Enforcing Fair Labor Standards in the Modern American Sweatshop

The following is a summary of the article "Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment," co-authored by Bruce Goldstein, Prof. Marc Linder (U. of Iowa Law School), Laurence E. Norton II (of Texas RioGrande Legal Aid), and Catherine K. Ruckelshaus (Litigation Director of the National Employment Law Project), UCLA Law Review, April 1999.

The FLSA, enacted in 1938, and the AWPA, passed in 1983, share a definition of employment relationships that is not used in most other federal laws or under the common law. Under these laws, "'Employ' includes to suffer or permit to work." Court decisions under these laws almost always ignore this sentence, perhaps because the language is archaic.

To "suffer" something to happen means to fail to prevent it from happening. The King James Bible, in Matthew 19:13-16, states: "Then were there brought unto him little children, that he should put his hands on them and pray: and the disciples rebuked them. But Jesus said, *Suffer* little children, and forbid them not, to come unto me: for of such is the kingdom of heaven." A more modern version of the Bible converts this latter phrase to "Let the children come to me and do not hinder them. . . ."

The "suffer or permit" phrase has a long history in the law. It was frequently used in the 19th century to impose criminal liability on an individual for passively allowing a third person to commit an objectionable act. For example, a farmer who "suffered" his animals to run freely could be liable for damage caused by the animals to another person's property.

By the 1880's, reformers had persuaded several state legislatures to use the "suffer or permit to work" phrase to strengthen laws that prohibited child labor. Laws that merely prohibited a business from "employing" a child had proved inadequate because they could be easily evaded. Under the common law, a business does not "employ" someone unless it possesses the power to control the specific manner in which a worker performed a job. There are numerous factors used by the courts to help answer that question. Many manufacturers denied that they were the employer of children based on the argument that third parties had hired the children, brought them to the factory, paid the child's wages, and supervised the child during work. Under the "suffer or permit" standard, such facts were not determinative. The company was liable if it knew or reasonably should have known that the child was performing work in that business and could have prevented it from occurring or continuing.

To reinvigorate the statutory definition in cases under AWPA and FLSA, our law review article encourages courts to rely on the child-labor cases, where the courts have given this phrase a very broad reading.

In the course of our research we concluded that there was much to be learned from the economic context in which the "suffer or permit" standard developed. During the late 19th century and early 20th century, Florence Kelley and other reformers who promoted this definition were engaged in a much broader struggle against abusive working conditions associated with the "sweating system." This is another archaic term that turns out to have significance for us today, although today we talk about "contracting out" and "contingent workers."

The "sweater" was the subcontractor, the labor intermediary or other "middleman." The subcontractor "sweated" a profit out of the difference between the money paid to him by a manufacturer and the amount paid to the workers. By the 1890's, the term "sweatshop" began to be used to describe any workplace with low wages and terrible conditions, but its roots are in the subcontracting system. The quintessential sweatshop occurred in the New York garment industry, where factories would give piece goods to contractors, who would have workers sew the pieces together in tenement houses. Because it was not difficult to become a contractor, competition was fierce and the victims were the workers whose wages were lowered by the contractors to squeeze out a profit. There are many parallels to today's agricultural and garment industries.

There are several lessons to be drawn from the efforts of the National Consumers' League (which celebrates its 100th anniversary this year) and others to reform the sweating system. The principal one is that it is virtually impossible to improve conditions by focusing government regulation on the contractors. Government efforts to improve conditions for workers must focus on the entities that have the economic power, that is, the businesses that hire the labor contractors.

The article also examined the historical context in which the Fair Labor Standards Act of 1938 was enacted to understand more about the reasons behind the broad "suffer or permit" definition. Congress declared in passing FLSA that substandard labor practices are not merely contrary to workers' economic well-being, but constitute "unfair competition" among businesses. FLSA, consistent with the approach of the National Recovery Act of 1933, aimed at eliminating "cut-throat competition." Congress and President Roosevelt sought to protect law-abiding, decent employers. The broad definition of employment relationships was intended to remove the competitive advantage of employers who kept labor costs unduly low through such evasive devices as abusive subcontractors. Courts today should recognize this statutory purpose of using broad coverage to protect law-abiding employers.

Our law review article suggests that courts and litigators re-examine and simplify their approach to interpreting the AWPA/FLSA statutory definition of employment relationships in a variety of occupational settings. The authors' approach is applied to agricultural and garment industry scenarios. The authors hope that by applying the

"suffer or permit" standard, courts will enable workers to enjoy the minimum labor standards required by law and law-abiding employers to compete fairly in the marketplace.