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## Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work

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# Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work

Stephen F. Befort†

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## I.

## INTRODUCTION

A dramatic shift in the nature of work relationships in the United States has occurred during the past two decades. Long-term employment constituted the predominant model of structuring work relationships well into the 1970s. Since then, American firms increasingly have resorted to a variety of non-traditional work arrangements. These new workers, frequently denominated the “contingent workforce,” tend to have a weaker workplace affiliation and a lower expectation of long-term employment.<sup>1</sup>

Some commentators laud contingent work arrangements as a means of enhancing competitive flexibility in a global marketplace.<sup>2</sup> Others decry these arrangements as unstable or unfair.<sup>3</sup> The latter view often is accompanied by proposals for reform, the most common of which is a call for an expanded definition of employment subject to regulation.<sup>4</sup>

A fresh look at the contingent work phenomenon is appropriate in a post-Enron world. The Enron scandal has taught us that corporate manipulations designed to maximize wealth do not necessarily produce socially desirable results. In some circumstances, our legal system needs to provide minimum safeguards to protect economically dependent workers from the machinations of more powerful entrepreneurs. Yet, a legislated return to the workplace of 1950 is as unwise as it is impossible.

This article takes a fresh look at contingent work with the aid of two perspectives. First, this article takes a historical perspective in analyzing the forces that have spurred the adoption of new work arrangements. An historical view provides a useful vantage point for understanding the decline in long-term employment and the problems that have accompanied this development. The creation of a veritable regulation-free zone in portions of the contingent work landscape is the most significant of these problems. Next, this article looks comparatively for possible solutions for

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1. For a general discussion of the contingent workforce, see RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557 (1996); Jonathan P. Hiatt & Lynn Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future*, 10 LAB. LAW. 143 (1994).

2. See generally Maria O'Brien Hylton, *The Case Against Regulating the Market for Contingent Employment*, 52 WASH. & LEE L. REV. 849 (1995).

3. See generally Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879 (1995); Hiatt & Rhinehart, *supra* note 1.

4. See, e.g., Lewis L. Maltby & David C. Yamada, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 266 (1997) (urging the extension of federal anti-discrimination statutes to cover independent contractors and their employees); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 112-14 (1984) (urging the adoption of an “economic realities” test for determining employee status).

reining in this growing black hole in a rational, policy-driven manner.

Part I of this article begins by describing the internal labor markets that predominated during the middle of the twentieth century. Part II summarizes the variety of non-traditional work arrangements that comprise contingent work today. Part III bridges this fifty-year span by identifying the principal factors that have contributed to the decline in long-term employment and the concomitant rise in contingent work arrangements. Part IV moves from the historical to the analytical by discussing the key social and economic shortcomings of the current legal regime. Finally, Part V offers three proposals for legal reform, drawing heavily on comparative legal systems that have attempted to grapple with the problems flowing from the "flexibilisation"<sup>5</sup> of work.

## II.

### 1950—PREDOMINANCE OF LONG-TERM EMPLOYMENT

The American workplace of 1950 was characterized by internal labor markets and long-term employment.<sup>6</sup> Rather than periodically bidding for workers in external markets, employers looked within their organizations for a dependable supply of labor.<sup>7</sup> Employers hired raw talent, developed employee skills, and then reaped the benefits of a loyal and productive workforce.<sup>8</sup>

This was not always the case. Employment tenure during the late 1800s and early 1900s was very transitory in nature. Plant foremen ruled the industrial scene, hiring and firing with impunity.<sup>9</sup> Many firms during this period experienced monthly separation rates in excess of ten per cent.<sup>10</sup>

The employment landscape began to change during the first half of the twentieth century, as an unlikely alliance of trade unionists and personnel managers advocated practices linked with long-term employment tenure.<sup>11</sup> Unions provided the initial push.<sup>12</sup> One of the unions' central objectives

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5. See REINHOLD FAHLBECK, *FLEXIBILISATION OF WORKING LIFE: POTENTIALS AND CHALLENGES FOR LABOUR LAW, AN INTERNATIONAL ANALYSIS* 12 (1998).

6. See PETER CAPPELLI ET AL., *CHANGE AT WORK* 15-23 (1997); SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, 241-285 (1985).

7. See CAPPELLI, *supra* note 6, at 15.

8. *Id.*

9. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 144-45 (1990); JACOBY, *supra* note 6, at 16-23.

10. See JACOBY, *supra* note 6, at 32. See also D. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, 163 (1978) (noting that the majority of industrial workers in the period from 1905 to 1917 changed jobs at least once every three years).

11. See JACOBY, *supra* note 6, at 6-7.

12. See CAPPELLI, *supra* note 6, at 17; WEILER, *supra* note 9, at 141, 151.

was to substitute fair and standardized employment practices for the arbitrary dictates of the foreman.<sup>13</sup> As unionization rates rose dramatically during World War I and again following the onset of the Great Depression,<sup>14</sup> so, too, did such bargained-for practices as seniority and job security.<sup>15</sup>

Proponents of scientific personnel management also favored the rationalization of employment policies.<sup>16</sup> In part, these personnel managers saw internal labor markets as a means to reduce the costs associated with high employee turn-over.<sup>17</sup> Managers realized that a stable workforce would reduce recruitment and training costs while simultaneously boosting employee morale.<sup>18</sup>

The personnel managers' principal impetus, however, was to avoid unionization within their organizations.<sup>19</sup> By espousing fair treatment and job security measures of their own, these "good" employers hoped to undercut the felt need for union representation in their workforce.<sup>20</sup> As noted by Professor Sanford Jacoby, "the continuing irony in personnel management was that it best served the purpose of thwarting unionism by introducing the same reforms the unions sought."<sup>21</sup>

The prevalent internal labor market model of 1950 was designed to encourage career rather than casual employment tenure.<sup>22</sup> Toward this end, employers adopted personnel policies that included competitive wage rates, training and development plans, and internal lines of progression and promotion.<sup>23</sup> The most important of these new policies, was managerial commitment to long-term job security.<sup>24</sup>

By 1950, most American employers accepted the principle that

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13. See JACOBY, *supra* note 6, at 23-30.

14. See COX, BOK, GORMAN & FINKIN, *LABOR LAW* 39, 80 (13th ed. 1996) (reporting that trade union membership nearly doubled in the period from 1914 to 1920 and then quadrupled from 1933 to the early 1940s).

15. See JACOBY, *supra* note 6, at 241-50.

16. See CAPPELLI, *supra* note 6, at 16.

17. See WEILER, *supra* note 9, at 146-47; Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 741 (1986).

18. See CAPPELLI, *supra* note 6, at 21-23; WEILER, *supra* note 9, at 146-49.

19. See WEILER, *supra* note 9, at 151; JACOBY, *supra* note 6, at 250-55; Finkin, *supra* note 17, at 741-42.

20. See JACOBY, *supra* note 6, at 254-55, 282-83.

21. *Id.* at 255.

22. See *id.* at 245-74 (describing the rise of internal labor markets and increased employee job security); See also WEILER, *supra* note 9, at 146 (noting the transition of the employment relationship from casual to career in nature).

23. See CAPPELLI, *supra* note 6, at 17-21; JACOBY, *supra* note 6, at 262-67; Finkin, *supra* note 17, at 741-42.

24. CAPPELLI, *supra* note 6, at 19-21; JACOBY, *supra* note 6, at 254-55, 267-69; Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 523, 535 (2001).

employees should be discharged only for just cause.<sup>25</sup> In the unionized sector, which composed 31.5 percent of the non-agricultural workforce in 1950,<sup>26</sup> the terms of collective bargaining agreements generally compelled a just cause standard.<sup>27</sup> In the non-union sector, employers generally adhered to this practice through an implicit understanding with their employees.<sup>28</sup>

Thus, the rise of internal labor markets reduced employee turnover rates<sup>29</sup> and fostered the development of an extra-legal social contract in which employers and employees possessed legitimate expectations of a long-term relationship.<sup>30</sup> A key ingredient of this social contract was the understanding that employees could expect continued employment so long as they adequately performed their job duties.<sup>31</sup> In short, employees at the mid-century mark could say, with William Whyte's *The Organization Man*, that "his relationship is to be for keeps."<sup>32</sup>

Richard S. Belous described this employment model as that of a "core worker system."<sup>33</sup> He explained that:

Core workers have a strong affiliation with an employer and are treated by the employer as having a significant stake in the company. Core workers can be thought of as having as being part of the so-called corporate family. They show long-term attachment to a company and have a real measure of job stability.<sup>34</sup>

Internal labor markets and the core worker system dominated American work relationships well into the 1970s.<sup>35</sup>

25. See JACOBY, *supra* note 6, at 269.

26. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS 1980b 412, tbl.165, as reprinted in MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10, tbl.1 (1987); U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, Bicentennial Edition, Series D 927-939 (1975) (illustrating that approximately fifteen million American workers in 1950 belonged to unions).

27. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of 'Just Cause' in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 n.1 (citing a 1983 Bureau of National Affairs report that stated that 94% of collective bargaining agreements entered into under the NLRA contain clauses that provide that an employer may discharge employees only with "just cause").

28. See Stone, *supra* note 24, at 523 (stating that "[t]he internal labor market involved employers giving their workers an implicit promise of long-term employment").

29. See JACOBY, *supra* note 6, at 276.

30. See CAPPELLI, *supra* note 6, at 200-01 (describing "an implicit employment contract" by which "[l]oyalty and retention by the employee are rewarded by stable employment and income"); See also JACOBY, *supra* note 6, at 269 (noting the "widespread acceptance of the principle that a worker could be dismissed only for just cause").

31. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM* 80 (1993); Thomas A. Kochan, *Reconstructing America's Social Contract in Employment: The Role of Policy, Institutions, and Practices*, 75 CHI.-KENT L. REV. 137, 138 (1999); Stone, *supra* note 24, at 523.

32. WILLIAM H. WHYTE, *THE ORGANIZATION MAN* 75 (1957).

33. BELOUS, *supra* note 1, at 12.

34. *Id.* at 5.

35. *Id.* at 12.

## III.

## 2000—THE NEW CONTINGENT WORKFORCE

Today, a large and growing group of workers provide labor or services based on a variety of arrangements that deviate from the traditional core worker model. The “contingent workforce” is a catch-phrase that encompasses a diverse group of non-core workers who provide work other than on a long-term, full-time basis.<sup>36</sup> While no universally-accepted definition of contingent work exists,<sup>37</sup> it is clear that this amorphous group is steadily increasing in size.<sup>38</sup>

It is helpful to think of contingent workers in two broad categories.<sup>39</sup> One group, consisting of independent contractors, contracted workers, and leased employees, are not legally classified as employees of the entity for whom they provide services.<sup>40</sup> Independent contractors are self-employed workers who are engaged by a company to “provide specialized services on a contract basis.”<sup>41</sup> Contracted, or out-sourced, work occurs when a company uses another firm to perform a particular service, such as janitorial services or copy services.<sup>42</sup> Finally, leased employees are workers who are employed by one entity, typically an employee leasing firm, but who provide work for a separate user entity.<sup>43</sup>

The second group of workers, consisting of part-time and temporary employees, have the legal status of employees but with a lessened degree of attachment to the workplace as compared to traditional “core” employees. Part-time employees are those who are scheduled for less than the usual forty-hour work week.<sup>44</sup> Temporary employees perform work at a particular company as a short-term supplement to a firm’s regular workforce.<sup>45</sup>

In addition to the difficulty of determining who is a contingent worker, or perhaps because of that difficulty, it is almost impossible to ascertain the exact number of contingent workers in the U.S. economy. Reliable

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36. See *id.* at 6.

37. See, e.g., Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 78-79 (1998) (capturing the confusion surrounding the scope of the contingent workforce by titling a section of her article, “The Elusive Concept of ‘Contingent’ Employment”).

38. See Daniel J. Roy, *Contingent Workers: Contingent Workers Cut Labor Costs While Increasing Worker Insecurity*, DAILY LAB. REP., October 26, 1995, at C-1.

39. See generally Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL’Y REV. 53, 57 (1998).

40. See *infra* notes 104-116 and accompanying text (discussing the legal tests for determining “employee” status).

41. Mark Diana & Robin H. Rome, *Beyond Traditional Employment: The Contingent Workforce*, 196 N.J. LAW 8, 9 (1999).

42. See Hiatt & Rhinehart, *supra* note 1, at 146.

43. See *id.*; BELOUS, *supra* note 1, at 46.

44. See, e.g., Diana & Rome, *supra* note 41, at 8, 9.

45. *Id.* at 9.

estimates, however, range upwards to 20 to 30 percent of all American workers,<sup>46</sup> accounting for more than thirty million members of the American workforce.<sup>47</sup> The proportion of contingent workers, moreover, is undoubtedly growing. One commentator asserts that the contingent workforce has grown approximately 75 percent faster than the overall workforce between 1980 and 1993.<sup>48</sup> More recently, as the United States struggles to climb out of a recession, a majority of the new jobs are of the contingent variety.<sup>49</sup>

While a diverse group in some respects, contingent workers share several common characteristics. First, contingent workers tend to have a weak affiliation with their workplace.<sup>50</sup> In contrast to “core” employees, these workers typically are not considered a part of the corporate family and have lower expectations of long-term employment with a single entity.<sup>51</sup> Second, although not a universal characteristic, contingent workers often receive reduced pay and benefits compared to traditional employees.<sup>52</sup> The benefit shortfall is particularly notable with respect to health care insurance.<sup>53</sup> Finally, many contingent workers have not voluntarily chosen their work status.<sup>54</sup> Some studies indicate that as many as 60 percent of

46. See BELOUS, *supra* note 1, at 15-17 (estimating that approximately 25 to 30 percent of U.S. workers fall into contingent categories); STANLEY NOLLEN & HELEN AXEL, *MANAGING CONTINGENT WORKERS* 9-10 (1996) (estimating that approximately 20 to 25 percent of U.S. workers fall into contingent categories); Middleton, *supra* note 1, at 564 (estimating that about one-quarter of the nation's working population are contingent workers). But see Dietrich et al., *supra* note 39, at 58 (using more stringent criteria to estimate that contingent workers comprise about ten percent of the U.S. workforce).

47. See BELOUS, *supra* note 1, at 16 tbl.2.1 (calculating between 29.9 and 36.6 million contingent American workers as of 1988); Middleton, *supra* note 1, at 564 (estimating the number of contingent workers in 1996 at approximately 32 to 37 million). The two largest categories of contingent workers are part-time workers and independent contractors. See BELOUS, *supra* note 1, at 16 tbl.2.1 (estimating 19.8 million part-time workers and 10.1 million independent contractors).

48. See Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV. 863, 867 (1995); see also Middleton, *supra* note 1, at 564 (noting a greater than 30 percent increase in contingent workers between 1980 and 1996).

49. See Margaret Webb Pressler, *Rising Use of Temps is Making an Impact*, STAR TRIBUNE, July 1, 2002, at D3 (reporting that 25,000 of the 41,000 new jobs added to the American economy during May 2002 were temporary in nature).

50. See BELOUS, *supra* note 1, at 5-6.

51. See *id.*

52. See, e.g., Hiatt & Rhinehart, *supra* note 1, at 148-49; Middleton, *supra* note 1, at 564-65 (noting that part-time employees earned 58 percent of the hourly wage of median full-time employees in 1989); see also Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 571 n.11 (1997) (noting that the average hourly wage for temporary employees in 1994 was 35 percent lower than it was for full-time employees).

53. See Middleton, *supra* note 1, at 565 (noting that only 22 percent of part-time workers received health care benefits through their employers in 1988 as compared to 78 percent of full-time employees); Karst, *supra* note 52, at 571 n.13 (“Since 1990, the nation's mostly female temp force has mushroomed more than 85 percent. Yet only 8 percent of temps receive health benefits. . .”).

54. See REPORT AND RECOMMENDATION OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 35 (1994) [hereinafter REPORT ON FUTURE OF WORKER-MANAGEMENT



temporary employees<sup>55</sup> and 25 percent of part-time employees<sup>56</sup> would prefer more traditional full-time jobs. As such, this subset of contingent workers essentially is underemployed.<sup>57</sup>

#### IV.

##### INCENTIVES FOR CONTINGENT WORK ARRANGEMENTS

What has caused this historical shift? A brief review of the principal factors that have spurred this change provides a unique perspective for analyzing the contingent work phenomenon.<sup>58</sup> This Part discusses four key catalysts in the contingency explosion.

##### *A. Corporate Desire for Flexibility*

Many firms see contingent work arrangements as a means to maximize labor market flexibility. Advances in technology and transportation have created a global economy in which American firms must compete on an international basis.<sup>59</sup> In this increasingly global economy, companies experience “severe fluctuations in their need for labor.”<sup>60</sup> Employers use contingent workers as one method of coping with this reality. Contingent workers add labor market flexibility by enabling companies to adjust personnel and staffing needs while avoiding “the expense of cyclical hiring and lay-off periods.”<sup>61</sup> A growing body of contingent workers acts as a flexible cushion supplementing core workers in the labor market. Firms

RELATIONS] (stating that “a large percentage of workers who hold part-time or temporary positions do so involuntarily.”); Lester, *supra* note 37, at 86-87; Arne L. Kalleberg, *Part-Time Work and Workers in the United States: Correlates and Policy Issues*, 52 WASH. & LEE L. REV. 771, 772 (1995).

55. See Pressler, *supra* note 49, at D3 (referring to a 1999 study).

56. See Kalleberg, *supra* note 54, at 772.

57. See Lester, *supra* note 37, at 86-87 (stating the view that contingent work is “underemployment”—meaning that there is a growing class “of workers for whom there is a ‘mismatch’ between the jobs they hold, and their human capital, abilities, and desires.”). See *id.* at 86.

58. For a broader discussion of the historical changes in the law and practices of the workplace that occurred between 1950 and 2000, see Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 BOS. COL. L. REV. 351 (2002).

59. See CRAVER, CAN UNIONS SURVIVE? 42-47 (1993) (describing the rise of the global economy); HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 1-5 (1987) (hereinafter “WORKFORCE 2000”) (depicting the development of an integrated world economy since the 1960’s). See INTERNATIONAL LABOR OFFICE, MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 77 (1973) (detailing the reality that, given the lower wage structures of most developing nations, American employers now face intense resistance in virtually every sector in which international production is feasible). See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 13 n.33 (1993) (noting that “[t]he impact of international product market competition has been principally felt in the manufacturing sector—in particular, the clothing, steel, automobile, rubber, and electronics industries”).

60. NOLLEN & AXEL, *supra* note 46, at 22.

61. Hylton, *supra* note 2, at 858.

expand their workforce by hiring contingent workers in boom times, and then let the contingent workers go during downturns.<sup>62</sup> Similarly, the pressure to “restructure” or “downsize” corporations in recent years has led employers to adjust their workforce in favor of more contingent employees.<sup>63</sup> In short, contingent work arrangements facilitate a flexible labor market and provide significant cost savings for American firms.<sup>64</sup>

### *B. Worker Desire for Flexibility*

Many workers also find contingent work arrangements desirable, particularly those seeking to balance work and family responsibilities.<sup>65</sup> The proportion of women who participate in the American workforce has nearly doubled during the past fifty years.<sup>66</sup> Whether as a single-family wage-earner or part of a married, dual-earner family,<sup>67</sup> the movement of society’s traditional care-givers into the workplace puts considerable strain on family child care and elder care needs.<sup>68</sup> Not surprisingly, many male and female workers gravitate toward flexible work arrangements, such as part-time work and contracted work at home, as a means to accommodate the needs of work and family.<sup>69</sup>

### *C. Advances in Technology*

Technological advances also have spurred contingent work arrangements.<sup>70</sup> Sophisticated computer and telecommunications systems

62. See SAMUEL ESTREICHER & STEWART SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW 25 (2000).

63. See NOLLEN & AXEL, *supra* note 46, at 20.

64. See BELOUS, *supra* note 1, at 8.

65. See NOLLEN & AXEL, *supra* note 46, at 23 (stating that as “more people. . . move in and out of the labor force, [there are more] who prefer part-time or temporary jobs because of competing demands on their time, [who are in] different states in the life cycle, or [who have] different family circumstances.”).

66. In 1950, 33.9% of adult women were members of the labor force. See HANDBOOK OF U.S. LABOR STATISTICS, EMPLOYMENT, EARNINGS, PRICES, PRODUCTIVITY, AND OTHER LABOR DATA 52, tbl.1-7 (Eva E. Jacobs ed. 3d ed. 1999). By 2000, 61.1 percent of all adult women, or almost double the earlier figure, were gainfully employed outside the home. See WORKFORCE 2000, *supra* note 59, at 85, tbl.3-4.

67. See LUCIA ALBINO GILBERT, TWO CAREERS/ONE FAMILY 5 (1993) (stating that “current norms assume not only that single and married men will work but also that single and married women will work”); 19 HUMAN RESOURCES REP. 1100 (BNA)(Oct 15, 2001) (reporting that only 19.2 percent of American married-couple families in 2000 followed the traditional model in which the husband is in the labor force while the wife is at home).

68. See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 35 (noting that flexibility in work arrangements “helps some workers, more of whom must balance the demands of family and work as the numbers of dual-earner and single-parent households rise.”).

69. See generally Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 33-36 (1998) (discussing desires of both women and men to balance work and family).

70. See Lester, *supra* note 37, at 112 (noting the acceptance of many that, among other things,

permit work to be removed from a physical worksite or a traditional nine-to-five work schedule.<sup>71</sup> Fax machines, e-mail, and the internet enable a growing number of contingent workers to provide services from their homes or other non-traditional sites.<sup>72</sup> This, in turn, permits firms to reduce costs by reducing the size of their facilities and paying only for work actually needed.<sup>73</sup> In addition, many companies now support their technological systems with an outside consultant, most likely an independent contractor or a contracted worker, rather than an in-house employee.<sup>74</sup> In these and other ways, technology is changing not only how work is done, but also the nature of the worker performing the task.

#### D. Legal and Financial Considerations

Finally, American business entities have powerful legal and financial incentives to increase their use of contingent workers. This is particularly true for those contingent workers who fall outside of the legal definition of an "employee."

Most statutes governing the workplace only apply within the context of the employment relationship. For example, while an employer must comply with the legal mandates of such statutes as Title VII,<sup>75</sup> the Fair Labor Standards Act,<sup>76</sup> and ERISA<sup>77</sup> or face the prospect of substantial

technological change as contributed to the "drive toward contingent staffing"); Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB L. & POL. J. 7, 8 (1999) (noting that "revolutionary developments in information technologies . . . have conspired to create new modes of laboring").

71. See MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 78 (4th ed.1998); U.S. DEP'T OF LABOR, COMM. ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT, 6 (1994) [hereinafter FACT FINDING REPORT]; see generally MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE (1996) (describing the impact of changes in information technology on social and economic trends).

72. See ROTHSTEIN & LIEBMAN, *supra* note 71, at 78-80.

73. See *id.* at 78.

74. See Renate M. De Haas, *Vizcaino v. Microsoft*, 13 BERKELEY TECH. L.J. 483, 483 (1998) (stating that in Silicon Valley "many of [the] high technology contingent employees are independent contractors. . .").

75. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2002), bans discrimination with respect to hiring, discharge, compensation and other terms and conditions of employment.

76. The Fair Labor Standards Act (FLSA), 29 U.S.C. § § 201-19 (2002) (mandating that employers pay covered employees a minimum hourly wage, currently pegged at \$5.15 per hour, and compensate work performed in excess of 40 hours in a week at one and one-half times the employee's regular rate of pay; the FLSA contains numerous exemptions, the most significant being for executive, administrative, and professional employees). See *id.* § 213(a)(1) (2002).

77. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § § 1001-1461 (2002), regulates pension and employee welfare benefit plans. It establishes procedural requirements with respect to the reporting, disclosure and fiduciary responsibilities for such plans. See 29 U.S.C. § § 1021-1031 (2002). While ERISA contains detailed provisions governing the funding and content of pension plans, it contains little substantive regulation concerning the content of welfare benefit plans, such as

monetary liability, these statutes are inapplicable to non-employee workers such as independent contractors, contracted workers, and leased workers.<sup>78</sup> Similarly, workers who are not employed by the entity for whom they provide labor are not covered by the National Labor Relations Act (NLRA)<sup>79</sup> and have no legal protection in seeking to unionize.<sup>80</sup> Since the factors for determining whether a worker is an “employee” are prone to manipulation,<sup>81</sup> many firms consciously structure work relationships in a manner that will avoid “employee” status and its accompanying legal strictures.<sup>82</sup>

Firms also can save costs through the use of contingent workers. Business entities are responsible for payroll taxes and contributions to unemployment insurance and workers compensation plans only for their “employees.”<sup>83</sup> Firms avoid these expenses by replacing traditional employees with non-employee contingent workers. Moreover, as noted above, firms tend to provide contingent workers with lower pay and benefits.<sup>84</sup> Many companies view core employee status as a convenient and defensible eligibility threshold for conferring premium pay and benefits.<sup>85</sup>

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those providing health benefits. Instead, the principal impact of ERISA on employment law matters is the act’s broad preemptive exclusion of state regulation. See 29 U.S.C. § 1144(a) (2002) (“[T]he provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereinafter relate to any employee benefit plan.”). See generally Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1 (2000).

78. See *infra* note 104 and accompanying text (discussing that the coverage of these and other statutes extend only to individuals who fall within the legal definition of an “employee”).

79. The National Labor Relations Act, 29 U.S.C. § 151-69 (2002), protects the right of employees to seek union representation, to bargain collectively, and to engage in concerted activities for the purpose of mutual aid and protection.

80. See 29 U.S.C. § 152(3) (2002) (defining an “employee” for purposes of the NLRA). The National Labor Relations Board (NLRB), the administrative agency charged with enforcing the NLRA, uses the common law test in determining employee status. See *Roadway Package System*, 326 N.L.R.B. 842 (1998). See *infra* notes 105-07 and accompanying text (describing the common law test).

81. See Middleton, *supra* note 1, at 568-69 (stating that “the legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability.”); see also *infra* notes 104-27 and accompanying text (discussing the legal tests for determining “employee” status).

82. See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 35 (1994) (stating that “current tax, labor, and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations.”); Middleton, *supra* note 1, at 571 (noting that employers are motivated to categorize workers as non-employees in order to avoid legal regulations applicable to employees).

83. See generally REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 40-41.

84. See *supra* notes 52-53 and accompanying text.

85. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc), cert. denied, 118 S.Ct. 899 (1998) (reviewing legality of pension and welfare plan benefits made available to common law employees but not to similarly situated workers designated as independent contractors).

## V.

## THE BLACK HOLE OF WORKPLACE REGULATION

The surge in contingent work has brought several problems. Contingent workers tend to earn less pay than their core employee counterparts.<sup>86</sup> They are less likely to enjoy employer-paid health care coverage and other employee benefits.<sup>87</sup> Contingent workers generally receive less training and experience more frequent periods of unemployment.<sup>88</sup> Not surprisingly, contingent workers are disproportionately female and African-American.<sup>89</sup>

The increase in contingent work arrangements, coupled with plant relocations and downsized operations,<sup>90</sup> also has contributed to a decline in long-term employment. As at the beginning of the twentieth century,<sup>91</sup> the employment relationship of the twenty-first century has become more transitory.<sup>92</sup> This time, however, the cause is capital mobility rather than labor mobility.<sup>93</sup> Many Americans perceive this change in employment practices as an unfair breach of the earlier social contract<sup>94</sup> and an abandonment of internal labor markets driven by greed, as opposed to just efficiency.<sup>95</sup> And, the response of many members of the contemporary workforce is to feel less loyalty and commitment to their employers.<sup>96</sup>

86. See *supra* note 52 and accompanying text.

87. See *supra* notes 52-53 and accompanying text.

88. See Dau-Schmidt, *supra* note 3, at 881-82. See also CAPELLI, *supra* note 6, at 141-42 ("As more part-time and subcontracted employees are taken on board, companies are unwilling to underwrite both remedial and technical skills training, on the presumably accurate perception that such workers will not remain with the company long enough to pay back their investments.").

89. Patricia Schroeder, *Does the Growth in the Contingent Work Force Demand a Change in Federal Policy?* 52 WASH. & LEE L. REV. 731, 732 (1995) (noting that "the percentage of African Americans in the temporary work force is double that of the whole work force" and that "two out of every three temporary workers are women").

90. See, e.g., CAPELLI, *supra* note 6, at 27-29, 44-63; THOMAS KOCHAN, ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 114-15 (1986).

91. See *supra* notes 9-10 and accompanying text.

92. See CAPELLI, *supra* note 6, at 177-79 (discussing various studies showing a decline in job tenure during the 1980's and 1990's).

93. Advances in trade and technology have made capital increasingly mobile. See generally ROBERT G. REICH, THE WORK OF NATIONS 113-22, 263-64 (1991) (describing the significant mobility of capital in the new global economy). Modern advances in information and communication technologies, in particular, have enabled employers to produce goods wherever labor costs are the most attractive. See R. Blanpain, *The Changing World of Work*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 23, 24-26 (R. Blanpain & Chris Engels, eds. 6th ed., 1998) (describing the impact of technology on the global movement of goods and services). American employers, accordingly, have shifted production to the Sunbelt and developing nations as a means of escaping unions and lowering labor costs. See KOCHAN, *supra* note 90, at 66-68.

94. See CAPELLI, *supra* note 6, at 200-201; Sanford M. Jacoby, *Melting into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1220-21 (2000).

95. See Jacoby, *supra* note 94, at 1221.

96. Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 520

While these social and economic issues are very important, the most significant legal problem posed by the rise in nonstandard employment arrangements is that many of these workers fall outside of the regulatory safety net constructed for the employment relationship. This regulatory “black hole” occurs primarily for three reasons.

#### *A. Threshold Jurisdictional Requirements*

Employment statutes, utilizing various formulations, exempt certain types of workers and employers from the scope of coverage. Contingent workers frequently fall outside the zone of statutory regulation because of these threshold requirements.

For example, some employment statutes only apply to employees who have attained a certain level of workplace attachment with a particular employer. The FMLA, for example, guarantees leave time only to employees who have worked for the same employer for at least one year and for at least 1,250 hours during the previous twelve-month period.<sup>97</sup> Under ERISA, employers may establish a minimum five-year employment period before an employee’s pension fully vests.<sup>98</sup> In addition, ERISA does not compel an employer to allow participation in a pension plan until an employee works at least 1,000 hours in a twelve-month period.<sup>99</sup> Similarly, most state statutes require an employee to work twenty weeks per year in order to qualify for unemployment insurance benefits.<sup>100</sup> Part-time and temporary employees often fail to meet these threshold jurisdictional requirements.

In a related vein, several statutes only apply to employers having a minimum number of employees. The FMLA, for example, does not apply to employers with fewer than 50 employees.<sup>101</sup> Title VII<sup>102</sup> and the ADA<sup>103</sup> each require a minimum of fifteen employees for coverage to occur. Some employers can avoid the applicability of such laws by utilizing independent contractors and temporary workers to stay under the respective numerical thresholds.

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(1997) (noting that contingent workers generally have a “reduced sense of attachment and loyalty to the enterprise”); BELOUS, *supra* note 1, at 6 (noting that “contingent workers have a weak affiliation with a specific employer and do not have a significant stake in a company”).

97. 29 U.S.C. § 2611(2)(A)(2002).

98. 29 U.S.C. § 1053(a)(2)(2002).

99. 29 U.S.C. §§ 1052(a)(1), 1052(a)(3)(A)(2002).

100. See Virginia L. duRivage, *New Policies for the Part-time and Contingent Workforce*, in *NEW POLICIES FOR PART-TIME AND CONTINGENT WORKERS* 106 (Virginia L. duRivage ed., 1992).

101. 29 U.S.C. § 2611(4)(A) (2002).

102. 42 U.S.C. § 2000e(b) (2002).

103. 42 U.S.C. § 12111(5)(A) (2002).

### B. *The Definition of Covered "Employment"*

Most significantly, American labor and employment regulations invariably extend only to "employees."<sup>104</sup> Given the restrictive tests currently used to determine employee status, many contingent workers fall outside of the zone of statutory coverage.

American courts have used a variety of tests to determine whether a worker is an "employee" and thus entitled to the benefits of protective labor and employment legislation. The most restrictive of these tests is the common law agency test.<sup>105</sup> This test primarily focuses on the employer's "right to control" not only the "result accomplished by the work," but also "the details and means by which that result is accomplished."<sup>106</sup> If such a right to control is found to exist, then the worker is deemed to be an employee.<sup>107</sup> In the absence of such a right to control, the worker is classified as an independent contractor and exempt from the coverage of labor and employment regulation.

A more inclusive "economic realities" test is used to determine employee status under the FLSA.<sup>108</sup> As a 1968 Department of Labor opinion letter summarized, "an employee, as distinguished from a person who is engaged as a business of his own, is one who, as a matter of economic reality follows the usual path of an employee and is dependent on the business for which he serves."<sup>109</sup> While an employer's right to control the manner in which work is performed is still an important factor under this approach, the economic realities standard assesses these and other factors by asking "whether the putative employee is economically dependent upon the principal or instead is in business for himself."<sup>110</sup>

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104. See Dau-Schmidt, *supra* note 3, at 882 (stating that "under our social welfare system, the receipt of statutory protection or benefits is dependent on a person meeting the definition of employee under the relevant statute"); REPORT ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 37 (noting that the "single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors").

105. The multi-factor formula of the common law test is set out in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

106. Maltby & Yamada, *supra* note 4, at 248.

107. See *id.*

108. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Donovan v. Dialamerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985). The Family and Medical Leave Act, 29 U.S.C. § 2601-54, adopts the FLSA's definition of a covered "employee," and similarly utilizes an economic realities test for determining the existence of an employment relationship. See 29 C.F.R. 825.105. The economic realities test was first developed under the National Labor Relations Act in *NLRB v. Hearst Publications*, 322 U.S. 111 (1947). That decision was overturned by the Taft-Hartley amendments adopted by Congress later that same year, 61 Stat. 136 (1947), and the NLRB now uses the common law test for ascertaining employee status. See *Roadway Package System*, 326 N.L.R.B. 842 (1998).

109. W & H Opinion Letter No. 832, (June 25, 1968).

110. *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992).

During the 1970s and 1980s, most federal courts of appeal adopted a "hybrid" test for determining employee status under federal discrimination statutes. This test combines elements of the common law and economic realities tests.<sup>111</sup> Under the hybrid approach, courts examine the economic realities of the work relationship, but with particular emphasis on "the employer's right to control the 'means and manner' of the worker's performance."<sup>112</sup>

Despite the growing popularity of the hybrid test, the Supreme Court reinvigorated the common law standard in its 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*.<sup>113</sup> At issue in that case was the appropriate test for employee status under ERISA. The Court rejected the use of an economic realities test under ERISA, suggesting that this broader standard was limited in application to the unique statutory formulation of the FLSA.<sup>114</sup> The Court instead adopted a thirteen-factor formulation of the common law test.<sup>115</sup> The *Darden* decision has led many courts to replace the hybrid test with the common law test in ascertaining employee status under other statutes.<sup>116</sup>

The restrictive *Darden* test is problematic for several reasons. For one thing, the test sets an unpredictable standard. Any formula with thirteen variables is bound to have considerable play in the joints. And, as the Microsoft Corporation learned, mistaken assumptions about employee status can entail costly consequences.<sup>117</sup>

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111. See Deanne M. Mosely & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 MISS. L.J. 613, 636-637 (1998). See also Maltby & Yamada, *supra* note 4, at 250 (stating "the hybrid test . . . became the favored standard for claims under both Title VII and the ADEA").

112. *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979); see also *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (applying hybrid test to ADEA claim).

113. 503 U.S. 318 (1992).

114. *Id.* at 325-326

115. In *Darden*, the Court articulated thirteen factors that should be considered when determining whether a worker is an employee or not: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hiring party's discretion over when and how long to work; (8) the method of payment; (9) the worker's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provisions of employee benefits; and (13) the tax treatment of the hired party. *Id.* at 323-24.

116. See Maltby & Yamada, *supra* note 4, at 253. See also *Lambertsen v. Utah Dep't of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996) (favoring common law test for Title VII claim, but finding that because the common law and hybrid tests are so similar, the lower court did not commit reversible error by applying the latter standard); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (adopting the common law test for ADEA claim).

117. See *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998) (holding that a group of workers erroneously classified by Microsoft as independent



The Darden test also is prone to entrepreneurial manipulation. As the final report of President Clinton's blue-ribbon Dunlop Commission noted, the common law test provides employers with "a means and incentive to circumvent the employment policies of the nation."<sup>118</sup> The incentive, of course, is to avoid the costs and loss of flexibility associated with governmental regulation.<sup>119</sup> The means is to structure work arrangements so that subcontractors and leased employees fall on the non-employee side of the Darden divide.<sup>120</sup>

Finally, the restrictive common law test is inconsistent with the fundamental objectives of modern labor and employment legislation. This legislation is rooted in the premise that "individual workers lack the bargaining power in the labor market necessary to protect their own interests and to obtain socially acceptable terms of employment."<sup>121</sup> The common law test, which was fashioned in the nineteenth century for the purpose of determining the reach of respondeat superior tort liability,<sup>122</sup> is blind to this goal. By focusing solely on the right to control, the test denies the benefits of protective social legislation to many workers who labor under subordinate economic circumstances. As Professor Marc Linder puts it, the common law test is rooted in "a denial of socioeconomic purpose."<sup>123</sup>

The Title VII sex discrimination claim of Patricia Knight provides an example of the Darden test's unresponsiveness to the objectives of labor and employment legislation.<sup>124</sup> Ms. Knight worked as an insurance agent

contractors may be eligible as employees to participate in the company's pension plans).

118. REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 38.

119. *Id.* at 35 ("[C]urrent tax, labor, and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations."); Middleton, *supra* note 1, at 571 (noting that employers are motivated to categorize workers as non-employees in order to avoid legal regulations applicable to employees).

120. Middleton, *supra* note 1, at 578 (explaining that businesses "enter complex arrangements of subcontracting and employee leasing in order to circumvent their responsibilities toward the workers involved"); Summers, *supra* note 96, at 518 (stating that "[e]mployers and their lawyers use all their ingenuity to create forms of detached employment which will free users of all employee responsibility"); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 227 (1999) (stating that the common law test "enables employers and judges to manipulate the appearances of control").

121. Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7 (1988). See also Taco van Peijpe, *Independent Contractors and Protected Workers in Dutch Law*, 21 COMP. LAB. L. & POL'Y J. 127, 155 (1999) (stating that the fundamental rationale of protective labor law is "to compensate for the social inequality constituted by economic dependency in labor relations.").

122. See MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 133-70 (1989).

123. Linder, *supra* note 120, at 187. See also REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 37 (noting that the test for defining employee status "is based on a nineteenth century concept whose purposes are wholly unrelated to contemporary employment policy").

124. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991).

selling Farm Bureau Insurance Company policies. Farm Bureau trained Ms. Knight in the art of insurance sales, assigned her to a designated sales territory, and provided her with an office, a secretary, and a computer. Farm Bureau required her to be present in the office during three specified periods each week and to retrieve mail and messages on a daily basis. Farm Bureau gave Ms. Knight written performance standards, which were backed up by periodic evaluations. Ms. Knight's contract with Farm Bureau prohibited her from selling the insurance products of any other company.<sup>125</sup> The district court, after a two-day trial, found substantial evidence of sexual harassment.<sup>126</sup> Nonetheless, the court dismissed Ms. Knight's claim because Farm Bureau did not control the intricacies of "the manner and means by which she sold insurance."<sup>127</sup> Deterring the sexual harassment of a subordinate and dependent worker such as Ms. Knight is apparently beyond the common law test's purposes.

### C. The Labor Law Void

Union density has declined precipitously in the United States during the past few decades. In 1950, union members comprised 31.5 percent of the non-agricultural labor force.<sup>128</sup> This percentage rose to 34.7 percent in 1954<sup>129</sup> and then began to fall. Union density dropped to 24.7 percent in 1970<sup>130</sup> and continued downward to 16.1 percent in 1990.<sup>131</sup> The decline has slowed, but not stopped, as data for 2001 shows union membership at approximately 13.5 percent of the non-agricultural labor force.<sup>132</sup>

Contingent work arrangements contribute to the decline in union membership in several ways. First, as noted above, many contingent workers are not employees or, at least, not employees of the entity for whom they provide work.<sup>133</sup> As such, these workers are not covered by the NLRA and are not protected against discharge or other retaliatory acts if they seek to join a union.<sup>134</sup> Second, part-time and temporary workers, even

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125. *Id.* at 378.

126. *Id.* at 378.

127. *Id.* at 381.

128. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS 1980b 412, table 165, as reprinted in GOLDFIELD, *supra* note 26, at 10, Table 1.

129. See *id.*

130. See Goldfield, *supra* note 26, at 11, table 2.

131. See *Union Membership Stays on Downward Trend, Falling to 16.1 Percent of Employment*, DAILY LAB. REP. (BNA) 26 (February 7, 1991) at B-8.

132. See *Labor Force Statistics from the Current Population Survey: Union Members Summary* (2001), available at <http://bls.gov/news.release/union2.nr0.htm> (last visited December 18, 2002). The Bureau of Labor Statistics reports a total of 16.3 million union members in the United States in 2001. See *id.*

133. See *supra* notes 40-43 and accompanying text.

134. See 29 U.S.C. § 152(3)(2002) (defining an "employee" for purposes of the NLRA). The Board

though legally classified as employees, commonly are excluded from bargaining units on the grounds that they do not share a sufficient community of interests with more permanent employees.<sup>135</sup> Thus, they are not within the represented group even if a union successfully obtains exclusive representative status.<sup>136</sup>

Third, until recently, leased workers who work alongside regular employees could not be included in a bargaining unit with the user firm's employees without the consent of both joint employers.<sup>137</sup> Since one or both of the employers invariably withhold consent,<sup>138</sup> these workers could unionize only in a separate unit consisting solely of employees of the lessor firm.<sup>139</sup>

Contingent workers, with their weak affiliation with the enterprise, are a difficult group to organize.<sup>140</sup> Many contingent workers do not see the benefits of union representation in an environment of short-term employment. Employers are well aware that contingent work and unions do not typically go hand-in-hand, and some employers hire contingent workers as an affirmative tool of union avoidance.<sup>141</sup>

The point is not that unionization is inherently desirable or that employer attempts to avoid the costs of dealing with unions<sup>142</sup> are inherently undesirable. The point, rather, is that workers should have the right to

uses the common law test in determining employee status. See *supra* notes 105-07 and accompanying text (describing the common law test).

135. See THE DEVELOPING LABOR LAW 1481-84 (Charles J. Morris, 2d ed. 1983); Summers, *supra* note 96, at 513.

136. See generally duRivage, *supra* note 100, at 116 (reporting that part-time workers are only approximately one-third as likely to be unionized as are full-time workers).

137. See Lee Hospital, 300 N.L.R.B. 947 (1990). The Board overruled *Lee Hospital* in 2000. See M. B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000). Under the new standard announced in *Sturgis*, the Board will include leased employees in a unit alongside regular employees without requiring consent so long as the two groups share a sufficient community of interest so as to constitute a single appropriate bargaining unit. *Id.* at 1304-05. Whether *Sturgis* will survive appellate review and/or reconsideration by a new Bush labor board remains to be seen.

138. See Bitá Rahebi, *Rethinking the National Labor Relations Board's Treatment of Temporary Workers: Granting Greater Access to Unionization*, 47 UCLA L. REV. 1105, 1124 (2000).

139. See *id.* at 1113-15; see also *Sturgis*, 331 N.L.R.B. 1298, 1308 (reaffirming that the dispersed employees of a supplier firm may seek to bargain with the supplier firm without needing to obtain the consent of the various user firms).

140. See KOCHAN, *supra* note 90, at 221; Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541, 551 (2001); Middleton, *supra* note 1, at 589-90.

141. See Forster, *supra* note 140, at 551; Linder, *supra* note 120, at 197-204.

142. The unionization of an employer's workforce tends to come with a sizeable wage premium. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 46, 64 (1984) (describing a 20 to 30 percent union wage and fringe benefit effect); H. G. LEWIS, UNION RELATIVE WAGE EFFECTS: A SURVEY 9 (1986) (describing a mean union/non-union wage gap of 15 percent for the period 1967-1979). Accordingly, it is not surprising that union avoidance and resistance to union wage demands have become a prime business strategy for many American employers. See KOCHAN, *supra* note 90, at 70, 107-108 (describing the financial incentive for American business to avoid unions).

choose for themselves whether or not to be represented by a union. One of the NLRA's key objectives is to protect "the exercise by workers of full freedom of association, self-organization, and the designation of representatives of their own choosing."<sup>143</sup> Managerial manipulation of worker status to avoid unionization runs counter to this goal and exacerbates the undesirable effects of the deregulation that has accompanied the rise in contingent work arrangements.

## VI.

### ENHANCING EMPLOYMENT PROTECTION FOR THE CONTINGENT WORKFORCE

The question remains as to the appropriate way to address this black hole of deregulation. Should the hole be tolerated, filled, or reconfigured? Our historical perspective on the growth of contingent work offers at least two insights regarding a possible solution.

First, it is clear that powerful forces have contributed to the rise in contingent work, including global economic competition, altered family-work arrangements, and technological advances.<sup>144</sup> The resulting "flexibilisation" in work relationships is a world-wide phenomenon<sup>145</sup> that is not likely to wane in the foreseeable future. Given these trends, it would be impractical to prohibit contingent work arrangements or regulate such practices to the point of inflexibility.

Second, the growth of non-standard work arrangements has skewed the traditional line delimiting the reach of protective social legislation pertaining to economically dependent workers. Traditionally, these protections extended to employees who were considered dependent upon a particular employer, but not to independent contractors, who were thought of as autonomous entrepreneurs who did not need regulatory intervention.<sup>146</sup> Today, however, many contract and leased workers work side-by-side with more traditional employees and, regardless of nomenclature, share an economic dependence upon a single user entity.<sup>147</sup> Since the demand for flexible work arrangements has driven a wedge between law and reality, the jurisdictional boundaries of these statutes should be redrawn in order to serve the "socioeconomic purposes"<sup>148</sup> of our most basic workplace laws.

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143. 29 U.S.C. § 151 (2002).

144. See *supra* notes 59-74 and accompanying text.

145. See generally FAHLBECK, *supra* note 5.

146. See generally Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 355-56 (2001).

147. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997)(en banc), *cert. denied*, 522 U.S. 1098 (1998) (analyzing the employment status of contract-based "freelancers" who worked side-by-side with regular Microsoft employees).

148. See Linder, *supra* note 120, at 187.

Toward this objective, this section recommends expanding the coverage of employment protection statutes, easing union organizing rules for leased employees, and increasing the portability of certain employee benefits.

*A. Expanding the Reach of Employment Protection Statutes*

As discussed above,<sup>149</sup> the most serious legal problem resulting from the increase in non-standard work arrangements is the lack of coverage for many types of contingent workers under American employment protection statutes. This problem, in turn, flows primarily from a restrictive interpretation of “employee” status. The prevailing common law definition fails to extend basic social protection to many workers who provide labor under subordinate circumstances.<sup>150</sup>

This problem was high on the agenda of the Dunlop Commission, a blue-ribbon panel of experts appointed by President Clinton in 1992. The Dunlop Commission’s proposed solution to this issue was to adopt a unitary “economic realities” test for defining employee status.<sup>151</sup> The Commission’s final report opined that the determination of whether someone is an employee for purposes of employment protection statutes should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying economic realities of the relationship.<sup>152</sup> Presumably, the Commission’s recommendation, if adopted, would extend the FLSA’s economic realities test to other federal labor, employment, and tax statutes.<sup>153</sup> Many commentators agree with this recommendation.<sup>154</sup>

While the Commission’s recommendation would improve on the current common law approach, it is not an ideal solution. The economic realities test, like the common law standard, consists of a multi-factor formula in which the right to control the manner of work is a significant

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149. See *supra* notes 104-27 and accompanying text.

150. See *supra* notes 121-27 and accompanying text.

151. See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 36. The Report also recommended that the “‘single employer’ doctrine should be expanded so that firms do not have incentives to use variations in the corporate form to avoid workplace responsibilities.” *Id.* at 41. I have argued elsewhere in favor of the need for such reform and proposed a reformulated test for determining employer status. See Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67.

152. See REPORT ON FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 54, at 38.

153. See *supra* notes 108-110 and accompanying text discussing the economic realities test as currently used under the FLSA.

154. See e.g., Dau-Schmidt, *supra* note 3, at 884; Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 749-50 (1995); Dowd, *supra* note 4, at 112-14; Stone, *supra* note 24, at 652. But see Hylton, *supra*, note 3, at 849 (arguing for a cautious approach to any increased legal regulation of contingent work).

factor.<sup>155</sup> As demonstrated by Professor Marc Linder, the federal courts increasingly have interpreted the economic realities test in a manner that is more restrictive than its ostensible purpose would suggest.<sup>156</sup> As a result, a considerable segment of workers is not covered, even though they are economically dependent upon a particular user entity.<sup>157</sup>

A comparative view may provide better solution. The rise in contingent work is a global phenomenon. Many countries have recognized a third category of workers that falls in between employees and independent contractors. These “dependent contractors”<sup>158</sup> technically are not employees under the traditional legal tests, but nonetheless are recognized as deserving of some employee-like legal protections by virtue of working in positions of economic dependence.<sup>159</sup> Employment protection laws in Canada,<sup>160</sup> Sweden,<sup>161</sup> Germany,<sup>162</sup> and the Netherlands,<sup>163</sup> for example, treat dependent contractors like employees for some purposes, but not for others.

Most Canadian jurisdictions have adopted provisions that treat “dependent contractors” as employees for purposes of collective bargaining.<sup>164</sup> Ontario’s Labour Relations Act provides a useful definition of a covered “dependent contractor”:

... a person, whether or not employed under a contract of employment . . . who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.<sup>165</sup>

Germany’s practice with regard to this category of workers is the one most worthy of emulation. There, an intermediate group of “employee-like

155. See *supra* note 110 and accompanying text.

156. See Linder, *supra* note 120, at 207-09.

157. See *id.*; Maltby & Yamada, *supra* note 4, at 260-62.

158. The term “dependent contractor” was coined by Canadian scholar Harry W. Arthurs. See Harry W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 TORONTO L. J. 89 (1965).

159. See Langille & Davidov, *supra* note 70, at 24-25.

160. See *id.* at 25.

161. See Ronnie Eklund, *A Look At Contract Labor in the Nordic Countries*, 18 COMP. LAB. L. J. 229, 240-41 (1997) (reporting that “dependent contractors” are covered by Sweden’s collective bargaining statute (the Joint Regulation Act), but not by the Swedish Employment Protection Act).

162. See Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL. J. 77, 94-95 (1999) (reporting that “employee-like persons” in Germany are covered by statutes relating to workplace health and safety, the prevention of sexual harassment, and collective bargaining, but not by statutes relating to employment security and working time).

163. See van Peijpe, *supra* note 121, at 141, 152 (reporting that economically dependent workers are covered by Dutch labor law, and to a lesser extent, by the Dutch statute regulating employment security).

164. See Langille & Davidov, *supra* note 70, at 24-25.

165. Ontario Labour Relations Act, S.O., ch. 1, Sched. A., 80 (2002).

persons”<sup>166</sup> is technically self-employed yet nonetheless treated as employees for some purposes because they are “economically dependent and are in similar need of social protection.”<sup>167</sup> Thus, employee-like persons are covered by statutes relating to workplace health and safety, the prevention of sexual harassment, and collective bargaining.<sup>168</sup> On the other hand, these dependent contractors are not covered by Germany’s Act on Protection against Dismissals and the Act on Working Time.<sup>169</sup> This dichotomy apparently reflects the notion that statutory coverage should be broader where basic societal interests are at stake than where the interests in question relate more narrowly to the status of an individual worker.

The United States should follow this example and extend the reach of employee protection statutes that serve core societal goals to contractors who are economically dependent on a user firm. Anti-discrimination statutes such as Title VII and the Age Discrimination in Employment Act<sup>170</sup> clearly fall within this category. The eradication of discrimination is a well-recognized societal goal,<sup>171</sup> and it will not unduly distort labor market competition by extending the anti-discrimination ban to this group of workers.<sup>172</sup> The same is true for broadening the reach of the NLRA and the Occupational Safety and Health Act.<sup>173</sup> On the other hand, a different type of solution is preferable in the context of with respect to ERISA and state unemployment compensation laws, as discussed below.<sup>174</sup>

### *B. Enhancing the Option of Collective Bargaining for Leased Employees*

An expanded definition of a covered dependent worker under the NLRA is insufficient by itself to facilitate the free choice objective of the statute<sup>175</sup> when it comes to leased employees. In this context, the NLRB’s traditional approach to union organizing initiatives should be reformed to provide jointly-employed workers a fair opportunity to exercise the option

166. See Daubler *supra* note 162, at 77 (describing “Arbeitnehmerähnliche Personem.”).

167. *Id.* at 88.

168. *Id.* at 94.

169. *Id.* at 95.

170. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621-634 (2002), (prohibiting discrimination in hiring, discharge and mandatory retirement with regard to employees 40 years of age and older).

171. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

172. See generally HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW & PRACTICE* 1039 (1992); Maltby, *supra* note 4, at 265.

173. The Occupational Health and Safety (OSH) Act, 29 U.S.C. § § 651-78 (2002) (authorizing the Secretary of Labor to adopt workplace health and safety standards and empowering him or her to enforce these standards through workplace inspections and by issuing citations for noncompliance).

174. See *infra* notes 195-98 and accompanying text.

175. See *supra* note 143 and accompanying text (discussing the NLRA’s objective of protecting the right of employees to choose freely whether or not to be represented by a union).

of union representation.

Leased workers from a temporary services company frequently work alongside a user company's regular employees. Yet, while the regular employees can decide for themselves whether to develop a collective bargaining relationship with their employer, the leased workers, until recently,<sup>176</sup> could not join that bargaining unit without the consent of both joint employers—the supplier lessor company and the user lessee company.<sup>177</sup> This is because the NLRB treated this situation as a variant of multi-employer bargaining, where a union cannot expand a bargaining unit to encompass another employer's employees without that employer's consent.<sup>178</sup> Since such consent was rarely granted,<sup>179</sup> the leased employees were usually left with the daunting task of organizing the supplier company's dispersed workers.<sup>180</sup>

The problem with the multi-employer analogy is that, in many leased employee contexts, the user firm is not an outside entity, but instead an employer of both employee groups. The user entity and the supplier entity, are considered joint employers of the leased workers if the two entities share or co-determine matters governing the workers' terms and conditions of employment.<sup>181</sup> The Board in *M.B. Sturgis, Inc.*<sup>182</sup> recently declined to accept the "faulty logic" of prior decisions that rely on rules applicable to multi-employer bargaining.<sup>183</sup> The Board ruled that a unit composed of a user employer's regular employees and those employees who are jointly employed by a supplier employer and a user employer is permissible, so long as the two groups share a sufficient community of interests.<sup>184</sup>

Although combining regular employees with jointly employed temporary employees may introduce some awkwardness in terms of tri-party negotiations,<sup>185</sup> the Sturgis approach comes with several advantages. First, eliminating the dual consent prerequisite to a combined unit offers the

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176. See *M. B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000) (overruling *Lee Hospital* in 2000).

177. See *supra* note 137 and accompanying text.

178. See *Lee Hospital*, 300 N.L.R.B. 947, 948 (1990) (applying the rules generally applicable to multi-employer units to the leased employee situation).

179. See Rahebi, *supra* note 138, at 1124 (referring to an interview with former Board Chairman William Gould during which he reportedly "remarked that he had not heard of a case to date in which the [leased] employees had obtained the consent of both employers.").

180. See *id.* at 1113-15; see also *Sturgis*, 331 N.L.R.B. at 1305 (reaffirming that the dispersed employees of a supplier firm may seek to bargain with the supplier firm without needing to obtain the consent of the various user firms).

181. See *Riverdale Nursing Home*, 317 N.L.R.B. 881, 882 (1995). As recommended above, "dependent contractors" should be included within that group of workers determined to be jointly employed for this purpose. See *supra* notes 158-73 and accompanying text.

182. 331 N.L.R.B. 1298 (2000).

183. See *id.* at 1305.

184. See *id.* at 1304-05.

185. See *id.* at 1320-21 (Brame, member dissenting).



only realistic prospect of meaningful choice in union representation for leased employees. Second, combined-unit bargaining provides a vehicle for narrowing the pay and benefits gap separating temporary and long-term workers.<sup>186</sup> Further, the Sturgis decision will not unduly burden the user firm's flexibility, since leased employees will be included in the unit only where the user firm exercises control over the leased employee's working life and assigns them to work tasks that are similar in nature to the user firm's long-term workforce.<sup>187</sup> In this particular context, Sturgis limits an employer's ability to use leased employees as a union-avoidance tool.<sup>188</sup>

At this point, a legitimate question could be raised concerning why a Board decision that already has been issued should be included on a list of proposals for reform. Either an appellate court or a newly constituted Bush NLRB could reintroduce the dual consent requirement. While I would oppose this retreat, the long-term elimination of the dual consent rule should remain on the reform agenda.

### *C. Increasing the Portability of Benefits*

Some commentators have called for more direct governmental intervention to reduce the pay and benefits gap. For a number of years beginning in 1987, Representative Patricia Schroeder introduced bills that would require employers to provide proportional health and pension benefits to certain part-time and temporary workers.<sup>189</sup> More recently, in 1999, Representative Lane Evans introduced legislation calling for employers to provide contingent workers with equal pay for equal work and the same benefits as regular employees after a qualifying period of work attachment.<sup>190</sup>

These proposals are quite intrusive and likely not very feasible. Equal pay for equal work is a concept that, as demonstrated by the federal Equal Pay Act, applies to a very narrow range of positions.<sup>191</sup> It would likely engender more litigation about what work is "equal" than it would engender pay equity. As for benefits, it is difficult to conceive how Congress could compel an employer to provide benefits to contingent workers when it does

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186. See *supra* notes 52-53 and accompanying text (discussing the lesser pay and benefits generally received by contingent workers).

187. See *Sturgis*, 331 N.L.R.B. 1298, 1301, 1305-16.

188. See *supra* note 141 and accompanying text (discussing that some employers hire contingent workers in order to further a union avoidance strategy).

189. See, e.g., H.R. 2188, 103rd Cong. (1993); see also Schroeder, *supra* note 89, at 736-37 (summarizing the proposed Part-Time and Temporary Workers Protection Act).

190. See H.R. 2298, 106th Cong. (1999); see also Forster, *supra* note 140, at 570 (summarizing the proposed Equity for Temporary Worker Act of 1999).

191. See Equal Pay Act, 29 U.S.C. § 206(d) (2002); see also MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW 298 (West Group, 2d ed. 1999) (describing the Equal Pay Act's substantive proscription as "brief and narrow").

not do so for employees generally.<sup>192</sup> Further, a mandate for more employer-provided benefits could act as a serious drag on employment.<sup>193</sup>

A more fruitful route would be to increase the portability of benefits.<sup>194</sup> As discussed above, many contingent workers are ineligible for certain employee benefits because they lack a sufficient work attachment with a particular employer.<sup>195</sup> Thus, an employee who has engaged in substantially continuous employment with a series of different employers may not gain eligibility for a variety of benefits. As an example of legislation that could enhance portability, Congress could amend ERISA to provide that employees who work for more than one employer can accumulate periods of service to meet the minimum vesting period for a defined contribution pension plan.<sup>196</sup> Similarly, state unemployment compensation laws could be altered to permit more employees who work at part-time and temporary positions to qualify for some proportion of unemployment benefits.<sup>197</sup> In both situations, the cost of providing these benefits could be prorated among the various employing entities.

Contingent work arrangements are not likely to decrease in the foreseeable future, and trying to prevent them is futile. By increasing the portability of benefits, the law can accommodate, rather than obstruct, the prevalence of these non-standard work arrangements.

## VII.

### CONCLUSION

Professor Sanford Jacoby recently published an article in which he disputes the purported demise of internal labor markets and long-term

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192. ERISA, the principal federal statute governing employee benefits, regulates the fiduciary management of benefits plans, but does not require that employers actually provide any particular benefits to employees. *See generally*, Philip D. Hixon, *Contingent Workers and ERISA: Should the Law Protect Workers With No Reasonable Pension Expectations?*, 25 OKLA. CITY U. L. REV. 667, 679 (2000).

193. MISHEL, ET AL., ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA 2000-2001 116-17 (2001) (noting that employer-paid benefits have increased three-fold since 1948 and now constitute 15.6 percent of compensation). Since the amount of benefits generally is fixed for a full-time employee without regard to the number of hours worked, an employer has a financial incentive to meet labor needs by increasing hours rather than by increasing the number of employees. *Id.* (mandating proportionate benefits for contingent workers likely would serve to strengthen that incentive).

194. The Health Insurance Portability and Accountability Act of 1996, which protects worker access to health insurance when changing jobs, is an example of a federal statute that enhances the portability of benefits. *See* 29 U.S.C. § § 1181-82 (2002).

195. *See supra* notes 97-100 and accompanying text.

196. ERISA currently permits employers to establish a minimum five-year employment period before an employee's pension benefit fully vests. *See supra* note 98 and accompanying text.

197. Most state laws require an employee to work twenty weeks per year in order to qualify for unemployment compensation benefits. *See supra* note 100 and accompanying text.

employment relationships.<sup>198</sup> The article reviews job tenure rates for the past few decades and concludes that, while job tenure decreased during the 1980s and 1990s, “the majority of workers continue to hold career-type jobs that offer fringe benefits, training, and prospects of continuity.”<sup>199</sup>

Professor Jacoby undoubtedly is correct on this score. Contingent work arrangements have not replaced long-term employment as the predominant model of structuring work relationships. Instead, the American labor market now is characterized by a majority of traditional long-term jobs and a significant minority of less durable contingent jobs. In effect, we now have a two-tiered labor market.

As this article has discussed, a considerable degree of inequality pervades this two-tiered system. Employees in long-term relationships generally enjoy better pay and benefits, greater job security, and the protections afforded by social legislation. In contrast, workers in the contingent sector generally earn less pay and benefits, have reduced job security, and fall outside the zone of protective social legislation.

Americans tend to oppose practices that result in second-class citizenship. The rise of contingent work has contributed to the creation of a significant group of second-class workers. Not surprisingly, many would like to see contingent work arrangements abolished or severely restricted.

A historical and comparative perspective suggests the propriety of a more limited response. The historical forces leading to the great increase in contingent work are too strong to be reversed outright. Similarly, a policy of mandating benefits for this diverse group of workers is both unpractical and unwise.

The more appropriate target for reform is the current black hole of deregulation that excludes many dependent workers from coverage under protective social laws such as Title VII, NLRA, and ERISA. These and other statutes should be amended to extend coverage to contingent workers who more closely resemble traditional employees than traditional entrepreneurs. A comparative analysis, such as Germany’s treatment of “employee-like persons,” provides valuable insights and examples for structuring such reforms. In the end, labor and employment law and the reality of contingent work arrangements should converge to extend fundamental social protection to dependent workers.

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198. See Jacoby, *supra* note 94, at 1205 (concluding that claims of the demise of long-term employment relationships are “hyperbole”).

199. *Id.* at 1220.