

MODULE 10

Temporary and Day Laborers

Module Overview

Time:	130-145 Minutes plus Introductions
Objectives:	<ul style="list-style-type: none"> • to share work problems faced by temporary and day laborers • to examine what determines employment status, as either an employee or independent contractor • to practice determining one's current employment status • to review workplace rights for temporary and day laborers • to consider and evaluate options for solving workplace problem
Preparation:	<ul style="list-style-type: none"> • prepare flipcharts • read and copy handouts: Participant Outline, Employee or Contractor?, Who's the Boss?, Your Rights on the Job in Mass.; Temp Workers' Right to Know Law In Brief
Materials:	<ul style="list-style-type: none"> • flipcharts, markers, masking tape, Post-its

Module Outline

Module Detail

Welcome and Introduction

Time: 5 minutes

Materials: flipcharts:
Objectives and Agenda

Icebreaker: Who is Here?

Time: 10 minutes

Welcome and Introduction

Welcome participants, introduce yourself and review workshop objectives and agenda. It is helpful to put the Objectives and Agenda on flipcharts to post.

Icebreaker: Who is Here?

Ask participants to introduce themselves, giving their name, union and/or organizational affiliation, if any, and where they are working now or their last work experience

Workplace Issues or Problems

Time: 20 minutes

Flipchart: *What's Wrong?*

Activity 1: Workplace Issues or Problems

Break participants into small groups to describe what problems they have experienced as temp agency workers or day laborers. You can name some possible issue areas such as: wages, wait time, assignments, health and safety, favoritism, discrimination, or transportation. After they talk about their concerns they are to write one issue or problem per person in the form of a brief phrase or question on sticky notes – one issue/problem per sticky.

Ask each group to send one person up to post the stickies on flipchart: *What's Wrong?* and name the issues or problems.

Tell participants that we will look at what legal rights they have and how those rights relate to the problems they have listed.

Employee or Independent Contractor?

Time: 20 minutes

Handouts: *Who's The Boss?*

Flipcharts: *Employee;*
Independent Contractor

Activity 2: Employee or an Independent Contractor?

Explain that the first step in determining what to do about these problems is to figure out your employment status — are you an employee or your own boss – sometimes called an independent contractor?

Using the worksheet *Who's The Boss*, ask participants to check off their answers to the questions regarding their own work.

Using two flipcharts, one labeled *Employee* and the other *Independent Contractor*, ask participants to use the checklist and decide which statement they think describes which status. For example: Where does the first statement, "I am paid by the hour" belong – under *Independent Contractor* or *Employee*?

Pass out handout *Employee or Independent Contractor?*

Compare handout to flipcharts and make any additions or changes. Make sure everyone understands the following concepts: salaried, supervision, control and usual course of work. Emphasize the following:

BEWARE: Your status is not determined by:

- what your boss or you label yourself
- whether your boss gives you a 1099 form instead of a W-2 form

The main issue is whether the employer has control over your work life.

Example: A plumber who sells his/her services to homeowners or businesses to fix a leaky toilet or unclog a clogged pipe is an independent contractor. But a plumber who works for a single business installing water pipes is an employee

For temp agency workers: note that for certain legal protections you may have two employers – the temp agency and the "client" or "user" employer. More on this later.

Ask: How many of you think you are an employee? How many think you are an independent contractor? Why? If you think you are an employee, are you being treated as an independent contractor?

Note to facilitator:

*This may be the time to point out that many workers – such as day laborers – are treated as independent contractors, but they are really employees and are getting screwed! Under these standards almost all temp agency workers and day laborers hired on the street corner are employees and not independent contractors. Under Massachusetts law it is difficult to be an independent contractor **because the standard requires that you perform work outside the usual course of work of the hiring employer's business.***

This means that if you are hired by a small company or a contractor to do construction work, landscaping or some other work that the contractor does for someone else, you are more likely to be an employee than an independent contractor no matter what kind of arrangement the person who hires you wants to make with you

What Rights Do You Have? Time: 30 minutes
Handouts: *Your Rights*
Flipcharts: *Employees are entitled to . . . ; Independent Contractors are Entitled to...*

Activity 3: What Rights Do You Have?

Ask participants: Why should you care about your employment status?

Answer: Because it makes a difference as to what legal rights you have – which laws cover you.

Explain and post the following rights on the flipcharts from Activity 2, first for *Employee*, then for *Independent Contractor*.

*As you name each right explain BRIEFLY what it means: e.g. minimum wage: the minimum hourly rate you must be paid which in Massachusetts is \$15.00/hr as of Jan. 1, 2023). See handout: **Your Rights**. The **T** and **C** designations will be added later on in this activity .*

Employees are entitled to:

Wages and Hours:

- Minimum wage protection (T & C)
- Overtime pay (T & C)
- Right to be paid all that you're owed and paid promptly (T & C)

- breaks, including bathroom breaks (T & C)

Health and Safety:

- a safe workplace (T & C)
- worker's compensation for on-the-job injury (T)

Unemployment and Leave:

- unemployment compensation (T)
- eligibility for FMLA, Massachusetts Maternity Law or other job protected leaves.

Organizing:

- Have the right to work together to correct many workplace problems (T & C)

Discrimination:

- Protection against workplace discrimination based on race, color, religion, national origin, ancestry, sex (including pregnancy), sexual orientation, gender identity, age (over 40), handicap (disability), mental illness, retaliation, sexual harassment, genetics, citizenship status, or active military status. Most blanket hiring/firing policies against workers with criminal records are illegal (T & C).
- Exercise these rights free from employer retaliation (T & C)

Independent Contractors:

Wages and Hours:

- are not covered by minimum wage laws
- are not entitled to time and a half for overtime
- terms of work and terms of payment are governed by a contract with the employer who hires them
- but are contractually entitled to be paid all that they are owed and paid promptly

Health and Safety:

- are not protected by OSHA laws
- are not covered by worker's compensation for workplace injury

Unemployment and Leave:

- not entitled to unemployment benefits
- not covered by FMLA or Massachusetts Maternity Law

Discrimination

- have limited protection against workplace discrimination

Taxes: If you are an independent contractor and declare your income you pay all Social Security and Medicare. taxes – twice as much as an employee pays

Which Problems Are Against the Law?

Time: 20-30 minutes

Handouts: *Your Rights on the Job in Massachusetts; Temporary Workers*

Right to Know Law In Brief

Flipcharts: work with flipcharts from Activity 2

Note to facilitator:

Where to Go With Your Problems

Time: 15 - 20 minutes

Handouts: *Your Rights; Government Agencies; A Partial List of Advocacy Groups*

Flipcharts: *Where to Go With Your Problems*

For Temp Agency Workers: Who is Your Employer?

Go back to the flipcharts and indicate — using a *T* or *C* - which protections are the responsibility of the Temp Agency as employer (T), which that of the Client or User (C), and where there may be dual responsibility (T and C). See pages 3 and 4

Activity 4: Which Problems Are Against the Law?

Break participants into small groups and give them one or two of the issues or problems identified in the first activity. Ask them to review the issues, and decide what, if any, violation of the worker's rights is happening and what right is being violated. If possible, give them one issue that is NOT a violation of any right, and in the report back discuss concept of employee-at-will (see below). They will report out by groups. For problems that are not violations, list them separately.

*If there are temp agency workers be familiar with the issues listed on the handout, **Special Problems for Temp Agency Workers**. If you have not already addressed these issues, use the handout to do so. If there are day laborers in the group, be familiar with the issues listed on the handout, **Special Problems for Day Laborers Hired on the Street Corner**. Review them with the group.*

*For problems that are not illegal point out the difficulty with **At-Will Employment**: If you are not in a union and do not have a written contract with your employer, you are an "at- will" employee. This means that your employer can fire you for no reason or any reason as long as the employer does not violate the rights we are discussing in this class. This means that many unfair or arbitrary decisions by the employer are not illegal.*

Activity 5: Where to Go With Your Problems

Ask participants to listen to the following mini-rap on where to go with your problems.

Mini-rap:

There are several different ways you can approach solving your workplace problems:

- Go to the employer by yourself and complain about the problem
- Consult with co-workers to see if others have the same problem
- Get a group of workers together to challenge the employer's practice

- Consult a lawyer
- Go to a government agency whose job it is to enforce the law.
- Contact the Joint Task Force on the Underground Economy hotline 1-877-96-LABOR
- Work with an advocacy group or a community organizing group that deals with workplace issues (see List of Advocacy Organizations)

Ask participants: What do you think are the pros and cons of each of these approaches?

Complaining to your employer by yourself:

- Often not safe
- Little power by yourself

Consulting with co-workers:

- Can identify whether others share the same problem
- Can think together about how to change the situation

Acting with other workers:

- You have the right to act with others to correct many workplace problems. BUT it is not always safe to do so.

Consulting with a lawyer:

- You do not always need a lawyer to exercise your workplace rights: Most agencies will take your complaint even without a lawyer. However, free legal services for some workplace issues are available:
- Start with Legal Services—if you qualify for their service—they help with wage and hour issues, unemployment and sometimes discrimination or firing for union organizing.
- If it is worker's compensation or health and safety, contact a COSH group (Mass COSH and Western Mass COSH.)

Contacting a government agency: (See handout: Government Agencies)

- For ALMOST every right we have as workers there is a government agency that handles enforcement.
- But, government agencies are often short staffed and take a long time to resolve problems.
- Most government agencies need names and contact information to file a complaint, so not always safe for the worker.
- Not always safe if you are an immigrant, with or without proper documents. You may jeopardize your chances of ever getting work again

Advocacy Groups and Organizing Groups

(See handout: *A Partial List of Advocacy Groups*)

- Advocacy groups can help you understand where else to go for help, so are good first places to go.
- Advocacy groups can help you understand where else to go for help, so are good first places to go.
- Community organizing groups help build power for workers

Special NOTE re: immigrant workers: Immigrant workers, whether documented or undocumented, are covered by most laws. It is not always safe, however, for undocumented workers to go to state and federal agencies with complaints, as those agencies might notify Immigration and Customs Enforcement (ICE). Undocumented workers should check first with an advocacy organization. The handout *Safe and Unsafe Agencies for Immigrant Workers* is only a guideline. Policies change. To be safe, always go to an advocacy organization first.

Sum up pros and cons. Highlight the risks and stress the importance of collective action.

Practice Reporting Violations or Getting Assistance (Optional)
Time: 15 minutes

Activity 6: Practice Reporting Violations or Getting Assistance (Optional: can do this as a whole group activity - or not at all.)

Send participants back into their groups to use the issues they worked on to determine where they would go to report any violations of rights they have identified or seek assistance in solving the problem. Have groups report back, one scenario per group, and have discussion

Summary and Remedies
Time: 10 Minutes

Summary and Remedies

Point out that other workshops or the *"In Brief's"* will explain the various laws and identify specific remedies available. We can't do all that now.

Look at any issues, identified at the beginning of the workshop that have not yet been talked about. Look at the issues we have left that have no legal remedy. Ask: How might we address these issues – *e.g.* new legislation, organizing in community or workplace, etc

Remind them:

- about the areas where the law is either unclear or offers no protection
- that there is some "whistleblower" protection

Close with:

- need to act with others to protect themselves
- focus on organizing— either with a union or a community organizing group - as a means of addressing most, if not all of these problem

MODULE 10

Temporary and Day Laborers Participant Outline

130-145 minutes

Objectives:

- to share work problems faced by temporary and day laborers
- to examine what determines employment status, as either an employee or independent contractor
- to practice determining one's current employment status
- to review workplace rights for temporary and day laborers
- to consider and evaluate options for solving workplace problem
- to practice responding to some of participants' problems

Welcome and introductions

Icebreaker: Who is Here?

Discuss participants' work experience.

Activity 1: Workplace Issues or Problems

Participants discuss problems they face at work.

Activity 2: Employee or an Independent Contractor?

Participants discuss rules for employee or independent contractor and identify their status.

Activity 3: What Rights Do You Have?

Review the laws protecting workers.

Activity 4: Which Problems Are Against the Law?

Discuss which of the participants' problems are against the laws.

Activity 5: Where to Go With Your Problems

Discuss resources available.

Activity 6: Practice Reporting Violations or Getting Assistance

Summary and Remedies

Employee or Independent Contractor?

Employee

- usually paid by the hour, but could be a salaried *employee* if a supervisor or manager
- typically works under the **supervision and control** of the employer, but supervision and control is not required.

Independent Contractor must meet all three of the following¹:

1. Performs with independence and autonomy, free from the hiring entity's control and direction, and
2. Performs work that is outside the usual course of work of the hiring entity's business, and
3. Person is engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

¹Massachusetts Independent Contractor Law (M.G.L.Ch149: Section 148B amended 2004).
Note: the tests for employee/independent contractor status are slightly different under the unemployment insurance law, workers' compensation law, tax law, and other federal laws.

ENFORCEMENT AGENCIES

The Council on the Underground Economy: Call 1-877-96-LABOR (877-965-2267) or email CUETIPS@Mass.gov. ALL REPORTING WILL REMAIN ANONYMOUS Fair Labor and Business Practices Division of the office of the Massachusetts Attorney General.

<https://www.mass.gov/service-details/independent-contractors>

Boston:	One Ashburton Place, Boston MA 02108 (617)727-3465
Western Massachusetts Region:	1441 Main St.12th floor Springfield, MA 01103 (413)784-1240
Southeastern Massachusetts Region:	105 William St. New Bedford, MA 02740 (508)990-9700
Central Massachusetts Region:	10 Mechanic Street, Suite 301, Worcester, MA 01608 (508) 792-7600

Who's The Boss?

This worksheet will help you determine whether you are an employee or an independent contractor. Check off your response to each question below.

YES NO

- | | | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | I am paid by the hour. |
| <input type="checkbox"/> | <input type="checkbox"/> | I am paid by the job. |
| <input type="checkbox"/> | <input type="checkbox"/> | I work under the supervision of a boss. |
| <input type="checkbox"/> | <input type="checkbox"/> | My boss controls what I do. |
| <input type="checkbox"/> | <input type="checkbox"/> | My boss controls how I do my job. |
| <input type="checkbox"/> | <input type="checkbox"/> | My boss controls the hours I work. |
| <input type="checkbox"/> | <input type="checkbox"/> | I have my own trade or business that I am hired to do. |
| <input type="checkbox"/> | <input type="checkbox"/> | The work I am hired to do is different from what the boss's business is. |
| <input type="checkbox"/> | <input type="checkbox"/> | I bring my own tools to the job. |
| <input type="checkbox"/> | <input type="checkbox"/> | The boss provides the tools for the job. |

Special Problems for Temp Agency Workers
(Facilitator's reference)
See also *Temporary Workers Rights to Know Law In Brief*

Employer: Who's my employer – the temp agency or the place they send me to work?

There is not one answer to this question. But there are some guidelines:

- The temp agency is typically responsible for wage and hour issues. Often, the “client” or “user” employer is also responsible for violations of wage and hour law.
- The temp agency and the “user” employer are both responsible for health and safety issues. The temp agency typically is responsible for providing you with worker's compensation insurance.
- The temp agency and the “user” employer can both be held liable for violations of anti-discrimination law and violations of your right to join a union or band together to complain about a workplace problem.
- The temp agency is responsible for issues relating to unemployment benefits.

Getting to Work: Am I required to pay for transportation to the location the temp agency sends me?

- If you are *required* to use the temp agency's transportation you cannot be charged for transportation.
- If you make only \$15.00 the temp agency cannot charge you to use its transportation.
- If you make more than \$15.00 and *choose* to use the temp agency's transportation it can charge you no more than 3% of your daily wages and the amount charged cannot cause you to make less than the minimum wage (\$15.00).

Waiting for Work: Am I entitled to be paid while waiting to work?

- If you are asked to report to work at a set time, you must be paid for three-hours' work at minimum wage even if you are sent home and no work is required
- But, going to a temp agency to find out if you will be assigned a job does not trigger this requirement.
- If you are required to take the temp agency's transportation to the job, it is possible that you should be paid for that travel time.
- The time you spend putting on and taking off required, specialized safety equipment should be paid time

Getting paid: When should I be paid and how much?

- You should be paid promptly and fully.
- Wages must be paid every week or every two weeks, and within six or seven days of the end of the pay period.
- If you voluntarily quit your job, you must be paid on your next regular pay day.
- If you are fired you must be paid on the day you are fired.
- If you work more than 40 hours in a week you are probably entitled to overtime pay – time and a half for any hours over 40.

Unemployment Insurance: How do I know when I am unemployed and can collect unemployment?

- You are unemployed when the temp agency tells you they have no work assignment for you.
- The temp agency must tell you *in writing* that you must report to *or call* the temp agency after finishing a job to see if other work is available.
- You are only obligated to accept “suitable work.” If the next assignment is significantly different in pay or the type of work you perform, you may not be required to accept it.
- If the agency does not have work for you, then you may apply for unemployment benefits if you have earned enough money to qualify for benefits
- Keep evidence that you requested a new assignment. Either make the request in writing or if you contacted the temp agency by phone get a copy of your phone records proving that you called the temp agency.

Health and Safety Equipment: Who is responsible for providing safety equipment – the Temp Agency or the User Employer?

- Because the temp agency and the workplace employer both have control over your employment both have obligations to provide a safe workplace. This includes training, providing information about hazardous equipment and/or chemicals and providing personal protection equipment (gloves, eye or hearing protection, for example).
- It is not always clear who is responsible for providing safety equipment and information about the safety of the workplace. Often, *you must ask* in order to know who is responsible for providing you with safety equipment.
- Firing a worker for complaining about workplace safety or health is illegal.
- Temporary workers have a right to workers compensation for medical care needed for workplace injury and compensation for time lost due to a workplace injury. The temp agency typically is responsible for workers’ compensation.

Special Problem For Day Laborers Hired On The Street Corner (Facilitator's reference)

Street Corner Hiring: Do I have a right to stand on the street to look for work?

Workers have a First Amendment/Free Speech right to solicit work on the streets. However, some cities and towns have created restrictions on solicitation; for example, telling you where it is lawful to solicit for work. This area of the law is still developing. Day labor organizations and legal rights workers helping day laborers are fighting for day laborer's right to seek employment on the streets of their communities.

Wage Theft: When and how much should I be paid?

All workers have the right to be paid fully and promptly. You should be paid for all hours worked at the agreed upon rate

Your Rights on the Job in Massachusetts

Wages and Hours

Minimum Wage

- Private sector employees must be paid at least \$15.00 per hour as of January 1, 2023. (Massachusetts Law)
- For public sector employees \$7.25 per hour (Federal Law)
- Tipped employees must be paid at least \$ \$6.75/hour as of 1/1/2023. If your tips do not cover the difference between the tip minimum wage and the regular minimum wage, your employer must pay you the difference.

Overtime

- Covered employees must be paid one and a half times their regular rate for all hour worked over 40 in a workweek.
- Mass hospitals may not require nurses to work over their regularly scheduled hours, except in emergency

Payment of Wages

- Wages must be paid in full within 6 or 7 days of the end of the pay period
- The pay period may be weekly or biweekly, but not longer for hourly workers. (Some salaried workers may be paid semi-monthly.)
- All employees must get a pay slip, even if they are paid in cash

Breaks

- Employees who work a period of more than six hours are entitled to a 30-minute unpaid meal break
- Employees are entitled to bathroom facilities and breaks
- With some exceptions, nursing mothers must be allowed reasonable break times to express breast milk for infant up to one year of age in private location other than a bathroom.

Discrimination

- An employer may not discriminate against a job applicant or employee in hiring, promotion, discipline, discharge, pay, fringe benefits, training or, or other aspects of employment on the basis of race, color, religion, national origin, ancestry, sex (including pregnancy), sexual orientation, gender identity, age (over 40), handicap (disability), mental illness, retaliation, sexual harassment, genetics, citizenship status, or active military status. Most blanket hiring/firing policies against workers with criminal records are illegal.
- An employer must make a reasonable accommodation to an individual with a physical or mental disability if this will enable the person to do the job.
- An employee is protected from sexual harassment

Unpaid Leave

- An eligible employee may be absent for up to 12 weeks a year without losing their job:
 - Due to a disability caused by a serious health condition
 - To care for a family member who is disabled due to a serious health condition
 - To care for or bond with a newborn, adopted or foster child
 - Starting in 2021 Mass. workers will be able to take paid time off for the above reasons. A tax on employers and employees was put in place in 2019 to build up a Trust Fund to pay for this.
- An eligible employee may take 24 hours of unpaid time off each year to:
 - Participate in school activities related to a child's education
 - Accompany a child to a routine medical or dental appointment
 - Accompany an elderly relative to a routine medical or dental appointment or to an appointment for professional services.
- An eligible employee may take up to 15 days of leave in a year if she or he has been the victim of domestic abuse

Paid Sick leave

- An employee can earn up to 40 hours per year of sick leave to address certain personal and family needs. Employers of 11 or more people must provide paid sick leave; smaller employers may provide unpaid leave.
- Employees are also entitled to up to 20 weeks medical leave or 12 weeks family leave paid at a lesser rate (capped at 64% of salary), regardless of size of employer.

Health and Safety

- Private and Public sector workers are entitled to a workplace free from recognized physical or health hazards.
- If injured on the job, a worker is entitled to receive Workers' Compensation insurance payments
 - Weekly benefits are 60% of the worker's average weekly gross wages
 - Work-related medical expenses are paid for life

Organizing

- Employees have a right to engage in concerted activity to improve their wages and working conditions, including the right to petition, leaflet, organize a union, picket, and strike. (Only private sector workers have the right to strike.)
- An employer must recognize a union chosen by a majority of employees in an appropriate bargaining unit
- An employer must bargain in good faith with the union about all matters relating to employment.

Layoff

- Workers who have lost a job through no fault of their own may be eligible for up to 30 weeks of unemployment insurance payments. This law does not cover undocumented immigrants.

Flipcharts for MODULE 10: Temporary and Day Laborers

Flipcharts for Welcome and Introduction

Objectives

- to share work problems faced by temporary and day laborers
- to examine what determines employment status, as either an employee or independent contractor
- to practice determining one's current employment status
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- to consider and evaluate options for solving workplace problem
- to practice responding to some of participants' problems

Agenda

- Welcome and Introduction
- Icebreaker: Who is Here?
- Workplace Issues or Problems
- Employee or Independent Contractor?
- What Rights Do You Have?
- Which Problems are Against the Law?
- Where to Go With Your Problems
- Practice Reporting Violations or Getting Assistance
- Summary and Remedies

Flipcharts for Activity 1 (title only):

What's Wrong?

Flipchart for Activity 2 (title only):

Employee

Independent Contractor

Flipchart for Activity 3 (title only):

Employees are entitled to...

Independent Contractors are entitled to...

Flipchart for Activity 5 (title only):

Where to go with your problems