

Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act

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I. INTRODUCTION

On July 17, 1991, four hundred fifty garment workers employed by Raymond and Yee Nor Kong found the doors to their workplace padlocked. These workers had no prior notice that the nine shops owned by the Kongs were about to go out of business.¹ For the workers, the closure of the shops meant more than the suspension of future income. The Kongs had not paid them for two months, claiming that money was tight and that compensation would follow when cash became available. The Kongs had borrowed substantial sums from their employees, threatening to terminate workers who would not lend them money. Furthermore, the Kongs had ceased paying health insurance premiums, despite having deducted money from employees' paychecks for this purpose. Employees and their families were left without health coverage although they had paid for insurance.² The California Labor Commissioner's Office described this case as one of the worst single violations of wage and hour laws it had ever confronted.³

The Kong case is just one example of a widespread pattern of labor rights abuses in the garment industry,⁴ a global industry with significant production facilities within the United States that predominantly employs poor women of color.⁵ United States industry is not immune to charges of labor rights abuses, as the Kong case demonstrates. Although international labor lawyers rarely look to the United States first when examining worker rights violations in a global industry, the U.S. garment industry warrants such attention.

The U.S. garment industry has violated both international labor standards and federal and state labor laws with some degree of impunity for decades. Manufacturers allow their clothing to be produced by contractors who under-

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1. Robert Collier, *Sewing for a Living: Unregulated Exploitation*, S.F. WKLY., July 24, 1991, at 1.

2. Steven A. Chin, *Garment Firm's Owners Sought*, S.F. EXAMINER, July 22, 1991, at 1.

3. Interview with Henry Huerta, Deputy Labor Commissioner, Office of the Labor Commissioner of San Francisco, in San Francisco, Cal. (Aug. 1, 1991).

4. Whether toiling in Taiwan, the Philippines, Central America, El Paso, or Chinatown, garment workers are paid wages at or below subsistence level. In Guatemala, for example, about fifty thousand Guatemalans sew for name-brand manufacturers such as Levi Strauss, Van Heusen, Calvin Klein, and Liz Claiborne, earning less than seven dollars per day. Mary Jo McConahay, *Koret Move Reflects an Industry Trend*, S.F. CHRON., May 31, 1990, at A4.

5. See *infra* note 31 and accompanying text.

pay and mistreat workers, undeterred by an international regime that has little enforcement power or by a domestic statutory scheme that has failed to curb labor rights abuses in the industry. The Fair Labor Standards Act of 1938 (FLSA),⁶ designed to protect workers from wage and hour violations, does not hold the manufacturers who contract out sewing work liable for such abuses. FLSA has done little to curb labor rights abuses in the U.S. garment industry in its present state. Under FLSA, ill-treated workers have been able to sue only intermediary contractors who, for lack of resources, are often effectively judgment-proof. To remedy this serious and growing problem, Congress must amend FLSA to create a cause of action against name-brand manufacturers whose garments are produced by contractors under conditions that violate the provisions of FLSA.

Before developing several policy arguments to support such an amendment, this paper provides an overview of the industry and the position of U.S. workers and manufacturers within it. Part II describes the effect of international competition on labor practices within the United States. Part III discusses the structure of the garment industry and the relationship between manufacturers, contractors, and workers. Part IV describes manufacturer complicity in labor rights abuses. Part V presents the proposed amendment to FLSA and provides the policy arguments supporting such a remedy. Finally, part VI assesses the objections and practical difficulties such an amendment is likely to encounter.

II. EFFECT OF INTERNATIONAL COMPETITION ON U.S. LABOR PRACTICES

Garment production in the United States is part of a worldwide industry that has changed markedly over the last thirty years.⁷ In the late 1950s, only one out of twenty-five garments purchased in the United States was produced abroad.⁸ During the 1960s and 1970s, domestic manufacturers began moving operations to Asia and South America in search of cheaper labor.⁹ By the late

6. 29 U.S.C. §§ 201-219 (1988).

7. Dilip K. Das, *Dismantling the Multifibre Arrangement?*, 19 J. WORLD TRADE L. 67, 68 (1985).

8. Diane Yen-Mei Wong, *Behind Unmarked Doors: Developments in the Garment Industry*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 159, 166 (Asian Women United of Cal. ed., 1989); Carol A. Parsons, *The Domestic Employment Consequences of Managed International Competition in Apparel*, in THE DYNAMICS OF TRADE AND EMPLOYMENT 113, 113-20 (Laura D'Andrea Tyson et al. eds., 1988).

9. In 1982, foreign competitors could hire labor at wages ranging from 5 to 32% of U.S. wage levels. Parsons, *supra* note 8, at 137-38. An associate research director for the International Ladies Garment Workers' Union estimated that the average garment worker earns \$0.25 per hour in the Philippines, \$0.16 per hour in China, \$1.18 per hour in Hong Kong, and \$0.63 per hour in South Korea. Wong, *supra* note 8, at 166.

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1980s, sixty to sixty-five percent of U.S. name-brand garments were produced overseas.¹⁰

However, in recent years a combination of uncertain political conditions abroad, increased labor costs, poor workmanship, and problems associated with moving goods quickly from distant locations has worked to reverse this trend.¹¹ As one manufacturer stated, "[r]ight now, Korea, Hong Kong and Taiwan are very expensive . . . for labor, for quotas, for import duties. Manufacturers that used to take up three, four floors of a factory in Hong Kong are now shrinking, shrinking, shrinking to one floor or half a floor."¹² As a result, the U.S. garment industry, though still sensitive to the problem of "runaway shops,"¹³ remains a significant producer in the global assembly line and a significant domestic employer.¹⁴ Indeed, statistics indicate that the number of garment shops and garment workers in the United States has increased substantially in the past ten years.¹⁵

Yet as illustrated by the Kong case, this spectacular growth has a dark side. As one commentator argued, "Other than unabashedly illegal enterprises, [the garment industry] is by all accounts the most lawless industry."¹⁶ Faced with significant international competition, the industry has created, according to sociologist Edna Bonacich, "a Third World labor force here to match the Third World labor force with which they're competing abroad."¹⁷

Ample evidence supports Bonacich's claim. For example, in 1990 inspectors from California's Department of Industrial Relations visited almost 1,700 garment shops in Los Angeles and cited eighty-six percent of the shops for various labor law violations. They imposed \$1.7 million in fines as a result

10. Wong, *supra* note 8, at 166.

11. Stephanie Strom, *U.S. Garment Makers Come Home*, N.Y. TIMES, Oct. 8, 1991, at D1.

12. *Id.*

13. The term "runaway shops" refers to manufacturers who move their garment production overseas to circumvent burdensome government regulations and laws and to take advantage of cheaper labor costs.

14. Garment manufacturing in the United States employs over two million workers nationwide. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE U.S. TEXTILE AND APPAREL INDUSTRY: A REVOLUTION IN PROGRESS—SPECIAL REPORT 33 (1987) [hereinafter U.S. TEXTILE SPECIAL REPORT]. California alone accounted for approximately 135,000 garment workers in 1990-1991, with approximately 95,000 workers in Los Angeles County and about 14,000 in the San Francisco Bay area. EMPLOYMENT DEV. DEP'T, STATE OF CAL., GARMENT AND HOSPITALITY INDUSTRY SURVEY Attachment 1 (1991) (on file with author) [hereinafter GARMENT INDUSTRY SURVEY]. Some estimate that the industry in Los Angeles stimulates five billion dollars of economic activity a year in the local economy. Mark Thompson, *Threadbare Justice*, CAL. LAW., May 1990, at 30. In the San Francisco Bay area, the garment industry is the largest manufacturing industry, accounting for 23,000 jobs and five hundred million dollars in local volume. Collier, *supra* note 1, at 12.

15. For example, the number of garment shops in California has increased from 2,750 in 1983 to 5,243 in 1990. Kelly Gust & Carolyn Newbergh, *Threadbare Dreams: Abuses Abound in Oakland's Sweatshops*, OAKLAND TRIB., July 28, 1991, at A8.

16. Thompson, *supra* note 14, at 30.

17. Sonni Efron, *Sweatshops Expanding Into Orange County*, L.A. TIMES, Nov. 26, 1989, at A38; Parsons, *supra* note 8, at 147.

of this inspection.¹⁸ In San Francisco, a recent survey conducted by two employees of a Garment Workers Center affiliated with the International Ladies Garment Workers Union (ILGWU) discovered a similarly high percentage of violations. The Center's employees, who posed as seamstresses seeking employment, applied for work at 230 shops, routinely inquiring about matters such as payment of minimum wage, overtime, workers' compensation, and other legally protected matters. They found that 161 shops, or seventy percent of the shops surveyed, flatly refused to pay overtime, while sixty percent paid below the minimum wage. Other shops employed young teenagers in violation of child labor laws and regularly sent workers home at night with work to avoid paying overtime.¹⁹ Indeed, after telling a prospective employer that she did not have much experience, one of the Center's surveyors was offered training for no wages. "The boss offered to let me work for free. She said, 'I give you free thread, free electricity.' But I had to promise to stay for six months."²⁰

As these examples indicate, international competition has prompted some U.S. garment makers to circumvent labor laws to reduce costs while maintaining proximity to major markets.²¹ Recent indications that more garment shops are opening in the United States, though promising for U.S. workers, cannot negate the effects of international trade on labor practices within the United States.

III. THE STRUCTURE OF THE U.S. GARMENT INDUSTRY

A. *Manufacturers and Contractors*

Even without international competition, the very structure of the garment industry renders abuses of labor laws virtually inevitable. A congressional report describes the garment industry as the one sector of the textile industry likely to retain a highly decentralized structure of small firms.²² As a recently published report noted, "There are over 15,000 firms in the industry, and the top four firms in almost all product segments account for less than twenty-five percent of total shipments."²³ This decentralization makes regulation difficult and thwarts attempts to set standard wage rates.²⁴

18. Thompson, *supra* note 14, at 30.

19. Collier, *supra* note 1, at 12.

20. Gust & Newbergh, *supra* note 15, at A8.

21. Parsons, *supra* note 8, at 146.

22. U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 33. While in many industries the fifty largest firms account for 90 to 100% of domestic production, the fifty largest firms in women's apparel seldom account for more than half of domestic shipments. *Id.* at 63.

23. Parsons, *supra* note 8, at 115.

24. Randi Weingarten, *The Re-emergence of the Sweatshop in the Downstate New York Area*, 15 INDUS. & LAB. REL. F. 69, 86 (1981).

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In addition, intense competition within the industry forces firms to cut prices and reduce profit margins to perhaps the lowest of any U.S. industry.²⁵ The multilayered structure of the industry means that many people are trying to take a profit from this narrow margin. As one newspaper described:

Imagine four people with a powerful thirst who want to squeeze juice from an orange. Imagine they're greedy.

They take turns squeezing it, so that the last person probably ends up with just a few drops.

That's how the apparel industry is said to work—on the squeeze principle.

It starts with investors, financial houses and retailers who squeeze out big profits, and ends with seamstresses who put in most of the labor for the few remaining bucks left.²⁶

The key players in the production aspect of the industry are manufacturers, contractors, and garment workers. Manufacturers design and merchandise apparel, but most now contract out the production of their garments.²⁷ Contracting out the production part of their business has enabled manufacturers to minimize their investment and insulate themselves from instability and risk. By characterizing their relationship with contractors as independent, they have avoided legal responsibility for workers' compensation, unemployment insurance and fringe benefits. In short, garment manufacturers have preferred contracting for two reasons: they can control how much or how little contractors are paid, and they can take advantage of the prevailing presumption that they are not liable for wage violations in their contractors' sweatshops.

Why are contractors so vulnerable to manufacturer domination? Sometimes called "glorified workers,"²⁸ contractors produce apparel according to specifications established by manufacturers. A contractor may work for one or several manufacturers and obtains work by bidding against other contractors. Bidding in the industry is fiercely competitive due to an overabundance of contractors.²⁹

Most contractors in the major garment centers are monolingual immigrants who were formerly garment workers themselves. They open or buy garment shops because entering the industry is one of the few opportunities for econom-

25. *Id.* at 83-84; U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 64.

26. Carolyn Newbergh & Kelly Gust, *Seamstresses Crushed Under Profit Squeeze Pile*, OAKLAND TRIB., July 28, 1991, at A9.

27. The trend for apparel firms to abandon producing their own garments in favor of contracting the work out became evident in women's outerwear between 1977 and 1982. U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 62. A prime illustration of this strategy is provided by Liz Claiborne, the world's largest women's apparel company, which does not produce any of its own merchandise. Liz Claiborne uses over 70 contractors, approximately 32% of whom produce the garments in the United States. Parsons, *supra* note 8, at 145.

28. Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry* (pt. 5), L.A. HERALD EXAMINER, Jan. 28, 1981, at A8. Another author described a contractor as "more of a supervisor of employees than an employer himself." Weingarten, *supra* note 24, at 85.

29. Newbergh & Gust, *supra* note 26, at A9.

ic advancement available to them that requires little capital.³⁰ Having gone into business with the smallest amount of capital necessary, a typical contractor is undercapitalized. In addition, contractors know little about running a shop, even though they may have worked in one. Lack of business experience and education, lack of capital, and fierce competition with other contractors all contribute to the contractor's limited power to bargain with manufacturers.

B. *Garment Workers and the Modern "Sweatshop"*

Similarly, garment workers have limited power to bargain with their direct employers, the contractors. A typical garment worker is a woman of color who recently immigrated to the United States from Mexico, Latin America, or Asia, who thus is less likely to assert her rights than the typical worker in another industry. According to a congressional report, "[a]pparel is one of the largest employers of women and minorities. People from small towns with few alternatives, the under-educated, and immigrants are widely employed in the industry, providing a low-wage, exploitable labor force."³¹

In many cases, garment workers immigrated to this country illegally.³² According to census statistics, the garment industry depends more on undocumented workers than any other industry.³³ This reliance on undocumented labor persists despite recent laws passed by Congress to prohibit such practices. The Immigration Reform and Control Act of 1986 (IRCA), for example, imposes fines against employers who hire undocumented workers.³⁴ Congress passed this provision to reduce illegal immigration by driving illegal aliens out of the workforce.³⁵ Theoretically, the industry should have faced dramatic labor shortages after the passage of IRCA. Yet the October 1991 Garment and Hospitality Industries Survey by the California Employment Development Department indicated that, in the four areas where the garment industry is most concentrated (Los Angeles, Orange County, San Diego, and the San Francisco Bay area), only six out of 120 garment employers reported any labor shortage, and none indicated that the shortage was related to IRCA.³⁶

30. Weingarten, *supra* note 24, at 82, 86.

31. U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 62.

32. According to one source, 39% of garment workers are undocumented aliens. Parsons, *supra* note 8, at 146.

33. Thompson, *supra* note 14, at 30; *see also* Weingarten, *supra* note 24, at 79 (quoting *60 Minutes* interview saying that if all undocumented workers were deported, U.S. garment industry would close down. CBS television broadcast, Nov. 4, 1979).

34. 8 U.S.C. § 1324a(e)(4) (1988).

35. BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, EMPLOYER SANCTIONS AND U.S. LABOR MARKETS: FIRST REPORT 3 (1991).

36. GARMENT INDUSTRY SURVEY, *supra* note 14, at 2.

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Immigrant rights advocates believe that IRCA merely exacerbated a bad situation by driving garment workers underground.³⁷ This has increased the opportunity for contractors to force immigrants to accept lower wages and substandard working conditions.³⁸ As one commentator explained, "[i]t obviously hurts all workers when one sector of the labor force is driven further underground."³⁹

Recent immigrants and undocumented workers generally are unfamiliar with labor and health laws or standard labor practices in the United States.⁴⁰ Even when aware of these laws, they often are unwilling to assert their rights for fear of deportation or job termination. Immigrants may view their situation either as an inevitable condition of being employed or as outside the scope of legal remedies.⁴¹ Indeed, complaining about pay or mandatory overtime is often grounds for dismissal. Conversely, according to a recent article in the *San Francisco Examiner*, workers often must give their employers gifts of liquor and food to stay in favor.⁴² According to one immigrant garment worker, "If your supervisor tells you to sit there, you sit there; if he tells you to kneel, you kneel."⁴³

In another instance, a *Los Angeles Herald Examiner* reporter disguised herself as a poor Brazilian without working papers and obtained work in several garment shops in Los Angeles. She reported that the conditions in the shops were "worse than I ever imagined in this country. If I hadn't been there, I would not have believed it." She was "grossly and unfairly underpaid," a meager \$38.74 for five days of work in a non-union shop and \$2.50 per hour for seven hours of work in a union shop.⁴⁴

The term "sweatshop" can be used to describe businesses exhibiting any number of traits: shops that do not pay the Federal minimum wage or, in union shops, the wage stipulated by the union contract; shops with poor lighting that are overheated, often because boilers for the pressers are in the same room as the sewing machines; shops that are in violation of building, safety, and sanitation laws; and shops that require workers to take work home.⁴⁵ In 1983,

37. Doug Turetsky, *Immigrants Sweat It Out in Illegal Garment Factories*, IN THESE TIMES, May 16, 1990, at 9. Up to 35% of garment production occurs in unregulated, "underground" shops. U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 62.

38. Thompson, *supra* note 14, at 84.

39. Turetsky, *supra* note 37, at 9.

40. Barbara E. Koh, *Alterations Needed: A Study of the Disjunction Between the Legal Scheme and Chinatown Garment Workers*, 36 STAN. L. REV. 825, 833-34 (1984).

41. *Id.* at 844.

42. Steven A. Chin, *Sweatshops: Bay's Ugly Secret*, S.F. EXAMINER, Feb. 13, 1989, at A10.

43. *Id.*

44. Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry* (pt. 1), L.A. HERALD EXAMINER, Jan. 14, 1981, at A1.

45. Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry* (pt. 2), L.A. HERALD EXAMINER, Jan. 19, 1981, at A8. For a detailed discussion of sweatshop conditions and the reappearance of sweatshops in New York and California, see Weingarten, *supra* note 24, at 71-78.

New York Attorney General Robert Abrams stated that, "the sweatshop is almost as big a problem as it was at the turn of the century" ⁴⁶ That year a major *New York Times* report on wage and hour violations in New York's Chinatown described working conditions as follows:

Workers can make \$5 an hour, particularly in union shops, although wages can run as low as \$1 an hour or, for a time, as high as \$9 an hour, because of the complicated piecework wage system that has almost always existed in the industry. The industry and the union consider this system efficient, and there is little effort to change it, although some critics and some workers say it makes the workers both slave driver and slave.

Wages in a Chinatown shop are 50 cents for a skirt and 50 cents for a jacket, two workers said. For this, the workers said, they must, on a skirt, sew two darts, a waistband and a zipper, and make a slit; on a jacket, they must sew a pocket and do top stitching.

. . . .
The workers, both of whom had been in the garment industry for several years, said they were making about \$9 or \$10 a day [in a union shop]. They said their employers altered the hours listed on their checks to make it appear as though they received the minimum wage. ⁴⁷

The "piecework wage system" refers to an incentive system that divides garment production into repetitive tasks requiring little skill. Instead of sewing a whole garment, workers sew only collars, sleeves, zippers, or buttonholes and are paid according to the number of "pieces" they complete. Many garment workers are paid on this basis. In reality, the piecework system, rather than being a true incentive device, is used to circumvent the wage and hour laws. ⁴⁸

As the preceding discussion indicates, many garment workers are not paid minimum wage and do not receive overtime pay. This situation both demands reform and seems ripe for unionization. However, "hostility from employers, a high failure rate among businesses and the transient and vulnerable nature of many employees have undermined organizing drives." ⁴⁹ The ILGWU, for example, has succeeded in attracting only thirty percent of women garment workers to its ranks. ⁵⁰

46. William Serrin, *After Years of Decline, Sweatshops Are Back*, N.Y. TIMES, Oct. 12, 1983, at A1.

47. *Id.*

48. *Id.*

49. Bob Baker, *Union Targets Sweatshops Operators*, L.A. TIMES, Apr. 27, 1990, at B3.

50. Gust & Newbergh, *supra* note 15, at A8. For a more detailed discussion of the union's role, see Koh, *supra* note 40, at 829-31, 847 (discussing failure of ILGWU in San Francisco's Chinatown); Parsons, *supra* note 8, at 132-33 (examining reasons for decline in unionization in garment industry); Weingarten, *supra* note 24, at 87-88, 96-97 (presenting more favorable account of ILGWU's role in New York garment industry).

IV. MANUFACTURER COMPLICITY IN WAGE AND HOUR VIOLATIONS

Manufacturers generally deny responsibility for the pervasive wage and hour violations in the garment industry. Despite the extent to which the problem has been publicized and the special efforts that labor law enforcement officials have directed to the garment industry, manufacturers maintain their ignorance of widespread labor rights abuses. The following statement of an industry official represents the manufacturers' general attitude: "[m]anufacturers have no control over any violations by the contractors There may be some rogue contractors out there who violate the law, and they should be flogged But the manufacturers can't be held responsible."⁵¹

Garment workers, contractors, and observers of the industry such as enforcement officials and union organizers argue that the very manufacturers who deny their complicity have helped create the problem through their pricing techniques. Generally, manufacturers calculate the contract price on the basis of the time it takes their sample-makers⁵² to produce the garment under "accepted industry conditions."⁵³ However, such estimates inaccurately reflect the actual production process.

A valid time-and-motion study that purports to reflect the amount of work to be done by a garment worker must be based on the performance of an average laborer working under average conditions. Therefore, a realistic contract price estimate must take several factors into account: the quality of sewing specifications, supervision, tools, and equipment; the skill level of garment workers; delays beyond the workers' control; the amount contractors have to pay pieceworkers who cannot sew enough pieces of garment to earn the minimum wage; and the time workers need to learn a new style.⁵⁴ A manufacturer's time-and-motion study, on the other hand, is based on the time it takes sample-makers working under conditions far better than those in the average sweatshop to produce a given garment. Contract prices based on these studies therefore underestimate the amount of time necessary for the typical garment worker to sew a piece of a garment using old machines and under little or no supervision.

A great deal of evidence indicates that these techniques result in contract prices so low that they leave contractors in only slightly better financial position than their workers. Contractors frequently complain that manufacturers do not pay them enough to cover costs and make a profit. In a recent article

51. Collier, *supra* note 1, at 12 (quoting Randall Harris, Executive Director of Fashion Industries, clothing industry umbrella group).

52. Sample-makers are seamstresses generally hired to sew sample garments to be displayed in showrooms for retailers' and buyers' inspection.

53. Wolin, *supra* note 44, at A10.

54. Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry* (pt. 4), L.A. HERALD EXAMINER, Jan. 25, 1981, at A12.

in the *Los Angeles Times*; contractors in Southern California complained that "they are paid so little by the manufacturers that they themselves are barely earning the minimum wage."⁵⁵ As one contractor stated, "[w]hy doesn't the Labor Department go to the shops and ask us how much we get for one garment If they did that they would go [fine] the manufacturer because they didn't pay us the minimum wage."⁵⁶ Thus, after contractors complete a job, they often have little money left to pay themselves. Naturally, even less remains for the workers. Yet contractors continue to accept the prices set by manufacturers, knowing that competitors will take the work they reject. As anthropologist Bernard Wong noted, "[w]hoever enters the lowest bid gets it. It's a dog-eat-dog world."⁵⁷

Unscrupulous manufacturers also abuse contractors by refusing to pay the contract price because the apparel is purportedly either improperly sewn or not delivered in time. In California, for example, within a two-year period over three hundred contractors informally complained to the California Department of Labor Standards Enforcement about manufacturer nonpayment for completed work.⁵⁸ The director of the Department's Concentrated Enforcement Program estimated that in eighty percent of the cases, manufacturers did not substantiate their arguments. They merely stated that they had to hire another contractor to rectify the first contractor's errors and that the apparel had already been shipped to the retailer. In a majority of these cases there are no written contracts, making it difficult for contractors to win lawsuits, even in the rare instance that they are able to retain attorneys. Nonpayment by the manufacturer directly affects garment workers: when a manufacturer refuses to pay the contract price, the contractor reduces the workers' wages or goes out of business without paying them.

Cutting labor costs is critically important for garment contractors. Overhead costs such as rent and utilities are fixed, and there is little room for entrepreneurial spirit among contractors, who neither buy their own fabric nor merchandise the final product. In essence, garment contractors are selling labor, which constitutes most of the contract price. A tiny difference in labor costs, especially on a large order, may make or break a contractor.⁵⁹

Cutting labor costs has become even more important in recent years, since overhead costs have increased without corresponding increases in contract

55. Sonni Efron, *Targets Get Bigger in Sweatshops War*, L.A. TIMES, Feb. 5, 1990, at A3.

56. Quoted in *id.*

57. Newbergh & Gust, *supra* note 26, at A9.

58. Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry* (pt. 3), L.A. HERALD EXAMINER, Jan. 22, 1981, at A10.

59. U.S. TEXTILE SPECIAL REPORT, *supra* note 14, at 62; Weingarten, *supra* note 24, at 97; Harold P. Dygert, II & David Shibata, Comment, *Chinatown Sweatshops: Wage Law Violations in the Garment Industry*, 8 U.C. DAVIS L. REV. 63, 64 n.10 (1975).

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prices.⁶⁰ Ironically, fines incurred by contractors for labor and health code violations add to the costs, increasing non-wage expenses and further decreasing workers' salaries. One contractor admitted that small companies often violate labor laws, explaining, "Small shops cannot afford to pay minimum wage, or overtime. Profits are very small, and with costs, nobody can afford minimum wage."⁶¹

V. CORRECTING ABUSES: AN AMENDMENT TO FLSA

Employers are unlikely to improve working conditions in the garment industry under the current legislative scheme. Therefore, Congress should amend FLSA to hold manufacturers jointly liable with contractors for wage and hour violations. This initiative will ensure that the rights protected by FLSA are supported by corresponding remedies.

A. *The Ineffectiveness of Current Law*

The Fair Labor Standards Act was designed to protect both the unorganized and the lowest paid workers, those workers with little bargaining power to protect themselves from exploitative wages and excessive hours.⁶² Today's typical garment workers are exactly the type of workers Congress intended to protect, "the men and women who are not organized . . . who are subject to the tyranny and oppression of sweatshops"⁶³ Clearly, however, the wage and hour laws and the enforcement mechanisms currently in place have not achieved these goals.⁶⁴

The Fair Labor Standards Act has failed to protect garment workers primarily because it has not dealt with the underlying cause of the sweatshop problem: the inability of workers and contractors to force the manufacturer's capital to be dispersed equitably among the various levels of production. Without manufacturer liability, abuses will not be rectified and the protective and remedial goals of FLSA will go unfulfilled.

60. A shift in the industry toward using synthetic fabrics exacerbated this trend by lowering material costs, thus accentuating the significance of labor cost differentials. Parsons, *supra* note 8, at 120.

61. Collier, *supra* note 1, at 12.

62. 81 CONG. REC. 7652, 7672 (1937) (statement of Sen. Walsh).

63. *Id.* at 7652.

64. For further discussion of reasons that legislation has failed to protect garment workers, see Weingarten, *supra* note 24, at 77, 99; *see also* Koh, *supra* note 40, at 842-54 (comparing ineffectiveness of legal regime for labor rights with more effective scheme for housing law in San Francisco's Chinatown). For a discussion of how FLSA has failed to meet the needs of homeworkers, see Laura Helene Goushorek, Note, *Crisis after Dole: The Plight of Modern Homeworkers*, 8 HOFSTRA LAB. L.J. 167, 174-77, 188-89 (1990).

The current system relies heavily on government enforcement mechanisms that require resources the government is unable or unwilling to allocate.⁶⁵ It also presumes that garment workers will bring lawsuits. This presumption fails to take into account the prohibitively expensive nature of such litigation, the socio-cultural barriers to seeking legal remedies,⁶⁶ and perhaps most importantly, the impracticability of collecting damages from most contractors, whose limited assets make them judgment-proof.

Manufacturer liability goes to the heart of the sweatshop problem: the contracting arrangement primarily used to evade the minimum wage laws. Manufacturer liability would promote the pursuit of remedies. Garment workers who have little incentive to sue an insolvent contractor are more likely to initiate lawsuits to collect unpaid wages if a solvent defendant is available.

B. *Liability Theories*

Garment manufacturers who claim that they are not jointly liable for labor law violations that occur in their contractors' shops base their argument on the outdated notion that manufacturers should not be held liable for the acts of their independent contractors. At common law, courts used a control test to distinguish employees from independent contractors.⁶⁷ The distinction determined a master's liability for the wrongful acts of an alleged servant under the doctrine of respondeat superior.⁶⁸ Where the tort-feasor was an independent contractor beyond the control of the master, the master could not be held liable.

The rationale for this rule is often stated as follows: since the person hiring the independent contractor (the "master") does not have the power to control the contractor's manner of working, the master should be able to rely on the presumption that the contractor will comply with any legal duties owed to employees and third persons.⁶⁹ The work is to be regarded as the contractor's own business, and the contractor is the proper party responsible for preventing, bearing, and distributing the risk.⁷⁰ However, many exceptions to this rule have developed in the last century, and the general rule is followed today only

65. Indeed, a bill introduced in 1989 by Representative Charles E. Schumer (D-New York), called the Sweatshops Prevention Act of 1989, provided for penalties of \$10,000 a year for repeat violators, and allowed Federal authorities to seize garments. It also provided a criminal penalty of up to one year. But the measure was aimed only at contractors, not at manufacturers. H.R. 3125, 101st Cong., 1st Sess. §§ 4-5 (1989) (did not pass Education & Labor Committee).

66. See *supra* notes 40-41 and accompanying text.

67. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

68. See *id.* §§ 219-220.

69. See *Harold A. Newman Co. v. Nero*, 31 Cal. App. 3d 490, 496 (1973); see also RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1958).

70. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

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where "no good reason is found for departing from it."⁷¹ Policy considerations frequently call for such a departure.⁷²

The claim that garment manufacturers cannot be held legally liable for the acts of their "independent" contractors is faulty. Vicarious liability is anything but a novel concept, except perhaps to garment manufacturers.⁷³ Manufacturers can indeed be held liable for contractors' violations of FLSA under a theory of vicarious liability that accounts for risk allocation and receipt of benefits. Such a theory is grounded in sound public policy. By vicariously holding a master liable for his or her servant's tort, the law attempts to allocate risk of loss to the person best able to anticipate, prevent, spread, or bear the loss.⁷⁴

Under this theory, vicarious liability may attach to an actor if he or she receives some type of benefit from the servant's actions. For example, an employer could be held liable for certain acts of its independent contractor based on the arguments that:

the enterprise is still the employer's, since he remains the person primarily to be benefitted by it, that he selects the contractor, and is free to insist upon one who is financially responsible, and to demand indemnity from him, and that the insurance necessary to distribute the risk is properly a cost of his business.⁷⁵

Garment manufacturers benefit in the form of lower contract prices from the fierce competition among contractors and from violations of minimum wage laws. They can help solve the problem by selecting contractors who pay the minimum wage and who are financially responsible. Thus, sound public policy reasons support precluding garment manufacturers from disclaiming responsibility for sweatshop conditions solely because contractors are separate business entities.

Manufacturer liability gains further support from FLSA's stated policy of eliminating unfair competition between producers who pay the minimum wage and producers who benefit from violating wage laws.⁷⁶ Since wage and hour

71. *Henderson Bros. Stores v. Smiley*, 120 Cal. App. 3d 903, 910 (1981); RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

72. RESTATEMENT (SECOND) OF TORTS §§ 409-429 (1965) (listing exceptions to general rule, e.g., negligence of employer in selecting, instructing, or supervising contractor; non-delegable duties of employer arising from relation to public or particular plaintiff; or inherently dangerous work). See generally Marc H. Monheimer, Comment, *Liability for the Torts of Independent Contractors in California*, 44 CAL. L. REV. 762 (1956) (explaining development and growth of exceptions to presumption of non-liability in California courts).

73. See generally John H. Wigmore, *Responsibility for Tortious Act: Its History*, 7 HARV. L. REV. 315 (1894) (tracing historical development of liability from Germanic law).

74. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 21, 39 (1970); John B. Attansio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Product Liability*, 74 VA. L. REV. 677, 695, 700 (1988); William O. Douglas, *Vicarious Liability and Administration of Risk* (pt. 1), 38 YALE L.J. 584 (1929).

75. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 71, at 509 (5th ed. 1984).

76. 29 U.S.C. § 202 (1988).

laws are not comprehensively enforced against contractors, some contractors will always reduce their price by violating minimum wage laws; unless manufacturers are held liable, some manufacturers will always use those contractors. This unfair competition will continue as long as the manufacturers, who basically determine wages, escape liability for the violations they thereby cause.

VI. POTENTIAL PROBLEMS: MANUFACTURER LOBBIES AND "RUNAWAY SHOPS"

Congress should not rely on state legislatures to solve these problems, since if only some states pass appropriate legislation, manufacturers will move to states that do not impose liability. A federal approach avoids this problem most efficiently. Such an approach would allow supporters of manufacturer liability to concentrate their efforts at the federal level instead of spreading their limited resources to fight difficult legislative battles in fifty separate state legislatures.

A. *Conserving Resources*

In states like California, New York, and Texas, where the garment industry accounts for a substantial part of economic activity, the manufacturer lobbies have consistently defeated attempts to pass manufacturer liability legislation. A review of recent attempts in California to enact such legislation illustrates the political difficulties facing labor advocates.

Since the Garment Manufacturing Act was passed in California in 1980,⁷⁷ state lawmakers have attempted on several occasions to pass legislation that expressly holds manufacturers liable for their contractors' labor violations. Legislative reforms have been uniformly worded. For example, Assembly Bill 1542, introduced in 1991, is typical:

[E]very person engaged in the business of garment manufacturing who contracts to have garment manufacturing operations performed by another person as an independent contractor shall be liable, with respect to these operations, to the same extent as the independent contractor for any violation . . . committed by the independent contractor, and shall be subject to the same penalties assessed against the independent contractor⁷⁸

In 1990, the California state legislature had passed a similar bill. However, the Garment Manufacturers Association vigorously opposed the measure. Manufacturers argued that its passage would "cripple domestic manufacturing."⁷⁹ They claimed that the liability bill would force them to hire "a fleet

77. CAL. LAB. CODE §§ 2670-2674.2 (West 1989).

78. Cal. A.B. 1542, available in LEXIS, Legislature Library (LEGIS), California Bill Tracking File (CATRCK).

79. Efron, *supra* note 55, at A3.

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of labor police," adding an expense that would prompt more manufacturers to produce their garments in other states.⁸⁰

In response to this opposition, Governor George Deukmejian vetoed the bill. This veto was especially troubling since the Governor had already approved a major reduction in state enforcement capability. Prior to Governor Deukmejian's election, the state Labor Department's Concentrated Enforcement Program (CEP) had fifty-nine inspectors assigned to monitor the garment industry. Upon assuming office, Governor Deukmejian abolished the entire unit and annually decreased the overall size and budget of the Bureau of Field Enforcement, the CEP's parent agency.⁸¹

Supporters of a manufacturer liability bill will clearly have a difficult battle to fight in any forum. To conserve resources, therefore, it is best that they begin at the federal level.

B. Refuting the Critics: Manufacturer Liability and Runaway Shops

Critics of manufacturer liability argue that, just as California legislation might prompt manufacturers to move to New York, federal legislation will prompt manufacturers to move overseas. Although this risk is a real concern, it should not deter Congress from amending FLSA, for two reasons. First, the factors that encouraged garment shops to return to the United States in recent years⁸² will continue to exist. Although manufacturer liability might shift the balance of competing forces somewhat, there is no evidence that it would tip the scales. Second, to admit that the fear of runaway shops should govern U.S. labor law is to concede that the United States must adopt a lowest common denominator approach to worker rights in order to remain competitive. Such an approach is intolerable for a country that has achieved such a high level of development. Indeed, it may well be an intolerable approach for any country, regardless of the sophistication of its economy.

C. Assessment

Worker rights advocates would naturally prefer manufacturer liability to take the form of strict liability, akin to the injunction provision of FLSA, which allows the Department of Labor to obtain an injunction preventing manufacturers from shipping goods produced in violation of labor laws.⁸³ However, political reality may make such a scheme unattainable. Legislators who remain concerned about runaway shops will probably block efforts to

80. *Id.*

81. *More Heat on Sweatshops*, SACRAMENTO BEE, Aug. 23, 1990, at B8.

82. *See supra* notes 11-15 and accompanying text.

83. 29 U.S.C. §§ 215, 217 (1988).

impose strict liability. A more realistic alternative would be to amend FLSA to impose liability on manufacturers who know or should have known that the apparel was produced in violation of the minimum wage and overtime provisions of FLSA.

In the light of California's experience, however, the prospect for passing even this weaker legislation is not particularly encouraging. Since beneficiaries of such legislation would be primarily poor immigrant women who generally do not have the right to vote, members of Congress will probably perceive that ignoring this issue would have few political repercussions. Pressure for inclusion of such a measure as part of other legislation promoted by organized labor, i.e., as a "rider" to future minimum wage legislation, should therefore be given serious consideration.

VII. CONCLUSION

Congress should amend FLSA to hold garment manufacturers strictly liable for wage and hour violations occurring in the sweatshops. Such an amendment is necessary to combat worker exploitation and manufacturers' complicity in perpetuating the abominable conditions rampant in the industry. Until such a stronger measure is enacted, enforcement of current law will be difficult, if not impossible. As one California state enforcement official said, "We're just putting our finger in the dike. It's a runaway industry. There's not much we can do about it."⁸⁴

84. Newbergh & Gust, *supra* note 15, at A9.