1943, Bulletin No. 57* (Washington, DC: U.S. Department of Labor, 1943).

17. Council of State Governments [hereafter CSG], *The Book of the States, Volumes 8-28* (Lexington, KY: Council of State Governments, 1950-1970).

18. U.S. Department of Labor. *State Laws Regulating Private Employment Agencies, Bulletin 209* (Washington, DC: Bureau of Labor Standards, 1960), 14.

19. U.S. Department of Labor, *State Laws Regulating Private Employment Agencies, Bulletin 252* (Washington, DC: Bureau of Labor Standards, 1962), 18; Arthur Goldberg, *Growth of Labor Law in the United States* (Washington, DC: U.S. Department of Labor, 1962).

20. See George Gonos, "The Contest over 'Employer' Status in the Postwar United States: The Case of Temporary Help Firms," *Law & Society Review*, 31, no. 1 (1997): 81-110.

21. CSG 1972-73, 508-509.

22. CSG 1970-71, 502; 1974-75, 501; 1976-77, 535; Tomas Martinez, *The Human Marketplace: An Examination of Private Employment Agencies* (New Brunswick, NJ: Transaction, 1976).

23. The standard split in 1915 was reported as 40 percent of the fees to the foreman or employer. Frances A. Kellor, *Out of Work: A Study of Unemployment* (New York: Arno Press, 1971 [1904, 1915]), 187.

24. As explained by the U.S. Commission on Industrial Relations in 1915: "The foreman agrees to hire men of a certain employment agent on condition that one-fourth or one-half of every fee collected from men whom he hires be given to him. This leads the foreman to discharge men constantly in order to have more men hired through the agent and more fees collected." Quoted by Goldberg, *Growth of Labor Law*, 140.

25. Grace Abbott, "The Chicago Employment Agency and the Immigrant Worker," *American Journal of Sociology*, 14, no. 3 (1908); Bogart, "Public Employment Offices."

26. George H. Trafton, "Employment Agencies Officially Exposed: Sworn Testimony Shows Urgent Need of State Action," *American Labor Legislation Review*, 20 (1930): 27-36.

27. Goldberg, *Growth of Labor Law*, 1962.

28. Woytinsky, *Employment and Wages in the United States*.

29. This arrangement came to be known as the "three gang system," as it meant having one group of workers on the job, another on its way from the agency, and a third group returning there to be rehired. Thus, workers complained of employment agents having "three men for one job . . . and receiving compensation (fees) from all." Commons and Andrews, *Principles of Labor Legislation*, 7; see also *Adams v. Tanner*, 244 U.S. 590, 602-3 (1917).

30. Kellor, *Out of Work*, 187.

31. In many cases, employers refused to hire directly, insisting that workers secure their job through a preferred agency, and possibly even one the employer himself owned or controlled. By arrangement with employers, some employment agents could receive fees for workers they never saw, that is, those who were actually hired directly, a practice the contemporary staffing industry calls "payrolling." See Kellor, *Out of Work*, 140-1.

32. U.S. DOL, *State Laws*, 1962.

33. *Florida Industrial Commission v. Manpower of Miami*, 91 So.2d 197, 199 (1956).

34. Gonos, "The Contest Over 'Employer' Status."

35. N.J.L. 1918 Chap. 227, Sec. 1(b).

36. Mack A. Moore, "The Legal Status of Temporary Help Services," *Labor Law Journal*, 16 (1965): 622.

37. Mack A. Moore, "Proposed Federal Legislation for Temporary Labor Services," *Labor Law Journal*, 26 (1975): 773.

38. *Nebraska v. Manpower of Omaha*, 73 N.W.2d 692 (1955); *Manpower, Inc. of New Jersey v. Richman* (Attorney General of New Jersey), Superior Court of New Jersey, Law Division, Essex County, Docket No. L-22576-56 (June 24, 1957, unpublished).

39. "The mark-up included in the billing rate is as legitimate as profit is in any other kind of business venture, and should not be treated as a fee under any conditions." Moore, "The Legal Status of Temporary Help Services," 634.

40. *Ibid.*, 633.

41. See Gonos, "The Contest Over 'Employer' Status."

42. U.S. DOL, *State Laws*, 1960.

43. *Manpower v. Richman*, 12.

44. U. S. Congress, *Hearings Before the Special Subcommittee on Labor of the Committee on Education and Labor on H.R. 10349, A Bill to Establish and Protect the Rights of Day Laborers* (92nd Congress). (Washington, DC: Government Printing Office 1971), 177.

45. Labor Management Relations Act, Section 8(b)(5).

46. Goldberg, *Growth of Labor Law*, 135.

47. CSG, 1976-77, 535. New York, for example, eliminated statutory ceilings on "employer-paid" fees provided the worker was not also charged a fee. *Ibid.*, 536.

48. CSG, 1974-1991. Throughout this period a continuing narrow battle was waged in the state legislatures between "competing bills" or "sharply divergent proposals" brought by state regulatory agencies supporting continued regulation and industry forces seeking a policy of deregulation or "self-regulation." CSG, 1974-75, 501; 1976-77, 535. Most new legislation "incorporated industry objectives almost entirely." CSG, 1972-73, 508.

49. The same reasoning was applied also to what the staffing industry called "liquidated damages," the charges made by staffing firms when temps are hired "away from them" by client firms. Many states provided that such charges would not be considered as "fees" (and would therefore be exempt from regulation) as long as client firms and not workers were held liable. For example, CSG, 1972-73, 509; 1976-77, 536. Since "liquidated damage" charges appeared to many observers to be identical to placement fees, their use threatened to undermine staffing firms' claim to be something other than traditional employment agencies. The industry's position, which became widely accepted in practice, was that staffing firms made these charges "not as payment for arranging the hire of their temporary employees, but for breach of the customer's promise *not* to hire them." Edward A. Lenz, "Liquidated Damages Revisited: A Discussion of the Legalities and Pitfalls of Liquidated Damages Provisions in Temporary Help Agreements," *Contemporary Times* (Spring 1986): 10, emphasis in the original.

50. Bruce Kaufman, "The Postwar View of Labor Markets and Wage Determination," in B. Kaufman, ed., *How Labor Markets Work* (Lexington, MA: Lexington Books, 1988), 180.

51. Lenz, "Apples and Oranges," 15. Interestingly, at the same time states were deregulating firms that relied on client-paid fees, they were simultaneously establishing more restrictive regulations for the "relatively few" employment agencies that were not exempted from coverage. To maintain their legal capacity in this area, it was important for the states to keep the regulation of employment agencies "on the books," even though the law now applied to a very small segment of the industry. This strategy allowed states to keep a regulatory unit open, and to continue to utilize the rhetoric of consumer protection, even in a deregulatory phase, and served the industry's needs as well. Indicative of this was the practice devised in New Jersey and other states whereby staffing firms that were no longer required to seek licensure continued to be "registered" by the state, a practice that kept the "regulatory" office busy, and allowed the state to continue to charge annual fees to

deregulated firms. (Agency operators complain about these fees, referring to them as “G and C”—graft and corruption.) Quite keenly, staffing firms had found a way out of regulation, not by defeating the idea of regulation itself, but by dissociating specific types of practices and firms from identification with the regulated “employment agency” business. Surely this way around fee ceilings was smarter than a direct assault on fee regulation (or worker protection) as such. Regulation was fine, as long as it was aimed at someone else.

52. Kellor, *Out of Work*, 164-5.

53. The same point was made early on by labor’s opponents of the plan for compulsory “employer-paid” unemployment insurance. Especially in the nonunion sector, such employers could unilaterally reduce wages to pay for premiums. Kenneth Casebeer, “Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology,” *Boston College Law Review*, 35, no. 2 (1994).

54. Andrews, “Fee Charging Employment Agencies.”

55. N.J.L. 1918, chap. 227, sec. 1(d), author’s emphasis.

56. Convention No. 34 Concerning Fee-Charging Employment Agencies, 1933, Article 1, author’s emphasis.

57. International Labour Office. “Interpretation of Decisions of the International Labour Conference: Fee-charging Employment Agencies Convention (Revised),” *Official Bulletin*, 49, no. 3 (1966): 393.

58. Mark Granovetter, *Getting a Job* (Chicago: University of Chicago, 1995); Martinez, *The Human Marketplace*. See also the discussion of “the pass-along economy” in Mark Green and John F. Berry, *The Challenge of Hidden Profits: Reducing Corporate Bureaucracy and Waste* (New York: William Morrow and Co., 1985), 296, 315. As one study puts it, low business failure rates in the temporary help industry reflect the “efficiency with which agencies are able to pass on the costs of order-book fluctuations to the workforce.” Peck and Theodore, “Contingent Chicago,” 30.

59. Quoted in U. S. General Accounting Office, *Employment Service: More Jobseekers Should Be Referred to Private Employment Agencies*, Washington, DC: Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, 1986, 13-4, author’s emphasis. When the question of whether public employment offices should fill job orders from temp agencies was raised, state representatives at the Interstate Conference of Employment Security Agencies in 1959 objected on the grounds that such practice would run against long-standing policy and tradition. William Haber and Daniel H. Kruger, *The Role of the United States Employment Service in a Changing Economy* (Kalamazoo, MI: Upjohn Institute for Employment Research, 1964), 67.

60. GAO, *Employment Service*, 30.

61. U.S. Senate, *Employment and Training Policy: Joint Hearings before the Subcommittee on Employment and Productivity of the Senate Committee on Labor and Human Resources and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, Parts I and II (97th Congress, 2nd session)* (Washington, DC: Government Printing Office, 1982).

62. At least one DOL official raised doubts about the reality of “employer-paid” fees. What, he asked, would “preclude the private agency from referring applicants from the State agency to employers who pay the private agency but recoup all or part of the fee from the employee?” GAO, *Employment Service*, 33.

63. ES staffers said in interviews that staffing firms make more extensive use of ES services than any other group of employers, some using it almost daily as an extension of their own offices. One staffer said he suspected that private agencies use “America’s Talent Bank” (the ES’s on-line job search service, which permits employers to search a pool of resumes) to circumvent the rule that they must have a signed agreement with the state to get

ES referrals. Michigan contracts with Kelly Services to run the computerized “Talent Bank” for that state.

64. Some public ES offices have added their own “fee-based enhanced services” to their free “core” services.

65. See Michael Indergaard, “Retrainers as Labor Market Brokers: Constructing Networks and Narratives in the Detroit Area,” *Social Problems*, 46, no. 1 (1999): 67-87.

66. Bruce Steinberg, “Temporary Help Services: An Annual Update for 1994,” *Contemporary Times* (Spring 1995): 11-16, my emphasis.

67. Ellen Reese, “From Welfare Rights to Workers’ Rights: Political Struggles over Welfare Reform in Los Angeles” (paper presented at the Annual Meeting of the American Sociological Association, Chicago, 1999).

68. John Pawasarat, “The Employer Perspective: Jobs Held by the Milwaukee County AFDC Single Parent Population, January 1996-March 1997,” University of Wisconsin-Milwaukee, Employment and Training Institute, 1999.

69. The author’s calculation of agency mark-ups is based on industry data from 1990-1998.

70. U.S. Bureau of Labor Bulletin No. 109, quoted in *Adams v. Tanner*, 244 U.S. 590, 601.

71. Martinez’ study of the employment agency business concluded that, “The extent of fee-splitting today is probably less than it was in the early 1900s, largely because of the disappearance of large labor contractors and the increased risks of detection by a government agency or moral crusader.” Martinez, *The Human Marketplace*, 48. Martinez’ study considered only the traditional or permanent segment of the employment agency business and did not include the temporary help and staffing industry.

72. “Secondary sourcing” arrangements, in which a “primary vendor” subcontracts with other staffing agencies, a frequent practice in the high-tech field, amounts to splitting in multiple ways. Income may be split with other businesses as well, as when check cashing firms locate within agency offices in the industrial sector, or when transportation to work sites is contracted to an outside firm.

73. Abbott, “The Chicago Employment Agency,” 294.

74. GAO, *Employment Service*, 22.

75. Indergaard, “Retrainers as Labor Market Brokers,” 77.

76. James K. Galbraith, *Created Unequal: The Crisis in American Pay* (New York: Free Press, 1998); Michael Hout, “Inequality at the Margins: The Effects of Welfare, the Minimum Wage, and Tax Credits on Low-Wage Labor,” *Politics & Society*, 25, no. 4 (1997): 513-524; Lucy Williams, “Rethinking Low-Wage Markets and Dependency,” *Politics & Society*, 25, no. 4 (1997): 541-550.

77. Paul Osterman, *Securing Prosperity: The American Labor Market: How It Has Changed and What to Do About It* (Princeton: Princeton University Press, 1999), 20.

78. Robert Kuttner, *Everything For Sale: The Virtues and Limits of Markets* (Chicago: University of Chicago Press, 1999), 80.

79. Given the staffing industry’s wage-setting practices, it becomes clear that the industry’s use of the term “mark-up” is misleading. The term mark-up implies a certain ordering of events, namely, that the cost of the “merchandise” to be sold—here, the temp worker’s wage—has been determined first by the agency, and then “marked-up” a certain percentage before being sold to the corporate user. For all but a small group of temps at the high end of the market, however, the flow of events is closer to being the other way around. In common practice, the prevailing pay rate at the time the client firm hires temps has been used as a guide in setting billing rates, that is, as a starting point for negotiations. Client firms, however, are normally unwilling to add the agency mark-up to the original quote. Hence, after

the final purchase price (billing rate) is set in negotiation with the corporate customer, it is *marked down* by the staffing agency to arrive at the temp worker's wage, insuring the agency a certain margin. This process accounts in part for why temps usually make a lower wage than regular employees doing the same work, and for the downward pressure on wages caused by this wage setting process. Further, since the hourly wage of the clients' regular employees has been used as a guide in setting billing rates, the cost of temporary labor to client firms has typically been the same or very close to the hourly wage of their regular (or former) employees in the same job positions. The greatest part of the corporate customer's immediate "savings" have typically come not from lower hourly rates, but from savings on benefits. See Arne Kalleberg and Kathryn Schmidt, "Contingent Employment in Organizations: Part-time, Temporary, and Subcontracting Relations," in A. L. Kalleberg, D. Knoke, P. V. Marsden, and J. L. Spaeth, eds., *Organizations in America: Analyzing Their Structures and Human Resource Practices* (Thousand Oaks, CA: Sage, 1996), 253-275; Mack Moore, "The Temporary Help Service Industry: Historical Development, Operation and Scope," *Industrial and Labor Relations Review*, 18 (1965): 569; Houseman, "Temporary, Part-time, and Contract Employment."

80. Elaine McCrate, "Welfare and Women's Earnings," *Politics & Society* 25, no. 4 (1997): 417-442.

81. Lawrence F. Katz and Alan B. Krueger, "The High-Pressure U.S. Labor Market of the 1990s," Working Paper No. 416, Princeton University Industrial Relations Section, 1999, 43.

82. E. Epstein and J. Monat, "Labor Contracting and its Regulation: I," *International Labour Review*, 107 (1973): 462. The labor market intermediary "makes a profit out of the earnings of the workers for whom he finds employment."

83. Louis Adamik, *Dynamite: The Story of Class Violence in America* (New York: Vintage, 1958 [1931]), 23.

84. See Robert Tillman and Michael Indergaard, "Field of Schemes: Health Insurance Fraud in the Small Business Sector," *Social Problems*, 46, no. 4 (1999): 572-590.

85. Randy Hodson, "Companies, Industries, and the Measurement of Economic Segmentation," *American Sociological Review*, 49 (1984): 335-348.

86. Michael Burawoy, *Manufacturing Consent: Changes in the Labor Process Under Monopoly Capitalism* (Chicago: University of Chicago Press, 1979).

87. Vicki Smith, "The Fractured World of the Temporary Worker: Power, Participation, and Fragmentation in the Contemporary Workplace," *Social Problems*, 45, no. 4 (1998): 411-30.

88. Martinez, *The Human Marketplace*, 43.

89. Elizabeth Mertz, "The Uses of History," 682. The "overall division between worker incentives and capitalist incentives is embedded in the structure of the legal system." Arthur L. Stinchcombe, *Economic Sociology* (New York: Academic Press, 1983), 183, 140-43. On "legitimized distribution," see also Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal*, 38 (1987): 837.

90. See Kitty Calavita, Henry N. Pontell, and Robert H. Tillman, *Big Money Crime: Fraud and Politics in the Savings and Loan Crisis* (Berkeley, CA: University of California, 1997) for analysis of an *illegal* example of "looting" or "collective embezzlement."

91. Washington Alliance of Technology Workers ([www.washtech.org](http://www.washtech.org)).

92. Fred Block and Jeff Manza, "Could We End Poverty in a Postindustrial Society? The Case for a Progressive Negative Income Tax," *Politics & Society*, 25, no. 4 (1997): 473-511; Kevin Duncan, "Incentives and the Work Decisions of Welfare Recipients: Evidence from the Panel Survey of Income Dynamics, 1981-1988," *American Journal of Economics and Sociology*, 59, no. 3 (2000): 433-449.