

# REGULATING THE EMPLOYMENT SHARKS: RECONCEPTUALIZING THE LEGAL STATUS OF THE COMMERCIAL TEMP AGENCY

*Harris Freeman and George Gonos*

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*This article presents a historical and legal argument for reclassifying and regulating commercial staffing agencies as labor market intermediaries. Their current legal classification as employers is a major factor contributing to the exploitation of temps. The article contrasts the deregulated environment for commercial staffing agencies with the extensive federal regulation of union hiring halls. Because these two institutions serve a similar function—providing access to the job market for short-term employees—both should be subject to comparable regulatory regimes in order to restore parity in the legal treatment of temporary employees by all parties to the employment relationship. A regulatory regime should impose on temporary help and staffing agencies a level of transparency and fiduciary obligations analogous to the duty of fair representation imposed on union hiring halls by federal labor law. Absent such legal reclassification, the staffing industry will remain unfairly privileged in the marketplace in a way that prevents fair treatment and representation for temps.*

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An integral feature of today's volatile labor markets is the pervasive use of temporary help and staffing firms to respond to the cyclical economy's fluctuating labor needs. Modern workplace law has not kept pace with this development. Federal labor law was enacted and developed during the mid-twentieth century to govern stable, long-term employment relationships, not the vicissitudes of the now-ubiquitous temporary work relationship. The Labor Management Relations Act (LMRA) does not address temporary work in the statutory text, and it has not provided an effective regulatory regime to govern the operations of contemporary staffing firms<sup>1</sup> and other profit-driven labor market intermediaries (LMIs). And, despite certain notable legal breakthroughs and some exemplary efforts creating alternative, non-exploitative agencies to challenge the likes of Labor Ready and Manpower, no one has yet to craft an effective legal framework that can advance the unionization and fair treatment of temp workers deployed in the workplace by exploitive profit-driven LMIs. Indeed, little attention has been paid to the legal status of the for-profit temp agency, the primary institution driving the expanded use of contingent workers. This essay aims to help remedy this neglect by examining the sociolegal character and history of the temp agency, an institution which by conservative

estimates deploys more than 2.5 million workers each day—more than the number employed by Wal-Mart or the big three automakers combined.

A central issue continually arises in the context of efforts to win meaningful labor rights for workers employed through commercial LMIs: how to legally characterize the status and obligations of the staffing agency that supplies “temp workers” when it is the user firm that actually engages these workers in productive labor. As previous research has shown, determining which entity is the actual employer has profound repercussions for union organizing and for the application of a wide range of employment laws (Gonos, 1997). Treating staffing agencies as bona fide independent employers of agency workers, as was the NLRB’s accepted practice during the temp industry’s boom period in the last quarter of the twentieth century, makes it practically impossible for temps to exercise their union rights.

It was only in 2000 that a landmark NLRB ruling offered a progressive resolution to one aspect of this issue. In *M. B. Sturgis, Inc./Jeffboat Division*<sup>2</sup> the Board reversed decades-old policy on the status of temp workers, ruling that, for purposes of collective bargaining, the user firm is the actual employer of both the direct and temporary employees who are engaged in common work at the user firm’s place of business. Significantly, *M. B. Sturgis* recognized that in many circumstances staffing agencies have little or no claim to employer status and thus have no say as to whether temp workers join a union with workers permanently employed at the user firm’s business. Moreover, the Board indicated that the new policy driving its ruling in *M. B. Sturgis* resulted from a significant shift in the employment paradigm, that is, the “tremendous growth in the temporary help supply industry noting that [from] 1982 to 1998 the number of jobs in the temporary help supply industry rose 577 percent, while the total number of jobs in the workforce grew only 41 percent.” Consequently, the Board noted, “certain industries and communities have begun to rely heavily on agency temps.”<sup>3</sup>

Not surprisingly, whatever potential *M. B. Sturgis* may have had to advance the labor rights of temp workers was recently quashed by President Bush’s decidedly antilabor appointees to the NLRB. In November, 2004, Chairman Robert J. Battista spearheaded a three to two decision reversing *M. B. Sturgis*. The Bush Board’s decision in *Oakwood Care Center and N&W Agency, Inc.* revived the wooden and outdated notion that contingent workers deployed by a temp agency cannot share a common bargaining unit with permanently employed workers without the permission of the temp agency.<sup>4</sup> Despite the setback which *Oakwood Care* represents, *M. B. Sturgis* was a meaningful attempt at providing a modicum of protection for temp workers’ rights and, the policy and reasoning that drove the decision was a laudable effort to creatively apply federal labor law to the widespread, but problematic, triangular employment relationship.

Yet, the analysis in *M. B. Sturgis* left an important question largely unanswered. If, as that ruling declared, the user firm is in many circumstances the *actual employer* of temp workers, then how does one legally characterize the temp agency? The answer offered in *M. B. Sturgis*—that the user-firm and the supplier-firm are both employers of the temp workers—failed to address critical

issues that arise when employers use temps to supplement their “regular” workforce. Consider, for example, what legal justification exists for the wildly disparate wage rates often earned by temps and permanent workers who share a common work experience (a condition that the *Sturgis* decision tolerated even among those belonging to the same bargaining unit). Creating an effective regime of regulation for the commercial staffing industry requires that labor advocates provide a more searching answer to the question of how to legally characterize commercial LMIs.

Based on a reconsideration of their role in American labor and legal history, this essay argues that a fundamental shift in the current legal characterization of temporary help and staffing firms is necessary to effectuate a fair regime of regulation for these formidable players in the labor relations arena. The argument has four parts. First, we locate for-profit employment agencies within the history of American labor by presenting early examples of how the labor movement responded to abusive private staffing practices. Second, we discuss the rise and fall of the regulatory regime that constrained for-profit agencies for the larger part of the twentieth century, and, specifically, how the contemporary staffing industry was able to escape effective regulation in the latter decades of the century by acquiring the undeserved and inappropriate legal status of “employer.” Third, we present empirical data and legal principles that call into question staffing firms’ current *de facto* legal status as employers.

Finally, informed by this sociolegal reevaluation of the staffing industry’s history and structure, we propose a legal reclassification, urging legislative reform to assign temp agencies and staffing firms a dual status, that of employer *and* labor market intermediary, analogous to the legal characterization of the temp agency’s pro-worker counterpart, the union hiring hall. The notion of creating an explicit legal definition for commercial staffing agencies rests on a fundamental principle of U.S. labor law: parity in the legal treatment of employees by all parties to the employment relationship.<sup>5</sup> Currently, this principle is not applied to for-profit LMIs. As this essay explains, in the last third of the twentieth century, the commercial staffing industry waged a successful national campaign to free itself of state government regulation. Moreover, certain historical factors permitted the industry to avoid express regulation under the Taft-Hartley and Landrum-Griffin amendments to the LMRA. Given the prominent role of the private staffing industry in today’s labor markets, we argue that federal labor law should restore legal parity by subjecting for-profit temp and staffing firms to a regime of regulation and structural transparency similar to that which governs union hiring halls, their functional equivalent on the labor side of the employment equation.

### **The Temp Agency and the Union Hiring Hall**

Labor market intermediaries have played a prominent role in the U.S. economy, especially during periods of economic transition and high labor market volatility. This was evidenced in the late nineteenth and early twentieth

centuries when the expansion of industrial capitalism spawned the rapid proliferation of private fee-charging agencies to supply cheap, no-frills labor to a range of industries. The labor movement responded to this form of exploitation by organizing and institutionalizing union hiring halls, mostly craft-based, in certain economic sectors. Thus, the union hiring hall and the commercial staffing agency arose as two primary kinds of labor market intermediaries, occupying—at times in direct competition with each other—a common socioeconomic niche, that is, both organized and provided human capital to industry on a short-term, seasonal, or cyclical basis.

Today, although both forms of LMIs operate in the labor market, private mega-corporations such as Manpower and Adecco clearly dominate the field, with outlets in large and small communities throughout the U.S. and the world. Also ubiquitous are small ad hoc or specialized commercial temp operations, providing sweatshop labor in industries as varied as fish processing, manufacturing, accounting, and law. At the same time, union hiring halls persist and continue to provide skilled and semiskilled labor to employers on a seasonal and temporary basis, most notably in the construction, maritime, and entertainment industries. One thing is clear: as long as the current need for cyclical and temporary labor remains high, LMIs will remain an important feature of the economy. It remains an open historical question, however, whether the predominant form of LMI will engage in the commercial exploitation of workers employed in fluid labor markets or, alternatively, some kind of proworker vehicle will emerge that can meet the flexible labor needs of our society and, at the same time, provide workers with labor representation, decent compensation, and a level of empowerment associated with the unionized sectors of the economy.

#### *Disparate Legal Treatment of Two Equivalent Labor Market Institutions*

Steven Wilborn (1997: 89) offers a useful functional definition of labor market intermediaries that explains the similarities between union hiring halls and temporary staffing agencies. He points out that both these kinds of LMIs limit frictional unemployment, that is, the time a worker spends searching for work, and both have the potential to provide an institutional continuity that allows workers to acquire medical/welfare coverage and pension benefits that otherwise would be unavailable to them as contingent workers.<sup>6</sup> Further, both union hiring halls and commercial staffing firms are often the contractually designated gatekeepers that provide an exclusive vehicle by which employees gain access to jobs in a given industry or with a certain employer.<sup>7</sup> In the mid-1990s, *Business Week* noted the functional similarity of temp agencies like Labor Ready and union hiring halls in that both provide employers with a “database of willing workers” (Weiss, 1996). Or, as one federal appellate court recently put it, an “exclusive hiring hall is akin to an employment agency where all employees hired by an employer are those referred by the union.”<sup>8</sup>

Another key structural characteristic shared by both types of LMIs is crucial to our argument for subjecting commercial staffing agencies to strict regulation.

Throughout the history of modern American capitalism, unregulated labor market intermediaries of all kinds have been prime purveyors of workplace abuse and exploitation.<sup>9</sup> On point is a recent exposé in the *New York Times*, entitled “Middlemen in the Low-Wage Economy,” that reports on the inherently exploitive triangular relationship involving private labor contractors, low-wage workers, and the economic conglomerates that actually employ contingent labor (Greenhouse, 2003). This is but one of innumerable stories about contingent workers brought to public attention in recent years by labor activists, scholars, and journalists that make it clear that the pervasive use of unregulated commercial LMIs continues to result in widespread abuse of a vulnerable strata of workers. Notably, at this historical juncture, unregulated LMIs, that is, commercial temp and staffing agencies, dominate the contingent labor market, while their highly regulated counterpart, the union hiring hall, is relegated to a relatively marginal role as a provider of labor.

The assertion that union hiring halls and commercial staffing firms perform common socioeconomic functions is not intended to gloss over their significant differences. Workers organized and dispensed by temp agencies experience substandard wages, nonexistent benefits, high levels of alienation and long-term economic insecurity, while workers organized and represented by union hiring halls are not subject to anything like the same level of exploitation and uncertainty. Indeed, rarely, if at all, are workers employed through union hiring halls considered “contingent” workers as they have acquired a level of income, job stability, and benefits that are characteristic of workers in the mainstream economy. A second related, but largely unexplored, distinction separates union hiring halls and staffing agencies: the diametrically opposite paths that government regulation of these two different types of labor market intermediaries has taken. Today, union hiring halls are highly regulated under federal labor law while staffing agencies are largely unregulated and unchecked at both the state and federal levels. Given their near-equivalent economic functions, it is worth exploring what accounts for such disparate levels of government regulation.

### *The Rise of a Regulatory Regime for Private Employment Agencies*

From the late nineteenth century until World War II, a constant stream of public criticism targeted the widespread abuses fostered by the private employment agency business. Voluminous government reports catalogued the standard industry abuses: excessive fees charged to workers, collusion with employers, and various forms of extortion and misrepresentation (see, e.g., U.S. Commission on Industrial Relations, 1916). Fee-charging practices, in particular, became a widely recognized “social evil” in early twentieth century labor markets.<sup>10</sup> Private agents earned the label of “employment sharks” by charging exorbitant fees and sending workers to nonexistent jobs. Agencies and employers colluded to bilk workers by intentionally promoting high turnover, hiring and quickly dismissing workers referred by the agency to maximize the number

of fees collected (Gonos, 2000–2001). One of the earliest labor struggles and legal battles addressing these employment agency practices occurred in Spokane, Washington in 1909, led by militant workers affiliated with the Industrial Workers of the World (IWW). Their organizing, soapbox speechmaking, and massive civil disobedience (over 400 arrests) inspired a successful boycott of the exploitive agencies by migratory workers, and culminated in a state-wide ballot referendum in which voters banned private fee-charging agencies (Foner, 1965: 177–85). The battle only ended when a U.S. Supreme Court decision, *Adams v. Tanner*,<sup>11</sup> employing the now-discredited constitutional doctrine of liberty of contract, held that the Fourteenth Amendment prevented the Washington legislature from banning private fee-charging agencies. Over the course of struggles like the one in Spokane, workers came to favor the establishment of free public or union-operated employment offices as an alternative to mistreatment in the hands of the agency sharks.

Along with workers' protests, government investigations of private agencies laid the basis for extensive state and municipal regulation. As early as 1914, twenty-five states had detailed employment agency laws on the books and nineteen had established free-labor exchanges as an alternative to for-profit offices. State regulation typically required licensing and bonding of agency operators. The laws also placed ceilings on fees or required that fee schedules be posted or filed with the state. Agencies were required to keep records, open to inspection, of all placements made and fees charged, and receipts had to be provided to workers. Many state laws made extra charges for additional "services" illegal, and also mandated refunds of fees when jobs were not obtained or turned out to be of short duration. Most states outlawed collusive fee-splitting where agencies and employers shared in the fees charged to workers. Statutory provisions also prohibited misleading advertisements and required that workers be informed of labor disputes so as to allow them to avoid functioning as scabs. The laws had teeth that provided remedies for victims and criminal penalties for agents who violated the law (Moses, 1971). Still, public outrage regularly flared up over continued gross abuses, leading to calls for even stricter regulation (e.g., Andrews, 1929).

It was only in the "New Deal" period that public enmity toward private employment agencies was quieted. During this period, employers strengthened internal labor markets as a means of recruiting and retaining workers, aided in large measure by the growth of industrial unionism, which secured job stability. In external labor markets, the free public Employment Service was firmly institutionalized, complementing the relatively strict regime of state regulation that was in place for private employment agencies—the precursors of the modern temporary help firm. Through the mid-1960s, state departments of labor vigorously pursued enforcement of employment agency laws for both permanent and temporary placements, and the U.S. Department of Labor (DOL) provided strong federal support (U.S. DOL, 1962). As a result, the private employment agency became, relatively speaking, a marginalized actor in the labor marketplace, and its abusive practices much less prevalent.

*Federal Regulation of Union Hiring Halls*

Union hiring halls came into existence as a means of ending the irregularity of work in temporary and seasonal labor markets, and to ameliorate employer discrimination and other abuses associated with the hiring process. A notable example is the celebrated West Coast longshoremen's strike in 1934, which had as its goal the establishment of an independent union hiring hall as a response to years of abuse at the hands of a company-dominated shape-up (Yellen, 1974: 327–34). Widely recognized as one of the labor battles that paved the way for the successes of the Congress of Industrial Organizations, the campaign was carried out by “casual” employees who sought unionism and a hiring hall as a means of ending the exploitation associated with their contingent employment status. But in the years following World War II, there was growing recognition that union hiring halls can also subject workers to unfair treatment, and their practices came under harsh criticism from antiunion forces. As a result of two rounds of revision to the National Labor Relations Act (NLRA), union hiring halls are now subject to an extensive set of federal regulations that, however pertinent they may be, do not apply to commercial staffing agencies.

First, the Taft–Hartley amendments spelled an end to the closed shop, which was well established in many industries where hiring halls predominated; no longer could employees be compelled to join a union as a condition of seeking employment. Second, the addition of a new class of union unfair labor practices in Section 8(b) of the LMRA provided administrative and judicial remedies to workers for a host of unfair practices that might be committed by a union-run hiring hall. Hence, a union hiring hall cannot force an employer to discriminate against applicants or employees so as to encourage or discourage union membership,<sup>12</sup> nor make access to skills programs dependent on union membership, or on a requirement that referral be from a union member.<sup>13</sup> Referral list information and out-of-work lists that serve as the basis for job referrals must be made available to all persons using the hiring hall.<sup>14</sup> Failure to abide by these lists, which determine the order in which applicants are to be referred is illegal. Further, separate and apart from being subject to unfair labor practice claims, union hiring halls are also subject to suit in federal court by any user when a departure from established hiring hall procedures results in a denial of employment.<sup>15</sup> Finally, union hiring halls cannot charge fees that are not reasonably related to the cost of their services.

Another provision of federal labor law germane to our analysis is the outright ban of negotiated prehire agreements outside the construction industry. Prehire agreements that permit a union to negotiate a contract without achieving majority status are considered highly suspect because they impose terms of employment on unrepresented workers. The fact that such agreements are routine business transactions in the commercial staffing industry reveals the glaring contrast in the scope of regulation between union hiring halls and for-profit LMIs. Significantly, it was only after extensive debate that the Landrum–Griffin amendments to the LMRA allowed even the limited use of

prehire agreements, and then only in accordance with specific objective guidelines (Hardin, 1998: 1517–23).<sup>16</sup>

In sum, under federal labor law, union hiring halls have become highly regulated LMIs. Consequently, they function transparently, their operations easily subject to open scrutiny by users to ensure fair, neutral practices. Many of the regulations governing union hiring halls are analogous to state regulations that used to govern employment agencies. Yet, none of these federal regulations apply to commercial temp or staffing agencies. Unlike union hiring halls, the story of commercial staffing agencies after World War II is one of almost complete deregulation, as discussed below.

### *The Fall of Regulation Governing the Commercial Staffing Industry*

The last twenty-five years of the twentieth century saw the steady decline of the New Deal model of employment—based on long-term attachment to a single employer—and heralded the return of high-velocity labor markets reminiscent of the late nineteenth and early twentieth centuries. With this came a resurgence of for-profit LMIs in the American economy, signaled by the now-legendary expansion of the temporary help industry that began in the 1970s. Ironically, the temporary help industry, a branch of the old employment agency business, was founded immediately after the close of World War II, at the same time the Taft–Hartley amendments weakened the position of organized labor. Nonetheless, consistent with the proregulatory mindset of the postwar period, temporary help offices were classified as employment agencies well into the 1960s, and state lawmakers and regulatory agencies continued to regulate them under laws that, as noted above, were enacted early in the twentieth century.

Over the next several decades, however, the industry fought for and won exemption from these laws and fashioned an existence in what an earlier government study had called the “no man’s land” between state and federal labor regulation (U.S. DOL, 1943: 16). Astonishingly, the deregulation of this entire industry was achieved not through the searching process of judicial review, but rather by political means. Beginning in the 1950s, the young temporary help industry (later renamed the “staffing industry”) organized a low-profile, fierce, protracted, and ultimately successful assault on the states’ regulatory regimes. Largely unopposed, and without any public hearings or debate, the industry managed between 1961 and 1971 to induce business-oriented state legislatures across the country to enact relatively simple but far-reaching statutory modifications of existing employment agency laws (Gonos, 1997).

Through its lawmaking efforts, the industry achieved two related, crucial objectives. First, it evaded the classification of temporary help firms as “employment agencies,” thus exempting them from state regulation and oversight; and second, it redefined temp firms as statutory “employers,” a status that was institutionalized in practice throughout the country in subsequent years.<sup>17</sup>

Winning employer status for temp agencies was literally the key to success for the emerging temp industry. Temp agencies’ newly minted employer status



effectively shielded user firms from most legal obligations toward agency workers, and ultimately, this became the temp industry's unspoken *raison d'être*. Importantly, this legal change facilitated a split workforce strategy whereby workers "employed" by the staffing agency were now understood as comprising a separate and distinct unit, despite the similarity in work performed by "regular" and "temporary" employees. Even before this so-called "core and periphery" staffing strategy was sanctioned by the NLRB,<sup>18</sup> the employer status of temp firms made it almost impossible for temps to organize or join existing bargaining units at their place of work over the last three decades of the twentieth century. The importance of this fact was noted in the final report of the Dunlop Commission.<sup>19</sup>

The other aspect of the staffing industry's political victory—avoiding the classification of temp firms as employment agencies—was also crucial. The detailed provisions of state employment agency law, many parallel to those governing union hiring halls under federal law, were made irrelevant by the temp industry's assault on state regulation. Temp firms were no longer required to keep records of placements made, wages paid, and fees charged open to inspection, as they previously had been in thirty-seven states. Nor were they subject to different forms of fee regulation, as they had been in thirty states where statutory provisions reflected decades of public opposition to widespread abuses and exploitive fee charges. In short, deregulation eliminated the transparency and public scrutiny that state regulation of staffing agencies was intended to achieve, replacing this with secrecy in regard to placement practices, fees, and the wages and other terms negotiated with client companies. Thus, the temp agency—an institution never considered by law or popular wisdom to have fulfilled the social function of employer—achieved employer status politically and escaped the purview of state employment agency regulation under which its predecessors had operated for most of the twentieth century.

Yet, ironically, because staffing agencies were not considered employers for most part of the last century, they have also largely passed below the radar of federal labor regulation, which has as its primary concern the relationship between employers, employees, and labor organizations. As federal labor law was being developed, employment agencies, including those handling temporary labor, were tacitly understood as labor market *neutrals* engaged in simply "matching" employees with employers. As such, they were ignored in the NLRA, and their regulation—or lack thereof—was left to the states. At the same time that industry efforts to deregulate temp firms were beginning to make headway, government regulation of labor unions and union hiring halls was being increased. With the passage of the Landrum–Griffin amendments in 1959, labor unions became subject to a range of reporting and disclosure requirements, as well as to claims for violation of an individual member's rights, so as to protect workers from abuses by unions and hiring halls run by them. But while the Taft–Hartley and Landrum–Griffin amendments purportedly established statutory parity between employers and labor organizations—subjecting both to claims of unfair labor practices—private employment agen-

cies and their progeny, temporary help and staffing firms, were given no clear classification in this statutory scheme. To this day, their status remains largely unaddressed by federal labor law, despite the fact that they have formally abandoned a neutral posture.<sup>20</sup> Consequently, the staffing industry is free of any particular federal or state oversight of its operation as a labor market intermediary. As a result, widespread agency abuses of the same kinds as those encountered by workers early in the twentieth century have returned as a daily feature of the employment scene.

### Reconceptualizing the Legal Status of Temp and Staffing Firms

The presumptive employer status that staffing firms have come to hold in practice lacks a solid socioeconomic or legal foundation and has become subject to a critical reassessment. Indeed, what the NLRB considers the most important factor in deciding employer status, the degree of control exercised over the work of employees, is usually nonexistent in the relationship between the staffing agency and temp worker.<sup>21</sup> The legal treatment of staffing firms as “employers” rests almost entirely on the fact that they perform a series of ministerial acts—issuing pay checks, collecting withholding tax, and carrying workers compensation insurance.<sup>22</sup> Hence, their employer status is increasingly seen as tenuous and flawed.<sup>23</sup>

Of many recent legal decisions that have effectively eroded the legal status of staffing firms as employers, we highlight three. Consider first *Vizzaino v. Microsoft*,<sup>24</sup> which involved long-term “contractors” who worked under the direct supervision of Microsoft managers on software products integral to the company’s core business. Because they were payrolled through outside staffing agencies, Microsoft officially treated them as “temporary” nonemployees and denied them company benefits and other rights and privileges enjoyed by similarly situated traditional employees. The Ninth Circuit Court of Appeals found that the agency temps were employees of Microsoft—not the staffing firms—and therefore entitled to participate in the company’s stock purchase plan. Ultimately, this case cast a bright light on the staffing industry’s practices and called into question temp agencies’ status as the “real employers” of temp workers.<sup>25</sup>

In the second case, *Sturgis*,<sup>26</sup> the NLRB addressed the question of who is the employer of temp agency employees for the purpose of collective bargaining. The conditions were typical of the standard staffing arrangement: temps supplied by the staffing agencies performed the same work as unionized employees, under common work and safety rules, and were subject to the same user firm supervision. The Board found “no evidence of any assignment or direction by the onsite [agency] representative.” Differences in employment conditions were limited to wage rates, availability of overtime and, presumably, the rules for hiring and promotions. In its landmark decision, the NLRB held that the consent of both the user and supplier firms is not required in order to permit the temporary employees bargaining unit status at the user employer’s place of business.<sup>27</sup> Pointing out that “all of the work is being performed for the user

employer” and that “all the employees in fact share the same employer, that is, the user employer,” the Board concluded that staffing agencies are not “independent employers.” In circumstances such as this, that is, when the locus of control rests entirely with the user employer, the Board recognized that the supplier’s consent to include the temp workers in the unit is irrelevant. Instead, the traditional community of interest test should determine the composition of the appropriate bargaining unit.

In a subsequent case, *Tree of Life*, the Board extended this reasoning by ruling that a unionized user firm was obligated to include agency temps in its bargaining unit and had a duty to bargain over those aspects of the temps’ working conditions that it controlled.<sup>28</sup> In a modification of the administrative law judge’s ruling, the Board backed away from what would have been a truly significant ruling: ordering that union wage rates be applied to the temps. This severely blunted the potentially explosive nature of the ruling. Notably, however, in a concurring opinion, Board member Wilma B. Leibman stated that she would have upheld the administrative law judge’s ruling applying *all* the terms and conditions of the collective bargaining agreement—including those affecting wages—to the temporary workers, “just as if the [user employer] had hired them without using an intermediary.” Although the specifics of the *Tree of Life* decision suggested an unwillingness on the part of the Clinton Board to provide a remedy for the core disparities in pay and benefits experienced by temp workers, the decision nonetheless signaled that Board’s recognition of the basic organizational reality that staffing firms control virtually none of the terms and conditions of the workers they supply to client firms.<sup>29</sup>

Another rationale also calls into question the staffing firm’s status as employers. Harper (1998) argues that the test for determining who is an employer for purposes of collective bargaining should not hinge solely on supervisory control, but rather on whether a given entity is a “primary direct capital provider,” that is, whether a business supplies a substantial proportion of the capital made productive by the employees. This formula would also exclude staffing firms from the category of employers, even in circumstances where a staffing agency takes on a certain degree of supervisory authority over temp workers at a user firm’s place of business. This analysis highlights an obvious structural characteristic of temp and staffing agencies: these entities perform few, if any, of the traditional economic functions associated with bona fide employers that utilize labor to make their capital productive.

### **Toward a Legal Reclassification of Commercial LMIs**

The analysis above calls into question the classification of temp and staffing firms as mere employers, and underscores the need for a definition that more accurately describes their sociolegal character. In this regard, an important lesson can be applied from the legal treatment of union hiring halls. Federal labor law has long characterized union hiring halls as having a dual status, as

nominal employers and, more importantly, as labor organizations, that is, a type of LMI. As one federal court of appeals explained, “When a union operates a hiring hall and assumes a dual role of *employer and representative*, its obligation to deal fairly extends to all users of the hiring hall” [emphasis added].<sup>30</sup> Because temp and staffing firms perform functions equivalent to union hiring halls, it makes sense to craft a legal definition that assigns to them an analogous dual status—as nominal employers but, primarily, as LMIs. By the same logic, the law should impose on commercial staffing agencies the obligation of fair dealing with workers that is imposed on a labor union that administers a hiring hall.

Subjecting temp agencies to a set of legal obligations similar to those imposed on its pro-labor counterpart would achieve the goal of restoring parity to the legal treatment of these two predominant kinds of LMIs. Certainly, the commercial nature of temp and staffing firms does not change the economic realities surrounding the employment relationships they foster, and does not justify a privileged legal classification exempting them from government oversight. In fact, because labor unions and nonprofit organizations historically generated less suspicion of wrongdoing, it was these organizations that were usually exempted from coverage by early state employment agency laws.

### *The Temp Agency as an Exploitative Labor Market Intermediary*

Contemporary exposés documenting the rampant abuses of temp and staffing firms are not hard to come by. Case studies by journalists, academics, unions, and community organizations now span several decades, documenting a host of temp industry abuses too numerous to list completely in this essay (e.g., Rogers, 2000; Henson, 1996). What follows can only summarize the pervasiveness of abusive practice that is the norm in this industry.

Favoritism and the use of arbitrary criteria in making assignments are common complaints among temps. Moreover, pay rates can vary widely for the same jobs and even within the same workplace. Because no receipt or written agreement is provided, temps are left with no recourse when, through “bait and switch” tactics, they are paid at a lower rate than promised. And fees—measured as the temp agency’s markup over wages paid—are exorbitant, far beyond the levels that state regulations had historically permitted. This has not prevented temp agencies from also charging workers for safety equipment, transportation, or check cashing.

Misleading advertisements of “temp to perm” arrangements are widely used as a marketing technique to present temp employment as a stepping stone to a “real” job. But these empty promises specify no time period or performance criteria by which a worker will be converted to “permanent” worker status. Consequently, workers can be indefinitely strung along in “temporary” work arrangements without benefits or job security. Moreover, because temps are not employees of the user firm, they often do not benefit from handbooks or established work rules that provide even the bare minimum of fair treatment. As a result, temps are used to intensify the pace of work and perform the most

degrading tasks. Agencies routinely require temps at all levels to sign legally dubious noncompete agreements containing restrictive covenants that put a “price on their head” if they accept a permanent position with the user employer. A complaint among temps, these agreements are the basis of the oft-heard charge that agency work is a modern form of indentured servitude. Staffing agencies deliberately obstruct workers from access to unemployment insurance or workers compensation, and judicial decisions provide examples of how staffing agencies shield their client firms from claims of race or gender discrimination.

Not surprisingly, today’s abuses are not qualitatively different from those experienced by agency workers a century ago, before state regulation of private agencies addressed the most exploitive conditions of temporary employment. Simply put, they are standard to the unregulated operation of for-profit LMIs and more than justify a call for strict regulation. To date, however, community-based organizations and some progressive legislators have been able to enact only a piecemeal bundle of state laws that, for example, prohibit certain specific exploitive practices, such as charges for transportation and check cashing. There has been no comprehensive effort to re-regulate the commercial staffing industry.

#### *Why Staffing Agencies Should Owe a Duty of Fair Representation to Temp Workers*

A strong case can be made for imposing a comprehensive duty of fair representation on temp and staffing firms, analogous to that which federal law now imposes on labor unions. Commercial staffing agencies make their profit by negotiating an agreement with user firms to deploy workers in productive jobs at the user firm’s business for an amount greater than the wages paid the temp workers. Indeed, the temp agency in most respects acts as if it were representing the workers’ best interests in bargaining with the user firm. However, as we have pointed out, temp workers deployed under this arrangement are extremely vulnerable and subject to exploitation. In addition to producing a level of subservience and a range of abuses typical of preunion conditions, the negotiating activities of staffing agencies impede workers’ ability to engage in concerted activity to effectuate meaningful bargaining over the terms and conditions of their employment. The nature of the triangular relationship itself—involving a user-employer, a staffing agency, and a temporary employee—results in a level of abuse that in the past has justified the adoption of a regulatory regime that imposed on private agencies an obligation of fair treatment, akin to a fiduciary duty, in order to protect workers. Because staffing agencies, like labor unions, are both gatekeepers to employment opportunities and representatives involved in setting the terms and conditions of work, imposing a legal obligation akin to duty of fair representation is appropriate and necessary.

Consider the usual scenario: staffing agency personnel meet or communicate with representatives of the user firm to discuss costs and exchange proposals concerning the agency’s billing rates and the pay rates of various classes

of workers the agency is to send (and in some cases other conditions of employment, e.g., procedures for handling grievances and dismissals). Hidden from workers, billing rates and wages are settled in private negotiations so as to allow for “cost savings” to the user firm and a reasonable operating margin for the agency.<sup>31</sup> In this process, user firms treat an agency’s staff, for all intents and purposes, as the temp employees’ representatives, explicitly recognizing their authority to come to agreement on wage rates, to sign contracts, and to take wage offers back to workers. The parties conclude what amounts to a prehire collective bargaining agreement, banned for unions in all except the construction industry because it is seen as violating workers’ right to choose their own representatives.

The staffing agency acts as if it were representing the workers’ interests, opportunistically advertising that it provides workers with good wages and benefits at the user firm’s business. Legally savvy staffing industry executives are careful to avoid language denoting worker representation, but local agency managers are less guarded. “We are the unions now,” one says. Or, as an industry enthusiast from the Cato Institute states, “the supposedly unique services of unions—bargaining on behalf of workers for higher wages, improving worker skills, providing access to desired benefits or flexibility—are being duplicated by staffing companies that deliver those services to individual workers more efficiently and more broadly” (Lips, 1998: 31). These candid comments from those “on the ground” more accurately reflect social reality than staffing industry propaganda.

Mimicking labor unions, staffing agencies go to great lengths to become what amounts to the *exclusive* agents of workers, monopolizing access to certain job markets. On their application, workers are required to sign an agreement not to discuss wages or conditions of employment directly with representatives of the user firm.<sup>32</sup> Likewise, user firms are expressly instructed in agency contracts not to discuss wages or any personnel matters directly with temp workers, to deal only through the staffing agency.<sup>33</sup>

Staffing agencies’ monopolistic lock on access to jobs restricts workers’ mobility. Temp workers often have little or no ability to choose an agency to represent them, or to deal directly with employers. For example, in “payrolling” arrangements, workers recruited directly by large corporate employers are required to affiliate with a specific agency as a condition of being hired, and must sign a noncompete agreement, even if they found the assignment on their own (Neuwirth, 2002; van Jaarsveld, 2000: 130). Workers who apply directly are referred to this “preferred vendor” (Strong, 2001: 667–68; Smith, 1998: 422).<sup>34</sup> Job seekers in smaller communities face a similar situation, often finding that employment opportunities listed in the classified ads of the local daily newspaper are available only through particular temporary help agencies (McAllister, 1998: 223).

In effect, staffing agencies having exclusive contracts with employers resemble closed-shop hiring halls, illegal for unions under the LMRA. Even in situations where hiring halls are lawful, the LMRA precludes such exclusive hiring

arrangements absent certain assurances that workers are hired by objective criteria (including training, seniority, etc.) to eliminate arbitrary and unfair practices.<sup>35</sup> And in all circumstances where exclusive bargaining and representation is lawful for unions, the law imposes on them a duty of fair representation. There is good reason to treat temp and staffing agencies in the same manner. The words of “temps” at Microsoft speak volumes on this point:

[I]f we are truly independent, then let us choose our own agency. S&T [the agency] offers its workers poor customer service . . . Yet, because it is a “preferred vendor” in my job category I could not escape their clutches when I found a new assignment . . . because of their preferred status, they have no incentive to improve their service. They’ll get workers no matter how messed up they are. When I tried to change agencies between assignments, an MS contingent staffing person told me twice, “Microsoft reserves the right to choose your payroll agency.”

I know of another agency that will compensate me more (\$, paid health and dental) without carrying over the cost to Microsoft. Volt [the agency] has done nothing to re-negotiate compensation even though original job spec has changed . . . Volt has never contacted me to ask if I’m satisfied . . . (quoted in van Jaarsveld, 2000: 129)

Workers’ rights of self-organization and freedom to choose their own representatives are obviously impaired in these situations.<sup>36</sup> They are not solicited for input in setting targets and have no voice in the negotiations. It is a common complaint among temps that when contracts are renegotiated, agencies do not always request a wage increase. Clearly, the staffing or temp agency’s substantive bargaining relationship with the user employer is one of collusion with that employer to minimize workers’ wages and benefits and to maximize profits. As the following comments of another agency worker indicate, there is often a feeling of betrayal, or in legal terms what can be characterized as a breach of fiduciary duty, in the way temp agencies treat the workers they deploy:

During the negotiations for pay rate, I felt that [the agency] represented Microsoft’s best interest and not my own. I had agreed to a rate with the MS manager and [the agency] still tried to get me to accept a lower rate of pay . . . The discussions I had with [the agency] were limited.

I think it’s unfortunate that all temps are beholden to their agencies, which are beholden to Microsoft . . . [M]y temp agency (and all the others, because they’re all in the same boat) will fight only so hard for me, because if they do something to tick Microsoft off, Microsoft can decide not to use them any more. (quoted in van Jaarsveld, 2000: 115–16)

Thus, the private staffing arrangement effectively precludes temp workers from engaging in bargaining themselves or involving labor unions to represent them

in negotiating the terms and conditions of employment under which they work. Yet, in most everyday situations, agencies do not stand up for the workers they deploy. Rather, as one study says, major staffing firms help maintain “workplace and labor-market discipline, . . . driving down and holding down the costs/wages of cheap labor” (Peck and Theodore, 2001: 494; see also Forde, 2001).

This is also evident in the temp agency’s handling of grievances. In Kelly Services’ contract with a major client, for instance, we find that “Kelly hears and acts upon complaints from its employees about working conditions, etc.” Again emphasizing their exclusive representational capacity, Kelly and other firms instruct their clients never to discuss grievances directly with temp employees. “[H]ave Kelly interact with temp employees where personnel matters arise,” the client agreement states.<sup>37</sup> But workers speak about staffing agencies’ lack of vigor in representing their interests on these matters:

. . . I noticed that most agencies, even when they knew I was being taken advantage of, they wouldn’t go to bat for you . . . They very often wimped out. They wanted to keep the accounts or whatever: “Just accommodate them.” What does that mean, “accommodate them?” (quoted in Rogers, 2000: 105)

The grievances of temp workers are typically not conveyed to the employer, but rather bottled up in the agency. In shielding the employer from temp employees’ actual complaints and demands, commercial agencies shirk the duty to fairly represent workers that their own claims have implied they would fulfill.

Absent the legal imposition of a duty to fairly represent temp workers, it is hard to imagine how temp workers will achieve fair treatment by the temp industry. Moreover, the imposition of such a duty in this industry does no more than bring a fair measure of parity to the legal treatment of all labor market intermediaries, whether they are private, for-profit companies, or bona fide labor organizations.

### **Conclusion: Correcting the Imbalance**

William Forbath (1991) has forcefully argued that the descriptive language of the law can shape the political consciousness of those engaged in labor struggles, possibly enhancing the fight for workers’ rights. In this spirit, this essay is aimed at providing labor activists and scholars with legal concepts and language that better capture the actual role of the temp or staffing agency, so that meaningful and realistic regulation can be part of the program of current and future labor struggles.

The temporary help industry is certainly deserving of the attention it has received from critics of contingent work relations. Yet, with certain exceptions its actual history and sociological functions have been sorely neglected. This is unfortunate because the issue of temporary and contingent work has had an



important, and at times central, place in American labor struggles since industrialization. The ever-present reality of temporary work in the twenty-first century labor markets makes it important to incorporate into our labor history and legal lexicon the forgotten story of how exploitative private agencies were characterized by workers and regulated by proworker legislation. Awareness of these past labor struggles can assist in forming a new vision of how to craft laws and build organization to halt the spread of the contemporary staffing industry's nonunion empire. This essay employs this history in conjunction with established principles of workplace law to construct an understanding of commercial staffing agencies and to bring the legal analysis of these entities into line with their actual labor market role. Our analysis points to the need for a legal reclassification of these for-profit LMIs in order to create meaningful standards of regulation.

In recent years, unions and community-based organizations have undertaken reform efforts to regulate some of the most exploitative temp agency practices on a state-by-state basis. This, of course, is in no way objectionable, and may indeed represent the beginnings of a more comprehensive reform movement. It should be kept in mind, however, that piecemeal legislative initiatives enacted in any state cannot effectively regulate the multinational staffing business. Indeed, the same conclusion was reached early in the twentieth century by the progressive reformers who crafted state-level regulatory regimes for private employment agencies that were far more extensive than anything being proposed today. Ultimately, the reformers proposed federal regulation, which nearly materialized in 1941 with the introduction of "A Bill to Regulate Private Employment Agencies Engaged in Interstate Commerce" (U.S. Congress, 1941). Essentially, this legislation would have required private agencies to be licensed under the U.S. Department of Labor and to comply with a list of detailed provisions modeled on the most stringent state employment agency laws at the time. If not for the entrance of the U.S. into World War II and the concomitant changes in employment brought on by the war, we might have federal regulation of the staffing industry today. It took another thirty years before Senator Walter Mondale and Congressman Abner Mikva introduced similar bills to have the U.S. DOL regulate the temporary help industry.<sup>38</sup> Unfortunately, these bills were introduced long before organized labor recognized the temp industry as an expansive and exploitative purveyor of low-wage work.

The reform proposals stemming from our analysis are aimed at incorporating the regulation of for-profit LMIs into federal labor law, an approach that is far more appropriate and parsimonious than prior reform measures. For one, the solutions we suggest eliminate the legal double standard that bifurcates the regulation of LMIs—extensive federal oversight and regulation of union-run hiring halls on the one hand, and a *laissez-faire* system for the profit-driven temp industry on the other. Moreover, this approach replaces the long list of detailed and difficult to administer provisions contained in the early state employment agency laws with an overarching and well-established legal principle—a fiduci-

ary-like duty of the temp or staffing agency to fairly represent the workers it deploys in the labor market. Specifically, this proposed legal reform involves two changes to federal labor law: first, adding a definition of for-profit LMIs to section 2 of the LMRA to identify them as legal entities distinct from employers; and second, incorporating into the law—possibly through a revision to the Labor-Management Reporting and Disclosure Act—a legal duty which requires for-profit LMIs to fully inform and fairly represent the workers they deploy. Fulfilling this duty might require temp agencies to, for example, provide workers with written receipts specifying pay rates and other terms of employment; make known the difference between the wages paid a temp worker and the amount the agency is receiving from the user firm; and require the use of objective standards to determine which workers are referred to preferred jobs. In sum, by crafting a statutory provision defining for-profit LMIs and developing a concomitant set of legal obligations owed temp workers, federal law would impose an enforceable level of transparency on temp agencies comparable to that which it requires of hiring halls and unions. Such a change would make it an unfair labor practice for a temp agency to breach its legal obligation to fairly represent the workers it sends to user firms.

Second, labor advocates should push to level the playing field so that union-run LMIs can compete in the labor market with for-profit agencies. Currently, commercial staffing agencies regularly enter into contracts with user firms that function as prehire agreements, and very often they enforce what are in effect exclusive “closed shop” hiring arrangements. The statutory text of the LMRA as currently interpreted turns a blind eye to these staffing industry practices, thus privileging for-profit LMIs over traditional union hiring halls, because the latter are legally precluded from using prehire agreements outside the construction industry, and are prohibited in all cases from instituting a closed shop. To remedy this imbalance, section 8(f) of the LMRA should be reformed to allow prehire agreements for all private sector unions in order to create a modicum of parity with the manner in which the commercial staffing industry routinely negotiates its hiring agreements with employers. The logic behind this proposal becomes clearly apparent when it is recalled that the construction industry was allowed an exemption from the prohibition against prehire agreements in recognition of the short-term and transient nature of employment in that industry. Today, it is widely recognized that such casual labor markets are a reality throughout the economy, which is the very reason for the commercial success of the temp and staffing industry.

Most labor activists recognize that given current political realities, American labor law is, for the time being, relatively impermeable to revision in labor’s favor. The courts have been averse to providing an expansive judicial interpretation of federal workplace law, and labor’s needs have fared no better in Congress. But the mood and views of legislators and judges can change quickly, as demonstrated by the rapid adoption of legal reforms following the labor movement’s popular upsurge in the early 1930s. Indeed, labor and its allies are now organizing for and anticipating the next working class upsurge or social move-

ment as a means of shifting the balance of class forces in America (Clawson, 2003). It is during these upsurges that fundamental legal reform becomes possible. It is our hope that this essay provides some tools that in the course of future struggles can aid in ending the abusive treatment of temp workers by commercial staffing agencies, and in building proworker alternatives.<sup>39</sup>

**Harris Freeman** is a visiting professor at the Labor Relations and Research Center, University of Massachusetts, Amherst, a member of the faculty at Western New England College School of Law and a cooperating attorney with the Massachusetts Civil Liberties Union. He is a machinist and toolmaker by trade and a former member of the United Auto Workers Union (UAW) and the International Association of Machinists (IAM).

**George Gonos** is Associate Professor of Employment Relations at the State University of New York at Potsdam. His research and writing focus on the legal and political underpinnings of the new labor regime and the organization of temps and other contingent workers, about which he advises community based labor groups. Currently, he is President of the Potsdam Chapter of United University Professions, AFT Local 2190.

## Notes

1. The national trade association officially altered its name from “temporary help” to “staffing” industry in the 1990s. In this paper we use those two terms, as well as “temporary help firm” and “staffing firm,” interchangeably.
2. 331 NLRB 173 (2000).
3. *Id.* citing and quoting a General Accounting Office study, *Contingent Workers: Income and Benefits Lag Behind Those of the Rest of Workforce*, GAO/HEHS-00-76, issued July 26, 2000.
4. *H.S. Care L.L.C., D/B/A Oakwood Care Center and N&W Agency, Inc. and New York’s Health and Human Service Union, 1199, Service Employees International Union, Petitioner*, 343 NLRB 76 (November 19, 2004).
5. Since 1947, national labor policy has been guided by the principle that federal labor law encourages equality of bargaining power for workers by protecting statutorily defined employees from employer *and* labor union interference with workers rights. See Findings and Policies of the Labor Management Relations Act, 29 U.S.C. § 1. More specifically, the parity principle is exemplified in the parallel provisions of Sections 8(a) and 8(b) of the LMRA, which respectively, subject employers and unions to charges of unfair labor practices. 29 U.S.C. §8(a) & (b).
6. Of course, as Wilborn also points out, even though both union hiring halls and staffing firms are in a position to institute multiemployer benefits plans, such plans are only routinely provided by union hiring halls.
7. Union hiring halls, of course, are designated as an exclusive representative and provider of labor pursuant to a collective bargaining agreement. 29 U.S.C. Section 159(a); *Breining v. Sheet Metal Workers Intl. Assoc. Local Union No. 6*, 493 U.S. 67, 87 (1989). But staffing firms also routinely enter into agreements with employers that preclude workers’ ability to secure jobs with a certain employer except through the agency (van Jaarsveld, 2000).
8. *Lucas v. NLRB*, 333 F.3d 927 (9th Cir. 2003).
9. The agricultural labor contractor is a third conspicuous type of LMI, which despite attempts at regulation, remains another prime source of exploitation of low-wage workers.
10. See generally *Adams v. Tanner*, 244 U.S. 590 (1917).

11. 244 U.S. 590 (1917). But see Justice Brandeis's dissent which would have upheld the "Abolishing Employment Offices Measure" and detailing the exploitive practices which, in his view, justifiably permitted the state to ban exploitive hiring agency practices.
12. See David J. Oliveiri, "Unions Discriminatory Operation of Exclusive Hiring Hall as Unfair Labor Practice Under Section 8(b) of the National Labor Relations Act," Section 3, 73 *American Law Reports Fed.* 171 (1985).
13. IBEW Local 99 (Crawford Electric Construction Co.), 214 NLRB 723 (1974); *NLRB v. Int'l Longshoremen's & Warehousemen's Union*, 549 F.2d 1436 (9th Cir. 1977), cert. denied, 434 U.S. 922.
14. *NLRB v. Local 139, IUOE*, 796 F.2d 985 (7th Cir. 1986); *NLRB v. Sheet Metal Workers' Int'l. Assoc.*, 491 F.2d 1017 (6th Cir. 1974).
15. *Breining v. Sheet Metal Workers Int'l. Assoc. Local 6*, 493 U.S. 67, 78 n. 3 (1989).
16. See 29 U.S.C. § 8(f).
17. See, for example, Private Employment and Information Agencies, Conn. Gen. Stat. ch. 564. Section 129(e) defines a temporary help service as a "business which consists of *employing individuals directly* for the purpose of furnishing part-time or temporary help to others" [emphasis added]. Section 130(c) states that the provisions of chapter 564, the employment agency law, do not apply to any temporary help service.
18. *Lee Hospital*, 300 NLRB 947 (1990).
19. Technically, temps could always legally organize unions vis a vis their agency employer, but for practical reasons this proved a nonviable strategy. See *All-Work, Inc. and Warehouse and Mail Order Employees Union, Local 743 IBT*, 193 NLRB No. 137 (1971).
20. Temp firms still characterize themselves as labor market neutrals when it suits their purposes, for example, in public relations where they claim to serve workers and client firms equally. Inappropriately, some academic studies are still prone to understand them as neutral "matching" institutions, despite their clear alliance with employers.
21. Grounded in the common law, the NLRB has stated that an employer-employee relationship exists "where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end." *Deaton Truck Line*, 143 NLRB 1372 (1963).
22. While the question of withholding taxes and social security payments from workers is a relevant factor, it has not been considered determinative. *Frederick O. Glass*, 135 NLRB 217, *enforced in part*, 317 F.2d 726 (6th Cir. 1963). See also Hardin, 1998: 1595.
23. One reaches the same conclusion applying the "hybrid test" that combines the right of control and economic realities tests (Rahebi, 2000).
24. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).
25. The immediate ramifications of the decision for other companies were limited because the court's ruling was based on specific pension plan language that other major user firms could learn to avoid, and also because other circuits were unlikely to follow the 9th Circuit's lead.
26. *Supra* at n. 2.
27. Prior Board decisions had established a bargaining unit rule which, in effect, precluded temporary workers from joining or accreting into a bargaining unit comprised of the user employer's workers without the consent of both the temporary agency and the user firm. *Greenboot, Inc.*, 205 NLRB 250 (1973); *Lee Hospital*, 300 NLRB 947 (1990). See also Mehta & Theodore, 2000-2001; 2003-2004.
28. *Tree of Life, Inc. d/b/a Gourmet Award Foods, N. E.*, 336 NLRB 77 (2001).
29. *Oakwood Care Center*, the Board's new, regressive ruling on the temp agency work relationship, reserves a good deal of indignation for what it labels the "anomalous" *Tree of Life* ruling because it extended what it calls "the strained logic of *Sturgis*" by ordering the accretion of the temp workers into the user employer's bargaining unit and mandating that the temps be subject to terms of the user employer's collective bargaining agreement with its union. See *Oakwood Care Center*, 343 NLRB 76 (2004). *Tree of Life* is, of course, in the direct lineage of the *M. B. Sturgis* decision and, therefore, is implicitly overruled by *Oakwood Care*. See *infra* at note 4 and accompanying text.
30. See *Plumbers and Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29, 34 (D.C. Cir. 1995) citing, *inter alia*, *Breining v. Sheet Metal Workers Int'l. Ass'n. Local Union No. 6*, 493 U.S. 67, 89 (1989).

31. The “settlement range” within which this bargaining takes place is sometimes quite narrow. Some employers set their “purchase price” for specific classes of labor which is then marked down by the agency to arrive at the workers wage (van Jaarsveld, 2000: 115). In other cases, a simple “cost-plus” formula is used, as when staffing agencies engaged in “payrolling” add their standard markup to the hourly wage paid at the time of the agreement.
32. A typical “employees’ agreement” states, “I understand that all matters relating to wages and rates are necessarily confidential and will never discuss same with clients or others.” (quoted by Lewis and Schuman, 1988: 62).
33. “Do not discuss pay rates with Kelly employees; Kelly is their employer and should handle all pay rates.” *Users Guide for Ordering & Managing Contract Labor—Jobson & Jobson/Kelly Services*, n.d., 3.
34. By 1994, Manpower reportedly controlled 330 client sites, up from just 15 in 1992 (Feder 1995: 37).
35. Sec. 8(f)(4). See Rep. No. 187 on S.1555, 86th Cong., 1st Session 27–29 (1959), *Legislative History of the Landrum–Griffin Amendments to the LMRA*.
36. Responding to criticism, Microsoft announced in 1999 that it would open up competition among agencies to allow temporary software testers a choice from among three “approved” agencies. Washington Alliance of Technology Workers, “Microsoft Revises Contingent Worker Policies,” April 2, 1999.
37. *Users Guide for Ordering & Managing Contract Labor—Jobson & Jobson/Kelly Services*, n.d., 26–7.
38. See H. R. 10349, “A Bill to Establish and Protect the Rights of Day Laborers” (1971) and H. R. 9298, “The Temporary Help Employee Protection Act” (1977). Although somewhat different in nature, there were also legislative efforts to obtain fairness for temp workers, introduced in the 1980s and 1990s, respectively, by Congresswoman Pat Schroeder (“Part-Time and Temporary Workers Protection Act,” 1987) and Senator Howard Metzenbaum (“Contingent Workforce Equity Act,” 1994).
39. For critical readings of earlier drafts, we thank Jamison Colburn, Ellen Dannin, Jeff Grabelsky, Sanford Jacoby, Tom Juravich, Debra Osnowitz, Cathy Ruckelshaus, and Danielle van Jaarsveld.

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